

**REPORT WITH REVIEW AND RECOMMENDATION  
OF BEST PRACTICES  
FOR THE CITY OF SANTA MONICA**

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## **I. EXECUTIVE SUMMARY**

On December 15, 2015, the Santa Monica City Council (“Council”) authorized an independent review of recent events in the City of Santa Monica (“Santa Monica”). The events to be reviewed were: (1) the 2014 revocation of an employment offer made to Elizabeth Riel for the Communications and Affairs Officer Position; and (2) recent complaints that alleged violations of the City of Santa Monica Taxpayer Protection Amendment of 2000 (“the Oaks Initiative”). I, John C. Hueston, was chosen by the Council to be the city’s outside advisor, along with members of my firm, Hueston Hennigan LLP. During the course of our review, we have interviewed 21 city and third-party individuals and reviewed relevant documents. I submit this report, which details my findings and recommendations for best practices.

### **A. THE REVOCATION OF ELIZABETH RIEL’S OFFER**

#### **1. Background.**

In December 2013, Deputy City Manager for Special Projects Kate Vernez informed City Manager Rodney Gould that she intended to retire in 2014. Ms. Vernez’s responsibilities included communications and public affairs for Santa Monica and intergovernmental communications. Mr. Gould offered the Deputy City Manager position to Debbie Lee, who worked for Downtown Santa Monica, Inc. at the time. Ms. Lee declined the offer for personal reasons.

Mr. Gould then decided to create a new position, the Communications and Public Affairs Officer (the “Communications Position”), which would take on Ms. Vernez’s Santa Monica communications and public affairs responsibilities. Danielle Noble, who was serving as Assistant to the City Manager at the time, was promoted to Deputy City Manager and ultimately allocated responsibility for intergovernmental matters.

Mr. Gould instructed Director of Human Resources Donna Peter to begin a recruiting process to solicit applications for the Communications Position. The Department of Human Resources (“Human Resources”) and members of the City Manager’s Office developed and posted a job listing for the Communications Position. The job listing did not mention political neutrality in the criteria for the Communications Position.

Over 200 people applied for the Communications Position. Assistant City Manager Elaine Polachek and Ms. Noble assembled an interview panel to evaluate the top tier candidates. Five individuals served on the interview panel, including three city employees, an employee of the City of Beverly Hills, and Debbie Lee. The interview panel posed pre-approved questions that had been developed by Santa Monica’s Human Resources Department and reviewed by the City Manager’s Office.

After meeting with the top tier candidates, the interview panel recommended Elizabeth Riel as their top choice for the Communications Position. In a debriefing meeting, the panelists told Mr. Gould and others that Ms. Riel had the best communication skills and the most relevant work experience of all of the interviewees. Some panelists remarked how Ms. Riel’s experience in Santa Monica and her knowledge of Santa Monica politics would be a boon in the Communications Position. One panelist thought that Ms. Riel’s most important distinguishing characteristic was her willingness and level of comfort working within the political atmosphere

that exists in City Hall. That same panelist told Mr. Gould that, among all of the candidates who had been considered, Ms. Riel was by far and away the most comfortable in the political arena.

After interviewing Ms. Riel himself and having other members of the City Manager's Office interview Ms. Riel, Mr. Gould offered her the Communications Position. Ms. Riel accepted the offer. Mr. Gould then informed the City Council of Ms. Riel's hiring, and re-communicated her hiring to each councilmember individually. He also issued a press release announcing her hiring.

Several weeks later, then Mayor Pamela O'Connor sent Mr. Gould at least nine e-mails over a three-day period concerning Ms. Riel's hiring. She informed Mr. Gould that Ms. Riel had previously participated in political activism in Santa Monica, and that Ms. Riel had advocated "slow-growth" policies. In connection with her activism, Ms. O'Connor said that Ms. Riel had even funded a political mailer sent by the Santa Monica Coalition for a Livable City ("SMCLC") during the 2006 election that had attacked Ms. O'Connor. Ms. O'Connor said that she would be "extremely hesitant to work with Elizabeth Riel" and wished instead for "someone else [to be] assigned [for]...Mayoral things" or for Mr. Gould to "[j]ust give [Ms. O'Connor] the technical materials [she] need[s] when [she] need[s] them and [she'll] do it [herself]."

Mr. Gould initially responded by asking Ms. O'Connor to "give [Ms. Riel] a chance to prove herself." Undeterred, Ms. O'Connor repeated that she "do[es] not and will not trust [Ms. Riel]." Ms. O'Connor said that she felt like she was "being attacked from both outside City Hall and from within City Hall." She then informed Mr. Gould that "[she] will be sharing this with others in the community and will be asking people for their opinion about [Ms. Riel] being in this position" and that "this is likely to become a news story in at least one local outlet next week." After digesting Ms. O'Connor's passionate feedback, Mr. Gould replied to Ms. O'Connor that he "may have to reverse course and rescind [Ms. Riel's] offer." He wrote that "[City Attorney] Marsha [Moutrie] and [Mr. Gould] have been discussing this option and [Ms. Moutrie] can help." Mr. Gould also stated in this e-mail that "[Ms. Riel's] hire is problematic given the way [Ms. Riel] and others may perceive it." Ms. Moutrie conducted research and concluded that, if Ms. Riel's offer was rescinded, Santa Monica would have a reasonable defense in a lawsuit.

Soon thereafter, Mr. Gould called Ms. Riel and confronted her about not disclosing her political activism, particularly her activities directed at City Council members. Mr. Gould recalled Ms. Riel offering three rationalizations for her silence on the issue, but Mr. Gould did not find any of them persuasive.

After his call with Ms. Riel, Mr. Gould told Ms. O'Connor that he planned to revoke Ms. Riel's job offer because "she is perceived as aligned politically, which makes doing her job untenable" and "she failed to disclose her prior activism...[which] goes to trust and judgment." Mr. Gould then asked Ms. Polachek and Ms. Vernez to develop a public explanation for his decision to revoke Ms. Riel's offer. During their back-and-forth on the matter, Ms. Polachek wrote that they "can't refer to political involvement or a perceived lack of neutrality."

Four days after Ms. O'Connor's initial e-mail to Mr. Gould, Mr. Gould informed Ms. Riel that he was revoking her offer for the Communications Position. The next day, Mr. Gould and

Ms. Polachek contacted and offered the Communications Position to Debbie Lee. Ms. Lee accepted the position. No interview process was conducted for Ms. Lee's hiring.

During this time, multiple councilmembers contacted Mr. Gould via e-mail to request an explanation for the revocation of Ms. Riel's offer. Mr. Gould declined to discuss the issue in detail, claiming that he could not do so because he did not want to "violate [Ms. Riel's] privacy rights by airing it" and he needed to protect the "privacy and confidentiality of the hiring process." Mr. Gould did not disclose the extent of his communications with Ms. O'Connor in any of his e-mail responses to councilmembers or in any subsequent conversations with them.

On June 5, 2014, Mr. Gould issued a press release describing his decision to revoke Ms. Riel's employment offer. The press release focused on the importance of certain positions in city government to be apolitical. He thereby strongly implied that he revoked Ms. Riel's offer because she was—at least in the past—a partisan in Santa Monica politics. Mr. Gould also wrote that he had consulted with "the City Attorney" throughout the process. Ms. Moutrie claims that while Mr. Gould did consult with her, he did not always follow her advice.

Ms. Riel sued Santa Monica and Mr. Gould for violating her First Amendment rights. After more than a year of litigation, Ms. Riel settled with Santa Monica for \$710,000.

## **2. Recommendations for Best Practices.**

In our opinion, there were several lapses in judgment in connection with the events described above, and those lapses had cascading consequences. Through our review of these facts, we offer the following findings and recommendations for best practices:

- **Councilmembers should be expressly mindful of restrictions in the City Charter—specifically Article VI of the Santa Monica City Charter, Section 610—when communicating with the City Manager and should be cognizant of whether their comments on hiring could be perceived as a direct or indirect request to hire or fire a city employee.** This recommendation is based on the finding during our review that Ms. O'Connor was not mindful of Section 610 during her conversations with Mr. Gould regarding Ms. Riel. Section 610 clearly prohibits city councilmembers from "order[ing] or request[ing] directly or indirectly the appointment of any person to an office or employment or the removal of any person."
- **The City Manager should instruct all city officials and employees to keep communications related to business issues on city systems and inform them of the requirements to do so in Administration Instruction II-4-10 dated May 7, 2007.** This recommendation is based on the finding during our review that some city employees use personal e-mail accounts to conduct city business. That practice violates Administration Instruction II-4-10 dated May 7, 2007, defining inappropriate use to include "[use of third party electronic mail system(s) for a City business purpose without prior authorization by the Chief Information Officer."
- **With room for limited exceptions, the City Manager should adopt a standard hiring process that publicly seeks applications for open at-will city positions and**

**employs an interview process to review top tier candidates. In exceptional circumstances where that process is not employed, the City Manager should be transparent about the reasons for bypassing the standard hiring process.** This recommendation is based on the finding during our review that failure to solicit applications from the public for open positions or failure to use an interview panel to select the best candidate has created doubt in Santa Monica about the merits and qualifications of city employees and about the fairness of the process used to recruit them. Additionally, being selected by an interview panel provides employees with more confidence that they were the best choice for the position.

- **To the extent possible, the City Manager should disclose equal information to all councilmembers.** This recommendation is based on the finding during our review that Mr. Gould provided detailed explanations to Ms. O'Connor about his decision to revoke Ms. Riel's offer, but he did not provide similar information to other councilmembers.
- **Human Resources should proactively determine which at-will city positions require a form of "political neutrality" and then include it as a desired criterion in job listings for those positions.** This recommendation is based on the finding that a City Manager could properly conclude that a form of political neutrality is a desirable characteristic for certain at-will positions. Unfortunately, that prerequisite was not communicated to applicants who wished to be considered for the Communications Position in 2014.

These facts, findings, and recommendations for best practices are discussed in greater detail in Section IV of this report.

## **B. THE OAKS INITIATIVE**

In November 2000, Santa Monica adopted the City of Santa Monica Taxpayer Protection Amendment of 2000 (the "Oaks Initiative") through a proposition vote. The Oaks Initiative prohibits public officials from receiving personal or campaign benefits from persons or entities after the official awards such persons or entities with a public benefit. Penalties for violating the Oaks Initiative include a criminal misdemeanor violation, and monetary and injunctive civil relief.

Public officials campaigned against the Oaks Initiative during the proposition vote, and were displeased with it after enactment. Officials, including City Attorney Moutrie, expressed concern with the constitutionality and enforceability of the Oaks Initiative. In fact, in June 2001, Santa Monica filed an action for declaratory relief and a petition for a writ of mandate against its City Clerk for non-enforcement of the Oaks Initiative. The complaint sought a judicial declaration regarding the constitutionality and legality of the Oaks Initiative. The state trial court dismissed the case as a non-justiciable controversy and the appellate court affirmed.

Since then, Santa Monica residents have filed two Oaks Initiative complaints with Ms. Moutrie's office, one against Ms. O'Connor for improperly accepting contributions and another against Mr. Gould for improperly accepting employment from a city contractor after he retired as Santa Monica's City Manager. Ms. Moutrie opted not to prosecute either alleged violation, citing

conflict of interest concerns because she had previously provided counsel to both Mr. Gould and Ms. O'Connor. The District Attorney and State Attorney General both declined to prosecute as well. Ms. Moutrie believed that she did not have a viable option to prosecute either complaint and so she declined to take action. Members of the community sued Mr. Gould in state court and reached a settlement to resolve the lawsuit. As part of the settlement, Mr. Gould resigning his position with the city contractor and agreeing to abide by Oaks Initiative restrictions. Ms. Moutrie does not currently have a clear policy on how to investigate or prosecute Oaks Initiative violations.

Based on our review of the provisions and history of the Oaks Initiative in Santa Monica and other California jurisdictions, our review of the structure of the City Attorney's Office in Santa Monica, and our review of federal anti-corruption rules, we make the following findings and recommendations:

- **The Oaks Initiative serves important anti-corruption interests in Santa Monica. To the extent that there are enforceability issues, interpretation issues, or legal infirmities with the Oaks Initiative, the law should be clarified or amended by the City Council and City Attorney's Office.** This recommendation is based on the finding during our review that the Oaks Initiative contains important prohibitions against corruptive actions and allows Santa Monica to penalize such actions without relying on the District Attorney or the State Attorney General.
- **The City Attorney's Office should appoint an attorney in the Criminal Division to be responsible for prosecuting Oaks Initiative violations. Alternatively, the City Attorney should hire a special prosecutor to assess and prosecute each Oaks Initiative complaint.** This recommendation is based on the finding during our review that the Chief Deputy of the Criminal Division, Terry White, and others under his supervision do not have the same conflict of interest concerns as Ms. Moutrie. This is because the Criminal Division is already largely shielded from Ms. Moutrie's influence for other policy reasons. If Ms. Moutrie still believes, however, that her hiring and firing power over Mr. White and his subordinates still taints the Criminal Division with her conflict of interest concerns, hiring a special prosecutor to assess and prosecute each Oaks Initiative violation would eliminate those concerns.
- **The City Attorney should approve clear guidelines for the implementation of the Oaks Initiative and the City Council should pass those guidelines by resolution.** This recommendation is based on the finding during our review that city officials are largely unaware of their obligations under the Oaks Initiative and have well-founded confusion about its enforcement by the City Attorney's Office. We have submitted draft guidelines for consideration by the City Council.
- **The City Clerk should provide the list of projects subject to Oaks Initiative strictures in a more accessible format and without extraneous information.** This recommendation is based on the finding during our review that the current format of the report of relevant projects makes compliance with the Oaks Initiative excessively burdensome for councilmembers.

- **The Oaks Initiative should be amended to solve reasonable concerns about the law’s apparent legal infirmities and to strengthen anti-corruption restrictions.** This recommendation is based on the finding during our review that there are provisions of the Oaks Initiative that may be susceptible to legal and constitutional challenge. Those provisions should be amended in a way that retains their anti-corruptive goals while reducing doubts as to their enforceability. Our recommended amendments are attached as Exhibit B.

These facts, findings, and recommendations for best practices are discussed more in detail in Section V of this report.

## **II. OVERVIEW OF REVIEW PROCEDURES**

### **A. SCOPE OF REVIEW**

At the November 10, 2015, Council meeting, the Council selected John C. Hueston, of Hueston Hennigan LLP, to conduct an independent review of certain recent events in Santa Monica and write an independent report regarding best practices for Santa Monica. This selection was based on a September 29, 2015, Special Council Meeting where the Council agreed to hire an outside advisor who would have the authority to interview staff, elected officials, appointed officials, and third parties in order to develop an independent report to be presented at a public meeting. On December 8, 2015, John Hueston submitted a scope of review (“Scope of Review”) for the Council’s consideration. At a Special Council Meeting on December 15, 2015, the Council authorized City Manager, Rick Cole, to negotiate and execute a Professional Services Agreement with Hueston Hennigan LLP in accordance with the proposed Scope of Review.

The Scope of Review stated that a review of issues including the Elizabeth Riel termination and the Oaks Initiative were necessary to determine the adequacy of existing governance protocols and the necessity for amendments and/or adoption of new practices. With respect to the Riel termination, the Scope of Review defined the review to include:

- (1) Whether public official(s) improperly influenced the Riel termination;
- (2) Whether the City Manager had an affirmative duty to warn or take steps to preclude potential use of political influence;
- (3) Whether fair process was employed in the termination process; and
- (4) Whether the City Attorney appropriately reported on the status of the Riel litigation and appropriately handled related referrals.

With respect to the Oaks Initiative, the Scope of Review defined the assessment to include:

- (1) Alleged legal infirmities;
- (2) Processing of reports of violations; and
- (3) Issues related to enforcement including declared conflict concerns by the City Attorney.

**B. WITNESSES INTERVIEWED**

In connection with our review, we interviewed the following individuals (some of them more than once), either in person or by telephone:

<b>Name</b>	<b>Current Title (in Santa Monica)</b>
Andy Agle	<b>Director of Housing and Economic Development</b>
Rick Cole	<b>City Manager</b>
Gleam Davis	<b>Councilmember</b>
Cheryl Friedling	<b>Deputy City Manager in Beverly Hills</b>
Rodney Gould	<b>Former City Manager</b>
Sue Himmelrich	<b>Councilmember</b>
Robert Holbrook	<b>Former Councilmember</b>
Joseph Lawrence	<b>Assistant City Attorney</b>
Debbie Lee	<b>Communications and Public Affairs Officer</b>
Kevin McKeown	<b>Councilmember</b>
Marsha Moutrie	<b>City Attorney</b>
Danielle Noble	<b>Deputy City Manager</b>
Pamela O'Connor	<b>Councilmember</b>
Terry O'Day	<b>Councilmember</b>
Donna Peter	<b>Director, Human Resources</b>
Elaine Polachek	<b>Assistant City Manager</b>
Sandra Santiago	<b>Office Manager, City Manager's Office</b>
Tony Vazquez	<b>Mayor &amp; Councilmember</b>
Kate Vernez	<b>Former Deputy City Manager</b>
Terry White	<b>Chief Deputy City Attorney, Criminal Division</b>
Ted Winterer	<b>Mayor Pro Tempore &amp; Councilmember</b>

Each witness participated in the interview process on a voluntary basis. Witnesses were free to decline to answer any question.<sup>1</sup> We did not provide witnesses with proposed questions

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<sup>1</sup> Very rarely did a witness decline to answer a question. And none of these instances involved issues that would materially affect our findings or recommendations for best practices in this report.

prior to interview. Those witnesses who requested interview topics received only general information contained in the Scope of Review submitted to the Council.

### **C. WITNESSES DECLINING REQUEST FOR INTERVIEW**

Two witnesses declined our request for an interview on the same terms offered to all other witnesses. These witnesses were:

- Elizabeth Riel

Elizabeth Riel was hired by Santa Monica for the Communications Position in May 2014. City Manager Rodney Gould revoked her offer later that month. We sought to interview Ms. Riel through her attorney, Steven J. Kaplan of the Law Offices of Steven J. Kaplan. Ms. Riel declined to participate in an uncompensated one-hour telephone call with us. She required: (1) full indemnification for the use of counsel in advance of and during the interview; (2) payment of consulting fees for all of the time she would spend on interview-related matters; and (3) reimbursement for travel and other interview-related expenses. Because we already had access to her 326-page deposition transcript addressing all aspects of her offer and subsequent revocation, we declined to pay the fees requested by her attorney in order to obtain likely cumulative information. Critical to our decision was the fact that the purpose of this review is not to investigate Ms. Riel's termination. Rather, it is to make findings for the purpose of recommending best practices for governance of Santa Monica.<sup>2</sup>

- Matthew Mornick

Matthew Mornick formerly worked in the City Manager's Office in the role of Assistant to the City Manager. Mr. Mornick served on the interview panel that selected Elizabeth Riel and was a recipient of an e-mail regarding the revocation of Riel's offer. Mr. Mornick declined an interview. All other members of the interview panel elected to submit to an interview.

### **D. MATERIALS REVIEWED**

In addition to witness interviews, we collected and reviewed a broad range of materials during the course of our investigation, including the following:

- Depositions from the Riel Case. We examined the following deposition transcripts from the *Riel v. Santa Monica* matter: Elizabeth Riel, Kevin McKeown, Pamela O'Connor, and Rodney Gould.
- Exhibits to Depositions. We examined exhibits from the Riel matter depositions.
- Pleadings and Decisions in the Riel Matter. We reviewed the pleadings and all other relevant filings made in the *Riel v. Santa Monica* case to get a full picture of

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<sup>2</sup> In addition to Ms. Riel's deposition, we reviewed the pleadings filed by Ms. Riel in the *Riel v. Santa Monica* litigation, Ms. Riel's e-mails from the days after her termination produced in the litigation, and public statements Ms. Riel and her attorney made about her termination.

the allegations made by Ms. Riel and the defenses offered by Santa Monica and Rodney Gould.

- Oaks Initiative Complaints. We reviewed the Oaks Initiative complaints filed against Pamela O’Connor and Rodney Gould by City resident organizations. We also reviewed the responses to those complaints from the City Attorney’s Office and others.
- Relevant Documents from Other Jurisdictions. We reviewed municipal codes, amendments, and other documents from various California jurisdictions, including those that have passed ordinances similar to the Oaks Initiative.
- Other Materials. We reviewed pertinent news articles and commentary relating to the Riel case and Oaks Initiative issues, as well as documents sent to us by interviewees after our conversations with them and by members of the Santa Monica community.

### **III. BACKGROUND**

The main Santa Monica city government institutions relevant to this review are the Santa Monica City Council, the City Manager’s Office, and the City Attorney’s Office. Santa Monica has a council-manager system of local government. In this system, all the legislative power in Santa Monica is concentrated in the elected Council—the Council sets the community’s goals, projects, and budget. The Council hires the City Manager, the City Attorney, and the City Clerk, and retains the ability to fire them at any time.

#### **A. THE CITY COUNCIL**

The Council is comprised of seven members who serve four-year terms. Elections are staggered and scheduled every two years. Councilmembers nominate and then vote for a Mayor and Mayor pro tempore without any formal citizen input; a Mayor will serve between one to two years depending on the vote of the Council. The Mayor presides at Council meetings, serves as a spokesperson for the town, and is the main city representative in intergovernmental relations. The Mayor pro tempore acts as a substitute mayor, fulfilling the Mayor’s responsibilities at events and official sessions. Both the Mayor and Mayor pro tempore meet with the City Manager before Council meetings to discuss procedural matters related to the agenda for the meeting.

#### **B. THE CITY MANAGER’S OFFICE**

The City Manager serves both the Council and the community. With respect to the community, the City Manager implements Santa Monica’s policies and responds to concerns from citizens. With respect to the Council, the City Manager prepares a budget for the Council’s consideration and serves as the Council’s chief advisor, including providing research and advice on policy proposals. The City Manager recruits, hires, and supervises city staff that help provide services in Santa Monica. Specifically, the City Manager hires staff for his office and many others, including the police chief, fire chief, public works director, and city librarian. Importantly, the City Manager is empowered to hire most of these employees on an at-will basis.

### **C. THE CITY ATTORNEY'S OFFICE**

City Attorney Marsha Moutrie interacts daily with the City Manager's Office and periodically with the Council. Both the City Manager and councilmembers consult with the City Attorney for counsel on legal issues. The City Attorney's priorities in order are: (1) Council; (2) City Manager; and (3) Department Heads.

The City Attorney's Office is comprised of three main divisions: (1) Criminal Law; (2) Municipal Law; and (3) Civil Liability. Ms. Moutrie works closely with the latter two divisions and has substantive oversight over cases in those divisions.

