

# A REPORT ON THE PUBLIC INTEGRITY INVESTIGATION OF OXNARD CITY OFFICIALS

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*GREGORY D. TOTTE*  
*District Attorney*  
*County of Ventura*  
*State of California*

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## EXECUTIVE SUMMARY

During the summer of 2010, the Ventura County District Attorney's Office learned of serious allegations of corruption involving elected and non-elected officials at the City of Oxnard.<sup>1</sup> The allegations involved potential criminal violations of conflict of interest, misappropriation, and gift-reporting laws. In response, the District Attorney conducted a thorough investigation to determine the truth of the allegations and whether the law had been violated. The investigation focused specifically on the following allegations:

- Several city officials misappropriated taxpayer dollars to pay for excessive travel, meal expenses, and personal purchases.
- City Manager Ed Sotelo violated misappropriation and conflict of interest laws by taking an improper \$10,000 personal loan of city funds and establishing an improper retirement benefit for himself and others.
- Public Works Director Ken Ortega<sup>2</sup> misappropriated taxpayer dollars to fund a formal grand opening celebration of a city facility.
- City officials received gifts of vacations, meals, rounds of golf, and event tickets from companies doing significant business with the city, without publicly declaring the gifts as required by law.
- City officials violated conflict of interest laws by approving multi-million dollar city contracts from which they stood to profit.

To determine the truth of these allegations, district attorney investigators interviewed dozens of witnesses and executed more than 30 search warrants at more than 50 locations, gathering over 100,000 pages of documentary evidence. The investigation found evidence establishing the following:

- A clear pattern of fiscal waste by a small number of city officials. Oxnard's lax policies and recordkeeping enabled officials to spend excessively while

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<sup>1</sup> As used in this report, the term "officials" refers to elected City of Oxnard city council members and non-elected City of Oxnard employees in supervisory positions.

<sup>2</sup> In June 2010, Ken Ortega resigned from city employment. For ease of reading, Ortega's position will be referred to as Public Works Director throughout this report, as that was the position he held during the relevant times discussed in the report. The same convention will be applied to other officials who have changed position or employment since June 2010.

traveling on city business. These same deficient policies and recordkeeping leave insufficient evidence to prove criminal misappropriation under the law.

- City Manager Sotelo took an impermissible personal loan of city funds in 1998. Because the statute of limitations for this conduct has expired, the loan having occurred more than 13 years ago, the law does not permit prosecution.
- In 2003, City Manager Sotelo implemented a retirement benefit for himself and others that was improper because under state law only the city council has the legal authority to set employee salaries and benefits. Because the statute of limitations has expired and there is insufficient evidence to prove a criminal violation of misappropriation or conflict of interest laws, this conduct cannot be prosecuted.
- A formal grand opening celebration that cost an estimated \$95,000 appears to have been funded with a combination of private contributions and diverted city funds. The available evidence does not reliably establish the extent of city funds expended on the celebration or who authorized the expenditures. City of Oxnard contracting practices did not accurately reflect the scope or cost of work to be performed under city contracts. Inaccurate contracting practices resulted in the improper diversion of city funds through an artificially inflated contract amendment. The diverted funds were used to finance a mural and a scale model featured at the grand opening celebration. Due to incomplete recordkeeping of both contracting practices and city expenditures, the evidence is insufficient to establish criminal misappropriation.
- Several city officials failed to declare gifts they received. The failures to declare gifts of meals, golf and event tickets have been referred to the Fair Political Practices Commission for administrative enforcement action. There is insufficient evidence to prove the most serious allegations involving gift vacations and the statute of limitations has expired as to many of the gifts.
- Close relationships existed between several city officials and private individuals conducting multi-million dollar transactions with the city. There were several instances of international travel by officials aboard one company's private aircraft. Companies affiliated with the private individuals made significant profits from transactions with the city. However, there is no evidence that the officials had any direct financial interests in the questioned transactions. The evidence does not establish criminal conflicts of interest related to the multi-million dollar transactions examined.

## The Investigation

In May 2010, the *Ventura County Star* reported that city officials had received gifts from companies doing business with the city without declaring the gifts as required by law.<sup>3</sup> In response to the initial allegations, district attorney investigators examined public records and interviewed witnesses. The interviews and records confirmed that several city officials received gifts from companies doing business with the City of Oxnard and failed to publicly declare the gifts as required by California law.<sup>4</sup> Investigators subsequently received reports of additional violations by city officials and encountered a lack of cooperation and repeated delay attempts from some city officials. The Mayor of Oxnard told the District Attorney that he suspected the city manager and assistant city manager were engaged in a “cover-up.”

In response, the District Attorney sought and was granted court authorization to search Oxnard City Hall on August 13, 2010. Subsequent search warrants were served at various city facilities, the homes and offices of several city officials, the offices of several companies doing business with the city, and numerous financial and escrow companies. In addition, several businesses provided documents voluntarily and the city provided additional documentation in response to Public Records Act requests.

The investigation was hampered by serious impediments to obtaining evidence, including city policies and practices that did not reliably document expenses or payments, the unavailability of critical witnesses, and the inevitable loss of evidence with the passage of time. Also, when interviewed by district attorney investigators, several City of Oxnard officials made statements that were demonstrably false, including Mayor Tom Holden, City Councilmember Andres Herrera, and City Manager Ed Sotelo. Mayor Holden repeatedly denied having taken international trips aboard a local businessman’s private jet, when in truth he had done so. Councilmember Herrera and City Manager Sotelo each said they had stayed in New York City on a city-expensed trip for only two or three nights, when in truth they had stayed five nights.

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<sup>3</sup> Hadly, “Gifts Get Scrutiny as Oxnard Official Admits Not Reporting Some Freebies, *Ventura County Star*, May 29, 2010, <http://www.vcstar.com/news/2010/may/29/gifts-get-scrutiny-as-oxnard-official-admits-not/> accessed on April 13, 2012.

<sup>4</sup> As discussed in Section Six of this report, there is no criminal prohibition against companies providing gifts to officials. The reporting requirement is an obligation imposed on the official, not the company. However, officials are required to declare certain gifts they receive and are limited in the value of the gifts they may accept.

## **Criminal Filing Standards**

In determining whether to file criminal charges, the Ventura County District Attorney's Office is guided by the same standards used by prosecutors throughout the state. In summary, a prosecutor may only file criminal charges if he or she believes, based on the evidence available after a thorough investigation, that the accused is in fact guilty of a crime and that guilt can be proven beyond a reasonable doubt at trial.

## **Misappropriation of Public Funds (Penal Code section 424)**

Under California law, the crime of misappropriation of public funds refers generally to the unlawful use, taking, or expenditure of public money by a public official. In August 2011, the California Supreme Court issued a ruling in an unrelated case that dramatically increased the proof required under misappropriation law.<sup>5</sup> The court added a new requirement that to prove misappropriation, prosecutors must prove the official knew, or was criminally negligent in not knowing, the use of public funds was unlawful.

## **Expensive Meals**

City officials regularly traveled on city business, when most of the misappropriation of public funds was reported to have taken place. When traveling, officials often ate expensive dinners at taxpayer expense in cities such as Washington, D.C., New Orleans, Las Vegas, and New York. The dinner bills, paid with city credit cards, often ran into the hundreds of dollars, with group meals most often paid for with a single credit card by an employee. Witnesses suspected the expensive meals were an unlawful expenditure of public funds.

Meal expenditures by Oxnard's *non-elected employees* are governed by the city's travel and reimbursement policy. The city's published meal reimbursement policy contained no effective limitations, permitting restaurant bills of virtually unlimited amounts to be paid with taxpayer funds, as long as receipts were submitted. Because the Oxnard officials followed the city's written policy authorizing virtually unlimited expenses, the non-elected city officials' expensive meal expenditures did not violate the law.

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<sup>5</sup> *Stark v. Superior Court* (2011) 52 Cal.4th 368.

In contrast, California law and a 2005 Oxnard resolution limit Oxnard's *elected officials* to Internal Revenue Service (IRS) reimbursement rates.<sup>6</sup> The city's policies and recordkeeping practices did not consistently identify the officials present at particular meals or who was legally responsible for any portion of the bill. Due to the city's inadequate recordkeeping systems and practices, it cannot be determined whether any elected official's portion of a group meal exceeded IRS rates. Moreover, the evidence does not establish the officials knew or were criminally negligent in not knowing their expenditures were illegal. As a result, there is insufficient evidence to prove misappropriation under the law.

### **Personal Purchases**

Officials reportedly misappropriated city funds by using city funds for personal purchases while traveling. Significant allegations were made that three officials unnecessarily extended a city-funded trip to New York City, essentially taking a vacation at taxpayer expense. However, the investigation revealed that one official paid a portion of his hotel bill. In addition, there is evidence corroborating claims the trip was extended to meet hotel minimum-stay requirements during a busy travel season and to meet with representatives of a company doing business with the city.

The investigation also revealed that while officials traveled on city business, they occasionally used city credit cards for personal purchases such as spa charges, in-room expenses, alcohol, or, in a few instances, spouses' travel or meal expenses. State law and city policy prohibit such use.<sup>7</sup> Nonetheless, city practice allowed officials to charge personal expenses and reimburse the city at the end of the trip. Because the city's recordkeeping system does not itemize personal expenses nor reliably record who reimbursed the city, it is impossible to determine whether personal purchases were actually paid for by the city or by the official. Moreover, the evidence is insufficient to prove the officials were aware that the city's practice was contrary to law, as required by the California Supreme Court decision in *Stark v. Superior Court*. As a result, the evidence is insufficient to prove criminal misappropriation.

### **Personal Loan**

City Manager Sotelo reportedly misappropriated city funds by loaning himself \$10,000 of city funds without lawful authorization. In 1998, City Manager Sotelo requested and received a \$10,000 personal loan of city funds. There is no evidence that the loan was approved by city council. Consequently, the loan was unauthorized

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<sup>6</sup> Government Code sections 53232.2 and 53232.3.

<sup>7</sup> Penal Code section 424; Government Code section 8314.

and therefore improper. However, the statute of limitations bars prosecution because the conduct occurred 13 years ago.

### **Retirement Benefit**

In 2003, City Manager Sotelo created a \$300 monthly retirement benefit for city management, including himself.<sup>8</sup> Although this was done without formal city council approval as required by state law,<sup>9</sup> there is evidence that councilmembers informally authorized Sotelo to create the benefit. Thus, there is insufficient evidence to prove that Sotelo's creation of the benefit was criminal. In addition, the statute of limitations has expired, barring prosecution.

### **Grand Opening Celebration and Contractual Impropriety**

Public Works Director Ortega reportedly misappropriated city funds in three ways – to pay for a formal grand opening celebration at a city facility, to commission a mural and a scale model of another project displayed at the facility, and to pay favored consultants for unnecessary services to the city.

The grand opening celebration was funded primarily by payments from private companies involved in the facility's construction or having other business with the city. Although city funds were diverted to pay for a portion of the celebration, the evidence does not reliably establish the nature of the city's expenditures or who authorized the expenditures.

The mural and scale model on display at the city facility were purchased by a company doing business with the city, using city funds received from the city. The city diverted public funds by overpaying the company under an artificially inflated city contract pertaining to another Oxnard city facility. The company used the excess funds to pay for the mural and scale model. The evidence does not establish who inflated the city contract. Instead, several city officials were identified who may have been responsible. The investigation revealed that similar contracting practices were used at other times by officials with the Public Works Department.

Several direct city contracts with the allegedly favored consultants were lawfully authorized and do not amount to misappropriation. The evidence does not reliably

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<sup>8</sup> As of July 1, 2007, Oxnard's "Top Management" classification included the assistant city manager, chief financial officer, city clerk, city treasurer, community development director, deputy city manager, development services director, fire chief, housing director, human resources director, library director, police chief, and public works director. The city manager and city attorney were entitled to the same benefits given to Top Management by the terms of their city employment contracts.

<sup>9</sup> Government Code section 36506.

establish that the use of the consultants as subcontractors was without authority of law or which city officials were responsible for the subcontracting expenditures. Moreover, the statute of limitations has expired as to these allegations.

Based on the available evidence, the various misappropriation allegations involving Ortega cannot be proven beyond a reasonable doubt.

### **Failure to Declare Gifts (Penal Code section 118 / Government Code sections 87203 & 87207)**

Several City of Oxnard officials reportedly received gifts from various companies involved in multi-million dollar transactions with the city, without publicly declaring the gifts as required by law. Three officials allegedly received separate gifts of travel to Cabo San Lucas, Mexico, courtesy of one local businessman. These trips cannot be substantiated as gifts. One official clearly purchased his trips. Another provided evidence that he exchanged fair value in services for his trips. It cannot be determined whether the third official's trips were gifts.

Reports were also made that officials received gifts of meals, rounds of golf, Broadway show tickets, and tickets to sporting events. These reports have proven true as to several officials, though in lesser amounts than alleged. While there is evidence to prove the gifts were not disclosed, there is insufficient evidence to prove the nondisclosure constituted felony perjury. Enforcement of these reporting violations has been referred to the Fair Political Practices Commission in accordance with the Political Reform Act.<sup>10</sup>

### **Conflict of Interest (Government Code sections 1090 / 87100)**

City officials reportedly violated conflict of interest laws by having financial interests in multi-million dollar contracts they approved. The questioned transactions included the RiverPark development, fees for underwriting a number of municipal bond issuances, the city's purchase of a sports park property at Oxnard Boulevard and Gonzales Road, the city's purchase of a police annex building on Sturgis Road, the city's sale of vacant lots in Oxnard Shores, and the selection of the operator of the city's Materials Recovery Facility.

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<sup>10</sup> Government Code sections 81000, *et seq.*

Conflict of interest concerns arose as to the RiverPark development and the municipal bond issuances as a result of gifts given to city officials by the companies involved. Conflict of interest allegations were raised about the sports park purchase because a company bought the property and sold it to the city on the same day, allegedly profiting by more than \$8 million. Conflicts of interest were also reported as to the Sturgis Road, Oxnard Shores and Materials Recovery Facility transactions due to the close personal relationships between several city officials and one local businessman who was involved in all three transactions. The businessman was alleged to have given the officials gifts of travel to Cabo San Lucas, Mexico, on a private jet.

There is clear evidence of close relationships between city officials and some of the individuals involved in the transactions. There is also evidence that officials received gifts from some of the businesses involved, though the travel to Cabo San Lucas cannot be substantiated as gifts. However, there is no evidence that any of the officials had a direct financial interest in any of the transactions they approved and insufficient evidence that any official had an indirect financial interest in any transaction. Accordingly, there is insufficient evidence to prove any criminal conflicts of interest.

### **Deficiencies in City Policies and Practices**

The investigation revealed several city policies and practices that do not comply with state law. Other city policies leave the city vulnerable to waste and abuse. These policies are identified below.

#### **Responsibility for Employee Benefits**

Although state law requires city council to set employee benefits,<sup>11</sup> the council impermissibly delegated its responsibility to the city manager. This allowed a supplemental retirement benefit for city management to go undisclosed to city council and the public for several years. Oxnard city councilmembers have since become aware of their legal responsibility to set employee salary and benefits and have committed to doing so in the future. The city council is reportedly examining its legal ability to modify or cancel the retirement benefit.

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<sup>11</sup> Government Code section 36506. Violation of this code section does not carry a criminal penalty.

### **City Credit Card Usage**

Though state law and city policy prohibit the use of city credit cards for personal purchases,<sup>12</sup> city practice allowed such use under certain circumstances. The city's recordkeeping systems failed to accurately identify the personal purchases and failed to ensure reimbursements were made to the city. While the city has modified its credit card practices, city reimbursement policies still permit some personal expenses to be charged to a city credit card, as long as reimbursement to the city is made.

### **Excessive Spending on Travel Expenses**

City policy and practices permitted virtually unlimited spending of public funds on meals and other travel expenses. In one example, taxpayers paid more than \$14,000 for five city officials to travel to New York City to attend an industry award dinner.<sup>13</sup> In February 2011, the city modified its travel reimbursement policies, limiting all employees and elected officials to the federal government's published reimbursement rates.

### **Failure to Report City-Expensed Travel by Elected Council**

Under California law and city resolution, when a city councilmember travels at public expense, the member must provide a brief report about the travel at the next city council meeting.<sup>14</sup> In Oxnard, city officials did not consistently comply with this legal requirement. Failure to make the required report thwarts transparency in government.

### **Failure to Use Competitive Bidding**

The City of Oxnard used the same investment banking company as a bond underwriter for several years. While the city has no legal obligation to solicit competitive bids for each bond issuance, the failure to regularly seek competitive bids reduced transparency and risked undermining public confidence in the use of taxpayer funds. Within the past 18 months, the city used a competitive process to establish a pool of qualified underwriters and began to diversify its use of bond underwriters.

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<sup>12</sup> Government Code sections 8314 and 36514.5; Penal Code section 424.

<sup>13</sup> In June 2009, the City of Oxnard cut budget allocations to several city departments in response to tightening fiscal limitations.

<sup>14</sup> Government Code section 53232.3. Violation of this reporting requirement does not carry a criminal penalty.

### **Failure to Comply with City Ethics Standards**

Oxnard city policy appropriately demands adherence to the highest ethical standards:

The policy of the City is that City officials and employees shall observe the highest standards of ethics.... City officials and employees shall conduct themselves so as not to give a reasonable basis for the impression that any such official or employee can be improperly influenced in the performance of his or her City duties.... They shall avoid even the appearance of conflict between their City duties and their personal interests.

The investigation revealed that several officials in the city did not follow the city's published ethics standards. City policy prohibits officials from accepting gifts valued at more than \$50 from anyone doing business with the city. Many officials routinely violated this policy.

### **Conclusion**

This report is not intended as an indictment of the City of Oxnard, its residents, or the vast majority of employees. The allegations and misconduct described in this report are limited to a very small group of individuals serving the city in leadership positions.

A thorough investigation by the District Attorney's Office revealed that the most serious allegations of criminal conduct are unsupported by the evidence. Several multi-million dollar transactions were scrutinized and no evidence of criminal activity was found. However, the investigation raised legitimate questions regarding the use of taxpayer funds and the lack of accountability among several city officials. The investigation established that city officials took advantage of the city's policies and practices to enjoy expensive meals with city funds. These same policies and practices insulate the officials from liability for the expenditures.

Some of these same city officials violated city ethics standards and state law while accepting gifts of meals, golf, and event tickets from companies doing business with the city, then failing to report the gifts as required by state law. The investigation also revealed that city contracting practices did not accurately reflect the scope or cost of work to be performed under city contracts. The lax contracting practices allowed city officials to conceal the true nature of city expenditures on a grand opening celebration for a city water facility and to divert city funds to finance a mural and scale model at the water facility. In addition, the investigation

determined that City Manager Ed Sotelo used his position to obtain an improper \$10,000 loan of city funds and to create an improper supplemental retirement benefit for himself and others.

It is not the District Attorney's role to evaluate the wisdom of the city's transactions and no such evaluation is included in this report. Such judgments are best left to the community the officials serve. Nonetheless, where city policies and practices conflict with state laws, or expose the city to potential criminal abuse, those policies and practices are identified as requiring reform.

## SECTION ONE - PURPOSE & SCOPE OF THE REPORT

The District Attorney's Office plays a dual role in the criminal justice system, having both prosecutorial and investigative functions. In the area of public integrity, it is the duty of the District Attorney's Office to investigate allegations of criminal wrongdoing involving local government. When such allegations arise, the District Attorney's duty is to protect both the public from corruption in government and the innocent from unfounded allegations. Accordingly, any such investigation is conducted with the singular goal of finding the truth.

In June 2010, the District Attorney's Office learned of serious allegations of criminal activity by officials<sup>15</sup> in the City of Oxnard. Early reports alleged misappropriation of public funds, failure to disclose receipt of gifts as required by law, and possible conflicts of interest. Initial inquiries by district attorney investigators quickly confirmed that city officials had failed to disclose gifts from companies doing business with the city. Significantly, the initial inquiries met with resistance and deception by key city officials.

The investigation of city officials understandably resulted in significant media attention and public interest. The purpose of this report is to inform the public and local government how the investigation unfolded, what was learned, and how the results of the investigation intersect with California law. The report is by its nature a summary. It would be impossible to include every investigative step taken, every issue examined, or every statement made by each witness. This report includes the most significant aspects of the investigation in order to provide a clear understanding of the results. This report was authored by Chief Deputy District Attorney W. Charles Hughes.

Unlike most public reports issued by the Ventura County District Attorney's Office, this report does not address a discrete event or series of related events. The investigation examined a wide variety of related and unrelated events between 2005 and 2010. As a result, only the early portions of the investigation are presented chronologically to provide a clear understanding of how the investigation unfolded. The balance of the investigation is summarized by category of alleged misconduct.

The report is organized in a number of sections, each addressing separate aspects of the investigation and the applicable law. One section provides an overview of the

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<sup>15</sup> As used in this report, the term "officials" refers to elected City of Oxnard city council members and non-elected City of Oxnard employees in supervisory positions.

investigation and is followed by a section outlining several significant evidentiary challenges encountered during the investigation. Successive sections discuss the applicable law of misappropriation, nondisclosure of gifts, and conflict of interest, as well as the evidence obtained regarding the allegations. These sections are followed by a discussion of several city policies and practices that conflict with state law and expose the city and the taxpayers to potential waste and abuse.

In determining whether to file criminal charges, the Ventura County District Attorney's Office uses the criteria adopted by California prosecutors. A prosecutor may file criminal charges only if he or she believes, based on the evidence available after a thorough investigation, that the accused is guilty of a crime and that guilt can be proven beyond a reasonable doubt at trial. In evaluating whether the evidence is sufficient to prove guilt, prosecutors are obligated to consider not only the statements of the accused, but the likely defenses to be asserted at trial. Moreover, the District Attorney's Office works with a number of administrative agencies having concurrent enforcement jurisdiction and violations may be addressed through alternate enforcement mechanisms. In this investigation, the Fair Political Practices Commission has concurrent jurisdiction with administrative enforcement authority over violations of the Political Reform Act.

While it is the duty of the District Attorney's Office to investigate potential criminal conduct, it is not the District Attorney's role to evaluate the wisdom of particular local governmental decisions. Except as it relates to compliance with California law, it is beyond the function of the District Attorney's Office to assess local governmental decision-making. However, the investigation revealed policies and practices within the City of Oxnard that are contrary to state law. These policies and practices resulted in fiscal abuses at the highest levels. In many instances, the city's own practices and inadequate recordkeeping system made it impossible to prove certain violations beyond a reasonable doubt. This report identifies these policies and practices so that local government and the public can make their own review and take appropriate corrective action. The recommendations contained within this report are made with that end in mind.

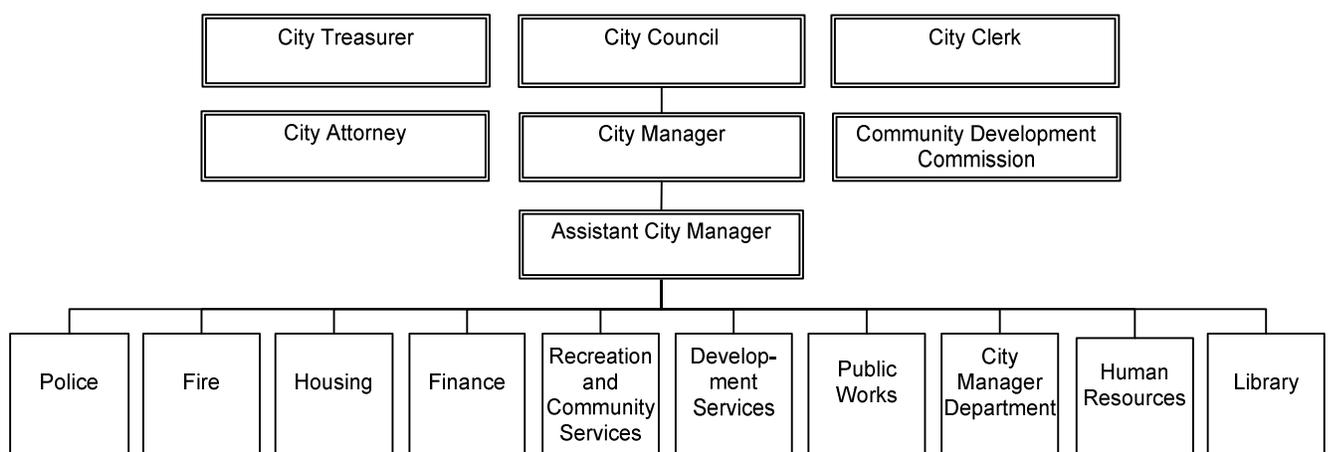
Oxnard's city government employs more than 1,100 people and this report involves only a very small number of them. The misconduct of the few should not be permitted to tarnish the reputation of the many.

## SECTION TWO - STRUCTURE OF OXNARD CITY GOVERNMENT

The City of Oxnard is the largest city in Ventura County, with a population of nearly 200,000 residents and an annual budget of \$368 million. Its city council is comprised of four elected councilmembers and an elected mayor. These are part-time positions. In Oxnard’s form of government, the mayor’s position is largely ceremonial and the mayor has only one vote of five on the city council. Though the mayor presides over city council meetings and is designated to sign official documents for the city, he has no power to act on his own, without a majority vote of the city council.

Like many cities, Oxnard has a city manager who is the highest ranking full-time city official and is responsible for the day-to-day operation of city government. The city manager is hired by a majority vote of the city council and may be removed by a majority vote of the city council. In Oxnard’s government, the city council makes policy and legislative decisions, such as zoning and budgeting decisions. The city manager implements policy, hires department heads, oversees city function, and is ultimately responsible for managing the city’s budget and resources. The city manager is essentially the chief executive of city operations. The chart below shows the organization of the City of Oxnard government.

*Figure 1 – City of Oxnard Organizational Chart*



In California, city governments operate under one of two sets of rules – general laws or city charter. Oxnard is a general law city. General law cities must follow state laws that specify how a city must operate. Charter cities are different. They have a governing document similar to a constitution, known as a city charter, that specifies how the city must operate. As a general law city, Oxnard must comply with state laws regarding the function of city government.

## SECTION THREE - GENESIS OF THE INVESTIGATION

The District Attorney's Office is a county law enforcement agency with primary responsibility for investigating allegations of criminal misconduct by government officials. In June 2010, the District Attorney's Office received reports of corruption among City of Oxnard officials. The District Attorney assigned investigators within the District Attorney Bureau of Investigation to examine the alleged improprieties. As is customary, the examination began with informal inquiries to determine whether a formal public integrity investigation was warranted. The inquiries quickly confirmed portions of the allegations. As the early stages of the investigation progressed, investigators confirmed additional aspects of the allegations and encountered repeated delays, deceit, and a lack of cooperation from some city officials. Ultimately, it became necessary to obtain a court order authorizing a search of city hall and the investigation became public knowledge when the search occurred at city hall on August 13, 2010.

At the outset, investigators were told that Public Works Director Ken Ortega<sup>16</sup> received gifts from companies doing business with the city but did not publicly disclose the gifts as required by law.<sup>17</sup> Further, Ortega was alleged to have concealed payment of public funds for a formal dinner event to celebrate the grand opening of a city water desalination ("desalter") facility. On June 9, 2010, district attorney investigators spoke with Ortega. He admitted receiving numerous gifts from companies doing business with the city. He also admitted not reporting the gifts on his Form 700, saying that he misunderstood the reporting requirements.

More specifically, Ortega admitted having attended a 2006 Los Angeles Lakers basketball game hosted by Jeff Savard, Vice-President of Kennedy/Jenks Consultants, a local engineering and consulting firm doing significant business with the City of Oxnard's Public Works Department. Ortega admitted that Savard paid for limousine transportation to and from the game and hosted refreshments during the game and dinner afterward.<sup>18</sup> Ortega stated that at the time he was in a position to approve, and did approve, contracts between the city and Kennedy/Jenks

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<sup>16</sup> In June 2010, Ken Ortega resigned from city employment. For ease of reading, Ortega's position will be referred to as Public Works Director throughout this report, as that was the position he held during the relevant times discussed in the report. The same convention will be applied to other officials who have changed position or employment since June 2010.

<sup>17</sup> California law requires government officials to declare each year the gifts they receive valued at \$50 or more on a public document known as a Form 700 Statement of Economic Interests. Officials are also limited in the value of the gifts they may accept. A more detailed discussion of the disclosure requirements may be found in Section Six of this report.

<sup>18</sup> There is no criminal prohibition against companies providing such gifts to government officials. The reporting requirement is an obligation imposed on the official, not the company.

Consultants. Ortega also admitted having received gifts from John Kim, a principal at De La Rosa & Co., an investment banking firm doing business with the city in connection with hundreds of millions of dollars of municipal bond issues.

Significantly, Ortega told investigators that he felt he was being unfairly singled out for conduct that was common practice in Oxnard. Ortega alleged that other officials in Oxnard received frequent gifts from companies doing business with the city. Ortega said that John Kim of De La Rosa & Co. hosted a 2005 golf outing at the Presidio Golf Course in San Francisco and hosted expensive dinners for Oxnard city officials during a trip to New York in 2008.<sup>19</sup> Among the other officials who reportedly received gifts from Kim were Mayor Tom Holden; Councilmembers Andres Herrera, Tim Flynn and Dean Maulhardt; City Manager Ed Sotelo; and Chief Financial Officer James Cameron. Ortega described the failure to report gifts as common practice for city officials.

Having learned this information, investigators set out to determine whether it was true. They first reviewed the officials' Form 700s obtained from the Oxnard City Clerk's Office.<sup>20</sup> The forms revealed that neither City Manager Sotelo nor anyone on city council declared any gifts received between 2005 and 2009. Chief Financial Officer James Cameron, however, declared a \$45 ticket to a Broadway show he received from De La Rosa & Co. on December 4, 2008. Cameron also declared a \$300 ticket to a 2008 Dodgers game from De La Rosa & Co. With this information, investigators confirmed that De La Rosa & Co. had in fact given gifts to at least one city official.

In a further attempt to verify the gift allegations, district attorney investigators interviewed several witnesses. City Manager Ed Sotelo spoke with investigators on July 22, 2010. During that interview, Sotelo confirmed that he attended the Presidio golf event in San Francisco and that there had been a city event in New York, though he declined to discuss the details of the events. While Sotelo denied knowingly receiving gift meals, he confirmed that De La Rosa & Co. may have paid for city officials' meals without his knowledge. Sotelo maintained that when he attends

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<sup>19</sup> Several Oxnard officials and their spouses traveled to New York City in December 2008. Councilmember Andres Herrera, City Manager Ed Sotelo, Chief Financial Officer James Cameron, and their spouses stayed at the Times Square Hilton for five nights, from December 2, 2008, through December 7, 2008. Finance Manager Mike More, Public Works Director Ken Ortega, and their spouses stayed at the Doubletree Hotel in Times Square. The purpose of the trip was to attend an awards ceremony held by a financial industry group. The city won an award from the industry group for creative bond financing and the officials attended the ceremony on the city's behalf. The officials' travel expenses, including most of their meals, were paid for by the City of Oxnard. This trip is discussed in Section Five of the report.

<sup>20</sup> The records were obtained by making a Public Records Act request to the Oxnard City Clerk's Office. Under California law, anyone may request copies of public records held by a city. Generally, the city must respond within ten days of the request, unless there are specific reasons to extend the deadline.

business dinners, he expects city staff to pay the city's portion of the bill. Sotelo also cited misconduct involving Public Works Director Ortega, saying that Ortega was involved in contractual improprieties with Kennedy/Jenks Consultants related to the desalter, as well as with JVV Communications, a marketing firm used by various departments in the city.

After interviewing Sotelo, the District Attorney's Office made a much broader Public Records Act request for documents relating to the investigation, including documents pertaining to the desalter celebration, gifts to public officials, and contracts between the city and various companies.

As more witnesses were interviewed, more allegations of misconduct surfaced. For instance, witnesses told investigators that Councilmember Andres Herrera attended the same 2006 Lakers game and dinner that Public Works Director Ortega attended, hosted by Jeff Savard of Kennedy/Jenks Consultants. Witnesses also reported that the 2008 New York trip had been unnecessarily extended by a group of city officials at city expense. Even more serious, witnesses told investigators that several multi-million dollar real estate transactions with the city involved potential conflicts of interest.

Executives with Kennedy/Jenks Consultants confirmed that the firm gave gifts to several city officials. Chief Executive Officer Keith London confirmed that Jeff Savard spent approximately \$2,300 taking Oxnard officials to a 2006 Lakers game and dinner via limousine. Jeff Savard, the Vice-President and Ventura County office manager of Kennedy/Jenks Consultants told investigators that he had numerous breakfast, lunch, and dinner meetings with City of Oxnard Public Works Department employees and that in most cases Kennedy/Jenks Consultants paid the expenses. More significantly, Savard also said that Ortega used \$34,000 of city funds to pay Kennedy/Jenks Consultants for expenses the firm incurred relating to the desalter and the grand opening celebration. Savard said that Kennedy/Jenks Consultants paid for a mural and a model at the desalter facility, an audio-visual presentation about the desalter, and floral expenses for the grand opening celebration. According to Savard, Kennedy/Jenks Consultants paid these expenses after a city contract amendment with the firm was artificially inflated to overpay for work Kennedy/Jenks Consultants would later do related to other city water facilities.

In subsequent interviews, Ortega maintained that the desalter celebration was paid for primarily by the companies involved in designing and building the desalter. He said that the celebration was more elaborate than was typical because the governor was expected to attend. Ortega alleged that City Manager Sotelo was aware that a dinner was planned and that Sotelo personally screened the list of invited guests.

Ortega disavowed any fiscal improprieties and said that former Oxnard Public Works employee Juan Moreno was primarily responsible for seeking vendor funding for the desalter event.

Additional witnesses further corroborated the initial allegations that officials failed to disclose gifts. On August 12, 2010, Councilmember Andres Herrera spoke with investigators and confirmed significant aspects of the gift allegations. Herrera admitted he had played golf at the Presidio Golf Course with Sotelo and the founder of De La Rosa & Co., though he said he did not know who paid the expenses. Herrera also admitted he attended a Lakers game with Kennedy/Jenks Consultants, but again denied knowing who had paid for the event. Though he admitted the group went to dinner after the game, Herrera said he did not eat. Herrera later admitted the vendor paid for the entire outing, but said that he did not declare the gift because he misunderstood the reporting requirements.

Herrera also discussed the New York trip in some detail. Herrera said he flew to New York in December 2008 to receive a bond industry award on behalf of the city. City Manager Sotelo, Chief Financial Officer James Cameron, Public Works Director Ortega, Finance Manager Mike More, and each of their wives also made the trip. Herrera confirmed his wife went on the trip and said he paid her expenses. Herrera said he stayed at the Times Square Hilton for two or three nights. City travel records contradict this claim, showing that he actually stayed five nights. Herrera admitted that he and his wife ate meals that someone else paid for, though again he said he did not know De La Rosa & Co. paid for the meals. Herrera told investigators he did not declare the New York meals and Presidio golf on his Form 700 because he believed they were city-sponsored events and that he was not required to declare them as gifts. He also said he believed the expenses were all placed on Sotelo's credit card.

Chief Financial Officer Cameron also corroborated the initial gift allegations, while significantly contradicting Herrera. Cameron, who began working for Oxnard in April 2008, went to New York as a fill-in for Mayor Tom Holden, who was scheduled to take the trip but had to cancel. Cameron said he stayed at the Times Square Hilton for five nights, as did Herrera and Sotelo. Cameron said he asked why they were staying five nights and was told they had to stay that long for the city to receive a discount.<sup>21</sup> He was also told that the reservation was nonrefundable. Thus, Cameron confirmed that the New York trip had been extended beyond what was necessary to attend the dinner, though he denied the extension was improper. Cameron also confirmed that while in New York, John Kim paid for two meals for

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<sup>21</sup> As detailed in subsequent sections, the length of the stay did not result in a discount to the city, but may have been the result of a five night minimum stay required by the hotel.

the Oxnard officials and several of their wives, as well as a Broadway show for some of them. Cameron also admitted that in 2009, Kim bought dinner for several city officials at the Cliff House restaurant in San Francisco.

Cameron's statements were consistent with receipts of De La Rosa's expenditures that investigators had obtained. One receipt showed Kim paid \$1,180.25 for dinner at Tribeca Grill in New York on December 3, 2008. Another receipt showed Kim paid \$1,571.66 for dinner at Gotham Bar & Grill in New York on December 4, 2008. The documents also confirmed that De La Rosa & Co. paid for 14 orchestra seats to a Broadway show for December 4, 2008, at a cost of \$88.25 per seat.<sup>22</sup>

Finance Manager Mike More provided additional statements to support the gift allegations. More was among the city officials who traveled to New York to receive the bond industry award. According to More, the group stayed in two different hotels in the Times Square area. More only stayed two or three nights, but said that others in the group stayed longer. More stated that he paid cash for his meals, with the exception of one dinner the group ate with John Kim. More told investigators he was not sure if he paid for that meal, saying, "I don't know, it was a big group." More said that John Kim invited him to go to a Broadway show and explained that De La Rosa & Co. was paying for the tickets, but More declined. More recalled attending another group dinner with city officials and John Kim at the Cliff House restaurant in San Francisco. More told investigators that the Cliff House dinner was also attended by City Manager Sotelo and Chief Financial Officer Cameron. More admitted he did not pay for his meal but said he was unsure who did.

On August 13, 2010, investigators met with Tim Flynn, who expanded upon the gift allegations and relayed significant additional suspicions about multi-million dollar corruption and improper favoritism surrounding city transactions. Flynn was then a candidate for city council in the November 2010 election. He had previously served on the council, but was not on the council at the time of his statements. Flynn confirmed that while he was previously on the council, gift meals had been provided to officials by both De La Rosa & Co. and Shea Properties, the developer of the RiverPark project. Flynn told investigators that Shea Properties hosted a "five star" dinner in Las Vegas at an annual convention in 2005. Flynn identified Mayor Holden, Councilmember Herrera, City Manager Sotelo and Assistant City Manager Karen Burnham as other recipients of the meal. Flynn estimated the cost of his meal at \$150. Because he was concerned whether taxpayers were paying for such a meal, he asked Sotelo who was going to pay for the meal. According to Flynn, Sotelo told

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<sup>22</sup> The play *Gypsy* was performed at the St. James Theatre, located at 246 West 44th Street, New York, New York.

him that Shea Properties would pay for the meal. Flynn said that the next day several officials went golfing with Shea Properties representatives.

Flynn further detailed for investigators several suspicions he had about impropriety in Oxnard city government. He outlined the city's purchase of a sports park property at the intersection of Oxnard Boulevard and Gonzales Road from Ernest Mansi. According to Flynn, Mansi owned the property only momentarily, yet profited approximately \$8 million at the city's expense. Flynn told investigators that he suspected the transaction was a "pay to play" situation, with Mayor Holden supporting the purchase in response to developers' previous financial support of a local charitable organization.<sup>23</sup>

Flynn also expressed concerns to investigators about the close relationship between Mayor Holden, Councilmember Herrera, and local businessman Bernard Huberman. Flynn relayed allegations that as a result of the relationships, councilmembers approved several contracts that unnecessarily enriched Huberman's companies. Flynn identified the questioned transactions as the city's purchase of a building on Sturgis Road for the police department, the city's sale of vacant land in Oxnard Shores, and the city's contracts for the operation of its Materials Recovery Facility (MRF). Each of these transactions involved millions of dollars.<sup>24</sup>

During the investigation's early stages, city officials tried several times to delay the investigation. On July 27, 2010, an investigator called City Manager Sotelo to arrange a brief meeting, but Sotelo did not return the call. Several days later, when the investigator called Sotelo's cell phone, Sotelo tried to put off the meeting until the following week, saying he was too busy to meet. When the investigator offered to meet Sotelo at that night's city council meeting, Sotelo agreed to meet the investigator 15 minutes later at a golf course. At one point, an assistant city attorney for Oxnard phoned the District Attorney's Office to cancel interviews with city employees that had been scheduled for the following day. Later, City Attorney Alan Holmberg asked investigators to delay the investigation at least a week so he could arrange lawyers to attend the employee interviews. The District Attorney's Office declined the delay request and Holmberg ultimately agreed that the employees would make their own decisions about whether to speak with investigators.

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<sup>23</sup> As discussed later in this report, this investigation found no evidence of criminality with respect to this transaction.

<sup>24</sup> A detailed discussion of these high-cost transactions may be found in Section Eight. The investigation found no evidence of criminality with respect to these transactions.

Investigators also encountered a lack of cooperation from Assistant City Manager Karen Burnham. On August 13, 2010, in response to a Public Records Act request for numerous documents, Burnham turned over just two boxes of documents, including a half-full box of city council minutes that were readily available on the Internet. Burnham told investigators that efforts to turn over additional documents were delayed because certain computerized records had been destroyed, though city personnel were working on restoring the data. Burnham had previously made the same assertion on August 2, 2010. However, Burnham's assertions were contradicted by another city employee, who said that much of the data had been recovered and provided to Burnham as early as August 2, 2010.

The delay attempts and lack of cooperation raised concerns of a "cover-up." These concerns were echoed by Mayor Tom Holden, who called the District Attorney on July 27, 2010, and told him that he suspected City Manager Sotelo and Assistant City Manager Burnham were engaged in some type of cover-up. Mayor Holden said that even he was not getting straight information out of the city manager's office. In a subsequent interview, Mayor Holden said he was fairly certain the city "stonewalled and drug our feet."

As the delays continued, investigators prepared a search warrant to seize the evidence they sought. On August 13, 2010, investigators sought a court order approving the search warrant and authorizing them to search Oxnard City Hall. As is customary in searches for records conducted in businesses open to the public, the District Attorney's Office conducted the search in a manner designed to minimize disruption to business activities. Shortly after 3:00 p.m. that Friday afternoon, investigators entered city hall, seizing dozens of boxes of documents relating to city officials' relationships with businesses, city travel expenses, city credit card usage, policies and procedures manuals, Form 700s, ethics training materials, and city council minutes, resolutions and ordinances. District attorney investigators learned that the city's weekly shredding service continued even after the first warrant was served and after the city manager issued a memorandum instructing employees not to destroy any documents.<sup>25</sup>

In the ensuing months, district attorney investigators and deputy district attorneys worked to secure evidence, interview witnesses and determine the validity of the many allegations. The investigation focused on events occurring between 2005 and 2010. Investigators relied largely upon search warrants to obtain evidence,

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<sup>25</sup> Although Penal Code section 135 prohibits intentionally destroying or concealing evidence to prevent the evidence from being produced in an investigation, there is insufficient evidence to prove any Oxnard officials acted in violation of this law.

executing more than 30 search warrants at more than 50 locations. It is important to point out that service of a warrant at a particular location does not mean an occupant of that location was a suspect. Rather, it indicates that investigators had probable cause to believe the location may have contained relevant evidence.

In all, investigators searched several city facilities and numerous departments, including the city manager's office, treasurer's office, city clerk's office, and city council offices, among others. Warrants were executed at several city officials' homes and at several businesses holding contracts with the city. Financial records pertaining to the City of Oxnard and several city officials were obtained from a variety of financial institutions. Escrow and title records were obtained from several companies relating to real estate transactions. In an effort to verify witnesses' statements and defenses raised by those accused of misconduct, search warrants were also executed at numerous businesses unrelated to the city, including various restaurants, hotels, and sports entities.<sup>26</sup>

A great deal of evidence was obtained simply by requesting it. Numerous documents and business records were provided by cooperative companies doing business with the city. More than a dozen Public Records Act requests were used to obtain additional records maintained by the city. In all, investigators collected more than 100,000 pages of documentary evidence to be examined.

District attorney investigators interviewed dozens of people, seeking either to confirm or disprove the allegations. In most instances people spoke with investigators, though some later invoked their right to remain silent. Among those interviewed were councilmembers and the mayor, the city manager, the assistant city manager and the chief financial officer. Investigators also spoke with a wide variety of current and former city employees, and developers and others doing business with the city. Relevant portions of key witnesses' statements are summarized throughout this report where appropriate to illuminate factual or legal aspects of the investigation.

In all, investigators prepared more than 15,000 pages of investigative reports and transcripts of interviews. All of these materials were analyzed by deputy district attorneys to determine whether crimes were committed and whether there was sufficient evidence to file criminal charges.

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<sup>26</sup> Where warrants sought records maintained by corporations out of the area and not doing business with the city, the warrants were mailed to the companies' legal departments and the records were provided by mail, in accordance with standard law enforcement procedure.

## **SECTION FOUR - EVIDENTIARY IMPEDIMENTS**

Three categories of evidence are important to prove allegations of official misconduct – statements of eyewitnesses, business and financial records of the events, and statements of the suspected persons. Several critical roadblocks prevented investigators from obtaining the evidence necessary to prove or disprove the allegations of criminal misconduct. In many instances, these roadblocks were caused by the city’s own practices, lack of adequate policies, and the failure to create or maintain accurate financial records.

### **Inadequate Recordkeeping by the City**

Key aspects of this investigation involved tracking public funds used for travel and meal expenses and city credit card purchases. These are the types of events and transactions that an effective recordkeeping system should document easily and thoroughly in any business setting, but particularly so where a public entity spends taxpayer funds. Unfortunately, the city’s practices and recordkeeping system did not accomplish these tasks with reliable accuracy.

#### **Travel Forms**

By city policy, traveling officials are required to prepare a Travel Authorization Request form no later than 10 days after traveling. The travel form must show actual or authorized expenses, with required receipts. City policy requires the purchasing division to audit the submitted items for accuracy and to determine if they are appropriate for reimbursement.

In practice, the submitted travel form often did not accurately reflect the nature of the expenditures. This was particularly true when groups of officials traveled together. For example, when multiple officials dined out together, one official typically paid the bill with his or her city credit card. However, the travel form submitted by the purchasing official often did not identify anyone else who was present at the meal. Only occasionally did the other diners list the meal on their own travel form, indicating that another official paid for the meal. Often there was no accurate record of how many city officials (or non-city officials) were present at a meal paid for by taxpayers. For example, one travel form revealed that on Thursday, November 15, 2007, Sotelo paid \$688.54 for a dinner. The following evening, he

paid \$746.40 for another dinner. Sotelo's travel form did not detail who else was present for these meals, nor did the receipts Sotelo submitted to the city.<sup>27</sup>

Also, although the travel form was supposed to be signed by the traveling official, the forms were frequently prepared by assistants and submitted unsigned. As a result, the officials cannot be held accountable for the accuracy of the information on the form. Further, the city did not keep the travel forms together for each particular trip. Rather, the travel forms were kept with the city employee's monthly credit card statements. As a result, determining who traveled to a particular conference or attended a city-expensed meal can require cross-referencing approximately 200 credit card statements for the months preceding and following any particular trip.

As to the auditing of travel forms, the investigation revealed that only occasionally did any employee question who was present at an expensive meal or the propriety of an expense. Moreover, as officials were not required to submit itemized receipts, no matter how expensive the meal charge, there is no way of establishing how many diners were present. Nor can it be determined whether alcohol was purchased with city funds.

Based on the city's recordkeeping and fiscal practices, it is impossible to determine from the records whether officials paid for their spouses' meals with city funds, as has been alleged. The end result is that some Oxnard officials routinely spent hundreds of taxpayer dollars at dinners without disclosing what was purchased or whose dinner the city purchased.

### **Credit Card Usage**

Although the city's credit card policy relating to travel and reimbursement flatly prohibits the use of city credit cards for personal purchases, in practice some officials made personal purchases with city credit cards and then reimbursed the city.<sup>28</sup> Numerous travel forms reveal this practice. In the example found in [Attachment A](#), Sotelo paid cash for some travel costs, such as taxi fares. He reflected those cash expenditures on the travel form, appropriately requesting that the city reimburse those costs. However, it can also be seen that Sotelo made personal purchases on the city's credit card because he reduced the amount the city was obligated to reimburse him by simply noting on the form \$500 for unspecified "personal costs." Without requiring the official to itemize the individual personal purchases and their cost, it is impossible to audit the expenditure for accuracy.

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<sup>27</sup> See [Attachment A](#).

<sup>28</sup> A copy of the relevant section of the city's credit card policy is found in [Attachment B](#). City of Oxnard Administrative Manual, Policy D-20.