The Criminal Division is separate from the Municipal Law and Civil Liability Divisions. The separation permits the City Attorney's Office to make decisions regarding criminal investigations and cases independent of the civil interests of Santa Monica. Although Ms. Moutrie technically provides oversight over the Criminal Division, in practice she has practically no involvement in the Criminal Division's cases. Ms. Moutrie and Assistant City Attorney Joe Lawrence recalled only one case in the last 20 years where Ms. Moutrie was involved substantively in a criminal case, and that single case uniquely raised a First Amendment question.

### **D. INTERVIEW PANELS**

Although not required to do so,<sup>3</sup> the City Manager often uses an interview panel to hire at-will employees in Santa Monica. Typically, members of the City Manager's Office and Human Resources select the members of the interview panel. An interview panel reviews candidates and approves some of them for subsequent interviews. The interview panel is not involved in identifying candidates; the panel reviews only those candidates initially selected by Human Resources. Interview panelists receive information about the position, class specification, and a copy of the recruiting brochure prior to the interview. The day of the interview, panelists review proposed interview questions and receive briefing regarding the qualifications of the desired candidate.

Immediately before each interview, the panelists will again review the candidate's resume and additional application material. In order to ensure fair and consistent candidate interviews, panelists are instructed to refrain from departing from the scripted questions other than to ask

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<sup>3</sup> The City Manager is not required to use an interview panel to hire at-will employees. Under Section 704 of the Santa Monica City Charter, the City Manager has the power to "[a]ppoint and remove, subject to the Civil Service provisions of this Charter, all department heads of the City except as otherwise provided by this Charter, and pass upon and approve all proposed appointments and removals of subordinate employees by department heads." Section 1102 defines positions not subject to Civil Service, including the "City Manager and the entire staff of the immediate office." While Human Resources provides consistent procedures for the selection of Civil Service positions—including the use of an interview panel—there are no similar procedures in place for the hiring of Section 1102 employees. Human Resources informed us that this is because the City Manager has the discretion under Section 704 to use any hiring procedure he wishes for those employees, as opposed to the hiring of Civil Service positions that are subject to strict regulations contained in the City Charter and Municipal Code.

follow-up questions. After the interview, the panelists score each candidate numerically. The scores are based only on the candidates' application materials and interviews.

#### **IV. THE REVOCATION OF ELIZABETH RIEL'S OFFER**

In May 2014, then City Manager Rodney Gould hired Elizabeth Riel for the Communications Position in the City Manager's Office. Mr. Gould revoked his offer to Ms. Riel later that month, citing various reasons for his decision. This section of the report analyzes questioned events regarding the revocation of the offer to Ms. Riel in order to suggest forward-looking best practices for Santa Monica.

##### **A. SUMMARY OF FACTS REGARDING THE REVOCATION OF THE OFFER TO MS. RIEL**

###### **1. Ms. Vernez's Decision to Retire and Subsequent Job Offer to Ms. Lee.**

In December 2013, Kate Vernez—Deputy City Manager for Special Projects—informed City Manager Rodney Gould that she intended to retire in 2014. Mr. Gould and Assistant City Manager Elaine Polachek asked Ms. Vernez for recommendations of potential replacements. Ms. Vernez recommended two individuals with whom she had worked with closely on various projects and whom she believed would be excellent replacements: Ms. Debbie Lee, who worked for Downtown Santa Monica, Inc., and Lisa Pinto, who served as District Director for Congressman Henry A. Waxman. Because Mr. Gould and Ms. Polachek were more familiar with the work of Ms. Lee, they decided to contact Ms. Lee to probe her interest in the position.

Sometime later in December, Mr. Gould had coffee with Ms. Lee for about an hour. Mr. Gould and Ms. Lee discussed her background, her views of communications responsibilities for city government in Santa Monica, and duties and responsibilities of the Deputy City Manager position left vacant by Ms. Vernez's retirement. Ms. Lee believes that she was offered the position of Deputy City Manager at this meeting. Ms. Lee declined the offer because she was the primary caregiver for a family member suffering from a severe medical issue and was therefore unable at that time to assume new employment.

###### **2. Mr. Gould Subsequently Employs an Interview Panel to Determine a Replacement for Ms. Vernez.**

Ms. Vernez's responsibilities by January 2014 included both a communications element and an intergovernmental element. Mr. Gould desired to restructure the new position to emphasize communications. Accordingly, Mr. Gould created a new position: the Communications Position. Concurrently, Mr. Gould transferred the intergovernmental responsibilities of Ms. Vernez's former role to a new Deputy City Manager position. In January 2014, Mr. Gould promoted then Assistant to the City Manager Danielle Noble to the newly created Deputy City Manager position.

Mr. Gould and Ms. Polachek contacted Human Resources—including Director of Human Resources Donna Peter—to begin a process through which the city would solicit applications for the new Communications Position. Prior to publicly releasing the job listing, Ms. Polachek again asked Ms. Lee if she was interested in the position. Ms. Lee again said that she was unable at that time to assume the responsibilities of the position and would not submit an application. Mr. Gould

said that they did not offer the position to Ms. Vernez's other recommended replacement—Ms. Pinto—because neither Mr. Gould nor Ms. Polachek had worked in a close enough capacity with Ms. Pinto to conclude if she would be a good fit in the role. They instead encouraged Ms. Pinto to submit an application through the Human Resources recruitment process, which she did.

Human Resources worked with members of the City Manager's Office—including Ms. Polachek, Ms. Noble, and Ms. Vernez—to develop a job listing for the position that listed a summary of the job, including minimum qualifications of the position. The City Manager's Office conducted a final review of the job listing before publication.

### **3. The Interview Panel and Members of the City Manager's Office Unanimously Selected Elizabeth Riel.**

Over 200 applications were submitted in response to the job listing posted for the Communications Position. Human Resources took the lead on sifting through these applications and created a list of the top candidates. The City Manager's Office examined the applications for the top candidates and further narrowed the list.

Ms. Polachek and Ms. Noble assembled an interview panel to assess the candidates. Their stated desire was to create a panel which included a mix of individuals who could best identify the candidates with the right experience for the role, and individuals who could capably assess whether the candidates would be a "good fit" in the City Manager's Office. The members who served on the interview panel and the stated reason for their selection is provided below:

- Debbie Lee of Downtown Santa Monica, Inc.—Ms. Lee worked closely with Ms. Vernez in her role and therefore might readily identify the best applicants;
- Cheryl Friedling, Deputy City Manager in Beverly Hills—Ms. Friedling served in a role very similar to the posted position;
- Andy Agle, Director, Housing and Economic Development Administration in Santa Monica—Mr. Agle had a lengthy work history with Santa Monica, had worked closely with Ms. Vernez, and would continue to work closely with whoever was chosen to replace her;
- Sandra Santiago, Office Manager in the City Manager's Office—Ms. Santiago had worked in the City Manager's Office for many years; she believed she served on the interview panel to help determine which applicants would be a proper fit for the Office; and
- Matthew Mornick, Assistant to the City Manager—Mr. Mornick worked with Ms. Vernez in the City Manager's Office and could therefore assess a candidate's fit for the position.

The interview panel interviewed approximately eight to ten candidates. Human Resources provided the interview panel with uniform questions to ask each of the applicants to keep interviews fair and equal. Members of the City Manager's Office also helped develop these

questions. Interviewers were allowed to ask follow-up questions to interviewees' answers. In addition, interviewers were given applicants' resumes and cover letters to review immediately before the interviews—interviewers could also ask questions based on these application materials.

The interview panel submitted an unofficial ranking to Ms. Polachek and Ms. Noble regarding the top three candidates they interviewed, with the number-one ranked candidate being Elizabeth Riel and number two being Lisa Pinto. The interview panel also debriefed Mr. Gould, Ms. Polachek, Ms. Noble, and certain Human Resources employees, to discuss their rankings and the candidates generally.

Members of the interview panel had different recollections of why they chose Ms. Riel as the best candidate. One said that Ms. Riel was far and away the best candidate for the position because, based on the job description, Ms. Riel was the most qualified based on her vast communications experience. Others on the panel remarked that she had an impressive background with initiative, determination and an interest in local community issues.

One panelist who requested to remain anonymous specifically recalled that the panel asked each candidate about their comfort level with politics. This individual was disappointed in many of the candidates because they largely expressed being uncomfortable with politics—in fact, at least two of the candidates adamantly said “no” to being involved with politics and vowed they would remain disconnected from politics in the role. This was a deciding factor for this panelist because s/he believed that the Communications Position would require a high level of comfort in working in an environment with elected officials where constituent matters are involved. Elections occur frequently and, in this panelist's opinion, staff therefore needed to be comfortable working in a highly charged political environment. The panelist believed that Ms. Riel was the only candidate who expressed confidently that she was comfortable working in a political environment. She mentioned that she had been involved with city politics in the past, worked for a city commissioner, and was active and interested in Santa Monica politics, though the panelist does not recall that Ms. Riel had been involved in campaigns for council members. This answer showed this panelist that Ms. Riel understood the nature of the position. This panel member specifically recalled mentioning to members of the City Manager's Office and Human Resources in a debrief following the interview panel that Ms. Riel was comfortable in the political arena.

Mr. Gould himself conducted a follow-up interview with Ms. Riel. He recalls the conversation with Ms. Riel being very smooth, and comparatively better than interviews with the other two final candidates. He arranged for Ms. Riel to meet with Ms. Vernez, Ms. Polachek, Ms. Noble, and the cable news staff that she may have worked with. All the members of his office attended a social gathering with Ms. Riel to assess her fit.

Mr. Gould offered Ms. Riel the position on May 2, 2014. Ms. Riel informed Mr. Gould that she needed time to consider his offer. Mr. Gould was surprised and disappointed. Others in the office were also surprised that she did not immediately accept the offer. Ms. Polachek sent Mr. Gould an e-mail suggesting that they could contact their initial choice, Ms. Lee, if the offer to Ms. Riel was not successful.

Ms. Riel and Mr. Gould met for coffee, during which Ms. Riel requested a higher starting salary. Mr. Gould agreed and Ms. Riel accepted his offer. The City Manager's Office issued a

press release announcing Ms. Riel’s hiring. Mr. Gould e-mailed the Council with news of Ms. Riel’s hiring and separately told councilmembers about Ms. Riel’s hiring during his regularly scheduled monthly meetings.

When Mr. Gould informed Councilmember Kevin McKeown about Riel’s hiring, Mr. McKeown claims that he disclosed to Mr. Gould that (1) Ms. Riel had been a supporter of his political campaigns in the past, (2) Ms. Riel’s picture was currently on his campaign website, and (3) Ms. Riel had actively worked on his campaign. Mr. McKeown recalled that Mr. Gould said that these disclosures were not a problem. Mr. Gould, in contrast, claims that Mr. McKeown told him only that he knew who Ms. Riel was and that Mr. McKeown had a picture of her on his website. Mr. Gould does not recall Mr. McKeown disclosing that Ms. Riel had worked on his campaign. Mr. Gould was not surprised that Ms. Riel would appear on Mr. McKeown’s website because Mr. McKeown used community organizations—one of which Ms. Riel led in the past—as his base of political support. Just being on Mr. McKeown’s website, therefore, was not a red flag to Mr. Gould that he felt necessitated him to investigate the matter further.

#### **4. Ms. O’Connor’s E-mail Communications with Mr. Gould.**

Between May 22, 2014, and May 24, 2014, then Mayor and current Councilmember Pamela O’Connor e-mailed Mr. Gould about Elizabeth Riel at least nine times:

May 22, 2014, 8:36 p.m.:

“I will be extremely hesitant to work with Elizabeth Riel especially during the campaign season. If I need support on Mayoral things I want someone else assigned. In past elections SMCLC has attacked me....”<sup>4</sup>

May 22, 2014, 9:01 p.m.:

“Rod, You hired someone who has political ties with some Councilmembers (she and Ted were active in the RIFT campaign--likely Kevin also). And someone who has a no growth background--one does not sign SMCLC letters unknowingly! She may be a pleasant

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<sup>4</sup> **Exhibit 3**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 22, 2014, 8:36 P.M. PST) (including a link to <http://www.smgov.net/departments/council/agendas/2008/20080624/s2008062408-D-3.pdf>). Ms. O’Connor included in this e-mail a link to a letter posted on Santa Monica’s website from Elizabeth Riel —among others including the Santa Monica Coalition for a Livable City (“SMCLC”)—who was listed on the letter as “Past President” of NOMA, the North of Montana Association. The letter requested that Maria Stewart, City Clerk, change the ballot description of RIFT, also known as Proposition T, a ballot initiative that sought to amend commercial development rules for the purpose of addressing traffic congestion. Ms. O’Connor opposed Proposition T and had been on the opposite side of Santa Monica development debates from SMCLC in the past. She therefore felt uncomfortable about working with Ms. Riel and sought to have someone else assigned to work she relied on from the City Manager’s Office. Mr. Gould forwarded Ms. O’Connor’s e-mail to Ms. Polachek, writing “Oh boy.” E-mail from Rodney Gould, City Manager, Santa Monica, to Elaine Polachek, Assistant City Manager, Santa Monica (May 22, 2014, 8:40 PST). Ms. Polachek said that Mr. Gould forwarded this e-mail to her because Mr. Gould would routinely seek her advice on such issues.

person--but you have put a no-growth activist in upper management at City Hall. Just give me the technical materials I need when I need them and I'll do it myself. Thanks!"<sup>5</sup>

May 22, 2014, 9:41 p.m.:

"I don't think your background checking folks did much of a job. Riel even contributed money to attacks on me. See below. 'The mailer urges voters to 'tell Pam O'Connor and developers that Santa Monica is NOT for sale,' and concludes, 'It's our city. Let's take it back.' 'Among those bankrolling the coalition's mailer were SMCLC head Diana Gordon, Pier Restoration Corporation Chair Ellen Brennan, Elizabeth Riel and Victor Fresco, according to a campaign finance report filled with the City Clerk last week.'..."<sup>6</sup>

May 23, 2014, 2:36 p.m.:

"Rod, I do not and will not trust her. I will not work with her not because she is a supporter of others but she attacked me directly by putting money onto a hit piece. There are very very few direct hit pieces done in Santa Monica and she was a leader in this effort. Then she is a supporter of Kevin. What confidence do I have that she is not going to elevate him and his position and be dismissive of me--as we go into a political season! This is a best practice of City a [sic] Managers!!! Hire people who are political enemies of people elected to your Council? I will be sharing this with others in the community and will be asking people for their opinion about her being in this position."<sup>7</sup>

May 23, 2014, 2:50 p.m.:

"I am still running even though I am being attacked from both outside City Hall and from within City Hall. And I am curious about Best Practices of City Management and if this is one of them. Always a learning experience!"<sup>8</sup>

May 23, 2014, 4:57 p.m.:

"I'm sure Kevin hasn't lost faith! And this is likely to become a news story in at least one local outlet next week. She is a public figure due to her political activity (not just political affiliation)."<sup>9</sup>

May 24, 2014, 2:58 a.m.:

"Just saw this. Just landed in Barcelona--think time difference is 9 hrs. Obviously email is working. We should be able to figure out a time. I would add that she had ample time

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<sup>5</sup> **Exhibit 3**—E-mail from Pamela O'Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 22, 2014, 9:01 P.M. PST).

<sup>6</sup> **Exhibit 4**—E-mail from Pamela O'Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 22, 2014, 9:41 P.M. PST) (including a link to [http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2006/October-2006/10\\_30\\_06\\_O'Connor\\_Targeted\\_by\\_Coalition.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2006/October-2006/10_30_06_O'Connor_Targeted_by_Coalition.htm))

<sup>7</sup> **Exhibit 5**—E-mail from Pamela O'Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 2:36 P.M. PST).

<sup>8</sup> **Exhibit 6**—E-mail from Pamela O'Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 2:50 P.M. PST).

<sup>9</sup> **Exhibit 7**—E-mail from Pamela O'Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 4:57 P.M. PST).

to have 1) apologized and 2) written a letter to the editor saying ‘in the past I may have been part of negative...but now think...can have strongly held positions on issues...but not demonize individuals...’ And as someone pointed out to me, as a communications expert she might have had a role in writing the hot [sic] piece on me. But now to put this aside and find hotel, and explore Barcelona. There is life beyond Santa Monica.”<sup>10</sup>

May 24, 2014, 4:40 a.m.:

“Just to give you a flavor of the Measure T debate in 2008. She signed the SMCLC letter (at least one) supporting Measure T. And this is still at the core of the land use debates of today—with many of the same folks involved....”<sup>11</sup>

May 24, 2014, 5:21 p.m.:

“And she was involved at a level of putting money into one side, being a public face for one side, and active at a level that got attention from the press....”<sup>12</sup>

Multiple interviewees cautioned that context is important in order to understand Ms. O’Connor’s reaction to Ms. Riel’s hiring. They said that the role Ms. Vernez had assumed for Ms. O’Connor was akin to acting as “the Mayor’s aide.” Ms. Vernez helped Ms. O’Connor in many ways, including writing Ms. O’Connor’s speeches, doing mock interviews with her, and working with her on commissions in Santa Monica. In fact, at Ms. Vernez’s going away event, Ms. O’Connor said: “City Managers come and go” but Ms. Vernez was special. Ms. O’Connor was losing one of the closest people to her in city government and that person was being replaced by someone who had previously been, in Ms. O’Connor’s opinion, diametrically opposed to Ms. O’Connor’s political positions.

Mr. Gould and Ms. Polachek claimed that they were unaware of the extent of Ms. Riel’s past political involvement and so this information from Ms. O’Connor provided them with new information relevant to Mr. Gould’s decision to hire Ms. Riel.

Mr. Gould admitted in our interview with him, however, that some of Ms. O’Connor’s statements in the e-mails could be perceived as threats, including: (1) “I will be sharing this with others in the community and will be asking people for their opinion about her being in this position”; and (2) “And this is likely to become a news story in at least one local outlet next week.” Mr. Gould agreed that it was inappropriate for Ms. O’Connor to attempt to use pressure points on him to influence his decision-making. Mr. Gould said that in the five years that he served as City Manager, he never experienced anything like this—the incident was wholly unlike the general behavior of the Council or any individual on the Council.

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<sup>10</sup> **Exhibit 8**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 24, 2014, 2:58 A.M. PST).

<sup>11</sup> **Exhibit 9**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 24, 2014, 4:40 A.M. PST) (including seven links to newspaper articles from 2008).

<sup>12</sup> **Exhibit 9**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 24, 2014, 5:21 P.M. PST) (including a link (<https://icma.org/Documents/Document/Document/100265>) to ICMA Guidelines and referencing Section 7).

Nonetheless, Mr. Gould stated that he was unconcerned and unintimidated by Ms. O'Connor's threats. He was unconcerned about Ms. Riel's past activity becoming public because Ms. Riel was already known as a political activist to the approximately 300 people who were very involved in Santa Monica politics. He stated that he was unintimidated by Ms. O'Connor's threats because there was so much political debate and speech in Santa Monica that one in his position eventually becomes numb to such speech.

Ms. O'Connor told us that she made these statements to Mr. Gould because she wanted to be "completely transparent" with him. When Ms. O'Connor said that she was going to "share[] this with others in the community," she said she was referring to "letting folks know that Gould had hired someone from SMCLC." She said that she doesn't "typically run to the press" but will let them know of things that she feels they would be interested in. From Ms. O'Connor's perspective, "SMCLC was working for the City Manager" and so she found this to be an interesting story. She talked to "Jorge of Outlook," before leaving for her trip.<sup>13</sup> She thought he would like the story and she said that she believed in "transparency."

##### 5. Mr. Gould's Responses to Ms. O'Connor's E-mails.

In his initial responses to Ms. O'Connor, Mr. Gould asked Ms. O'Connor to "give [Ms. Riel] a chance and wrote that "[he] must allow her to begin work":

"...I don't know that Elizabeth is a member of this group and have heard her speak very respectfully of you and the issues for which you stand. She is a communications expert and will help the City with its messaging. I would call upon her to help with notes and slides for you as needed and would hope you would give her a chance to prove herself. Let's discuss when you have a moment."<sup>14</sup>

"Our background checks focus on previous performance, criminal and financial issues. Elizabeth has grown very tired of all the complaining around town and thinks SM is a superb city. She wants to put the development issues in better light. I am surprised by her earlier association and will discuss it with her. I ask that you keep an open mind and give her a chance."<sup>15</sup>

"...Having made the job offer and it having been accepted, I am in a bit of pickle. I have a call into her and will address this head on with her. If she cannot serve all members of the City Council equally and without favor or if she cannot represent the policies of this City Council with professionalism, then I will rescind the job offer. If she insists that she can discharge the full duties of the position, then I must allow her to begin work. I will consult Marsha to be sure of my understanding here, but the civil service system was

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<sup>13</sup> It appears that Ms. O'Connor was referring to Jorge Casuso, Publisher for the *Santa Monica Lookout* Newspaper. About, surfsantamonica.com (2014), [http://www.santamonicalookout.com/ssm\\_site/2014--Contact\\_Us.html](http://www.santamonicalookout.com/ssm_site/2014--Contact_Us.html).

<sup>14</sup> **Exhibit 3**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O'Connor, Mayor, Santa Monica (May 22, 2014, 8:46 P.M. PST).

<sup>15</sup> **Exhibit 4**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O'Connor, Mayor, Santa Monica (May 23, 2014, 6:37 A.M. PST).

developed principally to protect candidates for municipal jobs and city employees from political influence. The Council can fire the City Manager at any time and for any reason. The employees under him/her have many protections as you know....”<sup>16</sup>

E-mails between Mr. Gould and Ms. Polachek also reflect this initial belief that Ms. Riel should be given a chance. Mr. Gould wrote that he “will speak with [Ms. Riel] today to be sure she can work with all members of the City Council and represent the City’s views professionally” but noted that he was “not at all sure [Ms. O’Connor] will give [Ms. Riel] a chance to prove herself.”<sup>17</sup> Ms. Polachek, noting first that it was a “trust issue for [Ms. O’Connor],”<sup>18</sup> wrote that “[Ms. Riel] will have to try to establish trust with [Ms. O’Connor].”<sup>19</sup> Ms. Polachek also stated however that “when [Ms. O’Connor] sets her mind on someone, she tends to be immovable.”<sup>20</sup> Mr. Gould replied, “Yes. That’s where we are.”<sup>21</sup>

By the evening of May 23, 2014, however, Mr. Gould wrote in a reply to Ms. O’Connor’s May 23, 2014, 4:57 p.m. e-mail that he “may have to reverse course and rescind [Ms. Riel’s] offer.”<sup>22</sup> The 4:57 p.m. e-mail contained the threat of a news story on Ms. Riel’s past political activity. He wrote that “[City Attorney] Marsha [Moutrie] and [Mr. Gould] have been discussing this option and [Ms. Moutrie] can help.”<sup>23</sup> Mr. Gould also stated that “[Ms. Riel’s] hire is problematic given the way [Ms. O’Connor] and others may perceive it.”<sup>24</sup>

Mr. Gould recalls that he contacted Ms. Moutrie for advice during this time and that she advised him that he had a legal right to rescind the offer. He recalls Ms. Moutrie specifically stating that the decision did not trample Ms. Riel’s First Amendment rights. According to Mr. Gould, Ms. Moutrie believed it was appropriate to rescind the offer and that waiting would only make things worse.