The city's practice alternatively allows officials to reimburse the city for personal charges by making payments directly to the Treasurer's Office. When an official makes such a reimbursement, he or she receives a generic receipt proving payment to the city. Several witnesses told investigators that the receipt is supposed to be attached to the travel form. In some instances, this occurred. However, many of the attached receipts contained no indication of why the payment was made. Frequently, there was no description of the personal charge incurred, making it impossible to determine the accuracy of the reimbursement amount. As discussed below, where no deposit receipt was attached to a travel form, the lack of detail in the city's financial database makes it impossible to determine whether a reimbursement to the city actually occurred.

### **Computerized City Financial Records**

When an official made a reimbursement to the Treasurer's Office, a city Treasurer's Office employee recorded the transaction in the city's computerized financial recordkeeping system. Pursuant to a search warrant, district attorney investigators obtained access to the city's financial recordkeeping system and attempted to determine whether city officials had reimbursed the city for personal expenses. Unfortunately, there is no tracking code for such reimbursements and there is tremendous inconsistency in how the payments were recorded in the computer system. Many times the computerized records do not identify the official who made the payment to the city or the purpose of the payment. Often, the only computerized record the city maintains about the payment is the fact that a particular amount was deposited into the city account on a particular date. This means a search of the city's database for reimbursements made by an official cannot be relied upon to accurately determine whether the official reimbursed the city for personal expenses. As a result of the city's recordkeeping practices, it is impossible to either validate or invalidate an official's assertion that he or she reimbursed the city for any personal expenditure.

### **Officials' Financial Records**

In a further attempt to determine whether city officials reimbursed the city for personal expenses or reimbursed the businesses and individuals who provided the officials with gifts, district attorney investigators obtained court-ordered search warrants to obtain financial records of city officials suspected of violations. Examination of the records revealed some reimbursements from officials to the city for personal expenditures. However, the multiple possible accounts and numerous alternative reimbursement methods made it impossible to disprove officials' reimbursement claims.

### **Availability of Witnesses**

The eyewitnesses to many of the allegations of unreported gifts and excessive travel and meal expenses are other accused city officials or their spouses. In those circumstances, the availability of witnesses to testify at trial is compromised. The Fifth Amendment of the United States Constitution guarantees the right to be free from self-incrimination. As such, a witness has a privilege not to speak to police or to testify in court when to do so would expose the witness to criminal prosecution. Where, as sometimes occurred in this investigation, witnesses invoke their privilege when questioned by investigators, statements from those witnesses are unavailable. Where the privilege is invoked at trial, the witness is unavailable to prosecutors absent a grant of immunity.

Under the marital privilege, an official's spouse may refuse to testify against the official, and the official may prevent his or her spouse from testifying. While there are exceptions in domestic violence and some other types of cases, the exceptions do not apply to these allegations. As a result, the officials' spouses in this investigation are generally unavailable to prosecutors to testify against their spouses.

### **The Passage of Time**

Many of the allegations involve events that occurred several years ago. The passage of time rarely helps a criminal investigation. Most often it results in faded memories and lost evidence. In this investigation, for example, the City of Oxnard maintains its e-mail records for only a few months. In public integrity investigations, significant information is often found in e-mail communications surrounding questionable events. In this case, e-mail surrounding the events in question simply no longer exists unless it was printed and placed in a file.

Another key example of how the passage of time has hindered the investigation involves the evidence that gifts were accepted. In some instances, the gift-givers kept expense reports listing who was present for a particular meal or event. In other instances, the records were less complete, forcing investigators to rely on the gift-giver's memory of remote events. Several such witnesses remembered some events well, while expressing uncertainty as to others. Similarly, those accused of misconduct remember some events well while other events are vague. In such instances, the availability of corroboration is essential to determine the truth of what happened. Where evidence is vague due to the passage of time and no corroboration is available, there is insufficient reliable evidence to prove charges beyond a reasonable doubt.

In summary, the city's inadequate and inaccurate records, the unavailability of key witnesses, and the passage of time dramatically hampers the ability to prove certain charges beyond a reasonable doubt.

## SECTION FIVE - MISAPPROPRIATION OF PUBLIC FUNDS

This section will outline the major legal principles, evidence and analysis relating to the allegations of misappropriation of public funds. The alleged misappropriations fall broadly into the following categories:

- Expensive meals at city expense<sup>29</sup>
- Personal expenses paid by the city, including:
  - Extended travel at city expense
  - Upgraded hotel rooms
  - Meals and travel expenses provided to spouses at city expense
- A personal loan of city funds
- The Supplemental Post-Retirement Benefit
- Excessive payments for marketing and organizational consulting
- Concealed payments of GREAT Program expenses

An overview of the major legal principles concerning misappropriation of public funds is pivotal to the analysis of evidence in each of these categories. By discussing the law first, the significance of the evidence obtained and the evidence that cannot be obtained, will be more readily apparent.

### **The Law of Misappropriation – Penal Code section 424**

Broadly speaking, the crime of misappropriation of public funds refers to the unauthorized use, taking, or expenditure of public money by a public official. California law does not allow public officials to spend taxpayer money however they would like. Officials may only spend public funds for the public benefit and only in ways specifically authorized by law. Among other things, California Penal Code section 424 prohibits public officials from spending public money for personal purchases, spending public money for the public's benefit but in ways not permitted by law, and loaning public money for personal benefit. Misappropriation is punishable by up to four years in state prison and results in disqualification from holding any office in this state.

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<sup>29</sup> A detailed discussion of the City of Oxnard meal reimbursement rates and contrasting discussion of the IRS per diem reimbursement rates may be found later in this section.

### **Recent Change in the Law of Misappropriation**

When this investigation began in June 2010, the law of misappropriation was at a crossroads. The courts had held that misappropriation was established when evidence showed an official intentionally committed an act that violated Penal Code section 424. The then-existing law did not require proof that the official knew the act was unlawful. However, during this investigation, the law was challenged before the California Supreme Court in a case involving the auditor-controller of Sutter County, *Stark v. Superior Court*.<sup>30</sup>

In August 2011, the California Supreme Court issued its decision in the *Stark* case, dramatically raising the burden of proof for prosecutors. The Court added a new requirement to Penal Code section 424, ruling that to be guilty of misappropriation of public funds, an official must know that his or her conduct was without authority of law, or must be criminally negligent in not knowing the conduct was without authority of law. *Stark* was a seminal case profoundly altering California law and directly impacting this investigation. As a result of the Supreme Court's decision, to prevail in a misappropriation case, prosecutors must now prove beyond a reasonable doubt that the official knew, or was criminally negligent in not knowing, that he or she acted without the authority of law.

### **What Must Be Proven**

Under the factual scenarios that are the subject of this investigation, to prove misappropriation of public funds under Penal Code section 424, it must be proven that:

1. An official spent public money,
2. The expenditure was without authority of law, and
3. The official knew that the expenditure was without authority of law or was criminally negligent in not knowing the expenditure was without authority of law.

### **The Evidence of Expensive Meals**

City of Oxnard officials regularly traveled on city business between 2005 and 2010, attending conferences and business meetings in other cities and states. The city manager and assistant city manager also took recruiting trips to meet candidates for positions within the city. Table 1, below, identifies several of the significant or recurring trips taken by city officials. It is by no means comprehensive. The listed officials are identified within city records as having attended the trips. Due to

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<sup>30</sup> *Stark v. Superior Court* (2011) 52 Cal.4th 368.

limitations of the city’s recordkeeping system, not all officials in attendance could be identified.

*Table 1 – Examples of City-Expensed Travel*

<b>Date</b>	<b>Location</b>	<b>Conference/Event</b>	<b>Attendees</b>
March 2005	Washington, D.C.	National League of Cities	Holden, Herrera, Burnham
October 2005	San Francisco, CA	League of California Cities	Flynn, Herrera, Zaragoza, Sotelo
May 2006	Las Vegas, NV	International Council of Shopping Centers	Holden, Flynn, Herrera, Sotelo, Burnham
March 2007	Washington, D.C.	National League of Cities	Herrera, Sotelo
May 2007	Las Vegas, NV	International Council of Shopping Centers	Holden, Herrera, Sotelo
November 2007	New Orleans, LA	National League of Cities	Holden, Herrera, Sotelo
March 2008	Washington, D.C.	National League of Cities	Sotelo
May 2008	Las Vegas, NV	International Council of Shopping Centers	Holden, Herrera, Sotelo, Burnham, Cannon
December 2008	New York, NY	Bond Buyers Awards	Herrera, Sotelo, Ortega, Cameron, More
January 2009	San Francisco, CA	League of California Cities	MacDonald, Pinkard, Sotelo
March 2009	Washington, D.C.	National League of Cities	Herrera, MacDonald, Ortega, Pinkard, Sotelo
May 2009	Las Vegas, NV	International Council of Shopping Centers	Herrera, MacDonald, Pinkard, Sotelo
March 2010	Washington, D.C.	National League of Cities	Herrera, Burnham
May 2010	Las Vegas, NV	International Council of Shopping Centers	Holden, Herrera, Maulhardt, Pinkard, Sotelo, Burnham, Cannon

When city officials traveled, flights and hotel rooms were commonly arranged by administrative assistants, at times working with travel agents. These expenses were usually placed on city credit cards. Meals during the travel were most often purchased with city credit cards. Because most city council members did not have or use city credit cards, their expenses were typically purchased with city credit cards issued to other traveling city officials or staff members. For cash expenses, officials used their own money and requested reimbursement from the city upon their return. Travel forms identified cash payments for such things as parking, taxi fares and tips, meals paid for with cash, or meals for which the city's standard per diem rate was being requested. In such circumstances, an official would list the expenses, turn in receipts, and request city reimbursement at the end of a trip, after which a check would be issued to the employee. In this way, a city official might expend hundreds or even thousands of dollars of city funds on transportation, accommodations and expensive dinners to attend a conference, and still receive a check for additional out-of-pocket or per diem expenses.

To track travel costs and reimbursements, city travel policy requires employees to prepare a Travel Authorization Request form upon return from city travel.<sup>31</sup> The completed travel form should summarize the travel in detail, including location, dates, conference fees, transportation methods and costs, accommodations and costs, meals, and other costs. The travel forms are supposed to be verified and signed by the official incurring the costs, though in practice they are at times prepared by assistants and submitted unsigned.

The investigation revealed that expensive dinners were a regular part of some officials' city travel. While not all meals were expensive, it was common for some officials to dine at expensive restaurants with total bills in the hundreds of dollars. Over the years, city taxpayers paid for costly meals at Ruth's Chris Steakhouse, Morton's Steakhouse, Oceanaire, McCormick & Schmick's, and Brennan's, to name a few.

Oxnard city travel policy permitted employees to cover meal expenses in one of two ways.<sup>32</sup> The employee may (1) receive a meal allowance of \$70 per day without providing receipts,<sup>33</sup> or (2) use city funds for actual meal expenses, even if it exceeds the \$70 allowance, as long as the employee provides a receipt. The policy tasked the finance department with auditing expenses to ensure they are allowable. Auditing was inconsistently done. Thus, in practice the city's policy permitted virtually

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<sup>31</sup> An example of a Travel Authorization Report form is found in [Attachment A](#).

<sup>32</sup> The full text of the City of Oxnard Administrative Manual, Policy B-2 in effect before February 2011, regarding travel and reimbursement may be found in [Attachment C](#).

<sup>33</sup> The \$70 per diem consists of \$15 for breakfast, \$20 for lunch, and \$35 for dinner.

unlimited meal expenses for ranking officials.<sup>34</sup> Several witnesses stated that unreasonable meal expenses could theoretically be refused and a few witnesses recalled charges occasionally being disallowed. However, nearly every witness confirmed there was no effective limit to meal expenses as long as receipts were submitted. Documentation seized from city hall reflects a few instances where meal charges were questioned and additional information requested before reimbursement was ultimately approved. City Manager Sotelo admitted the unlikelihood of city employees questioning the expenses coming from his office or city council. Some employees and officials also stated that limited amounts of alcohol could be purchased with the city credit card, with some saying that former City Attorney Gary Gillig had given them that advice.

When more than one city official was present at a meal, the most common practice was for one official to pay for the entire meal on his or her city-issued credit card. Only that official’s travel form would reflect payment for the meal, with the official attaching the credit card receipt. Itemized receipts showing the particular food or drinks purchased were rarely provided. Often, the receipt and the official’s travel form did not identify the other officials who attended the meal. In most instances, it is impossible to determine from the records how many people attended any particular meal, which officials attended the meal, whether meals were purchased for spouses or other guests, or which expenses any particular official incurred. As discussed elsewhere, in most instances it is also impossible to demonstrate whether an official did or did not repay the city for excessive expenses.<sup>35</sup> Recognizing those significant limitations in the evidence, Table 2 below reflects selected meals paid for with city credit cards.

**Table 2 – Examples of Expensive Meals**

Trip	Restaurant	Amount	Employee’s Credit Card	Diners Identified by Receipt or Credit Card Statement
Washington, D.C. March 2005	Oceanaire Seafood	\$189.65	Burnham	“Tom / Andres etc.”
	Equinox	\$392.00	Burnham	
San Francisco, CA October 2005	Scoma’s	\$540.55	Sotelo	
Costa Mesa, CA May 2006	Scott’s Restaurant & Bar	\$207.42	Sotelo	“Andres Herrera + Matt Winegar”

<sup>34</sup> As discussed in Section Nine of this report, the travel policy was modified in February 2011 to limit meal allowances for all employees and officials to the IRS reimbursement rates.

<sup>35</sup> The investigation did identify a small number of travel reimbursements by city officials.

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Trip	Restaurant	Amount	Employee's Credit Card	Diners Identified by Receipt or Credit Card Statement
Washington, D.C. March 2007	Ruth's Chris Steak House	\$473.54	Sotelo	"CM Councilmember"
	Mie N Yu	\$320.20	Sotelo	
	Oceanaire Seafood	\$383.72	Sotelo	
Pasadena, CA May 2007	JJ Steak House	\$263.55	Sotelo	"Karen Ed + Patty Kinaga Legal Issues"
New Orleans, LA November 2007	Tujagues	\$221.84	Sotelo	
	Antoine's	\$688.54	Sotelo	
	Commander's Palace	\$746.40	Sotelo	
	Brennan's	\$388.52	Sotelo	
Washington, D.C. March 2008	Ruth's Chris Steak House	\$236.36	Sotelo	
	Oceanaire Seafood	\$277.61	Sotelo	
San Francisco, CA April 2008	Scoma's	\$270.28	Sotelo	"H.R. Dir Candidate Background Ck"
New York, NY December 2008	Grand Central Oyster Bar	\$207.01	Sotelo	
	Trattoria Dell'Arte	\$554.53	Sotelo	
San Francisco, CA January 2009	The Firehouse	\$347.61	Sotelo	"New Mayor and Council"
Washington, D.C. March 2009	Mie N Yu	\$380.16	Sotelo	"Sotelo/Pinkard/MacDonald/Herrera"
	McCormick & Schmick's Seafood	\$428.31	Sotelo	"Sotelo/Pinkard/MacDonald/Herrera"
	Morton's The Steakhouse	\$629.14	Sotelo	"Sotelo/Pinkard/MacDonald/Herrera"
San Antonio, TX November 2009	Landry's Seafood	\$305.63	Sotelo	
	Fogo de Chao	\$372.57	Sotelo	
Washington, D.C. March 2010	Mie N Yu	\$379.02	Burnham	
	Filomena Ristorante	\$450.70	Burnham	
Las Vegas, NV May 2010	Dal Toro	\$1,151.54	Cannon	"Maulhardt's 2; Holden 1; Ed 1; Karen 1; Dave 1; Kelle 1; Kym 1; Brian 1; McDonalds 2; Herreras 2; Pinkards 2; Curtis 1; Maria 1" "17; 67.74"
	McCormick & Schmick's Seafood	\$297.04	Cannon	"Curtis; Dave; Tom; Herreras" "5; 50.41 each"
	Ruth's Chris Steak House	\$830.36	Cannon	"McDonald's 2 Herrera's 2 Kelle 1; Dave 1; Ed 1; Karen 1; Curtis 1; Maria 1; Kym 1" "11; 75.49"

Nearly every city official told investigators that their practice was to repay the city when their expenses were excessive or included personal charges. Mayor Holden told investigators that when he traveled alone on city business, he paid for his own meals and incidentals without requesting per diem or submitting reimbursement forms, thus balancing out any dinner expenses he incurred when traveling in a group. Occasionally, a travel form offset the reimbursement amount requested for out-of-pocket or per diem expenses with a notation that the official paid for personal expenses with a city-issued credit card. Only rarely did the official itemize what the personal expenses actually were or how the official arrived at his or her personal expense calculation.

**Analysis of Expensive Meals as Potential Misappropriation**

Witnesses suspected the expensive meals amounted to an unlawful expenditure of city funds and therefore criminal misappropriation. Beginning in January 2006, California law<sup>36</sup> and an Oxnard city council resolution limited meal reimbursement for members of the Oxnard city council to Internal Revenue Service (IRS) meal reimbursement rates, which vary depending on the time of year and the destination of the travel. Though this limitation went into effect in January 2006, the virtually unlimited reimbursement practice in Oxnard never changed. Significantly, Oxnard’s per diem rate of \$70 per day exceeded the IRS rate for Ventura County every year until 2009. Examples of the IRS meal per diem rates are contained in the table below:

*Table 3 – IRS Per Diem Rates<sup>37</sup>*

<b>Travel Destination</b>	<b>Date</b>	<b>IRS Per Diem (Meals &amp; Incidental Expenses)</b>
Ventura County, CA	October 2004 – September 2005	\$51 per day
Washington, D.C.	March 2005	\$51 per day
San Francisco, CA	October 2005	\$64 per day
Ventura County, CA	October 2005 – September 2006	\$64 per day
Costa Mesa, CA	May 2006	\$64 per day
Ventura County, CA	October 2006 – September 2007	\$64 per day
Washington, D.C.	March 2007	\$64 per day

<sup>36</sup> Government Code section 53232.2.

<sup>37</sup> The maximum federal per diem rates are listed by location and date in Table 3 of IRS Publication 1542. [www.irs.gov/formspubs/article/0,,id=244312,00.html](http://www.irs.gov/formspubs/article/0,,id=244312,00.html)

Travel Destination	Date	IRS Per Diem (Meals & Incidental Expenses)
Pasadena, CA	May 2007	\$64 per day
New Orleans, LA	November 2007	\$59 per day
Ventura County, CA	October 2007 – September 2008	\$64 per day
Washington, D.C.	March 2008	\$64 per day
San Francisco, CA	April 2008	\$64 per day
Orlando, FL	November 2008	\$49 per day
New York, NY	December 2008	\$64 per day
Ventura County, CA	October 2008 – September 2009	\$64 per day
San Francisco, CA	January 2009	\$64 per day
Washington, D.C.	March 2009	\$64 per day
San Antonio, TX	November 2009	\$66 per day
Ventura County, CA	October 2009 – September 2010	\$71 per day
Washington, D.C.	March 2010	\$71 per day
Las Vegas, NV	May 2010	\$71 per day

To prove that the expensive dinners amounted to criminal misappropriation, there must be sufficient admissible evidence to prove each of the elements.

**Element 1 – An Official Spent Public Money**

The first element that must be proven is that an official spent public money. In those instances that an official used his or her city-issued credit card to purchase a meal, the credit card statement proves the official spent public money. Similarly, a receipt submitted with an official’s travel form proves the official spent public money.

Proof becomes more elusive when one official purchased a meal for several people dining in a group. Clearly, the purchasing official spent public funds. To prove the other diners also spent public funds, several things must be proven. First, there must be sufficient evidence proving who the other diners were. Second, there must be evidence proving the other diners actually ate food purchased by the official, as opposed to merely being present or paying for their own meals. Third, the evidence must prove that the other diners knew the purchasing official used a city credit card to pay for their food. Finally, there must be evidence to prove the official did not reimburse the city as claimed. As outlined above, such evidence simply does not exist as to group meals.

**Element 2 – The Expenditure Was Without Authority of Law**

The next element that must be proven is that the official’s expenditure was without authority of law. With regard to meal and travel expenses, different legal standards

apply to the city council than apply to non-elected city employees. For non-elected employees, meal expenses are limited only by city policy. Because city policy authorized the meal expenses, the non-elected employees' expenses were legally permissible.

As to the city council, however, since January 2006, California law and an Oxnard resolution have limited reimbursement to the IRS daily reimbursement rates. Thus, to prove this element as to city councilmembers, it must be proven that the elected official's meal exceeded the IRS reimbursement rate and that the elected official did not repay the city for the excess amount. Again, given the evidentiary impediments discussed above, the evidence does not establish the cost of any particular city councilmember's meal. Most significantly, because the city's recordkeeping practices were inadequate, no evidence exists to verify or disprove the various councilmembers' claims that they reimbursed the city.

### **Element 3 – The Official Knew the Expenditure Was Without Authority of Law**

The final element that must be proven is that the official knew, or was criminally negligent in not knowing, the expenditure was without authority of law. This is the newly created *Stark* requirement. The city's virtually unlimited travel reimbursement policy effectively insulates the officials from criminal responsibility. City policy B-2, outlined above, permitted two options. An official could receive up to \$70 per day for meal expenses or could exceed the \$70 limit simply by purchasing a more expensive meal and submitting a receipt showing the higher cost. As to non-elected employees, the policy, while extremely generous, may not be contrary to law. As to the elected officials, it must be proven beyond a reasonable doubt that the official knew, or was criminally negligent in not knowing, this longstanding policy was contrary to law.

### **Conclusion – Expensive Meals**

The available evidence concerning expensive meals is insufficient to prove criminal misappropriation of public funds. In most instances, there is no evidence to prove which official incurred any particular excessive meal expense. In addition, the city's recordkeeping provides no avenue to disprove the officials' assertions that they reimbursed the city for excess expenses. Finally, because of the city's unduly generous policy, there is insufficient evidence to prove beyond a reasonable doubt that any official knew the meal expenses were contrary to law under the requirements of *Stark*.

## **The Evidence of Personal Expenses Paid by the City**

In addition to expensive meals, city funds were alleged to have been spent for personal purchases or for spousal travel or meals. The most significant instance involves the trip to New York in December 2008. Councilmember Herrera, City Manager Sotelo and Chief Financial Officer Cameron were alleged to have unnecessarily extended the trip, essentially taking a vacation at taxpayer expense. Other potentially personal expenses included upgraded hotel rooms, hotel spa purchases, an airline ticket and baggage fees for spouses, and meals for spouses.

### **New York Trip Timeline**

Several city officials traveled to New York City in December 2008 to receive an award on behalf of the city. Though the awards ceremony took place on only one night, Sotelo, Cameron and Herrera stayed for five nights. The officials flew to New York on Tuesday, December 2, 2008. Cameron, Herrera, and Sotelo stayed at the Times Square Hilton, as did their wives and Sotelo's daughter. Finance Manager Mike More, also accompanied by his wife, stayed at the Doubletree Hotel in Times Square. Public Works Director Ken Ortega flew to New York on December 1, 2008, accompanied by his wife, and also stayed at the Doubletree Hotel in Times Square.

On Wednesday, December 3, 2008, the Bond Buyer Deal of the Year Awards Ceremony was held at the New York Academy of Sciences, located at 7 World Trade Center. Cocktails were scheduled to begin at 6:00 p.m. and the ceremony was scheduled to conclude at 10:00 p.m. John Kim of De La Rosa & Co. said that after the awards concluded, he hosted Sotelo, Herrera, Cameron, Ortega, More and several spouses to dinner at Tribeca Grill. Kim paid the bill of \$1,180.25.

The next night, Thursday, December 4, 2008, John Kim again hosted dinner for Sotelo, his wife and daughter, Ortega, and his wife, as part of a group, this time at Gotham Bar & Grill. It is unclear whether Cameron or Herrera attended. Kim paid a bill of \$1,571.66. After dinner, Kim further hosted some members of the Oxnard group to a performance of the Broadway show, *Gypsy*, including Ortega, Cameron and Sotelo, their wives, and Sotelo's daughter. Tickets for the show cost \$88.25 each.