Ms. Moutrie similarly recalls Mr. Gould approaching her for advice during this time. She remembers Mr. Gould asking her, “Am I stuck with [Ms. Riel]?” Ms. Moutrie conducted legal

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<sup>16</sup> **Exhibit 6**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O’Connor, Mayor, Santa Monica (May 23, 2014, 3:38 P.M. PST).

<sup>17</sup> **Exhibit 10**—E-mail from Rodney Gould, City Manager, Santa Monica, to Elaine Polachek, Assistant City Manager, Santa Monica (May 23, 2014, 7:30 A.M. PST).

<sup>18</sup> **Exhibit 10**—E-mail from Elaine Polachek, Assistant City Manager, Santa Monica to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 7:21 A.M. PST).

<sup>19</sup> **Exhibit 10**—E-mail from Elaine Polachek, Assistant City Manager, Santa Monica to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 7:37 A.M. PST).

<sup>20</sup> *Id.*

<sup>21</sup> **Exhibit 10**—E-mail from Rodney Gould, City Manager, Santa Monica, to Elaine Polachek, Assistant City Manager, Santa Monica (May 23, 2014, 7:42 A.M. PST).

<sup>22</sup> **Exhibit 8**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O’Connor, Mayor, Santa Monica (May 23, 2014, 5:40 P.M. PST).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

research to try to find a case similar to this situation—where someone had accepted an offer but had not yet commenced employment—but was not successful in her search. Ms. Moutrie recalls telling Mr. Gould that Santa Monica would have a defense if Mr. Gould revoked Ms. Riel’s offer and Ms. Riel sued Santa Monica.<sup>25</sup> Ms. Moutrie also told Mr. Gould that Ms. Riel should have informed him of this past involvement. Ms. Moutrie recollects that Mr. Gould began repeating this reasoning because, she believes, it gave Mr. Gould a pathway to absolve himself of any mistakes in the process. Her personal belief is that Ms. Riel was “arguably honest” in her resume and application for the position.

## **6. Mr. Gould Speaks with Ms. Riel.**

Mr. Gould e-mailed Ms. Riel on the morning of May 23rd, asking to speak about a “small, gnarly issue.”<sup>26</sup> Based on e-mail communications, it appears that Mr. Gould and Ms. Riel spoke at some point between 5:40 p.m. PST and 8:28 p.m. PST.

Mr. Gould stated that after he confronted her with the information gathered by Ms. O’Connor, Ms. Riel responded, “It’s true but I did not hide it from you.” Mr. Gould interpreted Ms. Riel as acknowledging that something might be wrong. Mr. Gould recalled that she then provided three rationalizations for not providing the information: (1) that her husband wrote the largest checks; (2) that it happened a long time ago; and (3) that it should not matter. Mr. Gould did not find any of these three reasons persuasive.<sup>27</sup>

Ms. Riel claimed that Mr. Gould called her in an “angry and accusatory tone.” From her perspective, he “berated” her and told her that they had “a very serious situation.” He complained that Ms. Riel “contributed to a hit piece” against Ms. O’Connor and that she wrote “anti-development” articles. He asked why she did not bring this up during the interview process. Ms. Riel said that she did not have anything to hide and that her application disclosed that she was the president of NOMA and a writer for the Santa Monica Daily Press. She stated that she was a “professional” and would be “happy to meet and talk with anyone.” According to Ms. Riel, Mr. Gould said that she was very “sophisticated” and it troubled him that she either forgot about her past political activity or deliberately concealed it from him. She said that he ended the conversation by stating that he was going to “think about it” and she should too. Ms. Riel did not recall mentioning during this call that her husband wrote the largest checks to SMCLC.

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<sup>25</sup> Ms. Moutrie speculated that the city had three grounds to stand on: (1) the policymaker defense (Ms. Riel would be in a policy position and therefore could be terminated on the will of the City Manager); (2) Ms. Riel had not started her employment yet; and (3) there was a failure to disclose by Ms. Riel during the interview process.

<sup>26</sup> E-mail from Rodney Gould, City Manager, Santa Monica, to Elizabeth Riel (May 23, 2014, 1:22 P.M. PST).

<sup>27</sup> The first response did not convince Mr. Gould. As to the second, Mr. Gould said that the people Ms. Riel supported were still on the City Council. Timing was irrelevant to Mr. Gould because according to Mr. Gould, “four to six years is not a very long time in Santa Monica.” Finally, with respect to the rationalization that it did not matter, Mr. Gould stated that this determination was his to make, not Ms. Riel’s.

**7. Mr. Gould Continues to Respond to Ms. O'Connor and Seeks Advice on How to Explain Ms. Riel's Termination.**

Subsequent to his conversation with Ms. Riel, Mr. Gould sent multiple e-mails to Ms. O'Connor expressing that he would resolve the issue by rescinding Ms. Riel's job offer:

"Am moving toward a decision to retract the job offer based on a conversation with [Riel] that was less than helpful."<sup>28</sup>

"...I am moving to solve this before your return...."<sup>29</sup>

"Pam, You are correct that she backed some Councilmembers and actively opposed others and publicly supported one side of the development debate. She says that was 6-8 years ago, but the players and debate are the same. So, she is perceived as aligned politically, which makes doing her job untenable. Further, she failed to disclose her prior activism. That goes to trust and judgement. Her explanations were not persuasive. So I must withdraw the job offer. I will consult with Marsha to make certain that I do it in a way that does not create liability for the City...."<sup>30</sup>

Mr. Gould e-mailed Ms. Polachek and Ms. Vernez on May 25 to seek advice on "what to say about this turn of events."<sup>31</sup> He suggested that he could not just say "It's a personal matter" or that "Upon further consideration, it has been determined that the job fit is not optimal."<sup>32</sup> Ms. Polachek wrote that they "can't refer to political involvement or a perceived lack of neutrality" and so they should instead say that they needed to find a candidate closer to the "background, experience, and attributes" of Ms. Vernez.<sup>33</sup> Mr. Gould responded, "Better!"<sup>34</sup> Ms. Vernez suggested that they come to an agreement with Ms. Riel to say that they mutually parted ways, but

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<sup>28</sup> **Exhibit 5**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O'Connor, Mayor, Santa Monica (May 23, 2014, 8:28 P.M. PST).

<sup>29</sup> **Exhibit 9**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O'Connor, Mayor, Santa Monica (May 24, 2014, 12:39 P.M. PST).

<sup>30</sup> **Exhibit 9**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O'Connor, Mayor, Santa Monica (May 24, 2014, 7:07 P.M. PST).

<sup>31</sup> **Exhibit 9**—E-mail from Rodney Gould, City Manager, Santa Monica, to Elaine Polachek, Assistant City Manager, Santa Monica & Kate Vernez, Deputy City Manager for Special Projects, Santa Monica (May 25, 2014, 9:07 A.M. PST).

<sup>32</sup> *Id.*

<sup>33</sup> **Exhibit 9**—E-mail from Elaine Polachek, Assistant City Manager, Santa Monica, to Rodney Gould, City Manager, Santa Monica & Kate Vernez, Deputy City Manager for Special Projects, Santa Monica (May 25, 2014, 9:10 A.M. PST).

<sup>34</sup> **Exhibit 9**—E-mail from Rodney Gould, City Manager, Santa Monica, to Elaine Polachek, Assistant City Manager, Santa Monica & Kate Vernez, Deputy City Manager for Special Projects, Santa Monica (May 25, 2014, 11:08 A.M. PST).

Ms. Vernez also expressed that she was alternatively supportive of the wider skill set explanation.<sup>35</sup>

Mr. Gould stated that he and his team were trying to determine an acceptable way to publicly announce the termination. Even though Mr. Gould was revoking the offer based on a combination of a lack of trust and a lack of neutrality, he stated that he and his team wanted to minimize any harm to Ms. Riel publicly or personally. They also did not want to commit libel.

#### **8. Mr. Gould Informs Ms. Riel of Her Termination and Hires Ms. Lee.**

On Monday, May 26, 2014, Mr. Gould called Ms. Riel and left her a voicemail requesting that she return his call when she had time. Ms. Riel called back promptly. Mr. Gould told her that he thought more about the situation and did not see a way forward for her hiring. Although her political activities took place six to eight years ago, he recalls explaining that the same city councilmembers were involved in Santa Monica politics, the same interest group was involved in Santa Monica politics, and the same general matters were at issue in Santa Monica politics. Mr. Gould claimed that Ms. Riel was viewed as aligned with some city councilmembers and not others, which would compromise the City Manager's Office's need to remain neutral. Mr. Gould said that he wished that Ms. Riel had disclosed her past activity during the interview process but since she did not, he must terminate her. He asked her to agree to release a joint press release saying that they were mutually stepping back from the hiring. Ms. Riel said she needed time to process Mr. Gould's remarks. We are not aware of any further communication between the two.

On May 27, Mr. Gould and Ms. Polachek called Ms. Lee and offered her the Communications Position. Ms. Lee told them that not much had changed in her family situation but she would get back to them about it.

On May 28, Ms. Lee called Mr. Gould and expressed her intention of accepting the offer for the position. Ms. Lee explained that she spoke with her family and they told her to not to turn down such a great opportunity a second time. On June 2nd, Ms. Lee met with Mr. Gould at his office. Mr. Gould presented her with the employment contract and asked her to sign it immediately. She did so. Mr. Gould informed her that he planned to issue a press release about her hiring at 4:00 p.m. that same day. Ms. Lee expressed that she was surprised at and uncomfortable with the pace at which Mr. Gould finalized her hiring and issued the press release.

Mr. Gould and Ms. Polachek stated that they chose to bypass a formal interview process because it was time-intensive and they needed a replacement for Ms. Vernez prior to her departure in July. They did not approach any of the other candidates recommended by the interview panel because they first wanted to inquire about Ms. Lee's interest in the position—Ms. Lee was their first choice for the position in December 2013 and therefore their immediate inclination was to hire her if she was willing.

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<sup>35</sup> **Exhibit 9**—E-mail from Kate Vernez, Deputy City Manager for Special Projects, Santa Monica, to Elaine Polachek, Assistant City Manager, Santa Monica & Rodney Gould, City Manager, Santa Monica (May 25, 2014, 6:12 P.M. PST).

## 9. Mr. Gould Issues a Press Release.

During the week of May 26, 2014, multiple news outlets covered the revocation of Ms. Riel's offer. Mr. Gould expressed to Ms. Moutrie that he had to say something, especially because the volume of e-mails the city had received in relation to the revocation of Ms. Riel's offer was the largest number of e-mails he had ever received on one issue. Ms. Moutrie advised him not to write anything but said that it was impossible to stop him. Mr. Gould wrote a press release that Ms. Moutrie and others attempted to temper. The press release was issued on June 5, 2014.<sup>36</sup>

Writing in the press release that withdrawing Ms. Riel's offer was a personnel matter and therefore involved privacy rights, Mr. Gould largely focused on the necessity of certain positions in city government to be apolitical and implied that he revoked Ms. Riel's offer because she was partisan or had a strong history of partisan politics.<sup>37</sup> Mr. Gould also wrote that he consulted with, among others, "the City Attorney" throughout the process.<sup>38</sup> Ms. Moutrie informed us that while Mr. Gould did consult with her, he did not always follow her advice.<sup>39</sup>

## 10. Disclosures to Other Councilmembers Regarding the Reasons for the Riel Termination.

Multiple councilmembers requested more details about Mr. Gould's decision to revoke Ms. Riel's offer. Councilmember Ted Winterer e-mailed Mr. Gould, writing that he "hope[d] [Mr. Gould's] decision had nothing to with [Ms. Riel] having exercised her First Amendment Rights" and linked to a Lookout article about the rescinded offer.<sup>40</sup> Mr. Gould replied and said that "[t]he article is based on speculation," Mr. Gould's "decision is sound," and he will not "violate [Riel's] privacy rights by airing it."<sup>41</sup>

In response to Councilmember Kevin McKeown's written inquiry, Mr. Gould told Mr. McKeown that he preferred to speak about this issue at their regular Monday meeting.<sup>42</sup> Mr. Gould said that there were several factors that prompted his decision and while he could not discuss all of them because of "privacy and the confidentiality of the hiring process," he could

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<sup>36</sup> Rodney Gould, *Statement from Rod Gould, City Manager, City of Santa Monica on Public Affairs and Communications Officer Position* (June 5, 2014), available at [http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/letters/Letters-2014/06\\_06\\_2014\\_Statement\\_from\\_Rod\\_Gould.html](http://www.surfsantamonica.com/ssm_site/the_lookout/letters/Letters-2014/06_06_2014_Statement_from_Rod_Gould.html).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Ms. Moutrie provided one such example of Mr. Gould not following her advice. She stated that she counseled Mr. Gould to not issue the press release because such a release could jeopardize Santa Monica vis-à-vis a potential lawsuit by Ms. Riel. Nevertheless, Mr. Gould issued the press release.

<sup>40</sup> E-mail from Ted Winterer, Councilmember, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 28, 2014, 8:38 P.M. PST).

<sup>41</sup> E-mail from Rodney Gould, City Manager, Santa Monica, to Ted Winterer, Councilmember, Santa Monica (May 29, 2014, 4:13 A.M. PST).

<sup>42</sup> E-mail from Rodney Gould, City Manager, Santa Monica, to Kevin McKeown, Councilmember, Santa Monica (May 29, 2014, 5:59 P.M. PST).

provide Mr. McKeown with a better sense of why it was the right decision on Monday.<sup>43</sup> In the Monday meeting, Mr. McKeown claims that Mr. Gould declined to provide details because Mr. Gould did not want to violate Ms. Riel’s “privacy rights.”

Many of the councilmembers we spoke with expressed that they did not feel that the extent of Ms. O’Connor’s communications to Mr. Gould was fully disclosed to them by Mr. Gould or Ms. O’Connor. Their knowledge of Ms. O’Connor’s involvement was limited to her public comments, including when she stated to the *Santa Monica Daily Press* that she had not asked Gould to revoke Ms. Riel’s offer but “might have commented on my experience with her.”<sup>44</sup> She added, “But I can’t tell the city manager what to do.”<sup>45</sup> Mr. McKeown claims that he did not know the extent to which Ms. O’Connor put pressure on Mr. Gould until his deposition, and other councilmembers similarly expressed surprise, after public release of the e-mails, at the level of Ms. O’Connor’s contact with Mr. Gould.

When we asked Ms. O’Connor whether she volunteered the existence or substance of her communications with Mr. Gould to the Council, she said “No, why would I?” She claimed that no one asked her about her e-mails and so there was no reason to inform the Council. Her understanding was that Mr. Gould and Ms. Moutrie knew of the e-mails and so it was their obligation to bring it to the attention of the Council. She also said that transparency was not paramount in this situation because the city was being sued—or at least there were threats of lawsuit—and so her belief based on her experience was that the best practice was to not speak about issues that could jeopardize Santa Monica’s legal standing in potential litigation.

## **B. FINDINGS AND RECOMMENDATIONS FOR BEST PRACTICES**

The events associated with Elizabeth Riel’s offer and revocation present numerous opportunities for Santa Monica city government to improve its internal processes. This section details key issues presented by Santa Monica residents and then sets forth findings and recommendations in connection with each of these issues.

### **1. Issue: Improper Councilmember Influence on the City Manager.**

Under Article VI of the Santa Monica City Charter, Section 610, councilmembers are prohibited from directly or indirectly ordering or requesting the removal of a person from employment under the discretion of the City Manager.<sup>46</sup> Many members of the Santa Monica community have questioned whether Ms. O’Connor improperly attempted to influence Mr. Gould

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<sup>43</sup> *Id.*

<sup>44</sup> David Mark Simpson, Council to evaluate Gould over rescinded job offer, *Santa Monica Daily Press* (June 5, 2014), available at <http://smdp.com/council-evaluate-gould-rescinded-job-offer/135061>.

<sup>45</sup> *Id.*

<sup>46</sup> “Neither the City Council nor any of its members shall order or request directly or indirectly the appointment of any person to an office or employment or the removal of any person therefrom, by the City Manager, or by any of the department heads in the administrative service of the City.” The Charter of the City of Santa Monica, Article VI, Section 610.

into revoking Ms. Riel’s offer through her series of emails to him from May 22nd through May 24th, 2014.

**a) Findings**

Ms. O’Connor claims that she e-mailed Mr. Gould to notify him (1) of articles relating to Ms. Riel, (2) of her desire for a substitute for Riel, and (3) of her willingness to assume communications work herself if no substitute was available. It is difficult to square this claim of a narrow purpose with the substance, tone, and number of e-mails that she sent to Mr. Gould over a 3-day period leading to Mr. Gould’s decision to terminate Ms. Riel.

In support of Ms. O’Connor’s account, she in fact states in her first two e-mails that she “want[s] someone else assigned”<sup>47</sup> or for Mr. Gould to just “give [her] the technical materials [she] needs and she’ll do it [herself].”<sup>48</sup> She also cites Ms. Riel’s involvement in the RIFT campaign in these initial two e-mails. However, in her third e-mail to Mr. Gould, Ms. O’Connor appears to connect Ms. Riel to a mailer that urged voters to vote against Ms. O’Connor and that she perceived to be “attacks on [her].”<sup>49</sup>

After this discovery, Ms. O’Connor begins making what we find to be thinly veiled threats to Mr. Gould. In one email, she says that she “will be sharing this with others in the community and will be asking people for their opinion about [Ms. Riel] being in this position;”<sup>50</sup> in another e-mail, she states that “this is likely to become a news story in at least one local outlet next week.”<sup>51</sup> She chastises Mr. Gould for hiring “political enemies” of hers to serve in City Hall<sup>52</sup> and broadly asserts that she is “being attacked from both outside City Hall and from within City Hall.”<sup>53</sup> Only after Mr. Gould informs her that he is leaning toward revoking Ms. Riel’s offer does Ms. O’Connor drop her aggressive tone.

If Ms. O’Connor’s intention was merely to inform Mr. Gould of Ms. Riel’s past and of her wish to work with someone other than Ms. Riel, her first two e-mails were sufficient. The

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<sup>47</sup> **Exhibit 3**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 22, 2014, 8:36 P.M. PST). *See supra* section IV.A.4 for more detail regarding all the e-mails referred to in this section.

<sup>48</sup> **Exhibit 3**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 22, 2014, 9:01 P.M. PST).

<sup>49</sup> **Exhibit 4**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 22, 2014, 9:41 P.M. PST).

<sup>50</sup> **Exhibit 5**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 2:36 P.M. PST).

<sup>51</sup> **Exhibit 7**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 4:57 P.M. PST).

<sup>52</sup> **Exhibit 5**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 2:36 P.M. PST).

<sup>53</sup> **Exhibit 6**—E-mail from Pamela O’Connor, Mayor, Santa Monica, to Rodney Gould, City Manager, Santa Monica (May 23, 2014, 2:50 P.M. PST).

statements about “sharing this with others in the community and...for their opinion about [Ms. Riel] being in this position” and a “likely...news story in at least one local outlet next week” are not limited to the scope that Ms. O’Connor claims that her e-mails were within. In fact, these can only be described as threats meant to influence Mr. Gould. Indeed, Mr. Gould admitted to us that he interpreted these statements to be threats. The fact that Ms. O’Connor’s tone changed so significantly from her e-mails before and after Mr. Gould told her that he was leaning toward revoking Riel’s offer is further evidence that her intention behind sending the e-mails was in fact to pressure Gould into replacing Riel.

Ms. O’Connor stated to us that these were not threats but rather just Ms. O’Connor fully disclosing to Mr. Gould that she would be leaking the story to a reporter. Based on her tone in these e-mails, we do not find credible her explanation that the disclosure was purely for the sake of full disclosure.

While there was no direct request in any of Ms. O’Connor’s e-mails to fire Ms. Riel, the City Charter explicitly prohibits city councilmembers from making an indirect request to the City Manager to remove any person. The inclusion of “indirect” efforts to exert influence is critically important: if the City Charter banned merely express threats and requests, it would be easily circumvented.

In the context of nine emails sent to Mr. Gould at all hours of the day from May 22nd through 24th, we find that Ms. O’Connor’s thinly veiled threats that she would be “sharing this with others in the community” and suggesting that Mr. Gould’s hiring decision constituted an “attack[] from both outside City Hall and from within City Hall” was intended to pressure Mr. Gould into reversing his hiring decision. As such, it qualifies as at least an “indirect...request” for the removal of Ms. Riel.

An elected councilmember violates the City Charter provision regardless of whether a City Manager admits to being influenced. That said, it is difficult to believe that the tone of Ms. O’Connor’s e-mails and her threats were not a material factor in Mr. Gould’s decision. Mr. Gould claimed to us that he was unintimidated by Ms. O’Connor’s threats because there is so much political debate and speech in Santa Monica that a person in his position becomes numb to such speech. But this claim is inconsistent with Mr. Gould’s contemporaneous responses to Ms. O’Connor. He writes in one e-mail that he is “depressed over this” and writes in another that if “[Ms. O’Connor] and the Council have lost confidence in [him] as a result of this hiring decision,...[he] will tender [his] resignation.” As Ms. O’Connor’s tone in her e-mails gets more aggressive, Mr. Gould’s views shift from giving Ms. Riel a chance to prove that she can be objective to concluding that he can let her go because of non-disclosure relating to past political activity. These statements are not indicative of someone unaffected or unintimidated by Ms. O’Connor’s statements.

At best, Ms. O’Connor showed bad judgment in wording her e-mails in a way that had the foreseeable potential of influencing the City Manager’s hiring decision. At worst, Ms. O’Connor consciously and intentionally attempted to influence the City Manager’s hiring decision. In either case, Ms. O’Connor showed a failure to understand the limitations of her role as a councilmember in Santa Monica city government.

## **b) Recommendation for Best Practices**

The best practice for city councilmembers is to be expressly mindful of restrictions in the City Charter—specifically Article VI of the Santa Monica City Charter, Section 610—when communicating with the City Manager about hiring decisions or when communicating with administrators who report to the City Manager regarding substantive issues. With respect to hiring decisions, councilmembers should adopt a best practice to be cautionary and sensitive to whether their comments on hires could be perceived as an indirect request or instruction to the City Manager. This is not to prohibit councilmembers from providing useful information to the City Manager, but councilmembers should be careful about providing commentary that could be interpreted as intending to influence the City Manager’s decision. If there are any questions about whether a communication could be perceived as an indirect request, our recommended best practice is to review the proposed communication with the City Attorney beforehand. In certain situations, it may be better for the City Attorney to provide helpful information to the City Manager rather than a councilmember.

### **2. Issue: Use of Personal E-mail by City Officials.**

On May 28, 2014, Elaine Polachek sent an e-mail to Danielle Noble and Matthew Mornick titled “Elizabeth” from her personal e-mail account to their personal e-mail accounts.<sup>54</sup> In this e-mail, Ms. Polachek wrote that Mr. Gould revoked Ms. Riel’s offer and that Debbie Lee accepted the offer for the Communications Position.<sup>55</sup> Ms. Polachek also wrote, “Want to keep this on our personal email not work.”<sup>56</sup> There were eight subsequent e-mails about the issue—mostly innocuous—in the e-mail chain.

Ms. Polachek said that she sent this e-mail to their personal account because they were both on vacation and so she was e-mailing them on their personal account. She wanted to make sure they were not caught off guard when they got back to work. Ms. Polachek said she may have said to keep it on their personal accounts because it was a sensitive issue. Ms. Polachek admits that she regrets using personal e-mail to send this message and regrets writing, “Want to keep this on our personal email not work.”

Ms. Noble did not know why Ms. Polachek wanted to keep this communication on personal e-mail. She volunteered that members of the City Manager’s Office have a tendency to use personal e-mail for work when on vacation because they do not want to check their work e-mail during their vacation time. She believed that Ms. Polachek knew of this tendency and therefore sent this e-mail to their personal accounts.

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<sup>54</sup> E-mail from Elaine Polachek, Assistant City Manager, Santa Monica, to Danielle Noble, Deputy City Manager, Santa Monica & Matthew Mornick, Assistant to the City Manager, Santa Monica (May 28, 2014, 8:50 P.M. PST).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

Section H-7 of Administrative Instruction II-4-10<sup>57</sup> lists the “[u]se of third party electronic mail system(s) for a City business purpose without prior authorization by the Chief Information officer” as “Inappropriate Use.” Most of the individuals we interviewed were not aware of any e-mail policy for city employees and expressed surprise that there was an official Human Resources policy governing the use of personal e-mail for official city business.

**a) Findings**

We find that Ms. Polachek had no intent to deceive or conceal material information by her instruction to use personal email to discuss the Riel termination. Although her explanation that she was using personal email because of the vacation status of other employees is undermined by the fact that she further requested that such communications remain “on our personal email,” she did not attempt to conceal the emails and produced them upon request.

Yet the fact that Ms. Polachek wrote “Want to keep this on our personal email not work” reflects a lapse in judgment. Indeed, Ms. Polachek admitted in her interview with us that she regrets writing this expressed desire to stay on personal e-mail. Even if city officials are not trying to hide anything in their e-mails, an explicit request to keep communications about matters related to an event at work on personal e-mail rather than work e-mail has an aura of impropriety of which the community is rightfully suspicious.

Moreover, the fact that an Administrative Instruction posted on the Santa Monica Human Resources website explicitly prohibits use of personal e-mail for work-related matters further reasonably causes concern among the community that city employees engaged in cover-up efforts through the improper use of personal e-mail.<sup>58</sup>

**b) Recommendation for Best Practices**

Administrative Instruction II-4-10 dated May 7, 2007, section H-7 defines inappropriate use as including “Use of third party electronic mail system(s) for a City business purpose without prior authorization by the Chief Information Officer.” One of the reasons for such a policy is to ensure consistent recordkeeping, retention and production of documents and communications relating to city business. Citizens are particularly concerned with responsiveness to public records requests if key records and communications are not on city servers and databases. Currently, in response to a California Public Records Act request, the City Attorney’s Office searches the city e-mail of relevant employees but relies on those employees to disclose whether there are any relevant e-mails on their personal e-mail accounts. In order to avoid the rare but problematic situation where an employee fails to disclose that they had responsive city business documents on their personal account, the best practice is to retain all relevant communications on city systems.

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<sup>57</sup> Administrative Instruction II-4-10, *Employee Access, Use, Retention and Destruction of Electronic Mail*, City of Santa Monica (May 7, 2007).

<sup>58</sup> Administrative Instruction II-4-10 can be found on the Santa Monica Human Resources website. *Administrative Instructions*, Santa Monica Human Resources (2016), [http://www.smgov.net/Departments/HR/Labor\\_Relations/Administrative\\_Instructions/Administrative\\_Instructions.aspx](http://www.smgov.net/Departments/HR/Labor_Relations/Administrative_Instructions/Administrative_Instructions.aspx).

Almost all employees we interviewed had no understanding of the existing city e-mail policy. We specifically recommend that the City Manager instruct and train city employees to use the city e-mail system for all city business.

### **3. Issue: Absence of a Process to Hire Ms. Lee.**

Members of the Santa Monica community have questioned the hiring of Ms. Lee for several reasons. First, because Mr. Gould selected her to serve on the initial interview panel, some members of the community believed Mr. Gould's subsequent hire of Ms. Lee was a way for Mr. Gould to hire an insider that would not pose problems for him. Second, Ms. Lee never submitted a resume or application for the position, yet she was hired for the role. Third, she was offered the position the day after the revocation of Riel's offer and signed a contract officially accepting the offer no more than a week after the revocation—this timing was extremely quick compared to applications being posted in February 2014 and Ms. Riel's hiring in May 2014.

#### **a) Findings**

As an initial matter, the City Manager was not required under law to employ an interview panel process to select Ms. Vernez's replacement.<sup>59</sup> Mr. Gould and others proffered numerous facially reasonable bases for why Ms. Lee was appropriately hired without formal process: Ms. Lee's familiarity with Ms. Vernez's role, her experience in communications, and her knowledge of Santa Monica city government appeared to make her an ideal replacement for Ms. Vernez. Ms. Lee, however, did not accept because of extenuating family circumstances and therefore the City Manager's Office put her on the interview panel instead to utilize her familiarity with Ms. Vernez's position in a different way. When Ms. Riel was terminated, it was not unreasonable for Mr. Gould and Ms. Polachek to offer the position to Ms. Lee again—she was their first choice and her family situation could have changed in the five months that had passed. Indeed, Ms. Lee was in a place at the end of May 2014 to accept their offer.

Nonetheless, the community's concerns could have and should have been foreseen by Mr. Gould and others when offering the position to Ms. Lee in May 2014 following the revocation of Ms. Riel's offer. The complaints and press coverage resulting from the Riel matter should have put them on notice that hiring Ms. Riel's replacement should be done carefully and thoughtfully with an eye to optics. Ideally, Mr. Gould should have employed another interview panel and requested that Ms. Lee apply and interview through that panel. In fact, Ms. Lee herself wishes that she had been selected through an interview panel process. Ms. Lee noted that use of an interview panel process validates the ultimate choice as a wholly merit-based selection.

In addition, the use of a formal application and interview process ensures that the City is aware of other previously unknown, superlative candidates. The hiring of Ms. Riel illustrates this point. Despite the fact that no one initially involved in the selection process for the position was aware of Ms. Riel's qualifications, each remarked that Ms. Riel was an excellent fit for the position and most conceded that she was clearly the most qualified candidate. Without the interview process, the City Manager would not have known of or considered Ms. Riel for the position.

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<sup>59</sup> See supra note 3.

Therefore, even if Mr. Gould believed that he had the best candidate for the role before utilizing an interview panel, the interview panel yielded an unexpected best candidate.

Although the stated urgency of finding someone to replace Ms. Vernez may have justified bypassing a formal selection process, at the very least, Mr. Gould should have disclosed his rationale to the community. Doing so likely would have increased the public's confidence in the subsequent selection of Ms. Lee.

#### **b) Recommendation for Best Practices**

The best practice for hiring at-will employees is for the City Manager to adopt a policy to publicly seek applications for open positions and employ an interview process to review the best candidates that submitted applications, with limited exceptions. While the City Manager may have a person in mind for an open position, the best practice is to solicit applications from the greater public for the position because such a process inspires public confidence and the City Manager may be unaware of a possibly superior candidate.

Extenuating circumstances in certain situations may justify bypassing the process. For example, if a current city official serves in an assistant role and has a superb reputation that would uniquely qualify him/her to take over the at-will position, employing a process may simply waste time and resources. In addition, a pressing time need may warrant a very limited process.

In such rare situations, the best practice is for the City Manager to provide a statement to the community describing the reasons for bypassing the interview process. Providing information to the community will help legitimize the hire and preemptively mitigate any concerns in the community about the role of merit in the hiring. Whether or not the City Manager made the right decision to bypass the process is then up for evaluation by the community and its elected city councilmembers.

#### **4. Issue: Communication Between the City Council and City Officials.**

When speaking about potential violations of the City Charter with us, one councilmember stated that s/he had learned that another councilmember may have called a department head in order to substantively change an item on the city council agenda without notifying the City Council. The councilmember allegedly had a company call him/her and say that they wanted to submit a bid for a closed bid request—the councilmember contacted the department head who submitted the request and told him/her to take the item off the agenda. At no point was this communication forwarded to the City Manager's Office. Another example offered by the councilmember was of an issue of police over-enforcement in Santa Monica. Multiple councilmembers—in response to complaints from the public—allegedly contacted the Police Commissioner directly without notifying the City Manager's Office.

City Manager Rick Cole stated that in situations like the above, contact must first be made with the City Manager's Office. Otherwise, these communications may be considered a violation of the City Charter. Mr. Cole said that such contact could be as simple as involving or copying someone from his office on the communication.

**a) Findings**

We could not find corroborating evidence supporting the claim that a councilmember called a department head in order to change an item on the city council agenda without notifying the City Council. But if it happened, such contact is a violation of the City Charter. The Santa Monica City Charter, Article VI, Section 610, states:

Except for the purpose of inquiry, the City Council and its members shall deal with the administrative service under the City Manager solely through the City Manager and neither the City Council nor any member shall give orders to any subordinates of the City Manager, either publicly or privately.

Councilmembers should not contact city administrators in order to effectuate a change in policy or administration. Merely seeking information about policies or administrative issues would not constitute a violation, unless inartfully phrased in a way that would provide the appearance of an order to subordinates of the City Manager.

**b) Recommendation for Best Practices**

Councilmembers should be mindful of the fact that the City Manager is responsible for substantive administrative matters and that they are prohibited from giving orders to administrators who report to the City Manager. The best practice therefore is for councilmembers to proactively determine whether their potential communication with administrators on a substantive issue could influence that administrators' decision, and, if there is any chance of influence, copy the City Manager on e-mail communications and give advance notice to the City Manager's Office of telephone communications. Abiding by this best practice will allow the City Manager to determine the proper line of communication and permit correction and guidance for any possible problematic communication.

**5. Issue: Whether the City Manager and the City Attorney Treated Certain Councilmembers Differently.**

Several councilmembers expressed to us in interviews that Mr. Gould and Ms. Moutrie did not fully disclose the contents of the communications between Mr. Gould and Ms. O'Connor after the revocation of Ms. Riel's offer. Some expressed that they were especially upset because Mr. Gould cited "privacy" as the reason he could not discuss Ms. Riel's termination in more detail with them, but then his e-mails with Ms. O'Connor showed extensive communications about Mr. Gould's decision-making process. It is therefore important whether there was a variability in the treatment of councilmembers by the City Manager and City Attorney.

**a) Findings**

Mr. Gould claimed in communications with Kevin McKeown, Ted Winterer, and other councilmembers that he could not provide significant detail regarding his revocation of Ms. Riel's

offer because of “privacy and confidentiality of the hiring process”<sup>60</sup> and because he did not wish to “violate [Ms. Riel’s] privacy rights....”<sup>61</sup> Yet in e-mail conversations with Ms. O’Connor that preceded these claims of privacy, Mr. Gould was fully transparent about why he was revoking Ms. Riel’s offer, referring to Ms. Riel’s “trust and judgement” as major factors in his decision.<sup>62</sup> At no point in his e-mails with Ms. O’Connor did Mr. Gould refer to Ms. Riel’s hiring as a personnel matter that required privacy. In fact, even after hearing Ms. O’Connor’s multiple complaints about Ms. Riel over e-mail, Mr. Gould continued to request a phone conversation with Ms. O’Connor to discuss the situation further.<sup>63</sup>

Mr. Gould claims that he provided information to Ms. O’Connor but not others because she had contacted him with complaints and so he was just providing information in response. We are not satisfied with this explanation because Mr. McKeown and Mr. Winterer contacted Mr. Gould for more information based on complaints as well and were told by Mr. Gould that he could not provide that information. Although Mr. McKeown and Mr. Winterer sent messages after the revocation of Ms. Riel’s offer while Ms. O’Connor e-mailed before the revocation, this is a distinction without a difference because Ms. Riel would have the same privacy considerations in each time period.

Mr. Gould also did not clarify with other councilmembers the nature and extent of Ms. O’Connor’s communications regarding the Riel hiring. Ms. O’Connor admits that she did not disclose the substance of her e-mails to Mr. Gould and does not contest that neither Mr. Gould nor Ms. Moutrie disclosed that Ms. O’Connor had extensive and detailed conversations with Mr. Gould about Ms. Riel. In fact, Ms. O’Connor stated that she believed it was Mr. Gould’s and Ms. Moutrie’s obligation to disclose such communications to the Council, not hers.

Complete information should have been provided to councilmembers upon request. Providing information selectively only served to raise suspicion within the Council about whether city officials were attempting to protect the Mayor in a reelection year. We found no evidence to support this suspicion but the appearance of same undermines the relationship between the City Manager and councilmembers.

#### **b) Recommendation for Best Practices**

Absent special circumstances requiring confidentiality, the best practice is for the City Manager to disclose information equally to all councilmembers. There is no provision in the City Charter that permits the City Manager to provide relevant information to some councilmembers but not others. In addition, on issues of general concern, there is no reason for the City Manager

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<sup>60</sup> E-mail from Rodney Gould, City Manager, Santa Monica, to Kevin McKeown, Councilmember, Santa Monica (May 29, 2014, 5:59 P.M. PST).

<sup>61</sup> E-mail from Rodney Gould, City Manager, Santa Monica, to Ted Winterer, Councilmember, Santa Monica (May 29, 2014, 4:13 A.M. PST).

<sup>62</sup> **Exhibit 9**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O’Connor, Mayor, Santa Monica (May 24, 2014, 7:07 P.M. PST).

<sup>63</sup> **Exhibit 9**—E-mail from Rodney Gould, City Manager, Santa Monica, to Pamela O’Connor, Mayor, Santa Monica (May 24, 2014, 12:39 P.M. PST).

to provide information to the Mayor but withhold it from other councilmembers. Treating all councilmembers as similarly as possible also creates trust with the Council and an appearance of fairness and impartiality that is important for the position of City Manager.

## **6. Issue: Whether “Political Neutrality” is a Proper Position Criterion.**

Some community members have questioned whether “political neutrality” was merely pretext for Mr. Gould to revoke Ms. Riel’s offer or a proper characteristic that could be a disqualifying factor for the Communications Position. Others have asked whether Mr. Gould provided Ms. Riel with an adequate opportunity to rebut assumptions of political bias.

### **a) Findings**

Mr. Gould ultimately terminated Ms. Riel for the stated reason of a lack of “political neutrality.” Almost every interviewee admitted that no candidate can truly be politically neutral. Every city employee harbors political leanings and opinions. Accordingly, the citation of such a reason to disqualify Ms. Riel raises significant concerns of a pretextual reason for her termination.

That said, there are several sensitive positions in Santa Monica city government that may require either a form of political neutrality or adequate assurances that prior political activity would not undermine the ability of the candidate to fully perform the duties and responsibilities called for by the position. Many witnesses cautioned that the Communications Position could be reasonably considered one such position. Due to her communications role for the city, Ms. Vernez worked closely with the Mayor and the Mayor pro tempore. She wrote speeches for the Mayor and provided information for the Mayor on critical issues. Thus, in order to be effective in that role, the Mayor needed to trust that Ms. Vernez would be giving her proper and reliable information. The employee in the Communications Position would—and indeed did—take over these responsibilities. Whether or not an individual in the City Manager’s Office should in effect be functioning as the Mayor’s aide is outside the scope of this issue—Ms. Vernez did so and therefore her replacement arguably required similar strengths and attributes for fulfillment of Ms. Vernez’s responsibilities.

The City Manager therefore could properly conclude that a form of political neutrality was a desirable characteristic in the ideal candidate for the Communications Position. A hire that he believed could not work with the Mayor or other councilmembers would arguably pose difficulties for the City Manager’s Office because a significant portion of this position required contact with and trust of the Mayor.

This is not to say that a lack of political neutrality is a disqualifying factor. The vast majority of the individuals we interviewed said that a political past would not automatically disqualify a candidate for this position.<sup>64</sup> A full assessment of whether the person is able to put

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<sup>64</sup> The one exception was Councilmember Pamela O’Connor. She stated that a political hire was not allowed by the ICMA Code of Ethics. We reviewed ICMA Code of Ethics and in particular Tenet 7, which advises that municipal staff “[r]efrain from all political activities which undermine public confidence in professional administrators” and “refrain from participation in the election of the members of the employing legislative body.” *ICMA Code of Ethics with Guidelines*, International City/County Management Association (June 2015), available at <https://icma.org/Documents/Document/Document/100265>. Tenet 7

aside their past political opinions and act in an objective manner would be the proper course if political neutrality is in question. Indeed, every member of the City Manager’s Office we interviewed stated that they are able to put aside their personal opinions on issues in Santa Monica in the context of their work for the city.

Such a full assessment should include a chance for the candidate to express whether they would be able to work within a form of political neutrality. In this instance, “political neutrality” was not listed as a job qualification. Moreover, Ms. Riel included in her resume mention of political activity which was not probed during the interview process. Finally, Mr. Gould did not appear to provide Ms. Riel with a meaningful opportunity to explain her past actions or provide assurances about remaining apolitical in the position. Whether or not Ms. Riel would be effective in the Communications Position should have been determined through a careful and thorough investigatory process, not through a rushed decision-making process over a long weekend that failed to gather all relevant information.

**b) Recommendation for Best Practices**

We believe that vetting candidates for “political neutrality” is fraught with practical and legal issues.<sup>65</sup> At most, we recommend that candidates for sensitive positions be questioned about the nature and extent of their involvement in partisan political activity directly connected to elected officials with whom the candidates would be working. Each candidate so questioned should be afforded an opportunity to explain why their prior political work would not impede their ability to perform.

**V. THE OAKS INITIATIVE**

On November 7, 2000, the voters of Santa Monica adopted the Oaks Initiative. The Oaks Initiative prohibits a “public official” from receiving benefits from persons or entities after the “public official” votes to award, or exercises material discretion to award, such persons or entities with a “public benefit.” Violations of the Oaks Initiative can be pursued in both the criminal and civil contexts.

Many Santa Monica public servants spoke out against the Oaks Initiative before it was adopted in a proposition vote. City Council members campaigned against its passage and even authored the official ballot argument opposing it. City Attorney Marsha Moutrie expressed a host of concerns related to the constitutionality and enforceability of the Oaks Initiative. After the law was adopted over the objection of Santa Monica’s public servants, the city filed an action for declaratory relief and a writ of mandate against the City Clerk for non-enforcement of the Oaks Initiative. Specifically, Santa Monica’s complaint sought a judicial declaration as to whether the

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counsels *current* municipal staff to act in an apolitical manner—nowhere in Tenet 7 or the ICMA Code of Ethics is there a restriction on hiring a candidate who was once politically involved.

<sup>65</sup> Donna Peter told us that political neutrality should have been included in the job listing for the Communications Position. Ms. Peter suggested that the following positions should also include political neutrality in their listings: Director of Community Development/Planning; Assistant to the City Council; Department Directors; Director of Housing and Economic Development; City Manager; and Assistant City Manager.

Oaks Initiative “[was] or [was] not unconstitutional or otherwise illegal and unenforceable.” The state trial court dismissed the case, finding that Santa Monica lacked standing and that its claim was not ripe. Since the case was dismissed, Santa Monica residents have filed two Oaks Initiative complaints. In both instances, the City Attorney chose not to prosecute the alleged violations, citing concerns related to conflicts of interest.

Part V provides background on the Oaks Initiative, conducts a survey of analogous anti-corruption laws in other municipalities, makes findings about the Oaks Initiative, and then provides guidance on best practices with respect to enforcement of the Oaks Initiative.

## **A. SANTA MONICA OAKS INITIATIVE**

This section explores the key provisions and history of the Oaks Initiative in Santa Monica. After providing that background, it describes the two Oaks Initiative complaints that have been filed in Santa Monica since the law’s passage.

### **1. Key Provisions of the Oaks Initiative.**

The Oaks Initiative is incorporated as Article XXII of the Santa Monica City Charter. Section 2201 of the Oaks Initiative contains “Findings and declarations,” which provide justification for the law’s prohibitions. According to Section 2201, the Oaks Initiative protects the integrity of public decision-making and the public fisc by strictly regulating direct and indirect means and channels through which “public officials” and public contractors could exchange *quid pro quos*.

Section 2203 of the Oaks Initiative provides that a “public official”<sup>66</sup> who has “exercised discretion”<sup>67</sup> to approve and who has approved or voted to approve conveyance of a “public benefit”<sup>68</sup>

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<sup>66</sup> Under Section 2202(d), the term “public official” includes “any elected or appointed public official acting in an official capacity.”

<sup>67</sup> The Oaks Initiative provides no guidance as to the meaning of this term.

<sup>68</sup> Section 2202(a) defines “public benefit” to include “a contract, benefit, or arrangement between the City and any individual, corporation, firm, partnership, association, or other person or entity to: (1) provide personal services of a value in excess of \$25,000 over any 12 month period; (2) sell or furnish any material, supplies or equipment to the City of a value in excess of \$25,000 over any 12 month period; (3) buy or sell any real property to or from the City with a value in excess of \$25,000, or lease any real property to or from the City with a value in excess of \$25,000 over any 12 month period; (4) receive an award of a franchise to conduct any business activity in a territory in which no other competitor potentially is available to provide similar and competitive services, and for which gross revenue from the business activity exceeds \$50,000 in any 12 month period; (5) confer a land use variance, special use permit, or other exception to a pre-existing master plan or land use ordinance pertaining to real property where such decision has a value in excess of \$25,000; (6) confer a tax abatement, exception, or benefit not generally applicable of a value in excess of \$5,000 in any 12 month period; or (7) receive cash or specie of a net value to the recipient in excess of \$10,000 in any 12 month period.”

to a “person[] or entit[y]”<sup>69</sup> may not receive a “personal or campaign advantage”<sup>70</sup> from such person or entity for a specified period of time.

Section 2204 imposes serious due diligence obligations on Santa Monica public officials. They are required to carefully monitor all public benefits that they approve and check those public benefits against the persons or entities who provide them with personal or campaign advantages. Improper personal or campaign advantages must be returned no later than ten days after receipt. In addition, public officials must provide, upon request, the names of all public benefit recipients.