On Friday, December 5, 2008, Finance Manager More and Public Works Director Ortega left New York, while the other three officials remained for two more nights. That evening, Shea Properties hosted a dinner attended by the three Oxnard officials and their family members at Del Frisco's Double Eagle Steak House. At the time, Shea Properties was the primary developer of the RiverPark project in the city of Oxnard. Shea Properties paid a bill for the group of \$1,298.46. Representatives

from Shea Properties confirmed they invited the officials to have dinner with them in New York on December 5. The city's trip itinerary included the meeting and some Oxnard officials said they thought it was to be a business meeting, although the Shea Properties representative said it was purely social and did not have to take place in New York.

City officials had no city events scheduled on Saturday, December 6, 2008, though Sotelo used his city credit card to pay for a \$554 dinner at Trattoria del Arte that night. Councilmember Herrera's travel form indicates his dinner for that night was "paid by Ed's credit card." The next day, Sunday, December 7, 2008, the officials and their families flew back to California.

### **New York Trip Expenses**

The officials' round-trip flights to New York totaled more than \$1,600. The city also paid for Councilmember Herrera's wife's flight, at least initially, because Mrs. Herrera's flight was charged to Cameron's credit card by the travel agent. As will be discussed later, it is unknown whether this was intentional or whether Councilmember Herrera reimbursed the city for the cost of his wife's flight.

The City of Oxnard paid more than \$9,500 for hotel accommodations for the officials. Rooms for the three ranking officials at the Times Square Hilton cost approximately \$600 per room, per night. Cameron's and Herrera's rooms at the Times Square Hilton cost Oxnard taxpayers nearly \$3,000 each. City Manager Sotelo paid for two nights at the Times Square Hilton on his personal credit card. As a result, his room cost Oxnard taxpayers only \$1,880. The rooms at the Doubletree Hotel in Times Square for Public Works Director Ortega and Finance Manager More cost \$449 per room, per night, though Ortega personally paid for two nights of his stay. The city also paid more than \$1,200 for meals and per diem for the officials. These costs included a \$554 dinner at Trattoria del Arte and a \$207 lunch at Oyster Bar that were charged to Sotelo's city credit card. The costs also included a \$139 breakfast charged to Cameron's city credit card. Oxnard taxpayers also paid nearly \$1,500 in ground transportation and parking charges to take the officials, and, in some cases their wives, back and forth from the two airports. Significantly, taxpayers paid more than \$300 for Sotelo and Herrera's round trips between the airport and the Times Square Hilton. This was more than double the cost of a taxi, according to an e-mail from the city's travel agent to city personnel. Table 4, below, summarizes the New York trip costs.

**Table 4 – New York Travel Expenses**

	<b>Ed Sotelo</b>	<b>Andres Herrera</b>	<b>James Cameron</b>	<b>Ken Ortega</b>	<b>Mike More</b>	<b>TOTAL</b>
Hotel Costs	\$1,881	\$2,975	\$2,975	\$1,028	\$1,028 <sup>38</sup>	\$9,887
Airfare	\$301	\$405	\$389	\$305	\$271	\$1,671
Meals	\$910	\$187	Unknown	\$230	Unknown	\$1,327
Ground Transportation	\$532	\$659	Unknown	\$306	Unknown	\$1,497
<b>TOTAL</b>	<b>\$3,624</b>	<b>\$4,226</b>	<b>\$3,364</b>	<b>\$1,869</b>	<b>\$1,299</b>	<b>\$14,382<sup>39</sup></b>

In all, taxpayers paid approximately \$14,000 for five city officials to attend a one-evening awards ceremony. City officials spent this money after City Manager Sotelo announced an austerity program severely limiting training and travel due to the city’s serious budget issues. Moreover, in the two months following this excursion, Public Works Director Ortega announced additional cutbacks to the department’s training budget and suspended the department’s coffee and water service to employees. More significantly, in July 2009, the city cut the budgets of numerous city departments to make up for a \$10.2 million general fund budget shortfall.

Herrera told investigators that he only stayed in New York for two nights, which was untrue. Herrera otherwise gave a fairly specific description of what he did during the trip. Sotelo initially said he only stayed three nights, which was also untrue, though Sotelo paid for two nights at the hotel. Sotelo also paid the city \$1,800 following the New York trip. Due to incomplete recordkeeping by the city, it is unknown whether any portion of this payment was to reimburse the city for personal expenses related to the New York trip or whether it was unrelated.

Cameron went to New York as a substitute for Mayor Holden, who was scheduled to attend. When interviewed about the length of the stay, Cameron stated that he was not sure why the stay was five days, but said that he had been told it was to take advantage of some kind of discount that made the extended stay cheaper. Based on

<sup>38</sup> Estimated based upon charge for Ortega’s room.

<sup>39</sup> Any reimbursement by city officials would reduce the total. For example, in January 2009, City Manager Sotelo paid the city \$1,800, though it cannot be determined whether any portion was a reimbursement for the New York travel expenses.

Cameron's statements, investigators interviewed the travel agent who booked the New York trip. At the time of the interview, the travel agent had not done business with the city for more than a year. The travel agent told investigators that she booked the trip around Thanksgiving for travel to New York during the first week of December. She said that early December is one of New York's busiest travel seasons and that accommodations in New York were difficult to obtain on short notice. The travel agent told investigators that she thought the airfare may have been cheaper with a Saturday night stay and there may have been a five-night minimum on the hotel stay. The hotels suggested by the award ceremony promoters were booked up, so the travel agent chose the hotels, booking rooms at two hotels because there were not enough rooms available in the less expensive hotel. She said the hotel bookings were nonrefundable, which is why Cameron went to New York when Mayor Holden could not. The travel agent said that city personnel were normally frugal in their travel selections.

District attorney investigators also interviewed a representative of the Times Square Hilton hotel. The hotel representative confirmed that early December is one of their busiest times and that the Hilton frequently has mandatory minimum stays of three, five or seven nights. Hotel records did not show what the minimum stay was for the officials' trip, but the representative confirmed that it was at least three nights and may well have been five nights. Comparison of the flight costs for those who stayed five nights with those who went home after three nights revealed that the Saturday night stay did not reduce the airfare.

### **Analysis of New York Trip**

There is ample evidence that the five Oxnard officials spent public money on the extended New York trip. The key questions are whether there is sufficient evidence to prove beyond a reasonable doubt that the expenditures were unlawful and that the officials knew so or were criminally negligent in not knowing. The law permits the city to send officials to receive awards on its behalf, but does not permit the officials to extend the trip for purely personal reasons at city expense. The reasons for extending the trip are therefore critical. The false statements of Herrera and Sotelo create an inference that they lied about the length of the trip to hide misconduct. However, independent evidence suggests the trip was not criminal.

The available evidence reveals the hotels were selected by the travel agent based upon short-notice availability and that the length of stay may have been due to a minimum stay required by the hotel. Also, investigators found that the initial Travel Authorization Request forms for the New York travelers only requested travel from December 2, 2008, through December 4, 2008, which may support the assertion

that the dates were selected due to minimum stay requirements. Additionally, representatives from Shea Properties invited the officials to a dinner meeting with them and there is evidence that at least some of the officials believed this would be a business dinner.

Based on the available evidence, there is insufficient evidence to establish beyond a reasonable doubt that the extended trip was without authority of law. Whether to send city officials to an industry trade event is a permissible local governmental decision. Whether to send five officials to receive an award or to pay for a five-night minimum stay is similarly within the discretion of the local government. While this may be a questionable use of taxpayer resources, under the circumstances, it does not appear to be outside the authority of law.

Moreover, while meals and other expenses may have exceeded legal limits, there is insufficient evidence to prove beyond a reasonable doubt that the travelers knew or were criminally negligent in not knowing that the expenses were without authority of law. City Manager Sotelo personally paid for two nights at the hotel and may have reimbursed the city an additional \$1,800 after the trip. Public Works Director Ortega also personally paid for two nights at the hotel. Chief Financial Officer Cameron was a late substitute and the only available evidence is that he believed the length of stay was necessary to secure a savings for the city. Councilmember Herrera attended the Shea Properties meeting two nights after the award ceremony and there is evidence that before it occurred, the meeting was portrayed to officials as a business meeting. Once again, the city's lack of a meaningful policy on travel limitations further undermines the ability to prove knowledge or criminal negligence. The New York trip was clearly expensive. The fundamental question for this report, however, is whether the evidence is sufficient to prove beyond a reasonable doubt the officials are guilty of a crime. In this instance, again due to city policies and inadequate recordkeeping, the evidence does not meet that burden of proof.

#### **Other Potential Personal Expenses**

A variety of potentially personal expenses were discovered during the investigation. The table below lists these potentially personal expenses. For the reasons detailed previously, the city's recordkeeping system simply does not establish whether the city actually paid for these expenses.

**Table 5 – Potentially Unreimbursed Personal Expenses**

<b>Date</b>	<b>Conduct</b>	<b>Cost</b>
October 2005	Two spa treatments (San Francisco) – Herrera	\$225.00
May 2007	Upgraded hotel rooms (Las Vegas) – Holden, Herrera, Sotelo and Burnham	\$163.50 x 4 officials = \$654
May 2008	Upgraded hotel rooms (Las Vegas) – Holden and Herrera	\$163.50 x 2 officials = \$327
September 2008	Airline baggage fee (Richmond, Virginia) – Sotelo’s wife	\$40.00
December 2008	Airline flight to New York – Herrera’s wife	\$405.01
December 2008	Group lunch at Oyster Bar (New York) – Sotelo’s wife and daughter, Cameron’s wife	\$207.01
December 2008	Group dinner at Trattoria Del Arte (New York) – Sotelo’s wife and daughter, Cameron’s wife	\$554.53

### **Hotel Upgrades**

In May 2007, City Manager Sotelo, Mayor Holden, Councilmember Herrera and Assistant City Manager Karen Burnham upgraded their Las Vegas Hilton hotel rooms upon their arrival at a conference. The increased cost for each room was \$54.50 per night, for a total of \$163.50 per room. A witness told investigators that the officials’ rooms were not available when they arrived, so some of the officials requested upgraded rooms that were immediately available, resulting in upgrades for the entire group. The following year, Mayor Holden and Councilmember Herrera again upgraded their Las Vegas Hilton hotel rooms, at the additional cost of \$54.50 per night. No evidence is available as to the reason behind the latter upgrade.

In an effort to determine whether the upgrades occurred because reserved rooms were not available when officials arrived, investigators contacted personnel at the Las Vegas Hilton by telephone. One employee said that it was not possible to determine whether the officials were forced to upgrade their rooms upon arrival. Another employee stated that the reserved rooms would eventually have been

available on the day of arrival, though they may not have been available at the time the officials arrived.

The question regarding upgraded hotel rooms is not whether the officials took the most fiscally prudent steps by upgrading their rooms, but whether it was criminal for them to upgrade the rooms. Because it cannot be proven whether the lower rate rooms were available at the time they were needed, there is insufficient evidence proving that the expenditure was without authority of law. Additionally, it cannot be proven beyond a reasonable doubt that the officials knew that the extra expense was without authority of law.

### **Spouses' Meals and Travel Expenses**

City travel policy expressly prohibits the use of city funds to pay expenses for a spouse to travel with an employee. The policy nonetheless encourages spouses to travel with city employees at their own expense, stating:

[T]he attendance of a spouse serves and promotes desirable City purposes and goals. While traveling, the City Manager encourages spousal participation in the travel at the employee's own expense.

The other purchases identified in Table 5 above would be improper for the city to pay. All city employees who were interviewed on the topic agreed that expenditures on spouses are prohibited and no official claimed they thought it was legal for the city to actually pay their spouse's expenses. Virtually all of the officials interviewed said that when the spouses accompany them for meals, it is their practice to pay for their spouses' meals. Several also said that in group dining situations, the officials would pay portions of the expenses personally, such as by taking turns picking up the check at different meals. While there is some evidence to corroborate this claim, the practice makes accurately accounting for government funds impossible. Moreover, while city credit card policy prohibits the use of city credit cards for personal purchases, the city permits it in practice. The city's practice allowed some officials to put personal purchases on city cards temporarily, then either offset the purchase against reimbursement money owed to the official or repay the city via the treasurer's office.

In most instances, the officials and their spouses are unavailable to testify due to marital or Fifth Amendment privileges. Even when spouses can be placed at group meals, there is no evidence to prove that their expenses actually went on the city credit card as opposed to being paid for personally. Further, the city's recordkeeping system makes it impossible to prove whether these expenses were truly paid by the city or were paid by the officials personally. In most instances, the officials whose

spouses were present at city-paid meals told investigators that they reimbursed the city for their spouses' expenses. The city's recordkeeping makes it impossible to either confirm or contradict this assertion. In addition, there is no evidence that anyone but the purchasing official knew that the expense went on a city credit card, as opposed to having been offset by other shared expenses that evening. In all, there is insufficient evidence to prove the expenditures were criminal misappropriations.

### **The Evidence of City Manager Sotelo's \$10,000 Personal Loan**

In the fall of 1998, City Manager Ed Sotelo obtained a \$10,000 personal loan of city funds at a simple interest rate of 4 percent. In 1998, the bank prime loan rate varied between 7.75 percent and 8.25 percent and unsecured personal loan interest rates were approximately 13 percent.<sup>40</sup> The loan documents were prepared and signed by then-City Attorney Gary Gillig. The loan was processed and funded after approval from then-Finance Director Phil Molina. The terms of the loan required Sotelo to make interest payments of \$400 to the city every year on or before December 31. The balance of the loan was due and payable upon the earliest of three events: the sale of Sotelo's home, the date of December 31, 2008, or Sotelo's separation from the city.

California law prohibits personal loans of city funds under such circumstances unless the loan is part of the official's employment contract. An improper personal loan can be prosecuted as a misappropriation of public funds under Penal Code section 424(a)(2).

### **Evidence Regarding the Loan**

Former Finance Director Phil Molina told investigators that Sotelo approached him in August or September 1998, saying he needed a \$10,000 loan to make a down-payment on a house. Molina said that he referred Sotelo to then-City Attorney Gillig. According to Molina, Sotelo and Gillig approached him a few weeks later and asked him to process the loan payment to Sotelo. Molina said he questioned them about why the loan had not been on the city council agenda, why the loan was not signed by the mayor, and why the loan had not been approved by city council. According to Molina, City Attorney Gillig angrily told him that Gillig was the highest legal authority in the city and he would decide whether things had to go before council. Molina processed the loan despite his belief that neither he nor the city attorney had

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<sup>40</sup> Board of Governors of the Federal Reserve System, "Bank Prime Loan Rate Changes: Historical Dates of Changes and Rates," Release H.15 Selected Interest Rates (December 17, 2008); Edelberg, Wendy, "Risk-based Pricing of Interest Rates in Household Loan Markets," Working Paper (2003).

the authority to loan public funds without city council approval. Molina told investigators that he did not report the suspected crime to law enforcement despite his concerns.<sup>41</sup>

Former Accounting Manager Orlando Capulong told investigators that he issued the \$10,000 check to Sotelo in 1998 after Molina approved it. Capulong confirmed that he had never seen another loan to a city officer and that the city has no written policy authorizing such loans. Capulong also said that the loan was never publicized and the only people who knew about it were Sotelo, Gillig, Molina, More and Capulong. City records reveal that over the years, Sotelo's interest payments were addressed to a variety of officials, including then-Finance Director Marcie Medina (2006), then-Acting Finance Director Susan Winder (2007), and City Attorney Alan Holmberg (2008 and 2009).

Former City Attorney Gillig told investigators that it was strange that Sotelo approached him about the loan, rather than anyone on council approaching him. According to Gillig, Sotelo told him the loan had been approved by council and asked him to write it up. Gillig said he did not confirm Sotelo's statement with anyone on council because he accepted Sotelo's word and did not want it to look like he was checking up on his boss. District attorney investigators obtained two signed versions of Sotelo's loan. In one version, the loan was due at the end of 2003. In the second version, the loan was due at the end of 2008.<sup>42</sup> When shown copies of the promissory notes, Gillig confirmed that he had drafted and signed them. Gillig told investigators that he never discussed the loan with Molina, but said that he may have discussed it with Finance Manager Mike More.

A review of 1998 city council minutes and resolutions by investigators revealed no approval of the Sotelo loan. A review of Sotelo's employment agreements with the city revealed no mention of the loan. Records from the city's computerized financial system reveal that Sotelo made \$400 interest payments to the city through 2009, though it appears he may have missed a payment in 2001. Moreover, records reveal that Sotelo did not repay the loan in full when two of the triggering events occurred – when he sold his home in October 2003 or in December 2008.

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<sup>41</sup> Molina told investigators that in November 1999, after leaving city employment, he met on other issues with Gary Auer, who was chief of the District Attorney Bureau of Investigation. Molina said he provided Auer with a box of documents that contained a copy of the promissory note, though he never specifically told Auer about Sotelo's loan from the city. Former Chief Auer told investigators that although he met with Molina and received documents, he did not see evidence of a loan to Sotelo.

<sup>42</sup> Copies of the promissory notes are found in [Attachment D](#).

In August 2011, an article in the *Ventura County Star* publicized the loan and its overdue status. According to the article, Sotelo admitted receiving the loan and said that he had always intended to repay the loan when he retired. Sotelo was quoted as saying, “I think the salient point is that the contract required a \$400 payment every year” and “I never missed a year.”

City records show that as of February 2012, Sotelo has repaid the \$10,000 loan and has made the required interest payments.

### **Analysis of Criminality of the Personal Loan**

From the available evidence, Sotelo’s loan appears to have been criminal in that he borrowed or used \$10,000 of public funds without approval from city council. Thus, the loan was without authority of law. Further, as city manager, Sotelo was primarily responsible for putting matters on the city council agenda and clearly knew how to have his loan or employment agreement placed on the agenda for formal approval. Rather than doing so, Sotelo approached Molina and Gillig to have them write up the loan. As the ranking executive officer for the city, Sotelo was at the very least criminally negligent in not knowing his loan had to be approved by city council.

Because this violation occurred more than 13 years ago, however, the statute of limitations precludes prosecution against Sotelo. The applicable law permits prosecution only within four years of the date the crime was discovered by a qualifying city official. In this case, the crime was discovered more than four years ago by several qualifying officials – Finance Director Phil Molina, Finance Manager Mike More, and Accounting Manager Orlando Capulong. Because all of these officials knew of the conduct when it took place, and knew that the loan had not been approved by city council, the statute of limitations expired many years ago and prosecution is prohibited.<sup>43</sup>

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<sup>43</sup> The District Attorney’s Office also examined the possibility of prosecuting the loan as an embezzlement of public funds, which has no statute of limitations under Penal Code section 799. However, embezzlement carries with it a requirement that the funds be “fraudulently appropriated.” There is insufficient evidence to meet the fraud element for embezzlement. The loan was obtained in open consultation with several city financial officials and a legal professional. It was accurately entered into the city’s computerized financial system and payments were openly made annually. Although several of the officials were suspicious of the legality of the loan, it does not meet the definition of embezzlement. Rather, that suspicion is exactly what triggered the running of the statute of limitations for misappropriation.

## **The Evidence of the Supplemental Post-Retirement Benefit**

In July 2003, City Manager Sotelo established an additional compensation benefit for the city's Top Management category, plus the city attorney and himself. The benefit, known as the Supplemental Post-Retirement Benefit (SPRB), gave eligible employees a supplemental retirement payment of \$300 per month, in addition to their regular pension benefits through PERS and PARS.<sup>44</sup> Benefit payments to qualified retiring employees began in 2004. There is no evidence the SPRB was approved by the city council before its implementation. The SPRB was published in the city's Administrative Manual at least as early as January 2008.<sup>45</sup> As of 2011, payments were being made to six retirees, including former Police Chiefs Arthur Lopez and John Crombach, former City Attorney Gary Gillig, former Treasurer Dale Belcher, former Public Works Director Granville Bowman, and former Human Resources Director Lino Corona.

The matter was reported to the District Attorney's Office and received local media attention in the summer of 2011. The SPRB was examined as a potential misappropriation and a potential conflict of interest. The SPRB was placed on the city council agenda for discussion in September 2011, after the benefit was reported in the *Ventura County Star*. City Manager Sotelo provided a report to the city council concerning the SPRB, saying he had the inherent authority to set salary and benefits as city manager and had done so since 1998. At the meeting, councilmembers expressed their surprise at the existence of the benefit and directed staff to study its legality and whether they could discontinue the benefit. Councilmember Carmen Ramirez expressed her belief that Sotelo's decision was permissible, as did Councilmembers Bryan MacDonald and Irene Pinkard. Councilmember Flynn said that he did not know whether the decision was legal and requested that staff seek an outside legal opinion.

Councilmember Dean Maulhardt told a *Ventura County Star* reporter that the council authorized the city manager to negotiate benefits for non-union employees. Maulhardt also said that the part-time council would be overwhelmed if faced with the compensation details of each of the 160 or so non-union workers under the city manager's purview. Maulhardt was quoted as saying "We authorize people to do things. He did." Councilmember MacDonald subsequently told district attorney investigators that the council allowed Sotelo to make such decisions regarding benefits, though the arrangement was informal.

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<sup>44</sup> PERS is the Public Employees' Retirement System. PARS is the Public Agency Retirement Services.

<sup>45</sup> A copy of Section E-28 of the City of Oxnard Administrative Manual pertaining to the SPRB may be found in [Attachment F](#).

### **Analysis of the SPRB as Potential Misappropriation<sup>46</sup>**

Government Code section 36506 requires: “By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees.” Courts interpreting this law have clearly said that a city council cannot delegate its responsibility for determining compensation levels.<sup>47</sup> Thus, city council could not properly give Sotelo responsibility for setting benefits for city employees.

Sotelo plainly spent public funds by authorizing the SPRB. Because city council did not approve the SPRB, Sotelo’s expenditure was without authority of law. The two remaining questions are therefore whether Sotelo knew the expenditure was without the authority of law and whether the statute of limitations has expired. Current and former councilmembers confirmed that the council delegated to Sotelo the responsibility to set benefits for non-union employees. Former City Attorney Gary Gillig published the SPRB in the city’s Administrative Manual. Several councilmembers publicly stated their belief that Sotelo had the legal authority to set benefits. Though the councilmembers cannot lawfully delegate their responsibility to set compensation, the evidence is that they did so. This corroborates Sotelo’s stated belief that he had the legal authority to establish the SPRB. Based on this evidence, it cannot be proven that Sotelo knew or was criminally negligent in not knowing that his expenditure was without lawful authority. Moreover, the benefit was created in July 2003, well outside the applicable statute of limitations.<sup>48</sup>

### **The Evidence of Excessive Payments of Taxpayer Funds for Marketing and Organizational Consultants**

Witnesses told investigators that Public Works Director Ortega improperly spent city funds on the consulting services of JWV Communications, a marketing firm, and the Communication Goddesses, an organizational consultant. Witnesses reported that over several years Ortega entered into a series of contracts with the firms for unnecessary or redundant work and that the firms were at times paid with city funds restricted to other purposes. Witnesses also told investigators that Ortega later concealed his use of the firms by employing them as subcontractors for other companies and billing the city under the other companies’ city contracts.

City records reveal that between 2003 and 2006, the two firms provided services to various departments within the City of Oxnard under several direct contracts

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<sup>46</sup> Analysis of the SPRB as a potential conflict of interest can be found in Section Five.

<sup>47</sup> *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

<sup>48</sup> The SPRB was also examined as a potential embezzlement of public funds, which has no statute of limitations under Penal Code section 799. As was true of Sotelo’s personal loan, there is insufficient evidence to meet the fraud element required for embezzlement.

between the city and each firm. Each contract involved different services, related to different projects or departments. Ortega's name only appears on some of the contracts. In addition, both firms worked as subcontractors under other companies' city contracts many times between 2003 and 2006. In the summer of 2006, Sotelo learned the firms were acting as subcontractors under city contracts and about the use of restricted funds. In February 2007, Sotelo instructed Ortega to stop the Public Works Department's use of the firms as subcontractors. Sotelo addressed the issue with Ortega again in June 2007 and August 2007. Eventually, the practice stopped.

Ortega told investigators that the Public Works Department used JWV Communications for several years with independent contracts, both before and after he became Public Works Director. Ortega told investigators that he was aware that some project managers used JWV Communications as a subcontractor to provide public outreach services, but he did not know the scope of the firm's use when Sotelo asked him to stop the practice. Ortega said the Communication Goddesses and JWV Communications services were billed under broad general consulting services contracts with other companies, giving the city wide latitude in requesting the companies to complete tasks for the city. Ortega told investigators that both firms performed work that was necessary and appropriate service to the city. Ortega said that in 2006 or 2007, Sotelo eventually asked him to stop the department's use of the firms as subcontractors. Although it took some time, Ortega stopped the department from using the firms.

### **Analysis of the Use of Marketing and Organizational Consultants**

The city's policies in the early 2000's gave city department heads virtually unfettered authority to enter into contracts on behalf of the city. Though some JWV Communications contracts appear to be related and may have overlapped somewhat, each of the contracts identify different work to be completed for different projects. The evidence does not show that JWV Communications was paid for work it did not do. Significantly, the evidence establishes that Ortega only approved approximately one-half of the direct contracts with JWV Communications. The remaining contracts were approved by other officials, including Ortega's former supervisor. The analysis is similar concerning work performed by the Communication Goddesses. The firm contracted directly with the city several times over a period of years and was used by a variety of city departments, including public works. The evidence does not establish these contracts were without authority of law.

Neither does the evidence establish that Ortega was responsible for the firms' subcontract work or that such use of the firms amounted to a criminal misappropriation. Invoices submitted by companies with city consulting contracts identified the firms as subcontractors and the invoices were approved by numerous city personnel. Again, there is no evidence the firms were paid for work they did not do. In addition, the evidence does not meet the knowledge or criminal negligence standard required by *Stark*. Between 2003 and 2006, many Public Works Department employees at varying ranks used the city's consulting contracts seemingly to complete whatever tasks the city needed, regardless of whether the tasks were closely related to the scope of the contract or any restrictions on the funds. Witnesses openly discussed this as a common city practice, revealing no suspicion that the practice might not be lawful.

There is insufficient evidence to prove Ortega was involved in criminal misappropriation as to either JWV Communications or the Communication Goddesses contracts. In addition, because City Manager Sotelo was aware of these practices and addressed them with Ortega several times beginning in 2006, the statute of limitations bars prosecution.

### **The Evidence of Concealed Payments of Taxpayer Funds for GREAT Program Expenses**

Witnesses told investigators that Ortega used taxpayer funds to pay for a formal grand opening celebration of a city water facility. Ortega also reportedly inflated a city contract amendment and used the excess city funds to commission a mural and scale model for the city.

Oxnard's GREAT (Groundwater Recovery Enhancement and Treatment) Program is a \$250 million public works project launched in 1999 to improve the quality and reliability of the city's water supply and to reduce the city's reliance on imported water. To accomplish its goal, the city is building a number of water purification, desalination, and recovery facilities. This section of the report discusses three different facilities.

- Blending Station 1 (BS1) houses the desalter that is used to remove salt and minerals from Oxnard's brackish groundwater supply. The desalter became operational in the fall of 2008 and was the subject of a grand opening celebration on November 13, 2008. The contract for the initial design of the desalter at BS1 was awarded to Kennedy/Jenks Consultants.

The \$19.5 million contract for construction of the desalter was awarded to Emma Corporation.

- The Advanced Water Purification Facility (AWPF) is a facility, currently under construction, that will purify and recycle water. The facility was still in the design phase in 2008.
- Blending Station 3 (BS3) is a facility that will eventually house another desalter. The desalter at BS3 was still in the design phase in 2007 and 2008. The contract for the design of the desalter at BS1 was awarded to Kennedy/Jenks Consultants. In 2008, some of the funds authorized to pay for the design of the BS3 desalter were diverted to pay for a mural at the BS1 desalter facility and a scale model of the AWPF.

### **The Desalter Celebration**

On November 13, 2008, the city held a grand opening celebration for the BS1 desalter. Approximately 250 people attended the formal affair. Herzog Wine Cellars served wine and appetizers and gave guests etched wine glasses.<sup>49</sup> Tierra Sur restaurant (located at Herzog Wine Cellars) served a four-course dinner. A video on the history and construction of the desalter was shown to the guests and a scale model of the AWPF was unveiled as the next big step in the GREAT Program.

After the celebration, a councilmember questioned Sotelo about how the celebration was funded and Sotelo requested an accounting from Ortega. Ortega gave Sotelo a written list of expenses, indicating that various companies involved in the GREAT Program, as well as Herzog Wine Cellars, contributed to cover most of the costs of the celebration.<sup>50</sup> Much of the information Ortega provided proved inaccurate. Sotelo, other city employees, and a private investigator attempted to determine the true expenses and funding for the desalter celebration, with limited success.

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<sup>49</sup> Between 2005 and 2010, Herzog Wine Cellars repeatedly discharged wastewater that did not comply with its city-issued discharge permit, with pH levels or solids content outside the permitted range. Some employees questioned the impartiality of the city's permit enforcement regarding Herzog Wine Cellars. The evidence reveals numerous monthly discharge permit violations. These violations were documented by the city and resulted in monetary penalties based on the level of non-compliance. Records show frequent consultation between city officials and Herzog Wine Cellars representatives and efforts to remedy the violations. The Regional Water Quality Control Board (RWQCB) monitored the city's enforcement efforts via periodic audits. In February 2008, the RWQCB informed the city that due to the ongoing violations, the city's enforcement policies required more formal action. In June 2008, the RWQCB found the city's formal enforcement action against Herzog Wine Cellars sufficient. While a close relationship between city officials and local business raised concerns of preferential treatment, no evidence of criminal wrongdoing was found.

<sup>50</sup> A copy of Ortega's list of costs for the desalter celebration is in [Attachment G](#).

Due to inaccurate recordkeeping, the passage of time, and a lack of cooperation from some witnesses, the celebration’s costs and contributions cannot be fully determined. The following celebration expenses were confirmed:

<u>Item</u>	<u>Cost</u>	<u>Purchaser</u>
• Scale model of AWPf	\$13,500	Kennedy/Jenks
• Audiovisual presentation	\$ 7,401	Kennedy/Jenks
• Flowers	\$ 2,625	Kennedy/Jenks
• Wine	\$ 8,940	Herzog Wine Cellars
• Hors D’oeuvres	\$12,080	Herzog Wine Cellars
• Glasses	\$ 1,400	Herzog Wine Cellars
• Jeroboams <sup>51</sup>	\$ 700	Herzog Wine Cellars
• Dinner, tips, labor & tax	<u>\$49,000</u>	Various Contractors
	<u>\$95,646</u>	

Records show that three companies working on the GREAT Program paid a total of \$49,000 to Herzog Wine Cellars for the dinner costs. One of the companies, Emma Corporation, paid Herzog Wine Cellars \$25,000. After having initially denied that Emma Corporation donated to the desalter celebration, late in the investigation one Emma Corporation employee told investigators that Emma Corporation’s contribution was essentially city money. The employee said that Oxnard Project Manager Juan Moreno verbally authorized Emma Corporation personnel to use money saved in a contingency fund during the construction of the desalter to contribute to the celebration.

District attorney investigators confirmed that in addition to the construction changes reflected in the formal billings, Emma Corporation and Kennedy/Jenks Consultants kept an informal “contingency fund” to track additional construction changes not formally submitted to the city. Some of these additional changes reduced construction costs, while others increased costs. This informal contingency fund system was used to permit relatively low-cost adjustments to the construction project to be made quickly without seeking formal approval from the city. At the completion of construction, any net savings should have been returned to the city. Witnesses from both companies told investigators that Moreno verbally approved their use of the contingency fund. The contingency fund records do not detail the reasons for every entry. Neither do they establish whether funds from the contingency fund were used to pay for the desalter celebration.

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<sup>51</sup> A jeroboam is a large wine bottle equivalent to four regular bottles.

Investigation of this assertion was complicated by a contractual dispute between the city and Emma Corporation that arose after construction was completed. The dispute centered on the accuracy of Emma Corporation's billings for changes to the construction project. Emma Corporation submitted approximately \$1.9 million in construction change billings that were approved by Moreno. An audit by the city questioned the accuracy of approximately \$600,000 of the construction change billings. To resolve the dispute, Emma Corporation agreed to reduce its billings by \$150,000. The dispute makes it more difficult to establish the reliability of the contingency fund valuations.

### **The Inflated Contract Amendment for BS3**

Kennedy/Jenks Consultants had contracts related to BS1 and BS3. The firm's primary representative on the contracts was Jeff Savard. Savard and Ortega have a longstanding personal and professional relationship, beginning when they first met in college. According to Savard, in May 2008 Ortega asked Kennedy/Jenks Consultants to do additional work at both BS1 and BS3, requiring city council approval to amend the contracts. E-mail obtained from Savard shows that Ortega proposed bundling the work from both BS1 and BS3 into a single contract amendment related to BS3 and Savard agreed. The e-mail suggests Savard and Ortega also agreed on a price of \$90,000 for the work at both facilities and that the BS3 contract amendment would not disclose the work to be done at BS1. Savard said he subsequently e-mailed Ortega a proposed contract amendment consistent with their agreement.

The proposed BS3 contract amendment submitted to city council by public works personnel differed from the amendment Savard said he e-mailed to Ortega, however.<sup>52</sup> The submitted staff report and contract amendment reflected a cost of \$124,000 rather than the \$90,000 Savard said he requested. The documents did not mention the work to be done at BS1, or a mural, scale model, audiovisual presentation, or flowers. The Oxnard city council approved the \$124,000 contract amendment. Kennedy/Jenks Consultants later performed the work required at BS3 and the agreed-upon work at BS1.

Savard told investigators he did not know the BS3 contract amendment would be inflated to include an extra \$34,000, or who inflated the price, but he expected that

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<sup>52</sup> For a contract amendment to be considered by city council, a city employee must first prepare a staff report discussing the reasons for the amendment and recommending whether council should approve it. The contract amendment is attached to the staff report. Before the contract amendment is placed on the city council agenda for consideration, the staff report is circulated among several city employees, each of whom initials it indicating they have reviewed the report. A copy of the staff report with contract amendment may be found in [Attachment H](#).

Ortega would ask him to spend the extra money on city requests. According to Savard, Ortega asked Kennedy/Jenks Consultants to pay for a mural at BS1, a scale model of the AWPf and an audiovisual presentation at the desalter celebration. Documents confirm these claims and suggest that Juan Moreno asked Kennedy/Jenks to pay for flowers for the desalter celebration. In all, Kennedy/Jenks Consultants' expenses with respect to the contract amendment and desalter celebration were:

• Mural	\$ 20,472
• Model	\$ 13,500
• Audiovisual presentation	\$ 7,401
• Flowers	<u>\$ 2,625</u>
	\$ 43,998

The model maker confirmed he was hired by Ortega and paid by Kennedy/Jenks Consultants. The model was placed on display to visitors at BS1. The muralist, who is Ortega's brother-in-law, was hired by Ortega and paid by Kennedy/Jenks Consultants. The combined cost of the model and mural was \$33,972, just \$28 less than the excess funds in the contract amendment. The audiovisual company representative confirmed he was hired by Ortega and paid by Kennedy/Jenks Consultants.

Investigators were unable to determine who selected the \$124,000 figure for the contract amendment before it was presented to city council. The staff report and amendment documents were prepared by Water Resources Manager Anthony Emmert. Emmert told investigators he vaguely recalled the contract amendment, saying he may have prepared it or it may have been prepared by an assistant. Emmert did not recall how the amendment price was selected, saying that it may have come from Ortega. Emmert denied being involved in an effort to inflate the contract amendment and speculated that the price may have been an error. Emmert's assistant told investigators she typed the staff report and contract amendment. She said that when preparing such documents, she had no input on the content and either received the information the public works director's office, the assistant public works director's office, or from Emmert. Assistant Public Works Director Mark Norris told investigators he approved the staff report, but was not involved in its preparation and had no recollection of the report or contract amendment.

During several interviews, Ortega blamed the contract amendment and desalter celebration irregularities on a former subordinate, Juan Moreno, who was the project manager for the desalter construction. Ortega told investigators that Moreno

was responsible for securing funding for the celebration by seeking contributions from vendors. Ortega also said that the city's public information officer, who worked for City Manager Sotelo, was also involved in the day-to-day planning of the celebration. Ortega said he frequently discussed the event with City Manager Sotelo, who was aware that the event would be a formal dinner. Ortega explained to investigators that the desalter celebration was scheduled in the evening to accommodate the governor's schedule and that the governor's expected attendance was one reason why the event was more formal and costly than was typical. Ortega said that when Sotelo requested a list of the celebration's expenses, Ortega created one from incomplete information he received from Moreno and others. Ortega maintained that during the celebration's planning, there was no formal accounting or listing of who contributed. Rather, the celebration was planned in an informal manner by Moreno and the city's public information officer.

Ortega denied knowing that the BS3 contract amendment had been inflated. When confronted with the e-mail and other documentation obtained from Kennedy/Jenks Consultants and the city, Ortega admitted that it seemed like the contract was inflated to pay for the mural and model. However, he denied being involved, suggesting instead that Moreno may have been responsible. Ortega also said that under the city's contracting practices, it was not uncommon to broadly interpret general consulting services contracts to accomplish tasks that the city wanted done. He said that under the city's contracting practices it was not uncommon for work not specifically within the scope of the contract to be authorized, performed and billed to the contract. There is corroboration for these assertions. Ortega confirmed that he hired his brother-in-law to paint the mural at the desalter and told investigators that he regretted that decision. Ortega said hiring his brother-in-law had the appearance of impropriety and had hurt his reputation. He asserted that having a mural in the building was an appropriate use of city funds and was consistent with the city's desire to place art in public buildings, noting the existence of the city's "Art in Public Places" program.<sup>53</sup>

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<sup>53</sup> The city's Art in Public Places program requires developers to fund publicly displayed art within the city.

## **Analysis of the Concealed Payments for GREAT Program Expenses**

### **The Desalter Celebration**

The desalter celebration appears to have been funded with a combination of city and private funds. Efforts by city personnel and investigators to determine the celebration's true costs and funding were only partially successful. Several witnesses were uncooperative and others invoked their right to remain silent. Investigators learned that employees with Emma Corporation and Kennedy/Jenks Consultants used an informal contingency fund system to avoid formal city review of some modifications to the construction project. Employees from both companies told investigators that Public Works Project Manager Moreno verbally authorized and participated in the contingency fund. One witness told investigators that Moreno also verbally authorized the expenditure of city funds from the contingency fund to be used for the desalter celebration. These claims could not be confirmed or refuted. The available evidence does not accurately identify the desalter celebration expenditures or the sources of the funds used to pay for them. Witnesses essentially pointed at each other as having arranged, approved or authorized the city expenditures, with no clear way of determining the truth. Based on the available evidence, it cannot be proven to what extent the city paid for the celebration or who authorized the city's expenditures. As such, there is insufficient evidence to prove criminal misappropriation.

### **The Inflated Contract Amendment for BS3**

To prove misappropriation in this context, the evidence must first prove who artificially inflated the price in the contract amendment. There is no direct evidence implicating Ortega. Jeff Savard is the sole witness that the contract amendment overpaid Kennedy/Jenks Consultants, though he does not know who inflated the contract amendment. Neither does the documentary evidence establish who inflated the figures. While circumstantial evidence suggests that Ortega may have been responsible for the inflated amount, the evidence similarly suggests that a number of others working on the project may have been responsible instead. Emmert admitted that he or his office prepared the BS3 staff report and contract amendment. Emmert could not recall the source of the contract amendment price. Emmert's assistant similarly could not recall the source of the price, but identified Ortega, Assistant Public Works Director Mark Norris, or Emmert as the possible sources. Significantly, the documentary evidence establishes Savard interacted with several city employees about similar questionable GREAT Program contracting practices, as evidenced by an e-mail chain discussing similar inaccurate contract practices related to BS1 and other GREAT Program contracts.

The second requirement to prove misappropriation is that the expenditure of funds was without authority of law. The City of Oxnard had the legal authority to put a mural in a city facility and to display a model of a city facility in the desalter visitors' center. In fact, the initial contract for the design of the desalter at BS1 expressly contemplated inclusion of a visitors' center, necessarily including decorative and display elements. Although there is legal authority to use city funds on such expenditures, there is no legal authority permitting a city employee to mislead city council to approve the expenditure of city funds.

The third requirement to prove misappropriation is the knowledge or criminal negligence element required under *Stark*. The BS3 contract amendment was consistent with the Public Works Department's lax contracting practices. Witnesses from within city government and outside companies confirmed that it was not uncommon to use contract amendments for one project to fund work on related projects, though everyone agreed it was not the preferred practice. Witnesses also told investigators that informal agreements between consultants and city officials are sometimes used to complete work related to one contract that will later be paid for under another contract. Similarly, funds originally designated for one portion of a project are at times used for another portion of the project that is momentarily a higher priority without seeking a contract amendment. With respect to the BS3 contract amendment, the excess funds were put to lawful uses for the city's benefit. Significantly, there were several mechanisms providing lawful authority to expend city funds for the mural and model. Direct contracts between the city and model maker or muralist would have been within any department head's signatory authority, including Ortega's. Alternatively, the mural and model could have been included in a contract amendment related to BS1, because the items were to be displayed there. In addition, an application could have been made for funding from the city's Art in Public Places program.

The inability to establish who inflated the contract amendment and the deficient contracting practices in the Public Works Department leave insufficient evidence to prove criminal misappropriation with respect to the BS3 contract amendment.<sup>54</sup>

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<sup>54</sup> In 2006, the city began modifying its contracting policies. Over several years, individual officials' signatory authority was reduced and, currently, contracts over \$25,000 require city council approval. In 2008, the city created the Contract Compliance Review Committee to examine city contracts for policy compliance. Additional internal controls may be helpful in detecting irregular contracting practices among those public works employees who do not comply with city policy.

## SECTION SIX - FAILURE TO DISCLOSE GIFTS

This section will outline the major legal principles, evidence, and analysis relating to the allegations that Oxnard officials failed to disclose gifts received. To promote transparency in government and to avoid conflicts of interest, California law requires that city officials publicly disclose the gifts they receive on a designated form called the Form 700 Statement of Economic Interests.<sup>55</sup> The District Attorney's Office learned of allegations that officials received numerous gifts they were obligated to disclose but failed to do so.

The allegations focused largely on Oxnard's highest-level officials. The most serious allegations were leveled against Mayor Tom Holden, Councilmember Andres Herrera, City Manager Ed Sotelo, Public Works Director Ken Ortega, and Chief Financial Officer James Cameron. These officials were alleged to have regularly received gifts from companies and individuals conducting significant business with the city. More specifically, the officials were alleged to have received gifts of event tickets, golf outings, expensive meals or air travel from individuals affiliated with De La Rosa & Co., Shea Properties, BLT Enterprises, and Kennedy/Jenks Consultants.

An overview of the major legal principles involved in the nondisclosure of gifts is essential to the analysis of the evidence obtained in this investigation.

### **The Law Regarding Failure to Disclose Gifts**

The California Political Reform Act of 1974 (PRA) was enacted in part to protect taxpayers against undue financial influences corrupting their politicians. One aspect of the PRA requires designated government officials to publicly declare their financial interests each year by filing a Form 700 Statement of Economic Interests. Among other things, officials must report income from non-governmental sources, ownership interests in business entities, partnerships, stocks, and rental properties in the jurisdiction, gifts from non-relatives and travel payments from third parties.

Under the law, a gift is anything for which fair value is not exchanged. Most gifts from a non-relative worth \$50 or more must be reported on the Form 700, though various exceptions apply. In addition to the reporting requirement, there is also a limit on the value of gifts an official may receive. City officials may receive gifts from

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<sup>55</sup> The Form 700 Statement of Economic Interests and the accompanying instruction booklet can be found at the Fair Political Practices Commission Web site, [www.fppc.ca.gov](http://www.fppc.ca.gov).

businesses as long as the total value of gifts from a single source remains below a maximum limit, which has increased over time:

In 2005-2006, the gift limit was \$360 from a single source during a calendar year.

In 2007-2008, the gift limit was \$390 from a single source during a calendar year.

Since 2009, the gift limit has remained \$420 from a single source during a calendar year.

Nearly all Oxnard officials who are management-level or higher are required to file an annual Form 700 Statement of Economic Interests. Form 700 violations may be enforced in one of three ways:

- Filing of felony perjury charges under Penal Code section 118
- Filing of misdemeanor Political Reform Act charges under Government Code sections 87203 / 87207
- Referral to the Fair Political Practices Commission (FPPC) for administrative and civil remedies that typically include imposition of monetary fines

### **Perjury (Penal Code section 118 - felony)**

Form 700s are signed under penalty of perjury. As such, failure to disclose the receipt of gifts may constitute perjury under the right circumstances. To prove a Form 700 filer committed perjury, it must be proven that:

1. The law required disclosure of a particular gift,
2. The Form 700 filer knew he or she was required to disclose the gift,
3. The filer intentionally did not disclose the gift, with the intent to declare falsely under penalty of perjury, and
4. The information not disclosed was material.

Information is considered “material” if it is substantially likely that a reasonable person would think it is important in evaluating whether the official can do his job free from bias caused by the gifts. Under the law of perjury, proof of the gift’s receipt cannot come from the testimony of a single person alone. Corroboration is required because the law does not allow a perjury conviction to result from one person’s word against another’s.

### **Political Reform Act Violation (Government Code sections 87203 / 87207 – misdemeanor)**

The Government Code authorizes misdemeanor prosecution for violations of the Form 700 reporting requirements. The elements are similar to perjury, without the materiality or corroboration requirements. To prove a violation of the PRA, it must be proven that:

1. The law required disclosure of a particular gift,
2. The Form 700 filer knew he or she was required to disclose the gift, and
3. The filer intentionally did not disclose the gift.

### **Fair Political Practices Commission Referral**

The Fair Political Practices Commission may enforce Form 700 violations by filing actions for civil penalties and administrative remedies, including penalties of up to \$5,000 per violation. FPPC enforcement actions differ from traditional criminal prosecution. Criminal prosecution requires proof beyond a reasonable doubt to a jury of 12 people. FPPC administrative hearings have a lower burden of proof, requiring only proof by a preponderance of the evidence. FPPC administrative hearings are conducted before an administrative law judge, rather than a jury.<sup>56</sup> Most significantly, it is no defense to an FPPC administrative enforcement action that an official mistakenly failed to disclose gifts. While a mistake may reduce the penalty an official receives, it is not a defense to the enforcement action.

### **Statute of Limitations**

The statute of limitations for felony perjury charges is four years from the date the offense is, or reasonably should have been, discovered. For misdemeanor Political Reform Act prosecutions, however, the statute is four years from the filing of the Form 700. As such, misdemeanor prosecution for the nondisclosure of gifts received in 2005 and 2006 is time-barred. The FPPC may commence administrative action within five years from the commission of a Form 700 violation, or discovery of the violation if there is fraudulent concealment of information.

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<sup>56</sup> California Code of Regulations, title 2, section 18361.5.

Under California law and City of Oxnard Resolution, local officials are required to receive training in public service ethics laws and principles every two years.<sup>57</sup> Records obtained by investigators show compliance with the requirement by members of the Oxnard city council, as well as city officials Ed Sotelo, James Cameron, Karen Burnham, and others. Training provided to the City of Oxnard officials included, among other things, instruction relating to Form 700 disclosure requirements, gift and travel limitations, conflict of interest laws, and prohibitions against using public resources for personal purposes.

### **Gifts Received by Oxnard Public Officials**

It became obvious through this investigation that accepting gifts from companies doing business with the city was fairly common among some city officials. Unfortunately, the disclosure of such gifts was the exception rather than the rule. Notably, the city's own ethics policy prohibits the acceptance of gifts with a combined value of more than \$50 from those conducting business with the city.<sup>58</sup> While it does not carry the force of law, Oxnard's policy on personal ethics not only bans the receipt of such gifts, but also states, "City officials and employees *shall not accept any gift at all* from any such person or business entity when to do so would create an appearance of impropriety or favoritism in the official's or employee's discharge of his or her official duties." (Italics added) It is clear that the city's ethics policy has not been followed by several officials at the highest levels of Oxnard government.

The receipt of gifts by various officials was confirmed through interviews and records obtained from employees and owners of several businesses, including Shea Properties, De La Rosa & Co., and Kennedy/Jenks Consultants. Shea Properties was engaged in a series of contracts and transactions with the city related to the RiverPark development. De La Rosa & Co. was engaged in a series of contracts with the city related to municipal bond issuances. Kennedy/Jenks Consultants was engaged in a series of contracts with the city related to the GREAT Program.