In addition to public enforcement, the Oaks Initiative extends a private right of action to Santa Monica residents. A resident of the city may bring a civil action against a public official. If the resident’s civil suit is successful, the public official must pay the resident his reasonable attorney’s fees and costs. The resident also receives 10% of any civil penalty collected and the City’s general fund receives the remaining 90%.

A “willful violation” of the Oaks Initiative may be prosecuted as a criminal misdemeanor. Other violations of the law are subject to civil penalties, including restitution of the personal or campaign advantage received, a civil penalty of up to five times the value of the personal or campaign advantage received, injunctive relief necessary to prevent present and future violations, and disqualification from future public office.

Section 2207 of the Oaks Initiative contains a severability clause. The severability clause provides that, even if a provision of the Oaks Initiative is found invalid, the remaining provisions will remain in effect so long as they can be given effect without the invalidated provision.

## **2. The History of the Santa Monica Oaks Initiative.**

In 2000, a grass-roots group of consumer rights activists based out of Santa Monica called the Oaks Project organized an effort to place anti-corruption municipal codes on local ballot initiatives throughout California, including in Santa Monica.<sup>71</sup> The Oaks Project argued that the ballot measure was a way to prevent corruption in Santa Monica politics.<sup>72</sup> Opponents argued that the Oaks Initiative would stifle public participation in Santa Monica, and that campaign contribution limits were already sufficient to limit any corruptive influence. Furthermore,

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<sup>69</sup> Section 2202(b) defines “persons or entities” as entities and individuals who, at the time that the “public benefit” is conferred, have more than a 10% interest or are a trustee, director, partner, or officer of the entity receiving the “public benefit.”

<sup>70</sup> Section 2202(c) defines “personal or campaign advantage” as “(1) any gift, honoraria, emolument, or personal pecuniary benefit of a value in excess of \$50; (2) any employment for compensation; and (3) any campaign contributions for any elective office said official may pursue.”

<sup>71</sup> The Oaks Project is referred to as “the grass-roots volunteer arm of activist Harvey Rosenfeld’s Santa Monica-based Foundation for Taxpayer and Consumer Rights.” Putting Political Reform to the Test, Strumwasser & Woocher LLP (Oct. 23, 2002), <http://www.strumwooch.com/S-W-Press/2002/October/Putting-Political-Reform-to-the-Test.aspx>.

<sup>72</sup> Ralph Nader & Harvey Rosenfield, Argument in Favor of the Santa Monica Taxpayer Protection Amendment of 2000 (2000), available at [http://www.smgov.net/Departments/Clerk/elections/Election2000/argumentfor\\_taxpayer.htm](http://www.smgov.net/Departments/Clerk/elections/Election2000/argumentfor_taxpayer.htm).

opponents argued that the Oaks Initiative would impose an onerous burden on residents who volunteered on city boards, and that the law would have little positive impact in Santa Monica.

City Attorney Marsha Moutrie and Assistant City Attorney Joseph Lawrence authored an “impartial analysis” of the measure.<sup>73</sup> They wrote that it was “unclear how the City would be able to monitor compliance with the measure’s requirements” and that the “cost of monitoring . . . would likely be substantial.”<sup>74</sup> In addition, they noted that the measure may be subject to a legal challenge on constitutional grounds “because the measure purports to impose stringent limitations upon protected activities, including participation in the electoral process through making and receiving campaign contributions.”<sup>75</sup>

Despite such opposition, almost 59% of Santa Monica voters approved the Oaks Initiative on November 7, 2000.<sup>76</sup> On May 8, 2001, Ms. Moutrie sent a memorandum to the City Council recommending that it initiate a lawsuit challenging the constitutionality of the Oaks Initiative. Ms. Moutrie’s stated purpose for the challenge was to protect individual rights and take action in response to the voters’ decision.<sup>77</sup> City Clerk Maria Stewart relied on Ms. Moutrie’s advice and refused to enforce the Oaks Initiative until its constitutionality could be adjudicated.

Santa Monica filed a lawsuit for declaratory relief and a writ of mandate against its City Clerk, alleging an actual controversy between Santa Monica and its City Clerk over the constitutionality and enforceability of the Oaks Initiative. The Foundation for Taxpayer and Consumer Rights intervened in the lawsuit and filed a motion to dismiss the lawsuit. The trial court granted the motion to dismiss, holding that the case was non-justiciable. Santa Monica appealed the decision, but the appellate court affirmed the trial court on January 28, 2005, writing that “this action fails both the standing and ripeness aspects of the test of justiciability.”<sup>78</sup> Santa Monica appealed the ruling to the California Supreme Court, but the Supreme Court denied review on April 27, 2005.

In 2006, the City Council voted to put Proposition W—the Good Government Act—on the November 7, 2006 ballot in Santa Monica. This measure, if enacted, would have repealed the Oaks Initiative and replace it with a new anti-corruption measure. Ms. Moutrie wrote that Proposition W “would eliminate the risk of a constitutional challenge to Article XXII based on, for example, its prohibitions against campaign contributions or its distinction between ‘yes’ and

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<sup>73</sup> Marsha J. Moutrie & Joseph Lawrence, Impartial Analysis by the City Attorney of Proposition LL (2000), available at [http://www.smgov.net/Departments/Clerk/elections/Election2000/analysis\\_taxpayerprotection.htm](http://www.smgov.net/Departments/Clerk/elections/Election2000/analysis_taxpayerprotection.htm).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Measure LL: Contract Approvals by City Officials, City of Santa Monica, League of Women Voters of California (Jan. 9, 2001), <http://www.smartvoter.org/2000/11/07/ca/la/meas/LL/>.

<sup>77</sup> Marsha Moutrie, Memo from the City Attorney to the Mayor and City Council re: Proposition LL, the Oaks Initiative, City of Santa Monica: City Attorney’s Office (May 8, 2001), available at <http://www.smgov.net/departments/council/agendas/2001/20010522/s2001052208-A-3.htm>.

<sup>78</sup> *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 59 (2005).

‘no’ votes,” and “would also reduce costs to the City resulting from the requirement of keeping records relating to individual votes.”<sup>79</sup> Oaks Project members argued that the proposed legislation would no longer prohibit councilmembers from taking campaign contributions from persons or entities doing business with Santa Monica. Oaks Project members further contended that councilmembers could accept employment or gifts from entities immediately after rewarding them with public benefits. Proposition W was defeated on November 7, 2006.

The Oaks Initiative continues to remain in the Charter of the City of Santa Monica as passed in November 2000. The Santa Monica City Clerk monitors public benefits subject to the Oaks Initiative in a monthly-released report, available on its website.<sup>80</sup>

### **3. Santa Monica City Attorney’s Office’s Handling of Oaks Initiative Complaints.**

The City Attorney’s Office has received two complaints from resident organizations alleging violations of the Oaks Initiative. It has declined to prosecute either of the complaints. In order to make findings and recommendations for future enforcement of the Oaks Initiative, it is instructive to review the concerns expressed by Ms. Moutrie and her colleagues with respect to both complaints.

#### **a) Oaks Complaint against Pamela O’Connor**

On October 8, 2014, the Santa Monica Transparency Project (“SMTP”) filed a complaint with the Santa Monica City Attorney’s Office. In its complaint, SMPT cited 24 violations of the Oaks Initiative against then-Mayor O’Connor. The complaint alleged that Ms. O’Connor “illegally accepted campaign contributions from three of the biggest developers in Santa Monica: Hines, Macerich, and Century West.” SMTP alleged that residents of Santa Monica had asked her to recuse herself from votes on the developers’ projects after she received contributions from individuals at all three companies, but she refused to do so. The complaint alleged that Ms. O’Connor violated the Oaks Initiative either knowingly or recklessly. In response, Ms. O’Connor returned several contributions, citing innocent mistakes. Ms. O’Connor also disclosed that she had hired a treasurer to ensure that such problems did not happen again.

City Attorney Moutrie refused to prosecute SMTP’s complaint because of an apparent conflict of interest. Ms. O’Connor was a councilmember and close co-worker, Ms. Moutrie explained, which created a conflict of interest. As a result, Ms. Moutrie sent the complaint to the District Attorney’s Public Integrity Division (“DA PID”). The DA PID also refused to prosecute the complaint, stating that it did not want to “becom[e] the de facto enforcer of this local misdemeanor offense” and “[their] office also has concerns regarding the constitutional validity of

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<sup>79</sup> Measure W: Good Government Act of 2006, City of Santa Monica, League of Women Voters of California Education Fund (Jan. 4, 2007), <http://www.smartvoter.org/2006/11/07/ca/la/meas/W/>.

<sup>80</sup> Taxpayer Protection Report, Santa Monica Office of City Clerk (March 30, 2016), available at <http://www.smgov.net/uploadedFiles/Departments/Clerk/Taxpayer%20Protection%20Report%20with%20Ownership.pdf>.

this provision of the City’s Charter.”<sup>81</sup> The DA PID suggested that Ms. Moutrie cross-designate Oaks Initiative complaints to other cities, but Ms. Moutrie declined to do so because she did not believe that she could “lawfully arrange for other cities to prosecute violations of Santa Monica laws.” Ms. Moutrie then referred the complaint to the Attorney General’s office. The Attorney General also declined to take action. The Attorney General suggested that Ms. Moutrie could “obviate [her] conflict concerns...[by] the assignment of a deputy city attorney who is properly insulated from the rest of [her] office and the City Council.”<sup>82</sup> Ms. Moutrie declined to do so because, in her view, everyone in her office was subject to her oversight.

This complaint has not yet been resolved.

### **b) Oaks Complaint against Rodney Gould**

On June 10, 2015, SMTP filed a complaint against City Manager Rodney Gould, alleging violations of the Oaks Initiative and the ethics code of the International City Managements Association (“ICMA”). SMTP alleged that Mr. Gould approved and executed development agreements with Management Partners—a management consulting firm—shortly before he retired as City Manager and began working for Management Partners. The complaint also alleged that, before Mr. Gould approved the development agreements, Management Partners had hinted in an e-mail that it might extend an employment offer to Mr. Gould. Mr. Gould allegedly expressed interest in a potential position, writing to a Senior Partner at Management Partners, “I would truly enjoy working with you as there are fewer wiser and better people on the planet.”

Mr. Gould defended himself by arguing that there was no connection between the development contracts and his recent employment with Management Partners. He pointed to the fact that he had not fully negotiated or accepted Management Partners’ offer until after he had left his position as City Manager. The ICMA also provided a response, stating that there could only be a violation of the ICMA if Mr. Gould had negotiated his future employment with Management Partners at the same time that negotiations of the development agreements had taken place, or if employment with Management Partners had been extra consideration for the development agreements. The ICMA concluded that, on the facts of Gould’s case, there was no evidence of an ICMA ethics issue.

City Attorney Moutrie responded to SMTP’s complaint in a letter dated June 16, 2015. Ms. Moutrie wrote that the City Attorney’s Office routinely advised Mr. Gould and thus “[could] neither perform investigations nor make filing decisions” because of a conflict of interest. Ms. Moutrie noted that, in the Pamela O’Connor matter, she had referred an Oaks Initiative complaint to the District Attorney and Attorney General but both entities had declined to prosecute. Ms. Moutrie also wrote that she did not believe that the Oaks Initiative applied to the City Manager position. She also noted that the Oaks Initiative had multiple legal infirmities, and she cited two

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<sup>81</sup> Letter from Jackie Lacey, District Attorney, Los Angeles County and Patricia Wilkinson, Head Deputy, Public Integrity Division, Los Angeles County, to Marsha Moutrie, City Attorney, Santa Monica (Nov. 24, 2014).

<sup>82</sup> Letter from Kamala D. Harris, Attorney General, State of California and Lance E. Winters, Senior Assistant Attorney General, State of California to Terry White, Office of the City Attorney, Santa Monica (Apr. 13, 2015).

judicial decisions finding constitutional issues with the Oaks Initiative. Finally, Ms. Moutrie argued that it was unclear whether the Oaks Initiative could even reach Mr. Gould's actions seeing as he had accepted the employment position outside of Santa Monica's city limits and also because he had accepted the position after his retirement from his City Manager position. For those reasons, Ms. Moutrie refused to take any action on the complaint.

On August 7, 2015, members of SMTP filed a lawsuit in their individual capacities against Rodney Gould, alleging violations of the Oaks Initiative and seeking restitution, penalties, and attorney's fees.<sup>83</sup> On November 27, 2015, Mr. Gould and the SMTP members entered into a settlement agreement.<sup>84</sup> Under the terms of the agreement, Mr. Gould committed, among items, to:

Resign from Management Partners and refrain from accepting any employment with it until the end of the post-employment period during which such employment is prohibited under Oaks (January 31, 2017);

Abide by the post-employment restrictions of the Oaks Initiative as to other companies for which he approved contracts while working for the City, also through January 31, 2017; and

Pay \$20,000 to cover Plaintiffs' attorney's fees and costs.<sup>85</sup>

Neither Management Partners nor Mr. Gould admitted to any wrongdoing as part of the settlement agreement. Management Partners said in a statement that it agreed with Ms. Moutrie's statement that the Oaks Initiative was unconstitutional, unenforceable, and inapplicable to Mr. Gould.

## **B. SURVEY OF OTHER JURISDICTIONS**

This section provides a survey of other California jurisdictions that adopted analogues to the Oaks Initiative in 2009 and 2010. It also examines federal restrictions on campaign contributions that are similar to the provisions in the Oaks Initiative.

### **1. Other Oaks Initiative Jurisdictions.**

As mentioned above, in 1999 the Oaks Project organized an effort to place anti-corruption municipal codes on local ballot initiatives throughout California. The codes were called "The Taxpayer Protection Amendment of 2000" (the "TPA"). Oaks Project volunteers successfully placed the code on the local ballot of five cities: Santa Monica, San Francisco, Pasadena, Vista,

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<sup>83</sup> Complaint for Restitution, Civil Penalties, and Injunctive Relief, *Marlow v. Gould* (Aug. 7, 2015).

<sup>84</sup> Settlement Agreement and Release between Rodney Gould and Mary Marlow, Elizabeth Van Denburgh, and Nancy Coleman (Nov. 27, 2015).

<sup>85</sup> *Id.*

and Claremont.<sup>86</sup> According to Oaks Project officials, those cities were chosen to reflect California’s geographical and political makeup.

Oaks Initiative laws have fared differently in each city based on several factors, including the input of the voters, the reaction by political actors, and the way city officials have chosen to enforce the legislation. The approaches these cities took can be separated into two general categories: (1) the jurisdiction passed substitute anti-corruption legislation including some, but not all, of the restrictions in the TPA; and (2) the jurisdiction passed the TPA but has generally not enforced the law.

**a) Cities that Replaced the TPA with Different Anti-Corruption Legislation**

**(1) San Francisco**

On November 4, 2003, San Francisco voters repealed the TPA in its entirety and replaced it with “Ethics Reform” legislation that was aimed at addressing concerns that conflict of interest laws in San Francisco had become outdated, confusing, or had been inadequately drafted.<sup>87</sup> While the TPA was repealed, Proposition E contained several prohibitions that aimed to address conflict of interest concerns, and it applied to both elected and appointed city officials.<sup>88</sup> The conflict of interest provisions are still in existence today and largely mirror state conflict of interest laws, specifically the California Political Reform Act. The conflict of interest provisions that are relevant to our review of Santa Monica’s TPA include:

- **Restrictions on influencing public decisions after receiving a financial interest**—No officer or employee of San Francisco can make, participate in making, or seek to influence a decision of the City in which the officer or employee has a financial interest,<sup>89</sup> their family

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<sup>86</sup> The Oaks Project missed qualifying TPA for the ballot in Irvine by 81 votes in 2000. While it appears that Irvine residents and Oaks Project volunteers have met with city officials about the TPA since then, it does not appear that it has voted on or implemented any conflict of interest legislation since then.

<sup>87</sup> Voter Information Pamphlet (Nov. 4, 2003), available at [http://sfpl.org/pdf/main/gic/elections/November4\\_2003.pdf](http://sfpl.org/pdf/main/gic/elections/November4_2003.pdf).

<sup>88</sup> San Francisco Municipal Code, § 3.203(a).

<sup>89</sup> A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following: (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more. (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more. (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of

members are involved, or their own character or conduct is involved. The law only requires disclosure of a city officer or employee who has “any personal, professional or business relationship with any individual who is the subject of or has an ownership or financial interest in the subject of a governmental decision being made by the officer or employee where as a result of the relationship.”<sup>90</sup>

- **Restrictions on gifts before and after providing a benefit**—The law prohibits gifts to officers and employees from persons or entities doing business or seeking to do business with the city. “Gifts” include any payment that confers a personal benefit on the recipient.<sup>91</sup>
- **Disclosure of all potential conflicts of interests**—No officer or employee of San Francisco can make, participate in making, or seek to influence a decision of the City if the officer or employee is discussing or negotiating an agreement concerning future employment with the beneficiary.<sup>92</sup>
- **Post-employment restriction**— No current or former officer or employee of the City can be employed by or otherwise receive compensation from a person or entity that entered into a contract with the City within the preceding 12 months where the officer or employee personally and substantially participated in the award of the contract.<sup>93</sup>

## (2) Vista

While voters in Vista approved the TPA on November 7, 2000,<sup>94</sup> they approved another anti-corruption measure—the “Good Government and Fair Elections” ordinance (the “GGFE”)—with a higher proportion of the vote on the same date.<sup>95</sup> Opponents of the TPA had introduced and gathered enough signatures to put their own proposition, the GGFE, on same ballot as the

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gifts specified by this subdivision shall be adjusted biennially by the Commission to equal the same amount determined by the Commission pursuant to subdivision (f) of Section 89503. Public Reform Act, Cal. Gov't Code § 87103.

<sup>90</sup> San Francisco Municipal Code, §§ 3.206, 3.210, 3.212.

<sup>91</sup> “Gift has the same meaning as under the Political Reform Act, California Government Code Section 81000 et seq. ....” San Francisco Municipal Code, § 3.216. “Gift” means, except as provided in subdivision (b), any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value. Political Reform Act, Cal. Gov't Code § 82028.

<sup>92</sup> San Francisco Municipal Code, § 3.214.

<sup>93</sup> San Francisco Municipal Code, § 3.234(a)(3).

<sup>94</sup> Measure W: Vista Taxpayer Protection Amendment, City of Vista, League of Women Voters of California Education Fund (Jan. 25, 2001), <http://www.smartvoter.org/2000/11/07/ca/sd/meas/W/>.

<sup>95</sup> Measure V: Good Government and Fair Elections, City of Vista, League of Women Voters of California Education Fund (Jan. 25, 2001), <http://www.smartvoter.org/2000/11/07/ca/sd/meas/V/>.

TPA.<sup>96</sup> Due to the wording of the GGFE, it became operative while the TPA never became law in Vista.<sup>97</sup>

The GGFE is still law in Vista today. Its main provisions include:<sup>98</sup>

- Restrictions on councilmembers and appointed officials from receiving gifts from any single source or person of value of more than \$300 with no gift allowed to be over \$100, with regular increases based on the Consumer Price Index;
- Prohibitions on gifts of over \$50 to councilmembers and appointed officials if the donor or presenter of the gift has an economic or financial interest in contracts, property applications, or other similar requests for benefits from the city;
- Providing that no councilmember and no council candidate can accept honoraria, and no appointed official can accept it if they would be required to report the receipt of income or gifts from that source under this ordinance; and
- Restricting former councilmembers and appointed officials from influencing the City Council or any administrative action for one year after leaving office or employment.

**b) Cities that Passed the TPA but Have Not Yet Prosecuted Any TPA Complaints**

**(1) Pasadena**

Pasadena's City Council and City Attorney's Office initially challenged the constitutionality of the TPA, but they were not successful as the appellate state court dismissed their lawsuit for jurisdictional reasons.<sup>99</sup> In 2005, a local Pasadena newspaper conducted an investigation into City Councilmembers and found that six of the eight councilmembers had taken thousands in campaign donations that were prohibited under the TPA while the litigation was ongoing.<sup>100</sup> These councilmembers then approved a measure to indemnify themselves for any

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<sup>96</sup> Brad Drake, Politicians poison Vista politics, thwart will of people, San Diego Union Tribune (November 29, 2000), available at <http://www.consumerwatchdog.org/story/politicians-poison-vista-politics-thwart-will-people>.

<sup>97</sup> Proposition V was presented as an alternative to Proposition W. It therefore contained a "poison pill" that stated that if Proposition V were to receive more "Yes" votes than Proposition W, Proposition W would be deemed null and void even if voters voted for Proposition W to pass. Proposition W received 11,091 votes while Proposition V received 12,057 votes, and thus Proposition V became law and Proposition W was declared null and void.

<sup>98</sup> Vista Municipal Code, Chapter 2.33.

<sup>99</sup> See supra note 78 and accompanying text.

<sup>100</sup> Editorial, Stop the Backroom Deal Preservation Act, Pasadena Weekly (August 22, 2005), available at <http://www.consumerwatchdog.org/story/stop-backroom-deal-preservation-act>; see also The Battle over B, Pasadena Weekly (Dec. 29, 2005), available at [http://www.pasadenaweekly.com/cms/story/detail/up\\_front/7933/](http://www.pasadenaweekly.com/cms/story/detail/up_front/7933/).

potential prosecution. After outcry by the public—including from the then-Mayor—the councilmembers agreed to give back any contributions that were in violation of the TPA, implement the TPA as of the summer of 2005, and appoint a Task Force on Good Government (“Task Force”) led by a former California Attorney General.

To implement the TPA, the City Council passed a resolution that established guidelines for TPA enforcement.<sup>101</sup> The guidelines included interpretations of key TPA provisions. The Task Force issued their report on February 27, 2006, recommending twelve total changes to the TPA:

- The ban on receiving personal or campaign advantages should not apply to officers and directors from 501 (c)(3), (4), or (6) organizations, except that disclosure of such persons would continue to be required.
- The TPA should be amended to cover persons bidding on or negotiating for contracts that are worth over \$25,000.
- The TPA should be amended to apply contribution limits to Pasadena political races: \$1,000 per election for City Council and \$2,000 per election for Mayor.
- The TPA should cover Pasadena public officials who raise money for local ballot measure committees that the official controls.
- The TPA should apply only to officials and candidates in city races and not elections outside of Pasadena.
- The City should authorize the City Attorney to bring criminal actions except in cases involving elected City officials in which case the City Attorney should refer the complaint to the L.A. County District Attorney’s office.
- The TPA should give subpoena authority to the City Attorney and, where TPA cases are referred to it, the L.A. County District Attorney.
- The TPA should apply only to Councilmembers or other City officials serving on outside boards as City representatives (*e.g.*, the Burbank Airport Authority), if these other agencies have reporting requirements allowing compliance with the TPA.
- The dollar threshold for determining which decisions are covered by the TPA should be uniform at \$25,000 and above. The only exceptions would be the grant of a tax abatement, exception or benefit, which should remain at over \$5,000 in a twelve-month period, and awarding of franchises worth over \$50,000 in gross receipts.
- The City’s file which lists the persons who are prohibited from providing personal advantages to City officials should be posted on the internet so that the records are available to the public.