Tables below list the gifts confirmed either by business records identifying the recipient, multiple witnesses to the gift, city travel records, or admissions by the recipient.<sup>59</sup> It is impossible to establish the individual value of gift meals because the

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<sup>57</sup> Government Code section 53235, City of Oxnard Resolution 12,980. Officials required to receive the training include the mayor, city councilmembers, city treasurer, city clerk, city manager, assistant city manager, deputy city manager, and department directors, among others.

<sup>58</sup> The full text of Policy E-26 "Standards of Ethics" is contained in [Attachment E](#).

<sup>59</sup> The gifts given to the officials' spouses were not required to be reported as gifts before 2011.

meals were purchased for groups. The meals have evidentiary value, however, in demonstrating the frequency of gifts received and that the total value of an individual official’s gifts exceeded the \$50 reporting threshold. This is especially true where the official also received a gift round of golf from the same business during that calendar year. A more detailed spreadsheet outlining these gifts can be found in [Attachment I](#).

**Ed Sotelo, City Manager**

<b>Date</b>	<b>Gift Received</b>	<b>Company</b>
2005	Golf (2 rounds, \$170 & \$170), Meal (1), Drinks	De La Rosa
2005	Golf (2 rounds, \$225 & \$100), Meals (3), Drinks, Hat (\$25)	Shea Properties
2006	Golf (1 round, \$225), Meals (3-4), Snacks	Shea Properties
2007	Golf (1 round, \$225), Meals (4)	Shea Properties
2008	Golf (1 round, \$170), Meals (2), Broadway show (\$88)	De La Rosa
2008	Meals (3)	Shea Properties
2009	Meals (2)	De La Rosa
2009	Meal (1)	Shea Properties

Sotelo did not declare any of these gifts on his Form 700s. In addition, the investigation revealed that Sotelo stayed at Bernard Huberman’s Cabo San Lucas, Mexico, residence on two occasions. Sotelo maintained that the trips were not gifts, saying he purchased the vacation stays at silent charity auctions, paying approximately \$3,000 and \$4,000 for each trip. Records from local charities confirm that Sotelo in fact purchased two Cabo San Lucas, Mexico, trips at charity auctions, one for \$2,185 in 2008 and another for \$4,000 in 2009.

**Andres Herrera, Councilmember**

<b>Date</b>	<b>Gift Received</b>	<b>Company</b>
2005	Golf (2 rounds, \$225 & \$100), Meal (1)	De La Rosa
2005	Golf (2 rounds, \$170 & \$170), Meal (1)	Shea Properties
2006	Golf (1 round, \$225), Meals (2), Snacks	Shea Properties
2006	Lakers game, Limo (approx. \$380)	Kennedy/Jenks
2007	Meal (1)	Shea Properties
2008	Meal (1) (New York)	De La Rosa
2008	Meals (3)	Shea Properties
2010	Meal (1)	Shea Properties

Herrera did not declare any of these gifts on his Form 700s. In addition, records of border crossings reveal that Herrera took two undeclared flights from Cabo San Lucas, Mexico, to the United States on a private jet owned by a Huberman-affiliated

company while Herrera was on city council in 2003 and 2005. The available evidence does not establish whether Herrera paid for the Cabo San Lucas flights. As such, they cannot be proven as gifts.

**Tom Holden, Mayor**

<b>Date</b>	<b>Gift Received</b>	<b>Company</b>
2005	Golf (1 round, \$100), Meal (1), Hat, Socks, Glove (\$53)	Shea Properties
2006	Golf (1 round, \$225), Meals (3), Snacks	Shea Properties
2008	Meals (2)	Shea Properties

Holden did not declare any of these items on his Form 700s. In addition, records of border crossings and other evidence show that while on city council, Holden took the following flights on a private airplane owned by a Huberman-affiliated company:

<b>Date</b>		
1998	Private flight from Cabo San Lucas, Mexico	Huberman
2000	Private flight from Cabo San Lucas, Mexico	Huberman
2007	Private flight from Cabo San Lucas, Mexico	Huberman
2009	Private flight to Napa, California	Huberman

As will be discussed, Mayor Holden provided evidence that he exchanged fair value for the travel expenses in the form of optometric services he provided to Huberman’s family. Thus, the flights cannot be proven as gifts under the law.

**Ken Ortega, Public Works Director**

<b>Date</b>	<b>Gift Received</b>	<b>Company</b>
2005	Meals (3)	Kennedy/Jenks
2006	Laker game, limo, dinner (approx. \$380), Meal (1)	Kennedy/Jenks, ProUsys
2006	Golf (1 round, \$170), Meals (2)	De La Rosa
2007	Meals (5)	Kennedy/Jenks
2007	Dodger game (\$205)	De La Rosa
2008	Meals (4)	Kennedy/Jenks
2008	Dodger game (\$311), Broadway show (\$88), Meals (4)	De La Rosa
2009	Meals (8)	Kennedy/Jenks
2009	Dodger game (\$311), Meals (3)	De La Rosa

In 2010, Ortega declared the 2009 Dodger game and a 2009 gift dinner both paid for by De La Rosa & Co. Otherwise, he did not declare these gifts on his Form 700.

**James Cameron, Chief Financial Officer**

Date	Gift Received	Company
2008	Dodger Game (\$311), Meals (5), Broadway show (\$88)	De La Rosa
2009	Meals (5)	De La Rosa

Cameron told investigators that he asked John Kim for the cost of the Dodger game and *Gypsy* tickets and Kim told him they cost \$300 and \$75, respectively. Cameron only declared a value of \$45 for the *Gypsy* ticket on his Form 700. The Broadway show ticket actually cost \$88. Varying reports from De La Rosa & Co. valued the Dodger game ticket at \$311 and \$321. These values, together with five meals received from De La Rosa & Co., establish that Cameron exceeded the annual limit of \$390 in 2008.

**Karen Burnham, Assistant City Manager**

Date	Gift Received	Company
2005	Meals (2)	Shea Properties
2006	Meals (3)	Shea Properties
2007	Meals (2)	Shea Properties
2008	Meal (1)	Shea Properties

Burnham did not declare any of these items on her Form 700s.

**Mike More, Finance Manager**

Date	Gift Received	Company
2005	Meals (1-4)	De La Rosa
2006	Golf (\$170), Meals (4)	De La Rosa
2007	Meals (3)	De La Rosa
2008	Meals (6)	De La Rosa
2009	Meals (5)	De La Rosa

More did not declare any of these items on his Form 700s. More admitted that he received two meals that he did not pay for, but told investigators he was not sure whether the value of the meals reached the \$50 reporting threshold.

**Curtis Cannon, Community Development Director**

Date	Gift Received	Company
2005	Golf (1 round, \$100), Meals (3), Hat	Shea Properties
2006	Meals (2)	Shea Properties
2007	Golf (1 round, \$225), Meals (2)	Shea Properties
2008	Meals (1-2)	Shea Properties

Cannon did not declare any of these items on his Form 700s.

## **Analysis of Failure to Disclose Gifts**

### **Travel Related to Bernard Huberman**

Mayor Holden, Councilmember Herrera and City Manager Sotelo are linked to expensive travel related to Bernard Huberman. The available evidence shows that Sotelo and Holden exchanged sufficiently fair value for their travels. As such, there is insufficient evidence proving the travel was required to be disclosed on their Form 700s. As to Herrera, there is insufficient evidence to prove whether the travel was a gift or fair value was exchanged. As such, it cannot be proven that Herrera's travel required disclosure.

When interviewed, Bernard Huberman told investigators he donates the use of his Cabo San Lucas, Mexico, home and boat, valued at approximately \$3,000 to \$5,000, to local charity auctions. He believed Sotelo had bid on and won such a trip, and believed Holden may have gone on a trip purchased at auction by one of Holden's friends. Huberman said that Herrera attended, and Holden officiated at, Huberman's wedding in Cabo San Lucas in April 2009, but said both paid for their own airfare and stayed at local hotels. Huberman explained, "Anytime [city officials] have gone with me they have gone on their own accord, you know they have never gone with me on my plane or, yeah, I don't believe so."

Records of border crossings establish that Herrera flew from Mexico to the United States on Huberman's aircraft four times – once each in 1998 and 1999 while Herrera was not on city council, and on July 1, 2003, and December 19, 2005, while Herrera was a councilmember. The day after Herrera returned from Mexico in December 2005, he voted to approve the city's multi-million dollar purchase of the Sturgis Road building from Foxborough Park, Inc., a Huberman-affiliated company. However, the available evidence simply cannot establish whether Herrera's flights while on city council were gifts or whether he paid for them.

Sotelo vacationed at Huberman's Cabo San Lucas residence twice. At least one of the trips occurred while Sotelo was considering options for the new city contract to operate the city's Materials Recovery Facility (MRF). Evidence obtained from local charities confirms, however, that Sotelo purchased the trips at charity auctions, paying more than \$6,000 for the two trips. During another trip to Cabo San Lucas not purchased at auction, Sotelo went on a fishing trip Huberman reportedly arranged. A personal check and accompanying letter from Sotelo to Huberman reveal Sotelo reimbursed \$500 for the excursion. As such, the trips did not have to be disclosed.

Records of border crossings establish that Holden flew from Mexico to the United States aboard Huberman's aircraft three times – in December 1998, December 2000, and June 2007. The investigation also revealed that Holden traveled to Napa, California on Huberman's private jet in January 2009.

During his initial interview in 2010, Holden repeatedly made false statements to investigators about his travels with Huberman and his trips to Cabo San Lucas, denying time and again he had ever flown in Huberman's private jet or that he had ever stayed at Huberman's Cabo San Lucas residence. During a second interview, Holden admitted traveling to Cabo San Lucas with Huberman, but claimed he could not remember whether he stayed at Huberman's residence or whether he had flown there on Huberman's private jet. Holden said he did not feel there was a conflict with his association with Huberman because he was not on council during that trip.

During a third interview, Holden finally admitted to investigators that he had flown with Huberman to Cabo San Lucas in Huberman's private plane and stayed at Huberman's residence there. Holden maintained that he had first flown there with Huberman in January 1999, producing an invoice and canceled reimbursement check to Huberman as evidence that the trip was not a gift. Holden said he paid for his flight and lodging because he did not want there to be a conflict. Records of border crossings partially corroborate this claim, though they show that Holden returned to the United States from Mexico in December 1998, not in January 1999. More significantly, Holden told investigators that the next trip he took to Cabo San Lucas with Huberman was when he was no longer on city council, in 2003 or 2004. This assertion was untrue. Records of border crossings reveal that on December 3, 2000, while Holden was on city council, he re-entered the United States from Cabo San Lucas on a private jet accompanied by a member of his wife's family and Huberman, among others.<sup>60</sup> Holden also told investigators about a third trip to Huberman's Cabo San Lucas home aboard Huberman's plane that took place near Holden's anniversary in 2007. Records of border crossings confirm this trip took place and that Holden's wife was also on board.<sup>61</sup> When Mayor Holden took the 2007 trip, the city was actively engaged in a \$13 million real estate transaction for the sale of vacant lots in Oxnard Shores to Elevar Seven, LLC, a Huberman-affiliated company.<sup>62</sup>

Holden also admitted to investigators that he and his wife had flown with Huberman to Napa, California in January 2009. Holden maintained that while Huberman had

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<sup>60</sup> Sentence revised 06/15/12.

<sup>61</sup> Sentence revised 06/15/12.

<sup>62</sup> The city's sale of vacant lots in Oxnard Shores to Elevar Seven, LLC is detailed more fully in Section Eight of this report.

not charged them for the flight, Holden paid for his own hotel room and for an expensive dinner for Huberman while in Napa. Credit card records show that Holden's hotel room at the Silverado Hotel & Spa was paid on Huberman's credit card. Holden's credit card records confirm, however, that Holden paid more than \$775 for a dinner at LaToque, a Napa restaurant. Within three months after Mayor Holden took this trip, BLT Enterprises, a Huberman-affiliated company, submitted a bid for the new contract to operate the city's MRF.<sup>63</sup> The Utilities Task Force, of which Mayor Holden was the ranking member, ultimately recommended BLT Enterprises as the finalist to negotiate the new MRF contract.

Holden eventually told investigators that he did not declare all of this travel on his Form 700s because he believed he had exchanged fair value for the trips. Holden maintained that he had provided over \$4,000 in optometry services to Huberman and his family over the years, which exceeded the value of the flights Huberman had given him. Holden told investigators the cost of a commercial flight to Cabo San Lucas in 1999 was \$300, though he said he could fly there for about \$250 in 2010. Holden thought the roundtrip flight to Napa would cost approximately \$150, and said all of his estimates erred on the cautious side. Holden told investigators the value of the services he provided to Huberman's family was much more than what Huberman provided him in airfare. As a result, Holden said, the flights were not gifts under his understanding of the reporting requirements.

To support his statements, Holden gave investigators a partial printout of records from his optometry practice showing that he had written off thousands of dollars of services to Huberman and his family over the years.<sup>64</sup> District attorney investigators seized a copy of the billing database at Holden's business within days of the third interview. In an effort to confirm or disprove Holden's claims, investigators used special software to scrutinize Holden's billing records. The analysis confirmed that that the records appear genuine and that Holden provided more than \$4,000 worth of optometry services to Huberman and his family, without charging Huberman.

To further verify Holden's assertions, investigators examined the cost of chartered flights. Estimates for a charter flight aboard the type of plane Holden took ran from \$1,610 to \$2,400 per hour of flight time, plus various airport fees and travel expenses for pilots. A round trip flight to Cabo San Lucas from Camarillo Airport takes approximately five hours of flight time. A round trip flight to Napa takes approximately two hours of flight time. One local company offered a round trip flight to Cabo San Lucas for a flat fee of \$18,000 and a round trip flight to Napa for

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<sup>63</sup> A discussion of the city's selection of a new operator for the MRF is found in Section Eight.

<sup>64</sup> To protect the privacy rights of the medical patients, the patient billing records are not attached to this report.

\$3,950 per day. Another measure of the value of Holden's flights is the cost of commercial flights. Current commercial airfare from Los Angeles International Airport to Napa is approximately \$500 plus tax. The cost in 2007 was estimated to be approximately \$300 round trip. Current airfare from Los Angeles International Airport to San Francisco is approximately \$120.

Holden could not have chartered a private jet to Cabo San Lucas three times and Napa once for the cost of the services he provided to Huberman's family.<sup>65</sup> However, he could have flown commercially for far less than the cost of his services to Huberman's family. For purposes of perjury prosecution, the more reasonable measure of the flights' value is what it would otherwise have cost Holden to fly commercially. To prove perjury it must be shown that Holden knew that he had not provided at least equal value in exchange for the flights. Even at current fares, Holden could have flown to Cabo San Lucas three times and Napa once for less than half of the value he provided to Huberman's family. There is no evidence that Holden contemplated the costs of charter flights in making his assessment of the flight's value. As a result, there is insufficient evidence to prove beyond a reasonable doubt either that the flights actually constituted gifts or that Holden knew he was required to disclose the flights as gifts.

Further, there is insufficient evidence to prove Holden was required to declare any of his stays at Huberman's residence in Cabo San Lucas. Holden told investigators that Huberman accompanied him during his stays in Cabo San Lucas. Holden also said he paid for all of his own meals and golf outings. Holden correctly told investigators that under Form 700 gift-reporting requirements, he was not required to declare the free lodging as a gift as long as the owner was present during Holden's visit.<sup>66</sup>

### **Gifts of Golf, Meals, and Event Tickets**

Proof of felony perjury charges arising from the intentional failure to disclose gifts requires (1) meeting the corroboration requirement in perjury law, (2) proving the recipient knew the gift was purchased by a company rather than the city, (3) proving the recipient intentionally failed to disclose the gift, instead of misunderstanding the rules or forgetting the gift was received, and (4) proving that the omission was material under the law.

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<sup>65</sup> Until recently, FPPC regulations valued private air travel as the cost of a private chartered flight on a comparable aircraft, divided by the number of elected officials and other Form 700 filers on the flight. Accordingly, the FPPC valuation for a private flight with only one elected official on board would be the entire cost of the chartered flight. This valuation was modified effective January 1, 2012 to divide the cost of the flight by the total number of passengers on board, not just the elected officials. (Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations § 18946.6.)

<sup>66</sup> California Code of Regulations, title 2, section 18942(a)(7).

### **Corroboration**

As outlined above, there is evidence that each of the officials received at least some gifts that were required to be disclosed. To prove perjury, however, there must be more than one witness's word that he gave the official a gift. In a few instances, an official admitted being present at a meal, event, or round of golf, or another witness puts them there. In a few additional instances, city travel forms reflect that an official did not ask the city to pay for a meal the official attended that was ultimately paid for by a vendor. This evidence is sufficient to corroborate some of the meals and a few of the golf rounds.

### **Claims of Forgetfulness**

Most of the officials claimed they forgot to declare at least some gifts. As to Herrera, Ortega, and Sotelo, the receipt of numerous gifts over a period of several years, without a single disclosure, weakens their claim of forgetfulness. This is especially true for Sotelo who acknowledged during his interview that to be on the safe side, social events, dinners and outings should be reported on Form 700s. It is incredible to suggest that an official receiving several gifts from the same sources year after year honestly forgot to include every single gift on their Form 700s. On the other hand, where an official received only one or two gifts per year, a claim of honest forgetfulness carries greater weight. It is reasonably possible for an official to forget having received a complimentary meal or round of golf. Accordingly, claims of honest forgetfulness are not readily discounted where the receipt of gifts is infrequent.

### **Claims of Misunderstanding the Requirements**

Nearly every official also said, at some point, that they did not fully understand what must be disclosed. The Form 700 instructions can be difficult to understand and the definition of what must be reported has changed over time. Nonetheless, it is clear that gifts of meals, event tickets, and rounds of golf must be disclosed. In fact, common gift examples cited in Form 700 instructions relate to meals, rounds of golf, and event tickets. Also, the instructions contain specific guidance about how to get clarification from the FPPC if there are any questions.<sup>67</sup> Moreover, City of Oxnard officials are legally required to receive ethics training every two years. The training includes instruction on the Form 700 reporting requirements and gift limitations.

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<sup>67</sup> According to a city official, in an effort to help officials comply with the Form 700 reporting requirements, the city arranged multiple training sessions for its officials in 2011. The training was conducted by representatives of the FPPC.

Several officials contended they did not consider the meals to be gifts because they were not responsible for the cost. Councilmember Herrera stated in his interview that he did not pay attention to who paid for these meals because he was traveling on city business and would not have personally paid for the meal in any event. Mayor Holden made similar assertions. Cameron said he did not consider the meals to be gifts because they were business or working meals with companies contracting with the city. Cameron also said that some dinners he received from Kim occurred during city-paid travel, so he did not believe they constituted gifts to him.

Once again the city's reimbursement policy protects the officials. Under Government Code section 82028, any payment that confers a personal benefit on the recipient is a gift. Ordinarily, officials are limited in the amount of city funds they can spend on travel meals, so that at the very least the excess costs of gift meals would confer a personal benefit on the officials. In the case of Oxnard officials, however, there are no actual limits. There is no evidence to disprove the claim that the officials did not believe the gift meals conferred a personal benefit on them. A perjury conviction requires proof that the official intentionally declared falsely. If an official honestly but mistakenly did not believe the meals amounted to personal gifts, he or she did not intentionally declare falsely on the Form 700s and cannot be guilty of perjury.

### **Claims of Ignorance**

Several officials said they did not know who had paid for particular meals. Herrera and Holden said that city staff members handle arrangements for travel and they rely on city staff to let them know if they must declare a meal as a gift. Councilmember Flynn similarly asserted that City Manager Sotelo took care of meal arrangements and that Flynn never really knew who was paying for any particular meal. City Manager Sotelo, in turn, said that he relies on lower level city staff to pay for his meals and that he did not know certain meals were gifts.

The evidence suggests the officials blinded themselves to who was paying for meals, later claiming they thought the city paid for the meals. Given some officials' habits of costly dinners at city expense, however, it would be difficult to establish that they knew any given dinner was bought by a vendor instead of the city. Still, at least some of these assertions of ignorance seem unbelievable, particularly where some officials admitted they knew who bought the meal and the company buying the meals did so openly. Moreover, intentional ignorance is not a defense to perjury. A person may not affirmatively declare he received no gifts when he intentionally blinded himself to whether he received a gift.

### **Materiality of the Omission**

To prove felony perjury, the gifts omitted from the Form 700 must be “material.” That is, it must be substantially likely that the information would be important to a reasonable person in evaluating whether the official can do their job without being biased by the gifts. The evidence here does not meet that burden. Each year, several city officials failed to disclose one or more meals. In some years, officials also failed to disclose one or more rounds of golf. Over the five years examined, there was a single instance where several officials received tickets to a Broadway show and a few known instances of individual officials receiving tickets to sporting events. Based on the pattern and value of the gifts that can be proven and corroborated, there is insufficient evidence to prove that the undisclosed gifts were material for purposes of felony perjury. Further, the number and dollar value of the gifts are insufficient to warrant felony prosecution.

### **Conclusions Regarding Form 700 Violations**

There is insufficient evidence to prove felony perjury or to prove the Cabo San Lucas and Napa travel required disclosure. There is sufficient evidence, however, to prove intentional nondisclosure as to at least some gifts of meals, golf, and event tickets. Thus, the remaining question is the appropriate enforcement mechanism for these violations – misdemeanor prosecution or referral to the FPPC for administrative enforcement action. In evaluating whether to pursue misdemeanor prosecution or to refer the matters to the FPPC, various factors were considered, including the severity of the violations, whether the violator has past criminal history, whether prosecution of the violations is time-barred by the applicable statutes of limitations, and whether the monetary sanctions the FPPC may impose are adequate to address the violations.

As mentioned previously, the statute of limitations for criminal prosecution has expired as to the two years during which the most significant gifts were received, 2005 and 2006. Misdemeanor prosecution is therefore limited to nondisclosure of gifts received in 2007 and later. In consideration of all the above factors and in light of the available evidence, the appropriate remedy for the nondisclosure of these gifts is referral to the FPPC for administrative enforcement. The violations have been referred to the FPPC for whatever action it deems appropriate.

## **SECTION SEVEN - CONFLICT OF INTEREST**

California law prohibits government officials from being financially interested in any contract they, or their agencies, make. Similarly, a government official may not participate in any governmental decision in which the official has a financial interest. In other words, an officer may not stand to gain financially from any contract his agency enters into, or from any decision the officer participates in making. The courts have long recognized the compelling public policy reason behind these prohibitions – government officials owe their loyalty to the public they serve. If a public official is pulled in one direction by his or her financial interest and in another direction by official duties, the official’s judgment cannot and should not be trusted, even if he or she attempts impartiality.

During this investigation, several officials were identified as having potential conflicts of interest related to multi-million dollar contracts. These alleged conflicts of interest primarily related to the receipt of gifts detailed previously, with subsequent approval of city contracts with those who gave the gifts. Again, an overview of the major legal principles involved in conflict of interest law is vital to an analysis of the available evidence.

Conflicts of interest may arise under Government Code section 1090, and may be charged either as a felony or a misdemeanor, or as a misdemeanor under Government Code section 87100.

### **Conflict of Interest (Government Code section 1090)**

Under Government Code section 1090, city officers and employees “shall not be financially interested in any contract made by them in their official capacity or by any body or board of which they are members.” A violation of this section is punishable by up to three years in state prison. To prove a violation of Government Code section 1090, it must be proven beyond a reasonable doubt that:

1. A person was a city officer,
2. The officer acted in his or her official capacity, and
3. The officer knowingly and intentionally made a contract in which he or she had a financial interest.

For Government Code section 1090 analysis, a person is financially interested in a contract if he knows that the contract may result in a personal financial benefit to him. Some prohibited financial interests are direct interests, such as when an

officer, in his official capacity, does business with himself in his private capacity. The prohibited financial interest may also be indirect, such as when the officer does city business with a company from which his spouse will profit if the contract is made. Though the value of the financial interest need not be substantial, there are numerous legal exceptions where minor financial interests are not criminal. Conflict-of-interest law is extremely technical and the analysis depends entirely on the unique circumstances of each case.

There is no evidence that any of the city officials had a direct financial interest in questioned contracts with Shea Properties, De La Rosa & Co., Kennedy/Jenks Consultants, BLT Enterprises, Inc., Foxborough Park, Inc., or Elevar Seven, Inc. The investigation also examined whether the officers had an indirect financial interest in the contracts, looking at whether the expectation of future gifts might create an indirect financial interest in the contracts they participated in making. An indirect financial interest may establish a conflict of interest under the right circumstances.<sup>68</sup> However, the facts discovered during this investigation do not support such a conclusion concerning Oxnard officials.

Evaluating whether the officials' expectation of future gifts amounted to an indirect financial interest included examination of whether:

- The officer received a series of gifts from the contracting company
- The gifts were received before, during and after contracts were made with the company
- The pattern of gifts an individual officer received was sufficient in number, value and consistency to demonstrate a past financial effect on the officer
- The pattern of gifts demonstrates a reasonable expectation the gifts would continue because the contract was made
- The pattern of gifts showed that the expectation of continued gifts was tied to the contract at the time it was made

Based upon the gift analysis in the preceding section, these factors do not create an indirect financial interest in this case.

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<sup>68</sup> The circumstances, amount and timing of gifts may potentially constitute a conflict of interest. A recent decision of the California Court of Appeal recognizes that while receipt of campaign contributions generally does not create a conflict of interest, a conflict of interest under section 1090 was established by the timing of substantial campaign contributions, additional monetary gifts of approximately \$1,000 to each of six relatives of city council members, and employment of relatives of city council members who were unqualified for the job. (*Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4<sup>th</sup> 1114.) In that case, the contributions and gifts were made at about the same time of a key vote, and were given only to those councilmembers who voted in favor. In contrast, in the Oxnard case, the value of the gifts was far less egregious, and the timing and recipients of the gifts do not appear to be tied to any particular decisions.

### **Shea Properties**

The Shea Properties gift pattern consists primarily of golf and meals given to attendees at an annual industry conference in Las Vegas. Other than the conference gifts, Shea Properties paid for only a handful of meals and one celebration dinner following the Bond Buyer's Awards in New York. The gifts were of comparatively low value and were given to the officials who attended the ICSC conference each year regardless of the official's position. The pattern of gifts does not reasonably demonstrate a reasonable expectation the gifts would continue only if the various RiverPark contract amendments with Shea Properties were made.

### **De La Rosa & Co.**

The De La Rosa & Co. gifts involve golf, event tickets, and meals given with greater frequency and not centered on a single, annual conference. Still, for most recipients, the De La Rosa & Co. gifts consisted primarily of meals provided during a few events spaced out over a period of years. The gifts tended to be given while the officials were working directly with De La Rosa & Co. representatives during critical stages of bond issues, or in celebration of completed bond issues. The gifts given during the New York trip were related to an industry awards event honoring a specific bond issued by the city and conceived by De La Rosa & Co.

The analysis is somewhat different for Chief Financial Officer James Cameron, who began receiving gifts in 2008. He attended two events, a Dodger game, and a Broadway show, as a guest of De La Rosa & Co. He declared both events on his Form 700, though he somewhat undervalued them. The balance of Cameron's gifts came in the form of up to a half-dozen working meals that De La Rosa & Co. purchased in 2008 and 2009. After 2008, Cameron received no more gifts of event tickets. On balance, this pattern is not sufficiently numerous, valuable or consistent to establish beyond a reasonable doubt that an expectation of future gifts was tied to approval of the contracts. This is especially evident because Cameron began negotiating with De La Rosa & Co. in 2008, long after De La Rosa & Co. had already established its working relationship with the city.

Public Works Director Ortega received somewhat more valuable gifts from De La Rosa & Co., having received a Dodger game ticket each year in 2007, 2008, and 2009, as well as tickets to a Broadway show in 2008. Nonetheless, the gift pattern does not establish beyond a reasonable doubt that an expectation of future gifts was tied to approval of De La Rosa & Co. contracts, particularly where the evidence suggests that Ortega had no involvement in the decisions to use the services of De La Rosa & Co.

### **Kennedy/Jenks Consultants**

The unreported gifts from Kennedy/Jenks Consultants primarily involve meals provided to city staff, including Public Works Director Ken Ortega, as well as a Laker game, limo trip, and dinner provided to Ortega and Councilmember Herrera. The pattern of gifts does not establish any financial interest in the city's contracts with Kennedy/Jenks Consultants.

The numerous officials' receipt of these gifts plainly violates the city's policy against accepting gifts of more than \$50 from entities with whom the city is doing business. This may cause some members of the public to question city officials' decision making. However, when examined independently, the gift patterns from Shea Properties, De La Rosa & Co. and Kennedy/Jenks Consultants are not numerous, valuable, and consistent enough to prove beyond a reasonable doubt that the recipients had the expectation of financial benefit required by conflict of interest law. With few exceptions, the provable gifts fell within monetary limits specifically permitted under the Political Reform Act. Moreover, multiple representatives from Shea Properties and De La Rosa & Co. told investigators that the Oxnard officials did not receive unusually high levels of gifts compared with other municipalities. The witnesses also said that it was not their impression that the Oxnard politicians expected such gifts. This evidence is insufficient to prove that the officials had a criminal conflict of interest regarding the contracts with Shea Properties, De La Rosa & Co., or Kennedy/Jenks Consultants.

### **Travel Related to Bernard Huberman**

Initially, the pattern of alleged gifts tied to Bernard Huberman's entities raised troubling concerns of conflict of interest. However, independent evidence confirmed that City Manager Sotelo paid for his vacation stays. Similarly, though Mayor Holden repeatedly provided false statements to investigators about his travels aboard Huberman's aircraft, his business records ultimately supported his assertion that he had exchanged fair value for the flights.

As to Councilmember Herrera, there is insufficient evidence to determine whether his four flights on Huberman's aircraft were gifts. Moreover, the pattern of the flights reveals that even if his flights were gifts, they were years apart and Herrera's first two flights occurred in 1998 and 1999, when he was not a member of the city council. Herrera's final flight, in 2005, occurred the day before Herrera voted to approve the city's purchase of a building from a Huberman-affiliated company, circumstances that certainly create the appearance of impropriety.<sup>69</sup> There were no

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<sup>69</sup> The purchase of the Sturgis Road building is discussed in more detail in Section Eight.

subsequent flights, however. As a result, the pattern of Herrera's flights is insufficient to establish that Herrera had a financial interest in the sale of the building.

Herrera and Holden have long-term personal relationships with Huberman. Two of Herrera's flights occurred while he was not a member of the city council. Both Holden and Herrera attended Huberman's wedding in Cabo San Lucas in April 2009, paying their own way. Holden officiated the wedding.

In discussing his relationship with Huberman, Holden told investigators he and Huberman have been friends for 17 years and at times they talk two to three times per day. Holden said he looks to Huberman for advice and he relies on Huberman for financial assistance for the Oxnard Chamber of Commerce and the Boys & Girls Club of Greater Oxnard and Port Hueneme. Holden said that he and Huberman would alternate paying the bill when they went to lunch or dinner. Holden maintained, however, that he had learned friendships do not necessarily equate to conflicts of interest and that having dinner with friends would not affect his decisions. Holden said he makes city-level decisions in the best interest of the city. He also mentioned to investigators that his vote was only one out of five, though if he ever had complete control over the decision whether to enter into a city contract with a friend, he would abstain. Holden said he never hid his friendship with Huberman and while Holden understands the concern over conflict and undue influence, he feels avoiding people because of friendships would not be beneficial either. Holden also expressed his belief that because he has friendships with people who do business with the city, they are less likely to try to take advantage of the city and they often offer the city more favorable terms.

The personal ties between Holden, Herrera, and Huberman, coupled with the infrequency of the travel, further establish that the flights alone do not constitute a financial interest within the meaning of the conflict of interest laws. While the nature of the relationships understandably caused others in city government to question the impartiality of the officials, the evidence does not establish a criminal conflict of interest.

#### **Alternative Conflict of Interest (Government Code section 87100)**

A lesser alternative to Government Code section 1090 prosecution is found in Government Code section 87100. While section 1090 prohibits government officials from being financially interested in a *contract*, section 87100 prohibits government officials from participating in any *governmental decision* in which they have reason to know they have a financial interest. For example, an official approving a contract

for the city to purchase real estate from the official would have a financial interest in the contract and would violate section 1090. An official voting to change the zoning of real estate owned by the official in order to increase its value would have a financial interest in the zoning decision. In the latter example, the official would violate section 87100 instead of section 1090 because there is no contract involved in the governmental decision to change the zoning.

Under Government Code section 87100, “No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” For purposes of section 87100, a public official has a financial interest if it is reasonably foreseeable that the decision will have a “*material* financial effect” on the official, a member of the official’s family, or a donor of gifts exceeding the annual limit within the 12 months preceding the governmental decision. Proof of a violation of section 87100 using a gifts basis requires proof of the financial interest by the 1090 analysis above, plus proof that the gifts would have a *material* financial effect on the official or his family. For the reasons already outlined above, the evidence is insufficient to establish a conflict of interest beyond a reasonable doubt.

A final basis for a misdemeanor 87100 prosecution would be that a donor exceeded the annual gift limit and the recipient participated in a governmental decision that would have a material financial effect on the donor company. As to both of these theories, the applicable statute of limitations is four years from the date of the governmental decision. Only one remaining instance is not barred by the misdemeanor statute of limitations, involving Chief Financial Officer Cameron and a bond issuance in July 2009. However, there is insufficient evidence to prove beyond a reasonable that Cameron had reason to know he had a prohibited financial interest and failed to recuse himself from the decision to use De La Rosa & Co.<sup>70</sup>

### **The Supplemental Post-Retirement Benefit**

As discussed previously, in July 2003, City Manager Ed Sotelo established a Supplemental Post-Retirement Benefit (SPRB) for a management category of employees, plus the city attorney and himself. Because Sotelo stood to benefit from the SPRB he created in his official capacity, he had a financial interest in the contract. Sotelo’s conduct in this instance was not a criminal conflict of interest, however, due to a statutory exception to the conflict-of-interest law. Additionally,

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<sup>70</sup> The FPPC also has administrative enforcement jurisdiction over Government Code section 87100 violations. The potential violations have been referred to the FPPC for its consideration.

the statute of limitations has expired, such that even if the conflict were criminal, prosecution would be time-barred.

Under Government Code section 1091.5(a)(3), a conflict of interest is excused if the official's financial interest in the contract is the same as other members of the general public. This is known as the group benefit exception. For example, assume a city contracts with a utility company to provide electricity service to members of the public. The official who negotiates the contract with the utility company has a financial interest in the contract because it will affect the official's electricity rates. However, that official's financial interest in the contract is the same as other members of the general public. Under the group benefit exception, the official's conflict of interest is permissible.

On its face, a retirement benefit given to a narrow group of city employees would not seem to be a benefit available to the public. However, courts interpreting the group benefit exception have read it quite broadly. A California Supreme Court case, *Lexin v. Superior Court*,<sup>71</sup> addresses the precise issue of city officials determining their own retirement benefits along with the benefits of many other city employees. In *Lexin*, the court ruled that the group benefit exception shielded the officials from criminal prosecution because the decisions they made about retirement benefits impacted not only themselves, but a larger class of city employees.

In the case of the SPRB, Sotelo implemented a group benefit for a class of employees, not only for himself. While the class of recipients was very small compared to the class in *Lexin*, the legal principle still applies. By the terms of his employment contract with the city, Sotelo was entitled to the same benefits that the "Top Management" class of employees received. Members of the city council admittedly delegated to Sotelo the responsibility of setting Top Management benefits. Even though such delegation was impermissible, the delegation occurred and there is no evidence that anyone actually realized it was impermissible. Thus, Sotelo set a benefit for a class of employees as he had been authorized by the city council to do. Accordingly, Sotelo's financial interest falls within the group benefit exception.

Even if the group benefit exception did not apply, however, the statute of limitations would prevent prosecution. The generally applicable statute of limitations for conflicts of interest is four years, and there is no evidence to extend it in this case. Because the SPRB was established in July 2003 and benefits payments began a few months later, prosecution is time-barred.

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<sup>71</sup> *Lexin v. Superior Court* (2010) 47 Cal.4<sup>th</sup> 1050.

## **SECTION EIGHT – HIGH-COST TRANSACTIONS**

Allegations were presented to the District Attorney’s Office about the suspicious nature of four multi-million dollar transactions. All four transactions were initially examined in the context of potential conflicts of interest, but no criminality was found. Due to the value of the transactions, and the public’s legitimate interest in their fairness, all four transactions will be analyzed in detail. These transactions involved (1) the city’s purchase of the police annex building on Sturgis Road, (2) the city’s sale of vacant lots in Oxnard Shores, (3) the city’s purchase of the sports park at Oxnard Boulevard and Gonzales Road, and (4) the selection process for the new operator of the city’s Materials Recovery Facility.

Three of the transactions involved business entities affiliated with Bernard Huberman. Suspicions arose among several city officials as a result of the personal relationships between other city officials and Huberman, though no one directly identified any particular criminal activity.

It is not the role of the District Attorney’s Office to evaluate the wisdom of the transactions and no opinions are expressed in that regard. Rather, it is the role of the District Attorney’s Office to determine whether criminal conduct was involved. Having examined these transactions in great detail, there is no evidence of criminal conduct in any of the transactions.

### **Sturgis Road Building**

On December 20, 2005, the city approved a contract to purchase a building on Sturgis Road from Foxborough Park, Inc., a company affiliated with Bernard Huberman. Over the next nine months, the building’s interior was substantially modified to make it suitable for use by the Oxnard Police Department. The transaction closed escrow in September 2006.

Several witnesses expressed suspicion due to the timing of the transaction and Huberman’s involvement. When interviewed, Councilmember Tim Flynn told investigators that before the Sturgis Road building was considered, the city council had already agreed upon purchasing a building on Statham Boulevard that suddenly fell out of favor. At the same time, the Sturgis Road building surfaced as the favored building. Flynn was suspicious that Huberman appeared to be “the man on the spot” to purchase the Sturgis Road building and re-sell it to the city, making a profit of approximately \$400,000. Despite his suspicions, Flynn said he ultimately voted to

approve the purchase because Foxborough Park could provide a turnkey property to police specifications much more quickly than if the city went to bid to build out the property.

District attorney investigators interviewed individuals involved in the transaction and obtained documents relating to this transaction from a variety of sources. The investigation revealed that the search for the new police building was overseen primarily through the Oxnard Police Department, involving both Chief John Crombach and Assistant Chief Charles Hookstra. Early on, the city had in fact considered purchasing a building on Statham Boulevard, but the city decided not to buy it when significant roof defects were discovered. The city next focused on the building at 3001 Sturgis Road. Assistant Chief Hookstra toured the Sturgis Road building, but continued looking at others. A short time later, Hookstra met with Chief Crombach and Bernard Huberman, who, Hookstra was surprised to learn, was purchasing the Sturgis Road building and was interested in leasing or selling it to the city.

Records reveal that in September 2005, Foxborough Park, Inc., a Huberman-affiliated company, bought the Sturgis property for approximately \$5.15 million, or approximately \$88 per square foot. While still in escrow, Foxborough Park began negotiations with the city. Records obtained by investigators reveal an arms-length negotiation process that took several months. The city ultimately agreed to buy the building for \$6.21 million (approximately \$105 per square foot) and to pay build-out costs of approximately \$1.6 million. Foxborough Park agreed to complete the build-out before the transaction closed escrow and agreed to charge the city only its actual build-out costs. During the process, Foxborough Park disclosed that it had purchased the building for \$5.15 million. The city council unanimously approved the purchase agreement on December 20, 2005, the day after Councilmember Herrera flew home from Mexico aboard a plane owned by a Huberman-affiliated company.

Records and interviews establish that the build-out process took nine months and involved substantial negotiations between the city and Foxborough Park. Records also reveal that the final build-out cost came in modestly over budget, due to the city's revised build-out requests. Escrow documents and construction billing records from the contractor who handled the build-out confirm that Foxborough Park did not mark up its build-out costs. The transaction closed escrow on September 22, 2006. The city's total cost for the building was approximately \$7.95 million. Financial records show that it cost Foxborough Park more than \$300,000 to own the building during the year before the city bought it. Estimates derived from the records obtained by investigators indicate Foxborough Park netted approximately \$700,000 from the year-long transaction, perhaps less. Nearly every witness

confirmed that the purchase of the Sturgis Road building was a reasonable deal for the city. The estimated profit of less than 10 percent of the total price was not inherently unreasonable, particularly when Foxborough Park owned the property for one year at a time when real estate prices were increasing.

Though witnesses were concerned about Huberman's relationship with city officials, no witnesses were aware of any criminal activity, nor was any criminal activity discovered during the investigation.

### **Oxnard Shores Lots**

Another questioned real estate transaction involved the city's sale of vacant land in the Oxnard Shores area. In June 2005, the city sought to raise revenue by selling two Oxnard Shores lots, one on Breakers Way and the other on Whitecap Street. At \$13 million, the highest bidder for the lots was Elevar Seven, LLC, another Huberman-affiliated company. The city selected Elevar Seven to purchase the lots, beginning a years-long process to obtain legal permission to develop the lots.<sup>72</sup>

Again, witnesses expressed concern to investigators due to Huberman's relationship with city officials. Councilmember Tim Flynn told investigators that approximately one year after the city approved the sales agreement, Huberman wanted to renegotiate the purchase price because the real estate market had fallen and Huberman could not profitably develop the property at the agreed-upon price. Flynn questioned why the city would consider subsidizing Huberman's loss and was told by others on council that Huberman could still unwind the deal. Flynn questioned how that was possible since they had a contract. According to Flynn, the council ultimately reduced the price by several hundred thousand dollars per acre, but Flynn voted against it.

District attorney investigators obtained documents pertaining to the transaction from several sources. City records and statements of several witnesses confirm that the high bid of \$13 million came from Elevar Seven. On January 9, 2007, the city council unanimously approved the sale of the Oxnard Shores parcels to Elevar Seven. The Whitecap price was \$556,923 for each of 13 home sites on the lot, for a total of \$7.24 million. The Breakers Way price was \$480,000 for each of 12 home sites on the lot, for a total of \$5.76 million.

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<sup>72</sup> Because the lots were close to the beach, Coastal Commission approval was required before the land could be developed.

It is critical to the analysis of this transaction that the sales agreements for the two parcels contained several conditions that had to be fulfilled before Elevar Seven was obligated to buy the parcels. The conditions ensured that Elevar Seven would have the legal right to develop the properties before it was obligated to buy them. The conditions were analogous to those in residential home sales, allowing the buyer to cancel a home purchase if dissatisfied with the inspection or the home does not appraise for the purchase price. One condition in the Elevar Seven transaction required the development plans to receive final approval from both the Coastal Commission and the city. Another condition required a finalized development agreement with the city. Such conditions are common among developers, whether the property seller is a government entity or a private individual.

The California Coastal Commission approved development of the Breakers Way parcel in August 2007, but did not approve development of the Whitecap property, resulting in the cancellation of the Whitecap transaction. In the spring of 2008, Elevar Seven asked the city to renegotiate the purchase price of the Breakers Way parcel because the real estate market had fallen and development would not have been profitable at the originally agreed-upon price. At the time, the contractual conditions had not yet been met. Specifically, the development plans had not yet received final approval and a final development agreement had not yet been reached. As a result, Elevar Seven had the contractual right to cancel the transaction without purchasing the Breakers Way parcel.

Because the conditions had not yet been met, city staff recommended a renegotiated sales agreement to city council, expressly noting Elevar Seven's legal ability to cancel the transaction entirely. On May 13, 2008, the city council voted 3-2 to reduce the price to \$3.9 million, from the original \$5.76 million. Mayor Holden and Councilmembers Zaragoza and Herrera voted to approve the deal, while Councilmembers Flynn and Maulhardt opposed. Sources indicate that median home prices in Southern California dropped 20-30 percent or more between early 2007 and May 2008, and over 10 percent between January 2008 and May 2008 alone.<sup>73</sup>

Again, although the close relationship between Bernard Huberman and city officials raised understandable suspicions among several witnesses, no witnesses identified any criminal activity. The investigation found nothing criminal about the transaction.

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<sup>73</sup> California Association of Realtors, *Median Prices of Existing Detached Homes (Historical Data)*<sup>10</sup>, <http://www.car.org/marketdata/data/housingdata/> (2012); Dataquick Information Systems, Inc., *Southland home sales back to record low; median price slips again*, <http://www.dqnews.com/Articles/2008/News/California/> (June 16, 2008).

### **Materials Recovery Facility**

The third transaction that was identified to investigators as suspicious involved the city's Materials Recovery Facility (MRF). The MRF is a facility involved in the separation of recyclables from the municipal trash stream. The MRF was built for the city in the mid-1990s by BLT Enterprises of Oxnard, a company then owned by Bernard Huberman and Dan Rosenthal. Under the initial contract, BLT Enterprises of Oxnard operated the MRF. Republic Services purchased BLT Enterprises of Oxnard in approximately 1999, taking over operation of the MRF under the initial contract. Republic Services' contract to operate the MRF was scheduled to expire in early 2012. In 2009, the city began a bid process to select the company that would operate the MRF upon the expiration of the current contract in 2012. Several witnesses told investigators that it was unusual for the city to begin the bid process for a new MRF operator so far in advance of the expiration of the existing contract.

Witnesses again expressed concerns about the MRF transactions based upon the relationship between city officials and Bernard Huberman. Phil Molina, Oxnard's Finance and Administrative Services Director from 1997 to 1999, told investigators that in 1998, the city's contract for the operation of the MRF was about to expire.<sup>74</sup> Molina said he attended a meeting with Huberman, City Manager Sotelo, and others, wherein Huberman sought an extension of the contract so he could sell it to Republic Services for \$6 million. Molina said he suggested that instead of granting the extension, the city should allow the contract to lapse, put the contract out to bid, and get the \$6 million. Molina said that during a short break from the meeting Sotelo excused him from the negotiations. Molina said that a short time later, he learned that the contract had been extended and that Huberman sold it to Republic Services.

### **The Term of the Initial MRF Contract**

Investigators obtained the initial 1995 contract for the construction and operation of the MRF. By its terms, BLT Enterprises of Oxnard was to operate the MRF for 15 years after construction was completed and the facility was formally accepted by the city, which occurred in January 1997. Thus, by its original terms, the contract was not set to expire until January 2012. Also, a specific term of the contract allowed BLT Enterprises of Oxnard to sell the contract to another qualified waste-handling company with the consent of the city. The city formally consented to the sale of the contract to Republic Services in January 1999, without extending the contract.

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<sup>74</sup> Molina's statement about the contract's expiration appears inaccurate. City records reflect that the contract was not due to expire until 2012.

### **Selection of the New MRF Operator**

As described by various city officials, the city was dissatisfied with Republic Services' operation of the MRF over the years. The dissatisfaction eventually resulted in a lawsuit between the city and Republic Services that was settled in 2007, though concern about the MRF operation continued. In early 2009, the city began a selection process to choose a company to operate the MRF upon the expiration of the existing contract. A selection committee was empaneled consisting of City Manager Sotelo, Assistant City Manager Burnham, Chief Financial Officer Cameron, Development Services Director Matt Winegar, and Legislative Affairs Manager Martin Erickson, among others. Martin Erickson chaired the committee. A consultant was hired to assist with the selection. The selection committee reported to the city's Utilities Task Force (UTF), which included Mayor Tom Holden and Councilmember Dean Maulhardt. UTF records indicate that Republic Services offered to renegotiate its contract to operate the MRF before its expiration.

In February 2009, the city issued a Request for Qualifications, inviting interested companies to submit their qualifications to operate the MRF. The selection committee concluded that 7 of the 17 applicants were sufficiently qualified to proceed in the bidding process. In July 2009, the seven companies were asked to respond to a series of questions about their expertise and how they would operate the MRF. Documents obtained from the city reveal that the selection committee gave Waste Management and BLT Enterprises identical highest scores and gave Athens Services the third highest scores. Waste Management and BLT Enterprises were subsequently invited to submit detailed proposals for the operation of the MRF. Both companies eventually submitted detailed proposals. Thereafter the companies were interviewed about their proposals in March 2010. Following the interviews, a detailed report by the consultant hired to assist with the selection process gave a slight edge to BLT Enterprises. The UTF ultimately directed city staff to negotiate with BLT Enterprises for a new contract to operate the MRF. In late March 2010, City Manager Sotelo notified BLT Enterprises that they had been selected to begin negotiations. Negotiations were ongoing when this investigation began. To date, no contract has been agreed upon or presented to the city council.