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<sup>101</sup> Pasadena City Council Resolution 8500.

- The TPA should eliminate the need to cumulate public benefits in amounts under \$5,000 unless it is clear that the amounts will meet or exceed the thresholds.
- The TPA should be clarified to require that the franchise has to be awarded by the City.

The City Council adopted all of the above recommendations from the Task Force, except for the contribution limits. It additionally added four other amendments to the ballot initiative:

- Adding a restriction on campaign contributions during the time period when the person or entity is “bidding on a contract”;
- Amending the time restriction on public officials—other than those on the City Council or City Commission—receiving personal advantages from those to whom they allocate public benefits to “one year after the City employee departs from his or her office or for two years from the date the City employee approves the public benefit, whichever comes first.”<sup>102</sup>;
- The extent of the TPA’s application to land use decisions shall be addressed through administrative guidelines; and
- A grant of authority to the city council to adopt guidelines for implementation of the TPA that are consistent with the findings and declarations in the TPA.<sup>103</sup>

Pasadena voters approved the amendments on November 7, 2006.

On February 26, 2007, the City Council passed a resolution that amended the August 1, 2005 guidelines for the implementation of the TPA.<sup>104</sup> The guidelines were further amended by the City Council on January 26, 2009 out of a need for additional clarity.<sup>105</sup> It seems that no one has reported any violations of the TPA to the City Attorney and no violations have been prosecuted by private individuals in Pasadena.

## (2) Claremont

Claremont voters approved the TPA—Measure A—on March 6, 2001. Before the law’s passage, however, the Claremont City Attorney opined that the TPA had significant constitutional infirmities. After its passage, she reiterated those concerns and further stated that the City Council could either take legal action to obtain an enforceability opinion, or not implement the law due to concerns related to its constitutionality.

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<sup>102</sup> The change is that the TPA restriction on employees is reduced from five years to two years.

<sup>103</sup> Pasadena City Council Resolution 8633.

<sup>104</sup> Pasadena City Council Resolution 8707.

<sup>105</sup> Pasadena City Council Resolution 8918.

On March 29, 2011, the City Council decided to fight the TPA in court.<sup>106</sup> Claremont eventually joined the *Santa Monica v. Stewart* lawsuit as an *amicus curiae*. As mentioned above, the *Santa Monica* court dismissed the case without reaching the merits of the lawsuit.<sup>107</sup> After the dismissal, it does not appear as though Claremont took any further actions to amend or enforce the TPA.<sup>108</sup>

## 2. Federal Restrictions.

Federal law places many restrictions on federal employees and federal contractors in order to deter and penalize corruptive activities. These restrictions include banning federal contractors from making political donations, prohibiting federal employees from receiving certain gifts, and disqualifying employees from making decisions on matters in which they have a financial interest.

52 U.S.C. § 30119(a)(1) makes it unlawful for any person or entity “who enters into any contract with the United States . . . directly or indirectly to make any contribution . . . to any political party, committee, or candidate for public office or to any person for any political purpose.” The prohibition applies “between the commencement of negotiations . . . and . . . the completion of performance” of the contract. The Federal Election Commission (“FEC”) has construed the section not to apply “in connection with State or local elections.”<sup>109</sup> The FEC has interpreted the restrictions to apply “to only the specific legal entity that holds the federal contract, and not necessarily to parent or subsidiary organizations,” though the FEC has recently indicated that it is revisiting this interpretation and may in the future apply the restriction more broadly to related entities.<sup>110</sup>

Federal contractors challenged the constitutionality of section 30119 on First Amendment and Equal Protection grounds.<sup>111</sup> In a July 7, 2015, opinion authored by Chief Judge Merrick Garland for an *en banc* panel of United States Court of Appeals for the District of Columbia (“D.C. Circuit”), the D.C. Circuit held that section 30119 did not violate the federal contractors’ First Amendment and Equal Protection rights. The court placed emphasis on the fact that section 30119 fulfills two important anti-corruption interests: (1) “the ‘compelling’ interest in protecting against quid pro quo corruption and its appearance;” and (2) the “obviously important interest[]” in protecting merit-based public administration. The D.C. Circuit noted that those concerns were not theoretical but were rather shown to be realistic by many corruptive events.

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<sup>106</sup> Tipton Blish, [Claremont will fight Measure A in court](http://www.consumerwatchdog.org/story/claremont-will-fight-measure-court), Inland Valley Times (Mar. 29, 2001), available at <http://www.consumerwatchdog.org/story/claremont-will-fight-measure-court>.

<sup>107</sup> See supra note 78 and accompanying text.

<sup>108</sup> Claremont Municipal Code, Chapter 2.56.

<sup>109</sup> 11 C.F.R. § 115.2(a).

<sup>110</sup> [FEC Solicits Comments on Expanding Prohibition Against Political Contributions and Expenditures by Federal Contractors](http://www.wileyrein.com/newsroom-articles-3666.html), Wiley Rein LLP (Apr. 2, 2015), available at <http://www.wileyrein.com/newsroom-articles-3666.html>.

<sup>111</sup> *Wagner v. F.E.C.*, 793 F.3d 1 (D.C. Cir. 2015) (en banc).

Federal regulations also prohibit federal employees from receiving gifts from prohibited sources or in return for influencing an official act.<sup>112</sup> Prohibited sources<sup>113</sup> include any person who:

- (1) Is seeking official action by the employee's agency;
- (2) Does business or seeks to do business with the employee's agency;
- (3) Conducts activities regulated by the employee's agency;
- (4) Has interests that may be substantially affected by performance or nonperformance of the employee's official duties; or
- (5) Is an organization a majority of whose members are described in paragraphs (d) (1) through (4) of this section.

The federal regulations additionally contain disqualification provisions for “employees when seeking employment with persons whose financial interests would be directly and predictably affected by particular matters in which the employees participate personally and substantially.”<sup>114</sup> These regulations relate to a federal criminal statute, 18 U.S.C. § 208(a), which requires “that an employee disqualify himself from participation in any particular matter that will have a direct and predictable effect on the financial interests of a person ‘with whom he is negotiating or has any arrangement concerning prospective employment.’” That criminal statute, 18 U.S.C. § 208(a), also prohibits employees “from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the particular matter will have a direct and predictable effect on that interest.”<sup>115</sup> Federal employees additionally “shall not acquire or hold any financial interest that [they are] prohibited from acquiring or holding by statute, [or] by agency regulation,” which includes restrictions through agency determinations “that the acquisition or holding of such financial interests would cause a reasonable person to question the impartiality and objectivity with which agency programs are administered.”<sup>116</sup>

### **C. FINDINGS AND RECOMMENDATIONS FOR BEST PRACTICES**

This section makes key findings about the Oaks Initiative and recommends best practices for future implementation and enforcement of the Oaks Initiative.

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<sup>112</sup> 5 C.F.R. § 2635.202.

<sup>113</sup> 5 C.F.R. § 2635.203.

<sup>114</sup> 5 C.F.R. § 2635.601.

<sup>115</sup> 5 C.F.R. § 2635.402.

<sup>116</sup> 5 C.F.R. § 2635.403.

## **1. Issue: Whether the Oaks Initiative Should be Enforced.**

Some of the interviewees expressed an opinion that the Oaks Initiative is unnecessary because Santa Monica is a generally corruption-free city and the Oaks Initiative is burdensome and ineffectual without providing much benefit to Santa Monica. In order to suggest best practices for the Oaks Initiative, it is important first to establish whether the Oaks Initiative serves an important purpose in Santa Monica.

### **a) Findings**

The Oaks Initiative contains provisions that, if enforced, fulfill important anti-corruption goals. It is a very useful section in the City Charter because it contains prohibitions against clearly corruptive and potentially corruptive actions, and it invites public and private enforcement.

The Oaks Initiative prohibits three types of personal or campaign advantages: (1) gifts, and similar devices, of a value in excess of \$50; (2) employment for compensation; and (3) campaign contributions. It is important to regulate gifts and campaign contributions in order to prevent elected and unelected city officials from exchanging public benefits for monetary compensation. It is similarly important to restrict employment for compensation in order to curtail a potential revolving door issue.

Some interviewees said that federal and state anti-corruption laws already provide ample deterrence and that the Oaks Initiative is therefore an unnecessary piece of legislation. We disagree and find that the Oaks Initiative is useful, even with strong state anti-corruption laws. First, Santa Monica residents can enforce the Oaks Initiative—along with all of the anti-corruption values that it embodies—through private, civil litigation. Granting residents that enforcement power fosters better enforcement and, therefore, better compliance. Additionally, state enforcement agencies do not have the time or resources to litigate each potentially corruptive act. All else equal, enforcing the Oaks Initiative will create a deterrent effect and a tool to minimize corruptive behavior in Santa Monica.

### **b) Recommendation for Best Practices**

To the extent that there are constitutional issues, enforceability issues, interpretation issues, or other legal infirmities with the Oaks Initiative, the City Attorney or City Council should clarify or amend the law to remedy those issues, to the extent possible. We make specific recommendations below.

## **2. Issue: Whether A Conflict of Interest Truly Precludes Enforcement of the Oaks Initiative.**

City Attorney Moutrie has repeatedly taken the position that she cannot enforce the Oaks Initiative because she works too closely with public officials who are subject to the Oaks Initiative. The District Attorney and State Attorney General have both declined to enforce the Oaks Initiative. Ms. Moutrie said in her interview that she was unsure about how best to enforce the Oaks Initiative going forward.

**a) Findings**

The City Attorney's Office's current structure creates a wall between the Criminal Division and city officials sufficient to mitigate any conflict of interest concerns for the City Attorney. The City Attorney's Office is separated into three main divisions: (1) Criminal Law; (2) Municipal Law; and (3) Civil Liability. City Attorney Moutrie works closely with the latter two divisions and has substantive oversight over cases in those divisions. The Criminal Division, however, is led by Terry White. The Criminal Division is separated from the Civil Division so as to prevent city officials from influencing criminal prosecutions. While Ms. Moutrie theoretically oversees the Criminal Division, she only becomes involved if unique legal questions are triggered, such as First Amendment rights. Neither Ms. Moutrie nor Assistant City Attorney Lawrence could think of more than one case in the last 20 years in which Ms. Moutrie was substantively involved in a criminal case.

Additionally, while Ms. Moutrie works closely with the City Manager's Office and councilmembers, Mr. White has interacted with the City Manager's Office no more than a handful of times during his time as Chief Deputy of the Criminal Division, and Mr. White has never worked with the City Council. Rick Cole confirmed that he often communicates with Ms. Moutrie but that he has not communicated with Mr. White other than during an introductory meeting when he first started his role as City Manager. Mr. White said that the interactions of other attorneys in his Criminal Division with the City Manager's Office and City Council are similarly limited or nonexistent.

Due to Ms. Moutrie's close working relationship with the City Council and City Manager's Office, it is reasonable for her to claim that a conflict of interest prevents her from prosecuting Oaks Initiative complaints against public officials. That said, the insulation of the Criminal Division from the rest of the City Attorney's Office and Mr. White's general lack of communication with the City Council and City Manager's Office suggests that he is free from the same conflict of interest concerns. Based on the limited interaction between members of Mr. White's division and city officials, it is highly unlikely that a member of his Criminal Division prosecuting a city official under the Oaks Initiative would have a conflict of interest. In fact, Mr. White said that he had no problem prosecuting Oaks Initiative complaints himself and that he believed there was a clear separation between the City Attorney and his Criminal Division, especially because the City Attorney is not involved in criminal matters.

Ms. Moutrie and Mr. Lawrence had two concerns about that arrangement. First, both stated that everyone in the City Attorney's Office—including those in the Criminal Division—are at-will employees subject to oversight by the City Attorney. As a result, they technically all report to the City Attorney, which means that the Criminal Division is not sufficiently insulated from the City Attorney to overcome conflict of interest concerns. While Ms. Moutrie and Mr. Lawrence are right that the Criminal Division is not perfectly insulated from the City Attorney, the fact that its level of insulation and autonomy is deemed sufficient to allay concerns about the City influencing criminal prosecutions strongly suggests that the insulation is sufficient to solve concerns about the City Attorney influencing Oaks Initiative prosecutions. In addition, unlike the criminal case where Ms. Moutrie was consulted about First Amendment issues, the City Attorney's Office can create a policy that Oaks Initiative complaints remain within the Criminal Division to prevent any appearance of conflict.

Another concern that interviewees raised was that the Oaks Initiative has both criminal and civil dimensions, which would force a criminal attorney to potentially litigate a civil case. While this is true, it does not seem like an onerous burden. After all, in approximately 15 years, there have been only two complaints. The Oaks Initiative is not a very long ordinance and there is hardly any precedent about its applicability. A criminal attorney would certainly have sufficient expertise to enforce the civil elements of the Oaks Initiative, and the relative dearth of complaints should not impose heavy costs on the attorney who is otherwise focused on other matters.

**b) Recommendation for Best Practices**

In order to properly enforce the Oaks Initiative, the best practice is for the City Attorney's Office to appoint an attorney in the Criminal Division to be responsible for enforcing Oaks Initiative complaints. Out of an abundance of caution, the City Attorney should provide the utmost deference regarding the substance of the complaint to that attorney and yield oversight of the attorney's work on the Oaks Initiative complaint to Terry White. Other than that, the separation that already exists between the criminal attorneys and city officials solves for any potential conflicts concerns.

To the extent that the City Attorney is uncomfortable with an attorney under her oversight prosecuting Oaks complaints, the city of Santa Monica should hire a special prosecutor. Special prosecutors are outside attorneys who are hired when a jurisdiction either has conflict of interest concerns or feels that an outside attorney would be more effective in prosecuting a matter. If the City Attorney continues to have concerns about conflicts with Oaks Initiative prosecutions, she should, with the approval of the City Council if necessary, hire a special prosecutor for the specific purpose of handling Oaks Initiative complaints. That special prosecutor should be completely independent in making her own judgments about the complaint and whether to prosecute—the City Attorney should not provide any opinions or guidance to the special prosecutor. The problem with special prosecutors is their cost, but the fact that there are not many Oaks Initiative complaints means that this cost should be infrequent. With a specified enforcement procedure in place, the Oaks Initiative will serve as a strong deterrent for corruptive actions by public officials.

**3. Issue: Whether City Officials Understand Oaks Obligations.**

In order for the Oaks Initiative to serve as an effective deterrent to anti-corruptive behavior, city officials subject to the Oaks Initiative need to understand their obligations under the law. In August 2006, the City Attorney drafted an information memorandum about city officials' obligations under the Oaks Initiative for city boards and commissions but it does not appear that this information was shared with all city officials subject to the Oaks Initiative. Every interviewee we spoke with agreed that receiving more information and clarification on the Oaks Initiative would be helpful for them.

**a) Findings**

The City Attorney's Office has provided inadequate guidance to councilmembers and city officials on the application of the Oaks Initiative. Every city official—elected and unelected—stated that they would benefit from training and guidance regarding the Oaks Initiative. Currently, it appears that training on the Oaks Initiative is only provided to councilmembers during ethics

training in election years and it does not appear that this training is extensive. The City Attorney's Office admitted that they have not provided extensive training on Oaks Initiative matters, stating that part of the reason for that are the ambiguities in the Oaks Initiative.

**b) Recommendation for Best Practices**

The City Attorney should draft guidelines for the implementation of the Oaks Initiative. Such guidelines would be a powerful and efficient remedy to ambiguities or potential infirmities in the Oaks Initiative. The City Council should then approve the guidelines and ensure that they take effect immediately. To the extent that there is confusion about, for example, who the Oaks Initiative applies to or how it is triggered, establishing guidelines for implementation would help provide guidance to city officials and the public about how the provisions of the Oaks Initiative will be interpreted. Additionally, promulgating a clear set of guidelines would give Santa Monica residents confidence that the Oaks Initiative is being properly interpreted and enforced.

In fact, Pasadena did exactly this in 2005. The voters of Pasadena passed an ordinance very similar to the Oaks Initiative in March of 2001, and in 2005 the City Council passed a resolution adopting their City Attorney's interpretation of the ordinance for the purpose of fulfilling the ordinance's requirement of "the City's best efforts at interpretation and guidance so that [the ordinance] can be implemented to the best of the City staff's abilities."

A draft of potential guidelines for Santa Monica is attached to this report as Exhibit 1.

In addition, the City Attorney's Office should provide periodic training on the Oaks Initiative to city employees who qualify as "public officials," clarifying for them what obligations and actions could subject them to liability. New employees subject to the provisions of the Oaks Initiative should receive information during their orientation process so that they are fully informed of their obligations as soon as they begin working for the city. Elected officials should be given training on the Oaks Initiative in a separate session from their ethics training—this will allow for a more in-depth conversation with councilmembers about their obligations under Oaks.

**4. Issue: Whether Compliance with the Oaks Initiative is Burdensome.**

Every councilmember that we interviewed stated that compliance with the Oaks Initiative is burdensome. The more burdensome the compliance, the more likely there are to be inadvertent mistakes by affected parties and accordingly less trust that the Oaks Initiative is properly drafted. It is therefore important to analyze whether compliance is burdensome and how it could be made less so.

**a) Findings**

The Oaks Initiative imposes a heavy compliance burden on councilmembers. Councilmembers are given a list in PDF form by the City Clerk that contains a list of city

contractors from whom they cannot accept personal or campaign benefits.<sup>117</sup> The PDF list contains the meeting date during which the vote was taken to approve the public benefit, the entity the benefit was provided to, a description of the benefit, individuals with 10% ownership of the entity or service on the board of the entity receiving the public benefit, and how councilmembers voted on the project. Oaks Initiative restrictions can apply for up to “six years from the date the official approves or votes to approve the public benefit.” For 2010 to 2015, there are 401 pages of contractors with up to five contractors per page. Some of the entities have 29 or more individuals listed as having ownership of or being on the board of directors for the entities.

Councilmembers said that compliance with the Oaks Initiative was extremely time intensive. And, given the number of names to check, there is no assurance that inadvertent mistakes do not abound. Councilmembers have to search through the PDF report individually for every contributor to their political campaign. The report also includes contracts from all the way back in 2002 that would clearly not give rise to any current Oaks Initiative restrictions.

Based on our review of the list of city contractors, we agree that the Oaks Initiative imposes a heavy compliance burden on councilmembers. The expenditure of these resources without any assurance of compliance is problematic because it does not efficiently fulfill the anti-corruption goals of the Oaks Initiative and imposes immense costs of compliance, which may deter qualified individuals from running for political office.

#### **b) Recommendation for Best Practices**

We recommend that the City Clerk provide the report in EXCEL—or a comparable spreadsheet program—with each affected entity and associated name in its own row. Reports with contributors to councilmembers should also be retained in an EXCEL format—they are currently also in a PDF report. The benefit of this is that anyone—councilmembers, the City Clerk, or community members—can use a simple search function in EXCEL to find any improper contributions. For example,<sup>118</sup> if the restricted individuals are in column A, the contributors are in column B, and the list of names begins in the second row, the directions would be to:

- 1) Click cell C2
- 2) Enter this formula: =ISNUMBER(MATCH(B2,A:A,0))
- 3) Drag the formula down Column C for all items in B
- 4) Filter Columns A, B, and C for all “TRUE” values in Column C<sup>119</sup>

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<sup>117</sup> [Taxpayer Protection Report](http://www.smgov.net/uploadedFiles/Departments/Clerk/Taxpayer%20Protection%20Report%20with%20Ownership.pdf), Santa Monica Office of City Clerk (March 30, 2016), available at <http://www.smgov.net/uploadedFiles/Departments/Clerk/Taxpayer%20Protection%20Report%20with%20Ownership.pdf>.

<sup>118</sup> Please note that this is just one way of using a spreadsheet file to make compliance easier. We encourage the use of other data analytics techniques that help reduce the compliance burden on councilmembers.

<sup>119</sup> “TRUE” means that there is a match between a name in Column A and a name in Column B, meaning that there is a match between a restricted name and a contributor.

- 5) Analyze the names in Column B associated with the “TRUE” values to determine compliance

The benefit of this proposed system is that it would save councilmembers a large amount of compliance time. Instead of cross-checking each individual contributor one-by-one against the PDF list, review to find potential violations would take no more than a few minutes by using the above formula in EXCEL. This change in presentation should not cost Santa Monica any money either because the PDF provided by the City Clerk appears to be in an “Excel”-type format already.

We also recommend that the City Clerk remove contracts that were approved more than six years before the date of the report. Under section 2203 of the Oaks Initiative, the longest restriction possible is “six years from the date the official approves or votes to approve the public benefit.” It is therefore of no use that there are contracts on these lists from more than six years ago. To the extent someone needs historical information, the City Clerk can keep old reports available for download on its website.

## **5. Issue: Whether the Oaks Initiative Should be Amended.**

### **a) Findings**

Based on our review of the Oaks Initiative and our conversations with city officials, we believe that there are certain provisions of the law that should be amended or clarified for more efficient compliance and enforcement. Each is discussed in turn.

#### **(1) Ban on Campaign Contributions**

Section 2202(c)(3) of the Santa Monica City Charter prohibits “any campaign contributions for any elective office said official may pursue” by persons receiving benefits approved by that city official for the period of time that the Oaks Initiative is triggered. Since it applies only to elective office, this provision appears to govern councilmembers and city officials who decide to run for political office.

Ms. Moutrie and others believe that this is unconstitutional because it is an outright ban on campaign contributions. They argue that persons who receive a benefit are barred from the political process, which seems overly restrictive. In addition, the restriction prevents the donor and the recipient from exercising their freedom to associate with one another after a “public benefit” has been conferred.

We believe that this ban on campaign contributions by those who receive public benefits is very similar to the federal ban on campaign contributions by federal contractors.<sup>120</sup> In fact, the Oaks Initiative restriction is in some ways narrower than the federal restriction. 52 U.S.C. § 30119(a)(1) restricts contributions from the “commencement of negotiations” to “the completion of performance”—the Oaks Initiative only restricts from when the public benefit is approved and

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<sup>120</sup> 52 U.S.C. § 30119(a)(1) makes it unlawful for any person or entity “who enters into any contract with the United States . . . directly or indirectly to make any contribution . . . to any political party, committee, or candidate for public office or to any person for any political purpose.” The prohibition applies “between the commencement of negotiations . . . and . . . the completion of performance” of the contract.

to a specified time period tied to that vote, not the length of the contract. In addition, § 30119(a)(1) applies to all federal political parties, committees, and candidates for public office, not just those who exercised discretion to approve and approved the public benefit.

These differences are important to note because the ban on contributions by federal contractors in § 30119(a)(1) was deemed constitutional by the D.C. Circuit.<sup>121</sup> The same anti-corruption interests that were at issue in that case are present in the Oaks Initiative. Namely, restricting the ability of local contractors from contributing to local officials who approved their contract promotes “the ‘compelling’ interest in protecting against quid pro quo corruption and its appearance” because prohibiting such contributions both prevents quid pro quo agreements and creates confidence in the public that such agreements are not being made.<sup>122</sup> In addition, making sure officials cannot receive remuneration for their vote promotes the “obviously important interest[.]” in protecting merit-based public administration.

We therefore believe that the ban on campaign contributions in the Oaks Initiative would likely be upheld against a First Amendment challenge. Since we believe that protecting against quid pro quo arrangements—and the appearance of such arrangements—is very important, we do not suggest amending the ban on campaign contributions in the Oaks Initiative.

## **(2) Timing of the Restriction**

Currently, the Oaks Initiative prohibits a public official from receiving a personal or campaign advantage after they approve or vote to approve a public benefit.<sup>123</sup> But there is no prohibition on public officials receiving such advantages before approving or voting to approve a public benefit. Ms. Moutrie and others argue that there is an anti-corruption interest in preventing city officials from receiving advantages before approving projects, similar to the anti-corruption interest in preventing city officials from receiving advantages after approving projects. There is no reason to restrict ex-post personal or campaign advantages but not ex-ante personal or campaign advantages. Ms. Moutrie argues that the mismatch is arbitrary and may violate substantive due process rights.

We think a reasonable argument can be made that the restriction occurring after the vote is not arbitrary. The Oaks Initiative is focused on limiting quid pro quo corruption where the remuneration offered in exchange for approval of a public benefit is contingent on the approval. Nevertheless, we believe that the best solution is to amend the Oaks Initiative to add a prohibition against receiving ex-ante benefits. Such an adjustment absolutely furthers the anti-corruption interests of the Oaks Initiative because it restricts quid pro quo arrangements where the vote is

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<sup>121</sup> See supra note 111 and accompanying text.

<sup>122</sup> Some public officials we interviewed believe that the ban on contributions does not further an important anti-corruption interest because the campaign contribution limit in Santa Monica is currently \$325, a very low ceiling. Some councilmembers expressed to us that it was difficult to believe that they would be incentivized to take action to approve a project based on a \$325 contribution. However, there is a legitimate concern that multiple employees within an organization may donate to a councilmember who approves their project and such an aggregate contribution could certainly have a persuasive effect.

<sup>123</sup> Santa Monica City Charter, § 2203.

contingent on receipt of benefits. To the extent that there are legitimate concerns about substantive due process rights and arbitrariness, this change should assuage those concerns.

When dealing with an ex-ante restriction, it is crucial to determine at what point contribution prohibitions are triggered. In the federal context, the restriction begins at the “commencement of negotiations” between the federal government and federal contractors. We suggest adopting this language for the amendment but there may be some confusion about what the “commencement of negotiations” would mean in the context of a bidding process. We believe that for bidding, the restriction should begin at the time a contractor begins their consideration of bidding for a public contract. That is, when the contractor begins its consideration of submitting a bid for public benefits, restrictions on personal and campaign advantages should be triggered.

### **(3) Scope of City Contractors Subject to the Oaks Initiative**

The Oaks Initiative applies to persons and entities receiving a public benefit. It also applies to individuals who, during the period the benefit is made, have more than a 10% interest or are a trustee, director, partner, or officer of an entity receiving such a benefit. Some have argued that a reasonable amendment to this would be to allow an exception for directors and officers of non-profit entities. Multiple interviewees noted that there are many non-profit organizations in Santa Monica that have volunteer boards of directors. Imposing the Oaks Initiative restrictions on these volunteers reduces their willingness to participate in non-profit organizations and effectively limits their ability to participate in the local political process based on their volunteer service.

It is reasonable to prevent directors or owners of for-profit public contractors from conferring benefits, but there is no similar interest in preventing directors who volunteer to serve on the boards of charitable non-profit organizations from conferring personal or campaign advantages on city officials. Pasadena passed such an exception, which exempts “such persons from an organization that is exempt from income taxes under Section 501(c)(3), (4), or (6) of the Internal Revenue Code.”<sup>124</sup> We believe that a similar amendment to the Oaks Initiative would be proper.

### **(4) Scope of City Officials Subject to the Oaks Initiative**

Ms. Moutrie believed that there was confusion as to whether the Oaks Initiative applied to all public officials in Santa Monica or only elected public officials. Many unelected public officials that we interviewed expressed similar views, stating that they were unclear whether the Oaks Initiative applied to them.

In our opinion, the Oaks Initiative specifies clearly that “public officials” includes “any elected or appointed public official acting in an official capacity.” There is no indication in the language of the Oaks Initiative that it meant to apply only to elected officials. To the extent there

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<sup>124</sup> “However, this exception shall not apply to trustees, directors, partners, or officers of such organizations that are political committees or control political committees as defined by California Government Code Section 82013 or 2 U.S.C. 431(4). Any person who is exempted by this subdivision shall still be considered a public benefit recipient for the purposes of disclosure under Section 1705(b) and (c).” Pasadena City Charter, § 1703.

is confusion about what “appointed public official” means, other portions of the Santa Monica City Charter are instructive. Article VII, named “The Appointive Officers” provides guidance. This section specifies the “Officers to be appointed by the City Council,” “Officers to be appointed by the City Manager,” and “Other appointive officers.” In fact, in August 2006, the City Clerk’s Office released an information memorandum “prepared...[by] [t]he City Attorney [Marsha Moutrie]” which specified that “public official” included City Councilmembers, Planning Commission members, City Manager and Department heads and designees who confer “public benefits.”<sup>125</sup>

Ms. Moutrie and others may still believe that “public official” is not perfectly defined in the Oaks Initiative. Pasadena, in its guidelines for enforcement of its Oaks Initiative, specified that all city officials—elected or unelected—who “make the final approval” of public benefits are subject to the Oaks Initiative. We believe there is no harm in making an amendment to the Oaks Initiative that more clearly specifies that it applies to elected and unelected city officials who exercise discretion in approving a public benefit.

#### **(5) Jurisdictional Application**

In the connection with the Rodney Gould complaint, Ms. Moutrie stated that she felt as though it was unclear whether the Oaks Initiative applied to personal or campaign advantages made outside the geographic boundaries of Santa Monica. Based on the text of the Oaks Initiative, the restrictions on receiving personal or campaign advantages are triggered when the public official exercises discretion to approve or vote to approve a public benefit. Nowhere in the Oaks Initiative does it specify that, once triggered, the restriction only applies to personal or campaign advantages made in Santa Monica. In fact, such a provision could lead to absurd results. For instance, a “public official” could approve a “public benefit” and avoid the barbs of the Oaks Initiative by merely arranging to accept a personal or campaign advantage just outside the boundaries of Santa Monica.

Principles of statutory interpretation—specifically the doctrine of absurdity—counsel that a law should be interpreted in such a way to avoid absurd outcomes. The best interpretation to avoid the flawed outcome here is that the predicate act that triggers the Oaks Initiative needs to be in Santa Monica but the restriction on receiving a personal or campaign advantage extends to anywhere the advantage is procured. We do believe however that, out of an abundance of caution, this should be clarified in the Oaks Initiative through an amendment.

#### **(6) Penalty on City Contractors**

The Oaks Initiative only penalizes public officials, not their patrons. There is no penalty provided in the Oaks Initiative for the city contractor. Multiple interviewees expressed that it seemed arbitrary to them that there was a punishment inflicted on individuals receiving personal or campaign advantages but not on individuals or entities furnishing that advantage. They expressed support for including penalties for city contractors.

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<sup>125</sup> City Clerk’s Office, Information to Candidates for City Boards and Commissions: Implementation of the Oaks Initiative (August 2006).

That there should be a penalty on city contractors is reasonable and, we believe, should be included in an amendment to the Oaks Initiative. This would achieve the same purpose—preventing public contractors from conferring personal and campaign advantages on city officials—while putting the onus to comply on contractors in addition to councilmembers. It is arguably easier for a contractor to instruct its directors and owners to not give personal or campaign advantages to a small group of people in city government than for councilmembers to go through 400 pages of contractors every election cycle to assure compliance. Santa Monica can ensure that the contractor advised its related parties about their Oaks Initiative obligations by adding one additional question to its already-existing Oaks Initiative Disclosure Form<sup>126</sup> that states: “Person or Entity warrants that it has sent notification to its trustees, directors, partners, officers, and 10% equity holders (as applicable) of their obligations under City Charter Article XXII—Taxpayer Protection to not provide personal or campaign advantages to city officials who have approved their public benefit.”

### **(7) Employment Restriction**

The Oaks Initiative restricts public officials from accepting “any employment for compensation” from those to whom they allocated public benefits.<sup>127</sup> The purpose of this restriction is to prevent public officials from awarding contracts to entities they will work for in the future. Ms. Moutrie and others argue that this restriction may be found unenforceable under California law. California Business & Professions Code section 16600 voids “every contract...[restraining persons] from engaging in a lawful profession, trade or business.” The Ninth Circuit held in April 2015 that Section 16600 may extend to not just “covenants not to compete” but also “other contractual restraints on professional practice.”<sup>128</sup>

At this point, it is unclear whether section 16600 would apply to void the employment restriction in the Oaks Initiative. On one hand, the Oaks Initiative restrictions could be thought of as contractual restraints because city officials are subject to the provisions of the Oaks Initiative, which limit their employment opportunities. On the other hand, there is no precedent that applies section 16600, a part of the California Business & Professions Code, to anti-corruption municipal legislation.

Our recommendation is to keep these employment restrictions in the Oaks Initiative for several reasons. It is unclear whether California courts will apply section 16600 to invalidate the employment restriction. In light of this and that the employment restriction fulfills a very important anti-corruption interest—and directly addresses the type of quid-pro quo arrangement anti-corruption legislation should seek to prevent—these employment restrictions should be enforced as written.

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<sup>126</sup> Oaks Initiative Notice, City of Santa Monica, available at [https://www.smgov.net/uploadedFiles/Departments/Finance/Purchasing\\_Section/OaksInitiativeNotice.pdf](https://www.smgov.net/uploadedFiles/Departments/Finance/Purchasing_Section/OaksInitiativeNotice.pdf).

<sup>127</sup> Santa Monica City Charter, § 2202(c)(2).

<sup>128</sup> *Golden v. California Emergency Physicians Medical Group*, 782 F.3d 1083 (9th Cir. 2015).

**b) Recommendation for Best Practices**

The Oaks Initiative has commendable goals that need to be preserved but could also be advanced more effectively. The best practice we recommend therefore is to pass an amendment to the Oaks Initiative that improves its implementation and enforcement. A draft of such an amendment is in Exhibit 2 to this report. This amendment largely mirrors the changes suggested above.

# **EXHIBIT 1**

**GUIDELINES FOR IMPLEMENTATION OF THE  
CITY OF SANTA MONICA TAXPAYER PROTECTION AMENDMENT OF 2000  
("TPA")  
(SANTA MONICA CITY CHARTER, ARTICLE XXII)**

I. DEFINITIONS

- A. "Public official" is defined in the TPA as "includ[ing] any elected or appointed public official acting in an official capacity." The City interprets this definition to:
- i. Exclude:
    1. Any person(s) making recommendations, or acting within a series of required approvals, preceding the last required approval;
    2. Any hearing officers who are not City employees; and
    3. Any person(s) approving as to form, content, process, or execution only.
  - ii. Include only person(s) who make the final approval, including but not limited to:
    1. City Council members;
    2. Commission members;
    3. City Manager or official designees thereof; and
    4. Department heads or official designees thereof.
- B. "Public benefit" as defined in the TPA "does not include public employment in the normal course of business for services rendered..." and thus excludes memoranda of understanding or other contracts primarily concerning compensation, benefits, or employment arrangements between the City and union, employee association or employee. "Public benefit" is defined in the TPA, and is limited to "a contract, benefit, or arrangement between the City and any individual, corporation, firm, partnership, association, or other person or entity to:
- i. provide personal services of a value in excess of \$25,000 over any 12 month period [including any contracts awarded through a competitive bidding process; the contract price is the presumed value],
  - ii. sell or furnish any material, supplies, or equipment to the City of a value in excess of \$25,000 over any 12 month period [the sale/contract price is the presumed value],
  - iii. buy or sell any real property to or from the City with a value in excess of \$25,000, or lease any real property to or from the City with a value in excess of \$25,000 in any 12 month period [the sale/purchase/lease price is the presumed value],

- iv. receive an award of a franchise to conduct any business activity in a territory in which no other competitor potentially is available to provide similar and competitive services, and for which gross revenue from the business activity excess \$50,000 in any 12 month period,
- v. confer a land use variance, special use permit, or other exception to a pre-existing master plan or land use ordinance pertaining to real property where such decision has a value in excess of \$25,000 [the presumed value of the land use application is as indicated by the applicant on the application],
- vi. confer a tax abatement, exception, or benefit not generally applicable [to the general public] of a value in excess of \$5,000 in any 12 month period [the value is that determined by the Finance Director],
- vii. The “12 month period” reference in subsections (i) through (vii) above run concurrent with the City’s fiscal calendar: July 1 through June 30,
- viii. The “12 month period” referenced in subsections (i) through (vii) above run concurrent with the City’s fiscal calendar: July 1 through June 30.
- ix. Public benefits excludes, among others:
  - 1. third-party benefits and/or indirect benefits arising from the receipt of a public benefit;
  - 2. loans which are reasonably certain to be paid back and are not forgiven (regardless of the interest rate charged);
  - 3. sponsorships;
  - 4. membership dues or obligations;
  - 5. purchases made with credit cards held by individual mid-level staff members for ongoing, minor purchases with are not aggregated under the City’s purchasing ordinance;
  - 6. licenses that result in income to the licensee less than \$10,000; and
  - 7. public utility trading transactions.

C. “Personal or campaign advantage” is limited to:

- i. any gift, honoraria, emolument, or personal pecuniary benefit of a value in excess of \$50; excluding gift exceptions containing in the FPPC regulations (2 CCR 18940 et seq.); and excluding gifts from public agencies or gifts distributed by the City, or
- ii. any employment for compensation, or
- iii. any campaign contributions for any elective office said official might pursue.

Subsection iii of this definition is overly broad as it could encompass campaigns for which a candidate has not yet declared intent to run. Accordingly, it is narrowed to include only campaign contributions for any elective office for which

a person has declared an intent to run, or has established an account into which campaign contributions may be deposited.

- D. “Persons or entities receiving public benefits” excludes governmental entities; excludes any agent for the applicant if the agent is not listed in subpart D(ii), below; requires disclosure of the real party in interest, and includes:
- i. the individual, corporation, firm, partnership, association, or other person or entity so benefiting, and
  - ii. any individual or person who, at the time the public benefit is conferred, or within the 12 month period where the public benefit accrues, if applicable:
    1. has more than a 10% equity, partnership, association, or other person or entity so benefitting, and
    2. is a trustee, director, partner, or officer of that entity.

If any of the entities disclosed under subsections 1 and 2 directly above are themselves a corporation, firm, partnership, or other entity, the TPA does not require further disclosure of those interest holders or corporate officers.

## II. REQUIREMENTS OF TPA

- A. The TPA does not apply to the exercise of a ministerial duty, or to the award of any public benefit arising out of an emergency.
- B. The TPA’s requirements are only triggered when a public benefit is actually conferred. The denial of an application, permit or contract does not confer a public benefit.

## III. DUTIES OF THE CITY

- A. Notice: The City will provide any person or entity applying/competing for a “public benefit” with notice of the TPA requirements. The City has revised its model contracts, requests for proposals, purchase orders, and discretionary application forms to include such notice.
  - i. All applicants for a public benefit must disclose those individuals or other entities which would be “persons or entities receiving public benefits,” as requested by the City. This disclosure will be considered a public record and will be transmitted to the City public official/body.
  - ii. Failure of an applicant to make this disclosure may result in disqualification for award of the contract, forfeiture of bid security, and/or designation of an application as incomplete, at the City’s discretion.

- B. Lists of benefits conferred, and recipients: The City will maintain lists of public benefits conferred, the date on which the public benefit was conferred, the value of the public benefit, and the recipients of the public benefit. The City assumes any responsibility for any errors or omissions on the lists, excluding the knowing or intentional failure of a City public official to report a qualifying public benefit which gives rise to an error on the City's list, and excluding erroneous or incomplete representations by recipients of public benefits.
- i. The City Clerk will maintain the list with regard to any public benefits conferred by the City Council.
  - ii. Each department within the City will maintain the list with regard to any public benefit conferred by that department.

#### IV. DUTIES OF CITY PUBLIC OFFICIALS

- A. City public officials have the following duties under the TPA:
- i. Keep track of all actions by which a public benefit is conferred. As set forth in section III above, the City assumes this duty. City public officials must report any approval of a qualifying public benefit entry into the City's list(s).
  - ii. Keep track of all campaign contributions for those elective offices for which a City public official has declared an intent to run, or has established an account into which campaign contributions are deposited.
  - iii. Return any personal or campaign advantages received within 10 days of receipt.
  - iv. Provide, upon inquiry, the names of all public benefit recipients known, by referring the inquiring party to the appropriate City department responsible for maintaining the lists.

# **EXHIBIT 2**

**PROPOSAL TO AMEND THE CHARTER OF THE CITY OF SANTA MONICA,  
ARTICLE XXII—TAXPAYER PROTECTION**

**Section 2200. TITLE.**

This Article shall be known as the City of Santa Monica Taxpayer Protection Act  
~~Amendment of 2000.~~

**Section 2201. FINDINGS AND DECLARATIONS.**

(a) The people of the City of Santa Monica (“City”) find that the use or disposition of public assets are often tainted by conflicts of interest among local public officials entrusted with their management and control. Such assets, including publicly owned real property, land use decisions conferring substantial private benefits, conferral of a franchise without competition, public purchases, taxation, and financing, should be arranged strictly on the merits for the benefit of the public, and irrespective of the separate personal or financial interests of involved public officials.

(b) The people find that public decisions to sell or lease property, to confer cable, trash hauling and other franchises, to award public construction or service contracts, or to utilize or dispose of other public assets, and to grant special land use or taxation exceptions have often been made with the expectation of, and subsequent receipt of, private benefits from those so assisted to involved public “decision makers.” The people further find that the sources of such corruptive influence include gifts and honoraria, future employment offers, and anticipated campaign contributions for public officials who are either elected or who later seek elective office. The trading of special favors or advantage in the management or disposal of public assets and in the making of major public purchases compromises the political process, undermines confidence in democratic institutions, deprives meritorious prospective private buyers, lessees, and sellers of fair opportunity, and deprives the public of its rightful enjoyment and effective use of public assets.

(c) Accordingly, the people declare that there is a compelling state interest in reducing the corruptive influence of emoluments, gifts, and prospective campaign contributions on the decisions of public officials in the management of public assets and franchises, and in the disposition of public funds. The people, who compensate public officials, expect and declare that as a condition of such public office, no gifts, promised employment, or campaign contributions shall be received from any substantial beneficiary of such a public decision for a reasonable period, as provided herein.

**Section 2202. DEFINITIONS.**

(a) As used herein, the term public benefit does not include public employment in the normal course of business for services rendered, but includes a contract, benefit, or arrangement between the City and any individual, corporation, firm, partnership, association, or other person or entity to:

- (1) provide personal services of a value in excess of \$25,000 over any 12 month period,

- (2) sell or furnish any material, supplies or equipment to the City of a value in excess of \$25,000 over any 12 month period,
- (3) buy or sell any real property to or from the City with a value, in excess of \$25,000, or lease any real property to or from the City with a value in excess of \$25,000 over any 12 month period,
- (4) receive an award of a franchise to conduct any business activity in a territory in which no other competitor potentially is available to provide similar and competitive services, and for which gross revenue from the business activity exceeds \$50,000 in any 12 month period,
- (5) confer a land use variance, special use permit, or other exception to a pre-existing master plan or land use ordinance pertaining to real property where such decision has a value in excess of \$25,000,
- (6) confer a tax abatement, exception, or benefit not generally applicable of a value in excess of \$5,000 in any 12 month period,
- (7) receive cash or specie of a net value to the recipient in excess of \$10,000 in any 12 month period.

(b) Those persons or entities receiving public benefits as defined in Section 2202(a)(1)-(7) shall include the individual, corporation, firm, partnership, association, or other person or entity so benefiting, and any individual or person who, during a period where such benefit is received or accrues,

- (1) has more than a ten percent (10%) equity, participation, or revenue interest in that entity, or
- (2) who is a trustee, director, partner, or officer of that entity except for such persons from an organization that is exempt from income taxes under Section 501(c)(3), (4), or (6) of the Internal Revenue Code. However, this exception shall not apply to trustees, directors, partners, or officers of such organizations that are political committees or control political committees as defined by California Government Code Section 82013 or 2 U.S.C. 431 (4). Any person who is exempted by this subdivision shall still be considered a public benefit recipient for the purposes of disclosure under Section 1705(b) and (c).

(c) As used herein, the term personal or campaign advantage shall include:

- (1) any gift, honoraria, emolument, or personal pecuniary benefit of a value in excess of \$50;
- (2) any employment for compensation;
- (3) any campaign contributions for any elective office said official may pursue.

(d) As used herein, the term public official includes any elected or appointed public official acting in an official capacity. This includes, but is not limited to:

(1) City Councilmembers;

(2) Planning Commission members; and

(3) City Manager and Department heads and designees who confer “public benefits” (e.g., contracts, purchase orders, and discretionary permits, variances or text amendments).

**Section 2203. CITY PUBLIC OFFICIAL SHALL NOT RECEIVE PERSONAL OR CAMPAIGN ADVANTAGE FROM THOSE TO WHOM THEY ALLOCATE PUBLIC BENEFITS.**

(a) No City public official who has exercised discretion to approve and who has approved or voted to approve a public benefit as defined in Section 2202(a) may receive a personal or campaign advantage as defined in Section 2202(c) from a person as defined in Section 2202(b) for a period ~~beginning on:~~

(1) Beginning on:

(A) the commencement of negotiations for the public benefit; or

(B) the date the official approves or votes to approve the public benefit; whichever is first;

(2) And ending no later than:

~~(1)~~ (A) two years after the expiration of the term of office that the official is serving at the time the official approves or votes to approve the public benefit;

~~(2)~~ (B) two years after the official’s departure from his or her office whether or not there is a pre-established term of office; or

~~(3)~~ (C) six years from the date the official approves or votes to approve the public benefit; whichever is first.

(b) No City public official who has exercised discretion to approve and who has approved or voted to approve a public benefit as defined in Section 2202(a) may receive a personal or campaign advantage as defined in Section 2202(c) from a person as defined in Section 2202(b) in any geographic location, including within and outside the geographic boundaries of Santa Monica.