As with the prior transactions, suspicions of city leaders' relationships with Bernard Huberman ran high among some city officials and employees. Again, however, no evidence of criminal activity was identified by any witness and none was found during the investigation.

## **Sports Park at Oxnard Boulevard and Gonzales Road**

The last real estate transaction that was identified to investigators as suspicious involved the sports park property at Oxnard Boulevard and Gonzales Road. The city purchased the sports park property in April 2007 from Aldersgate Investments, operated by local developer Ernest Mansi. The city paid approximately \$13 million, comprised of \$10.8 million cash plus another property valued at approximately \$2.2 million. Some city officials reported that Aldersgate bought the property the same day it sold it to the city, paying only \$4 million to the prior owner and seemingly making an apparent \$9 million profit overnight. Councilmember Flynn was publicly critical of the transaction. Witnesses told investigators that they were suspicious of the profit made by Aldersgate, believing that the city improperly valued the property, perhaps intentionally, and therefore paid too much for it.

District attorney investigators obtained documents about the sale from various sources, interviewed many of the people involved in the transaction, and examined videotapes of the relevant council meetings. The investigation revealed no criminal activity in the transaction and found that the city's valuation of the property was broadly consistent with established legal principles. Whether the transaction was advisable or served the taxpayer interests is a matter of local governmental discretion and no opinion is expressed in that regard.

## **History of the Property**

The sports park property is a vacant lot of approximately 21 acres, located at the corner of Oxnard Boulevard and Gonzales Road, next to what is now Pacifica High School. Until the city purchased it, the property was owned by a local family trust. In the early 1990's, the City of Oxnard changed the zoning on the property to Community Reserve (C-R), meaning that the property was to remain open space. It was designated in the city's specific plan as a sports park. Over the years, the residents in the area vocally opposed several attempts to develop the property for residential use and were able to defeat the projects because any development on the property would require city council's approval of a zoning change.

In 2000, a developer agreed to buy the property from the family trust if it could secure the zoning change necessary to develop the property. The developer proposed a 306-unit apartment complex and 12-acre sports park for the site, but did not pursue the project in light of vigorous community opposition. In the summer of 2002, the city tried to buy the property. The city obtained an appraisal valuing the property at just over \$1 million, based upon agricultural land values. The city council authorized staff to move forward with attempts to purchase the property, noting that the city may have to proceed via condemnation. The city offered to

purchase the land for approximately \$1 million. A court-appointed representative of the family trust rejected the city's offer as significantly below other offers the trust already received.

In 2004, another developer agreed to buy the property from the family trust, again contingent upon a zoning change entitling development. The developer proposed a 282-unit condominium complex with a somewhat larger sports park. Again, significant community opposition doomed the project and the developer subsequently abandoned the effort.

#### **The Centex Homes Development Effort**

On October 1, 2004, national developer Centex Homes entered into an option to buy the property from the family trust for \$4 million. A year later, Centex Homes entered into a contract with Aldersgate Investments providing that Aldersgate would seek a zoning change from the city. If the zoning change was approved, Aldersgate would be paid a flat fee by Centex Homes, plus a percentage of the subsequent home sales profits. If the zoning change was denied, Aldersgate would not be paid.

In 2006, Centex proposed building over 100 homes, with an eight-acre sports park. The project was approved by the city's planning commission and slated for a city council vote in July 2006. Again, the project drew significant public opposition. Mayor Tom Holden and Councilmember Andres Herrera publicly supported the plan, noting that the community would get a complete sports park at no cost. However, because there was not enough councilmember support for the development plan, it was sent back to the planning commission for further modification.

#### **Aldersgate Investments Takes Over from Centex Homes**

Centex Homes pulled out of the project later in 2006. Ernest Mansi of Aldersgate continued with efforts to develop the property, because he would not have been paid for the work he had already done if the project was abandoned. Aldersgate bought Centex Homes' option to purchase the sports park property, agreeing to pay Centex Homes nearly \$1 million if the project was approved. Aldersgate modified the development proposal, reducing the number of homes to 89. Again, the planning commission approved the project and a city council vote was scheduled for February 27, 2007.

Significant public opposition continued, with opponents speaking at nearly every city council meeting between March 2006 and February 2007. Mayor Holden and Councilmember Herrera again publicly supported the project. Councilmembers Tim

Flynn and John Zaragoza opposed the project. Councilmember Dean Maulhardt would be the swing vote.

### **The Proposal to Sell the Property**

A day before the city council vote, Mansi called Mayor Holden to see if the city was interested in buying the property outright. Mayor Holden referred Mansi to Sotelo to see if they could come to terms and if the city had sufficient available funds to buy the property. At the February 27, 2007, council meeting, the broad terms of the deal were outlined, indicating that the city was considering buying the property with a combination of Quimby Funds and another property.<sup>75</sup> Many residents expressed relief and gratitude at the prospect of the city buying the property rather than developing it. Some residents suggested that the city should outright refuse the development project, keep the current zoning, and buy the property at a lower cost.

At the next city council meeting, on March 20, 2007, the city council voted unanimously to buy the property for \$13 million, or approximately \$618,000 per acre. The purchase price was to be paid with \$10.8 million cash (comprised of Quimby Funds, park development funds, and general reserve funds) plus a piece of property known as the Colonial House property, valued at \$2.2 million.<sup>76</sup> Several members of the public and each of the councilmembers spoke in favor of the purchase.<sup>77</sup> Some members of the public suggested that the city was paying too much for the property, noting that they were paying close to residential prices for land that was not zoned residential. One citizen noted that as residential land, the property would be worth \$1 million per acre. However, since it was not zoned residential, it was worth much less.

Mayor Holden commented that the price was fair, comparing the property to non-residential property the city bought two years earlier for \$500,000 per acre. He also stated that if the city paid residential land prices, it would pay upwards of \$2 million per acre. Holden added that if the city had proceeded under condemnation, it would be a years-long process and the courts always favor the property owners. Holden also noted that the council must value the vocal community desire for a park.

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<sup>75</sup> Under the Quimby Act of 1965 (Government Code section 66477), local governments may require the payment of fees to be used for park or recreational purposes as a condition to the approval of new residential development. These fees are known as "Quimby Fees" or "Quimby Funds." Cities frequently accumulate the funds earmarked for park development before using them to acquire park land or build parks and park facilities.

<sup>76</sup>The Colonial House property is a 2.1 acre parcel that the city purchased in 2005 for \$2 million, which was formerly the site of a local landmark restaurant.

<sup>77</sup> For the complete content of the discussions, please refer to the archived video of the March 20, 2007, city council meeting available on the City of Oxnard Web site, at [www.ci.oxnard.ca.us](http://www.ci.oxnard.ca.us).

Councilmember Zaragoza stated that \$600,000 per acre was reasonable compared to \$2 million per acre for residential property. Zaragoza noted that he worked in real estate and that values are all relative. He described the deal as a win/win for everyone.

Councilmember Herrera told the public that he was not in favor of the purchase before he met with community leaders. Herrera said that he wanted to be sure the community knew they were giving up a plan that would give them a fully operational park in exchange for control of the property and nothing more. Herrera noted that the deal would use all of the available Quimby Funds, with nothing left to develop the park. Herrera said that the community leaders convinced him they still wanted the city to buy the property, even though the park would not be built for years. Herrera also said that the price was appropriate and commented that it is very difficult to put a price tag on quality of life issues.

Councilmember Flynn told the public that the transaction was a victory for every man, woman and child in the city of Oxnard. He noted that getting to the deal was difficult and thanked a number of people, including local community leaders and his colleagues on council. Flynn said when this option was presented by Mr. Mansi, it showed he was an innovative businessman. Flynn said that the whole council embraced this project, as did staff. He also described the deal as a win/win for everyone.

The purchase was approved by a 4-0 vote, with Councilmember Maulhardt absent.

### **The Conclusion of the Transaction**

The transaction closed escrow on April 12, 2007, with a simultaneous close of a double escrow, meaning that on the same day, Mansi bought and sold the property. Mansi bought the property from the family trust for \$4 million, using a portion of the cash from the city's \$10.8 million. One minute after that escrow closed, the sports park property was transferred to the city. Records reveal that of the \$10.8 million cash, Mansi paid \$4 million to the family trust, approximately \$850,000 to Centex Homes, a broker's commission of approximately \$425,000, and various other closing costs. Aldersgate left the transaction with approximately \$5.5 million cash, plus the Colonial House property valued at \$2.2 million, offset by its significant expenditures and operating costs to create and revise development plans, obtain legal analyses, and obtain environmental studies during the nearly 18-month entitlement process.

### **Subsequent Public Discussions**

The next year, Councilmember Flynn put the sports park transaction on the city council agenda for discussion on October 14, 2008. Once again, the transaction was fully discussed before the public. At the time, Flynn was running against Holden for mayor and the election was a few weeks away. Flynn told the public that he had learned that Aldersgate made a gross profit of \$8.6 million while flipping the property. Flynn described Mansi as a middleman and stated he was concerned about the lack of a process that could have ensured taxpayers made the best deal. Flynn proposed that the city not use a middleman in the future unless they had first approached the landowner directly. He acknowledged that the effort to purchase the sports park was altruistic and noble, but said that it was not a good deal for the city.

The other councilmembers defended the transaction, explaining the thought process that went into it.<sup>78</sup> Councilmember Maulhardt said that although he thought Aldersgate's proposed development was a better option than the purchase, he believed the purchase was a good deal. Maulhardt noted that at the time, the city had just sold another property to a developer for \$2 million per acre, compared to the \$600,000 per acre they paid for the sports park. Maulhardt also noted that Colonial House was valued at \$1 million per acre. Significantly, Maulhardt explained that the family trust wanted the "highest and best use"<sup>79</sup> value for its property and that he had seen pure agricultural land get residential value as the highest and best use when it was condemned.

Mayor Holden stated that the city had looked at comparable property values ranging from \$750,000 an acre to \$2 million per acre. Councilmember Herrera noted that the community supported taking the opportunity to buy the land, so they did. He said that they did it quickly and effectively because quality of life was important to that community. He also noted that the city had sold acreage to other developers for \$1.7 million per acre. Councilmember Zaragoza said that he had fought for the sports park for 10 to 12 years and that he thought the price was an appropriate amount. He said that an agricultural land price was out of the question and that no one would have sold to them at an agricultural price.

Later in the meeting, Councilmember Flynn said that council had a very lively debate about the value of the land and that no one really knew whether it was commercial or C-R. However, Flynn explained that the mere talk of development made the property more valuable and if the owner heard the city would not allow

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<sup>78</sup> For the complete content of the discussions, please refer to the archived video of the October 14, 2008, city council meeting available on the City of Oxnard Web site, at [www.ci.oxnard.ca.us](http://www.ci.oxnard.ca.us).

<sup>79</sup> The legal concept of "highest and best use" value of a property is discussed in detail later in this section.

development, the value would have been lower. Flynn said that because the city was open to development, it raised the land's value.

### **Highest and Best Use**

Under state and federal law, when a city obtains property by condemning it, the city must pay the owner the "highest and best use" value of the property. Highest and best use analysis is not limited to current zoning. Rather, California law mandates that if it is reasonably probable that a property would be re-zoned in the near future, the city must pay the higher re-zoned value.<sup>80</sup> Thus, if it was reasonably likely the sports park property would be re-zoned residential, the city was obligated to pay residential value for the land. The policy behind this concept of highest and best use is to protect landowners from local governments that intentionally refuse development efforts so they can purchase property at a lower cost. Such efforts by local government are unfair to landowners and the United States Constitution protects them against such practices.

In this case, the Aldersgate development proposal had a favorable planning commission recommendation. Two councilmembers publicly supported the project and a third declared later that he thought the development project was superior to the purchase plan. The project was set for a final city council vote and, before the sale was proposed, likely had sufficient council support for approval. Thus, under California law, if the city had tried to condemn the property, it would likely have had to pay the full residential value of the land. Thus, valuing the sports park property according to residential land values was consistent with established legal principles.

District attorney investigators obtained documents showing the comparable sales the city used to value the property, ranging from \$737,000 per acre to \$1.68 million per acre, for property permitting residential development. The city paid approximately \$618,000 per acre. Moreover, Ernest Mansi provided investigators with a written offer he received from another developer in early February 2007. The offer would have earned Aldersgate approximately \$7.7 million for the property, plus a 75 percent share of the profits from home sales. Based on prevailing costs of home building and the market at the time, Aldersgate stood to earn more from the development project than it earned from the sale to the city.

### **Conclusion Regarding Sports Park**

The sports park transaction, though profitable for Aldersgate Investments, appears to have been an arms-length transaction using property values consistent with

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<sup>80</sup> *Metropolitan Water Dist. of Southern California v. Campus Crusade for Christ* (2007) 41 Cal.4th 954.

established legal principles. No witness identified any criminal activity and none was discovered during the investigation.

## **SECTION NINE - DEFICIENT CITY POLICIES AND PRACTICES**

The District Attorney's investigation revealed several city policies and practices that do not comply with state law, though violations of the regulations are not necessarily criminal. These noncompliant policies and practices provided ineffective oversight and resulted in fiscal abuses at the highest levels. Because the city's own practices and inadequate recordkeeping system did not properly track spending by city officials, potential criminal violations related to the officials' expenditures cannot be proven or disproven.

This section identifies key city policies and practices that are inconsistent with state law or that lack proper fiscal oversight and transparency. These practices have resulted in excessive and hidden costs to taxpayers and expose the city to potential misappropriation of city funds. The policies and practices are identified so that city officials and the public can determine what corrective measures should be taken to reduce the city's exposure to fiscal waste and abuse. In several instances, city officials have already taken steps to modify these policies and practices.

### **Delegation of Responsibility to Set Benefits**

In 2003, City Manager Sotelo implemented a Supplemental Post-Retirement Benefit (SPRB) for himself and city employees designated as Top Management.<sup>81</sup> This benefit pays qualifying employees \$300 per month in addition to their various other retirement benefits.

Government Code section 36506 requires that "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees." Courts interpreting this law have held that a city council cannot delegate the responsibility for determining compensation levels. The city's practice of permitting the city manager to set employee benefits is therefore inconsistent with state law. The requirement that the city council set compensation levels by resolution or ordinance provides a level of oversight and transparency that protects against an employee giving himself an undisclosed increase in salary or benefits. Without city council consideration and approval, the public has virtually no way of knowing when employees receive an increase in benefits.

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<sup>81</sup> See Sections Five and Seven for a detailed analysis of the SPRB.

This impermissible practice can easily be remedied by presenting employee salary and benefit levels to city council for approval by resolution or ordinance. While the city manager may recommend the appropriate salary and benefits levels to city council, state law requires the council to make the final decision. Acting City Manager Karen Burnham recently told investigators that the city is now aware that the council, not the city manager, has sole authority for setting salary and benefits. The City of Oxnard is also examining the SPRB and the city's ability to cancel or modify the benefit.

### **Personal Use of City Credit Cards**

City of Oxnard policy and California law prohibit the intentional use of city credit cards for personal purchases.<sup>82</sup> However, city practice regularly permitted officials to make personal purchases on city credit cards while traveling. Under the city's recordkeeping practices, the personal purchases were rarely itemized and, in those circumstances where there was reimbursement, the amounts were unverifiable.

When city officials are permitted to make personal purchases on credit cards, the risk to taxpayers is genuine. This impermissible practice can be remedied by implementing a more rigorous oversight and recordkeeping process, and consistently requiring every official and employee to itemize and personally verify all expenses on city credit cards. Acting City Manager Burnham recently told investigators that the city conducted a review of its credit card practices within the past year, reducing the number of employees who hold city credit cards and modifying the spending limits available to each cardholder. Burnham was unsure whether the city formally modified its credit card auditing procedures or recordkeeping practices, but noted a significant shift in the city's attention to fiscal oversight issues, particularly as to the required documentation for city-expensed meals.

### **Reimbursement of Expenses**

As discussed previously, a City of Oxnard resolution and state law limit the amount city councilmembers can be reimbursed for meal expenses to IRS rates. State law also requires that a city councilmember must seek *prior* approval at a city council

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<sup>82</sup> Penal Code section 424; Government Code section 8314.

meeting to exceed IRS reimbursement rates.<sup>83</sup> The city's published policy and actual practice ignored these limitations.

According to Acting City Manager Burnham, steps have been taken to address these issues. As of February 1, 2011, the city implemented a fixed per diem rate for all employees and elected officials, using federal per diem rates.<sup>84</sup> The revised policy no longer permits officials to exceed the per diem rate. The revised policy specifies that if a meal is paid for with a city credit card, the employee will be responsible for costs in excess of the per diem rate. While the revised travel reimbursement policy is an improvement, it may yet conflict with state law because the provisions appear to still permit officials to use a city credit card for personal expenses, including charges for a spouse's expenses, as long as the employee reimburses the city.

Burnham told investigators that the city has modified its practices with respect to reimbursements to elected officials. According to Burnham, the city's chief financial officer held meetings with each member of city council to discuss the limitations and obligations imposed on elected officials by the Government Code. The city developed new travel expense forms specifically for city council to ensure compliance with Government Code requirements.

### **Failure to Report City-Expensed Travel by Elected Council**

When a member of city council travels at city expense, he or she is required to provide a report about the travel at the next city council meeting. This report is mandated by Government Code section 53232.3 and city resolution.<sup>85</sup> The clear policy behind this law is transparency in the expenditure of public funds. The investigation revealed that in the City of Oxnard, the travel reports by city councilmembers were inconsistent. Compliance with state law and increased transparency could be achieved by adding a recurring council agenda item concerning city-expensed travel.

### **Failure to Use Competitive Bidding**

Several witnesses and officials told investigators that Oxnard used the same investment banking company as its bond underwriter for years even though the

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<sup>83</sup> Government Code section 53232.2.

<sup>84</sup> A copy of revised City of Oxnard Administrative Manual Policy B-2 can be found in [Attachment J](#).

<sup>85</sup> Failure to comply with reporting requirements is subject to potential loss of reimbursement privileges and restitution to the local agency under Government Code section 53232.4.

industry is highly competitive. The investigation revealed that the bond underwriter provided several city officials with gifts of expensive meals and event tickets that the officials then failed to declare accurately, as required by law. No one suggested that the bond underwriter has done a poor job for the city or that the company has charged an unfair price for its services. However, by repeatedly using the same company without seeking competitive bidding, city officials missed an opportunity to ensure the best services at a competitive price. Foregoing competitive bidding also exposed the city to potential abuses by its officials.

Within the past year, the city changed its practice concerning its bond underwriting needs. The city recently used a competitive process to establish a pool of qualified bond underwriters and has begun to diversify its use of bond underwriters. While using a regular competitive bidding process will not necessarily result in cost savings, it will nonetheless help protect the city and the taxpayers.

### **Adherence to City Ethics Policy**

Oxnard's published policy concerning personal ethics appropriately appeals to the highest ideals of public service and mandates that the public interest take precedence over personal considerations. During the course of this investigation, it became apparent that some officials have fallen short of these standards.

The first paragraph of City Policy E-26, Standards of Ethics, provides:

The proper operation of democratic government requires that City of Oxnard ("City") officials and employees be independent, impartial, and responsible to the people; that government decisions and policy be made within the proper channels of the governmental structure; that City office not be used for personal gain; and that the public have confidence in the integrity of its City government. City officials and employees must never compromise their honesty or integrity for personal gain or advancement and must remain sensitive to the values of the public they serve.

In a later section, the policy states:

The policy of the City is that City officials and employees shall observe the highest standards of ethics.... City officials and employees shall conduct themselves so as not to give a reasonable basis for the impression that any such official or employee can be improperly influenced in the performance of his or her City duties.... They shall

avoid even the appearance of conflict between their City duties and their personal interests.

A later section prohibits receipt of any gifts valued at more than \$50 from someone doing business with the city, stating:

City officials and employees shall not accept at any time or over any period of time any gift having a value of more than \$50.00 from any person or business entity which, to the knowledge of the City official or employee, does business or is interested in doing business with the City.... City officials and employees shall not accept any gift at all from any such person or business entity when to do so would create an appearance of impropriety or favoritism in the official's or employee's discharge of his or her official duties.

These standards were adopted by city resolution in 1997. Requiring adherence to these standards at all levels of city government would eliminate the nondisclosure of gift violations that contributed to the cloud of suspicion over the City of Oxnard government.

The suggestions are offered to ensure compliance with state law, improve transparency, and reduce the risk of fiscal abuses. It is ultimately the responsibility of the city's officials and residents to determine whether and how to improve the city's practices and policies. Fortunately, many of the suggestions have already been adopted by the city.

## CONCLUSION

Upon learning of serious allegations of criminal activity by City of Oxnard officials, in June 2010, the District Attorney's Office began a public integrity investigation to determine the truth of the allegations. The investigation focused on allegations of misappropriation of public funds, failure to disclose receipt of gifts as required by law, and conflicts of interest. The investigation generated significant public interest and media attention. The intent of this report is to inform the public and local government of the nature and results of the investigation.

During the course of this investigation, the District Attorney's Office received a number of allegations of misconduct. The most egregious allegations of criminality have proven untrue. Several multi-million dollar transactions were examined and no evidence of criminality was found. However, the investigation uncovered significant instances of waste and abuse by several city officials. The evidence established that these officials enjoyed expensive meals while traveling at taxpayer expense and at times used city-issued credit cards to pay for personal expenses. The city's generous travel expense policy and incomplete recordkeeping practices leave insufficient evidence to prove criminal violations.

The evidence further established that a grand opening celebration at a city water facility was funded with a combination of private and city funds. In addition, items featured at the grand opening celebration were purchased with city funds diverted through an artificially inflated city contract pertaining to another facility. Inaccurate contracting and recordkeeping practices used in the City of Oxnard Public Works Department leave insufficient evidence to prove allegations of criminal misappropriation involving the use of city funds on the celebration.

The investigation determined that City Manager Ed Sotelo took an improper \$10,000 personal loan of city funds in 1998 and implemented an improper retirement benefit for himself and other city management employees in 2003. Although the personal loan was not properly authorized by city council, the statute of limitations has expired, barring prosecution as to the loan. The retirement benefit Sotelo created was improper because only the city council had the legal authority to establish the benefit. However, the city council informally permitted Sotelo to set employee benefits, though it did so in conflict with state law. As a result, there is insufficient evidence to prove criminal misappropriation with respect to the retirement benefit and the statute of limitations has expired as to the benefit, again barring prosecution.

The investigation established that over a period of years, several Oxnard officials received gifts of expensive meals, rounds of golf, and a small number of event tickets. The officials did not publicly disclose the gifts as required by law. The failure to disclose the gifts does not rise to the level of perjury and has been referred to the Fair Political Practices Commission for enforcement.

The evidence does not support the allegation that the officials had financial interests in the contracts they approved. Several multi-million dollar transactions were examined in detail and no criminal activity was discovered.

Several of the city's policies and practices enabled officials to overspend on themselves or others. The lack of effective constraints, transparency, and oversight allowed certain of the city's officials to spend city funds virtually at will. The very same policies and practices that permitted the conduct also prevented accountability, harming the taxpayers.

City officials have the ability and authority to correct these deficient policies and practices to ensure such fiscal abuses do not reoccur. Several corrective efforts have already begun.

**ATTACHMENT A – Travel Authorization Request Form**

**ATTACHMENT B – City of Oxnard Administrative Manual:  
Guidelines for the Use of Purchasing Credit Card**

**ATTACHMENT C – City of Oxnard Administrative Manual:  
Authorization and Reimbursement for Travel and Related  
Expenses**

**ATTACHMENT D – Promissory Notes**

**ATTACHMENT E – City of Oxnard Administrative Manual:  
Standards of Ethics**

**ATTACHMENT F – City of Oxnard Administrative Manual:  
Supplemental Post-Retirement Benefit**

**ATTACHMENT G – GREAT Program Desalter Ceremony Cost  
Breakdown: Provided by Public Works Director Ken Ortega**

**ATTACHMENT H – City of Oxnard Staff Recommendation to  
City Council and Contract Amendment**

**ATTACHMENT I – Gift Summary Table**

**ATTACHMENT J – City of Oxnard Administrative Manual:  
2011 Authorization and Reimbursement for Travel and  
Related Expenses (2011)**