(c) If applicable, “commencement of negotiations” shall refer to the date the person or entity receiving the public benefit begins its consideration of submitting a bid for public benefits.

~~(b)~~ (d) Section 2203(a) shall also apply to the exercise of discretion of any such public official serving in his or her official capacity through a redevelopment agency, or any other public

agency, whether within or without the territorial jurisdiction of the City either as a representative or appointee of the City.

**Section 2204. APPLICABLE PUBLIC BENEFICIARIES SECTION.  
RESPONSIBILITIES OF CITY PUBLIC OFFICIALS AND  
ADVANTAGE RECIPIENTS.**

(a) City public officials shall practice due diligence to ascertain whether or not a benefit defined under Section 2202(a) has been conferred, and to monitor personal or campaign advantages enumerated under Section 2202(c) so that any such qualifying advantage received is returned forthwith, and no later than ten days after its receipt.

(b) City public officials shall provide, upon inquiry by any person, the names of all entities and persons known to them who respectively qualify as public benefit recipients under the terms of Section 2202 and 2203.

**Section 2205. DISCLOSURE OF THE LAW.**

The City shall provide any person, corporation, firm, partnership, association, or other person or entity applying or competing for any benefit enumerated in Section 2202(a) with written notice of the provisions of this Article and the future limitations it imposes. Said notice shall be incorporated into requests for “proposal,” bid invitations, or other existing informational disclosure documents to persons engaged in prospective business with, from, or through the City.

**Section 2206. PENALTIES AND ENFORCEMENT.**

(a) In addition to all other penalties which might apply, any knowing and willful violation of this Article by a public official or a 2202(b) person or entity constitutes a criminal misdemeanor offense.

(b) A civil action may be brought under this Article against a public official who receives, or a 2202(b) person or entity who confers, a personal or campaign advantage that violates ~~in violation of~~ Section 2203. A finding of liability shall subject the violator ~~public official~~ to the following civil remedies, whichever applicable:

- (1) restitution of the personal or campaign advantage received, which shall accrue to the general fund of the City;
- (2) a civil penalty of up to five times the value of the personal or campaign advantage ~~received~~;
- (3) injunctive relief necessary to prevent present and future violations of this Article;
- (4) disqualification from future public office or position within the jurisdiction, if violations are willful, egregious, or repeated.

(c) A civil action under subdivision (b) of this section may be brought by any resident of the City. In the event that such an action is brought by a resident of the City and the petitioner prevails, the respondent public official shall pay reasonable attorney’s fees and costs to the

prevailing petitioner. Civil penalties collected in such a prosecution shall accrue 10% to the petitioner, and 90% to the City's general fund.

(d) When the City Attorney receives a complaint containing a violation of this Article from any person or entity, the City Attorney must promptly, for the purposes of assessment and prosecution, either:

(1) Refer the complaint to Chief Deputy of the Criminal Division, or another attorney in the City Attorney's Office; or

(2) Refer the complaint to an independent investigator hired by the City.

**Section 2207. SEVERABILITY.**

If any provision of this Article is held invalid, such invalidity or unconstitutionality shall not affect other provisions or applications which can be given effect without the invalidated provision, and to this end the provisions of this Article are severable.

# **EXHIBIT 3**

Kate Vernez

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**From:** Rod.Gould@SMGOV.NET  
**Sent:** Friday, May 23, 2014 6:42 AM  
**To:** Elaine Polachek; Kate Vernez  
**Subject:** Fwd: FYI

Sent from my iPhone

Begin forwarded message:

**From:** Pam OConnor <Pam.OConnor@SMGOV.NET>  
**Date:** May 22, 2014 at 9:01:44 PM PDT  
**To:** Rod Gould <Rod.Gould@SMGOV.NET>  
**Subject:** Re: FYI

Rod,

You hired someone who has political ties with some Councilmembers (she and Ted were active in the RIFT campaign--likely Kevin also). And someone who has a no growth background--one does not sign SMCLC letters unknowingly!

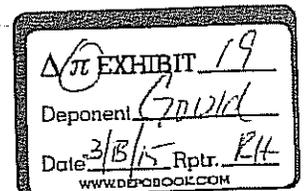
She may be a pleasant person--but you have put a no-growth activist in upper management at City Hall.

Just give me the technical materials I need when I need them and I'll do it myself.

Thanks!

Pam

On May 22, 2014, at 20:46, "Rod Gould" <Rod.Gould@SMGOV.NET> wrote:



Pam, Welcome home. I don't know that Elizabeth is a member of this group and have heard her speak very respectfully of you and the issues for which you stand. She is a communications expert and will help the City with its messaging. I would call upon her to help with notes and slides for you as needed and would hope you would give her a chance to prove herself. Let's discuss when you have a moment. Rod

Sent from my iPhone

On May 22, 2014, at 8:36 PM, "Pam OConnor"  
<[Pam.OConnor@SMGOV.NET](mailto:Pam.OConnor@SMGOV.NET)> wrote:

I will be extremely hesitant to work with Elizabeth Riel especially during the campaign season.

If I need support on Mayoral things I want someone else assigned.

In past elections SMCLC has attacked me.

<http://www.smgov.net/departments/council/agendas/2008/20080624/s2008062408-D-3.pdf>

Thanks!

Pam

# **EXHIBIT 4**

**Kate Vernez**

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**From:** Rod.Gould@SMGOV.NET  
**Sent:** Friday, May 23, 2014 6:37 AM  
**To:** pam.oconnor.samo@gmail.com  
**Subject:** Re: From the local press...

Our background checks focus on previous performance, criminal and financial issues. Elizabeth has grown very tired of all the complaining around town and thinks SM is a superb city. She wants to put the development issues in better light. I am surprised by her earlier association and will discuss it with her. I ask that you keep an open mind and give her a chance. Rod

Sent from my iPhone

On May 22, 2014, at 9:41 PM, "Pam O'Connor" <[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)> wrote:

I don't think your background checking folks did much of a job.

Riel even contributed money to attacks on me. See below.

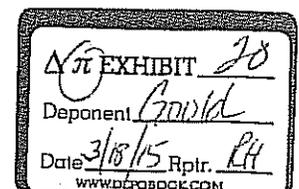
"The mailer urges voters to "tell Pam O'Connor and developers that Santa Monica is NOT for sale," and concludes, "It's our city. Let's take it back.""

"Among those bankrolling the coalition's mailer were SMCLC head Diana Gordon, Pier Restoration Corporation Chair Ellen Brennan, Elizabeth Riel and Victor Fresco, according to a campaign finance report filed with the City Clerk last week."

[http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2006/October-2006/10\\_30\\_06\\_O'Connor\\_Targeted\\_by\\_Coalition.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2006/October-2006/10_30_06_O'Connor_Targeted_by_Coalition.htm)

CONFIDENTIAL

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COSM00951

# **EXHIBIT 5**

**From:** [Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)  
**To:** [pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)  
**Subject:** Re: From the local press..  
**Date:** Friday, May 23, 2014 8:28:35 PM

---

Am moving toward a decision to retract the job offer based on a conversation with Elizabeth that was less than helpful.

Sent from my iPhone

On May 23, 2014, at 2:36 PM, "Pam O'Connor" <[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)> wrote:

Rod,

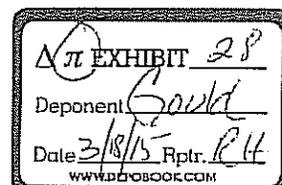
I do not and will not trust her. I will not work with her not because she is a supporter of others but she attacked me directly by putting money onto a hit piece. There are very very few direct hit pieces done in Santa Monica and she was a leader in this effort

Then she is a supporter of Kevin. What confidence do I have that she is not going to elevate him and his position and be dismissive of me--as we go into a political season!

This is a best practice of City Managers!!! Hire people who are political enemies of people elected to your Council?

I will be sharing this with others in the community and will be asking people for their opinion about her being in this position.

Pam



On May 23, 2014, at 9:36, Rod Gould <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

Our background checks focus on previous performance, criminal and financial issues. Elizabeth has grown very tired of all the complaining around town and thinks SM is a superb city. She wants to put the development issues in better light. I am surprised by her earlier association and will discuss it with her. I ask that you keep an open mind and give her a chance. Rod

Sent from my iPhone

On May 22, 2014, at 9:41 PM, "Pam O'Connor" <[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)> wrote:

I don't think your background checking folks did much of a job.

Riel even contributed money to attacks on me.  
See below.

"The mailer urges voters to "tell Pam O'Connor and developers that Santa Monica is NOT for sale," and concludes, "It's our city. Let's take it back.""

"Among those bankrolling the coalition's mailer were SMCLC head Diana Gordon, Pier Restoration Corporation Chair Ellen Brennan, Elizabeth Riel and Victor Fresco, according to a campaign finance report filed with the City Clerk last week."

[http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2006/October-2006/10\\_30\\_06\\_O'Connor\\_Targeted\\_by\\_Coalition.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2006/October-2006/10_30_06_O'Connor_Targeted_by_Coalition.htm)

# **EXHIBIT 6**

**Rod Gould**

---

**From:** Rod.Gould@SMGOV.NET  
**Sent:** Friday, May 23, 2014 3:38 PM  
**To:** pam.oconnor.samo@gmail.com  
**Subject:** RE: Btw

Pam, I am aghast at this development. You need to know that we are prohibited from asking candidates for city positions about their political affiliations. She could be a Tea Party member and I would never know it. She has not disclosed her prior political activities to me or any member of the selection panels. This is out of the blue.

Having made the job offer and it having been accepted, I am in a bit of pickle. I have a call into her and will address this head on with her. If she cannot serve all members of the City Council equally and without favor or if she cannot represent the policies of this City Council with professionalism, then I will rescind the job offer. If she insists that she can discharge the full duties of the position, then I must allow her to begin work. I will consult Marsha to be sure of my understanding here, but the civil service system was developed principally to protect candidates for municipal jobs and city employees from political influence. The Council can fire the City Manager at any time and for any reason. The employees under him/her have many protections as you know.

You are not under attack from City Hall. We all view you with the greatest respect and admiration. I am particularly proud to serve you and recognize that this will be a blistering campaign season. I can make certain that nothing done by my staff makes it any more difficult. If Elizabeth were to act politically in her role, I would take action up to and including termination. Let me think about this further and have the conversation with her. Then perhaps we can discuss it face to face or on the phone. If you and the Council have lost confidence in me as a result of this hiring decision, then I will tender my resignation. Rod

-----Original Message-----

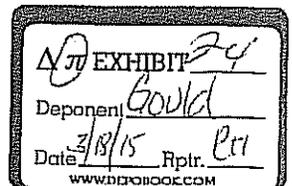
**From:** Pam O'Connor [mailto:pam.oconnor.samo@gmail.com]  
**Sent:** Friday, May 23, 2014 2:50 PM  
**To:** Rod Gould  
**Subject:** Btw

I am still running even though I am being attacked from both outside City Hall and from within City Hall.

And I am curious about Best Practices of City Management and if this is one of them.

Always a learning experience!

Pam



# **EXHIBIT 7**

**Rod Gould**

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**From:** Pam O'Connor <pam.oconnor.samo@gmail.com>  
**Sent:** Friday, May 23, 2014 4:57 PM  
**To:** Rod Gould  
**Subject:** Re: Btw

I'm sure Kevin hasn't lost faith!

And this is likely to become a news story in at least one local outlet next week. She is a public figure due to her political activity (not just political affiliation).

> On May 23, 2014, at 18:38, Rod Gould <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

>

> Pam, I am aghast at this development. You need to know that we are prohibited from asking candidates for city positions about their political affiliations. She could be a Tea Party member and I would never know it. She has not disclosed her prior political activities to me or any member of the selection panels. This is out of the blue.

>

> Having made the job offer and it having been accepted, I am in a bit of a pickle. I have a call into her and will address this head on with her. If she cannot serve all members of the City Council equally and without favor or if she cannot represent the policies of this City Council with professionalism, then I will rescind the job offer. If she insists that she can discharge the full duties of the position, then I must allow her to begin work. I will consult Marsha to be sure of my understanding here, but the civil service system was developed principally to protect candidates for municipal jobs and city employees from political influence. The Council can fire the City Manager at any time and for any reason. The employees under him/her have many protections as you know.

>

> You are not under attack from City Hall. We all view you with the greatest respect and admiration. I am particularly proud to serve you and recognize that this will be a blistering campaign season. I can make certain that nothing done by my staff makes it any more difficult. If Elizabeth were to act politically in her role, I would take action up to and including termination. Let me think about this further and have the conversation with her. Then perhaps we can discuss it face to face or on the phone. If you and the Council have lost confidence in me as a result of this hiring decision, then I will tender my resignation. Rod

>

> -----Original Message-----

> From: Pam O'Connor [mailto:[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)]

> Sent: Friday, May 23, 2014 2:50 PM

> To: Rod Gould

> Subject: Btw

>

> I am still running even though I am being attacked from both outside City Hall and from within City Hall.

>

> And I am curious about Best Practices of City Management and if this is one of them.

>

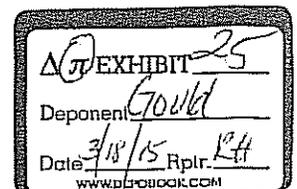
> Always a learning experience!

>

> Pam

>

>



# **EXHIBIT 8**

## Rod Gould

---

**From:** Pam O'Connor <pam.oconnor.samo@gmail.com>  
**Sent:** Saturday, May 24, 2014 2:58 AM  
**To:** Rod Gould  
**Subject:** Re: Btw

Just saw this. Just landed in Barcelona--think time difference is 9 hrs. Obviously email is working. We should be able to figure out a time.

I would add that she had ample time to have 1) apologized and 2) written a letter to the editor saying "in the past I may have been part of negative...but now think...can have strongly held positions on issues...but not demonize individuals..."

And as someone pointed out to me, as a communications expert she might have had a role in writing the hot piece on me.

But now to put this aside and find hotel, and explore Barcelona. There is life beyond Santa Monica.

> On May 24, 2014, at 2:39, Rod Gould <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

>

> Pam, I need for you to know that I would never knowingly do anything to hurt you or any member of the City Council. I am depressed over this.

>

> But, I am also increasingly bothered that Elizabeth shared none of this in the process. As a public relations expert, she of all people would have strong sense of how her previous activism would affect how she is perceived in this role. How indeed could she be viewed as objective and neutral after her very public stands? Does her previous political work disqualify her for this key position?

>

> I will speak with her and think hard about this. I may have to reverse course and rescind the offer. Marsha and I have been discussing this option and she can help.

>

> I would like to talk with you this weekend if possible as it weighs heavily on me. You asked about best practices as a city manager. On one hand, we are to make the best decisions we can to carry out the wills of our councils in the interests of our communities. In this case, key information was missing. We should have done a simple Google search. That is our mistake. On the other, we are to be politically astute without being political or politically aligned. This hire is problematic given the way you and others may perceive it.

>

> So, I tried calling you, but your cell voice-mail is full and won't accept any more messages. Would it be all right to speak this weekend? I respectfully ask for the chance to discuss this debacle with you. Rod

>

> -----Original Message-----

> From: Pam O'Connor [mailto:[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)]

> Sent: Friday, May 23, 2014 4:57 PM

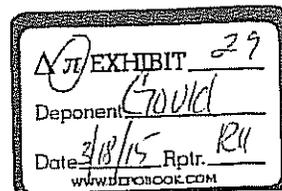
> To: Rod Gould

> Subject: Re: Btw

>

> I'm sure Kevin hasn't lost faith!

>



> And this is likely to become a news story in at least one local outlet next week. She is a public figure due to her political activity (not just political affiliation).

>

>

>

>> On May 23, 2014, at 18:38, Rod Gould <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

>>

>> Pam, I am aghast at this development. You need to know that we are prohibited from asking candidates for city positions about their political affiliations. She could be a Tea Party member and I would never know it. She has not disclosed her prior political activities to me or any member of the selection panels. This is out of the blue.

>>

>> Having made the job offer and it having been accepted, I am in a bit of pickle. I have a call into her and will address this head on with her. If she cannot serve all members of the City Council equally and without favor or if she cannot represent the policies of this City Council with professionalism, then I will rescind the job offer. If she insists that she can discharge the full duties of the position, then I must allow her to begin work. I will consult Marsha to be sure of my understanding here, but the civil service system was developed principally to protect candidates for municipal jobs and city employees from political influence. The Council can fire the City Manager at any time and for any reason. The employees under him/her have many protections as you know.

>>

>> You are not under attack from City Hall. We all view you with the greatest respect and admiration. I am particularly proud to serve you and recognize that this will be a blistering campaign season. I can make certain that nothing done by my staff makes it any more difficult. If Elizabeth were to act politically in her role, I would take action up to and including termination. Let me think about this further and have the conversation with her. Then perhaps we can discuss it face to face or on the phone. If you and the Council have lost confidence in me as a result of this hiring decision, then I will tender my resignation. Rod

>>

>> -----Original Message-----

>> From: Pam O'Connor [mailto:[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)]

>> Sent: Friday, May 23, 2014 2:50 PM

>> To: Rod Gould

>> Subject: Btw

>>

>> I am still running even though I am being attacked from both outside City Hall and from within City Hall.

>>

>> And I am curious about Best Practices of City Management and if this is one of them.

>>

>> Always a learning experience!

>>

>> Pam

>>

>>

# **EXHIBIT 9**

**Kate Vernez**

---

**Subject:** RE: Ok a little more

**From:** Elaine.Polachek@SMGOV.NET  
**Sent:** Sunday, May 25, 2014 8:23 PM  
**To:** Kate Vernez  
**Cc:** Rod Gould  
**Subject:** Re: Ok a little more

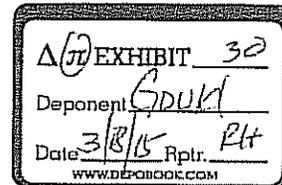
Yes Kate. That makes a lot of sense if she's willing.

On May 25, 2014, at 6:12 PM, "Kate Vernez" <[Kate.Vernez@SMGOV.NET](mailto:Kate.Vernez@SMGOV.NET)> wrote:

Perhaps Elizabeth is part of the solution if she wishes to be--I know that I would. She might also feel that the demands of her firm have increased necessitating a re-evaluation on her end too. If that is not the case then I think that our evaluation underscores the need for a wider skill set to meet the City's needs including at the national, state and county stages as well as communications.

---

**From:** Rod Gould  
**Sent:** Sunday, May 25, 2014 11:08 AM  
**To:** Elaine Polachek  
**Cc:** Kate Vernez  
**Subject:** Re: Ok a little more



Better! !

Sent from my iPhone

On May 25, 2014, at 9:10 AM, "Elaine Polachek" <[Elaine.Polachek@SMGOV.NET](mailto:Elaine.Polachek@SMGOV.NET)> wrote:

This is really tough because we can't refer to political involvement or a perceived lack of neutrality.

How about reflecting back to Kate and the attributes that made her so successful. Could we say "Reflecting on the unique qualities that Kate brought to the position, we've decided to expand our search in hopes of finding a candidate with a similar combination of background, experience and attributes."

On May 25, 2014, at 11:07 AM, "Rod Gould" <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

I need to figure out what to say about this turn of events. Standing on "It's a personnel matter" doesn't seem to cut it. Saying "Upon further consideration, it has been determined that the job fit is not optimal" sounds obtuse. What would you recommend? Rod

Sent from my iPhone

On May 25, 2014, at 7:42 AM, "Kate Vernez" <[Kate.Vernez@SMGOV.NET](mailto:Kate.Vernez@SMGOV.NET)> wrote:

I'm very sorry to say that there is no other choice for you and the City and that you made the right decision. Let me know how I can help on next steps.

**From:** Rod Gould  
**Sent:** Saturday, May 24, 2014 8:42 PM  
**To:** Kate Vernez  
**Subject:** Fwd: Ok a little more

FYI

Sent from my iPhone

Begin forwarded message:

**From:** Rod Gould <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)>  
**Date:** May 24, 2014 at 7:07:20 PM PDT  
**To:** Pam O'Connor <[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)>  
**Cc:** Elaine Polachek <[Elaine.Polachek@SMGOV.NET](mailto:Elaine.Polachek@SMGOV.NET)>, Marsha Moutrie <[Marsha.Moutrie@SMGOV.NET](mailto:Marsha.Moutrie@SMGOV.NET)>  
**Subject:** Re: Ok a little more

Pam, You are correct that she backed some Councilmembers and actively opposed others and publicly supported one side of the development debate. She says that was 6-8 years ago, but the players and debate are the same. So, she is perceived as aligned politically, which makes doing her job untenable. Further, she failed to disclose her prior activism. That goes to trust and judgement. Her explanations were not persuasive. So I must withdraw the job offer.

I will consult with Marsha to make certain that I do it in a way that does not create liability for the City.

ICMA Tenet 7 is very familiar to me as I sit on the committee that enforces the Code on ICMA members. She is not a member.

I am in a martial arts class tomorrow at 1 pm and we have the Memorial Day Observance from 11-2 on Monday.

Enjoy your time in one of Europe's finest cities. I will keep you posted as I go. Please feel free to relay any questions you may have.

Rod  
Sent from my iPhone

On May 24, 2014, at 5:21 PM, "Pam O'Connor" <[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)> wrote:

And she was involved at a level of putting money into one side, being a public face for one side, and active at a level that got attention from the press.

See Tenet 7 and Guidelines: <https://icma.org/Documents/Document/Document/100265>

If you really want to talk (by really I just mean rather than emailing now and talking when I return) perhaps 1pm your time Sun or Mon?

On May 24, 2014, at 21:39, Rod Gould <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

Hope you are enjoying Barcelona. You need a break from SM politics and personalities.

Yes, these articles include much of the same claims and counter claims being made today. The fight over Hines is just another battle in this long running conflict, and the actors are very much the same. Only this time SMRR is fully engaged and there is private money is flowing on both sides.

Please suggest a time for a call and I will reach out to you (9 hours behind). If you are too busy, no problem. I am moving to solve this before your return. Rod

Sent from my iPad

On May 24, 2014, at 4:40 AM, "Pam O'Connor" <[pam.oconnor.samo@gmail.com](mailto:pam.oconnor.samo@gmail.com)> wrote:

Just to give you a flavor of the Measure T debate in 2008. She signed the SMCLC letter (at least one) supporting Measure T. And this is still at the core of the land use debates of today--with many of the same folks involved.

<http://smdp.com/measure-t-creates-rift-within-ceps-membership/73540>

[http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2008/October-2008/10\\_22\\_08\\_Groups\\_Battle\\_Over\\_RIFT.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2008/October-2008/10_22_08_Groups_Battle_Over_RIFT.htm)

[http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2008/October-2008/10\\_01\\_08\\_Kuehl\\_Opposes\\_Prop\\_T.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2008/October-2008/10_01_08_Kuehl_Opposes_Prop_T.htm)

<http://m.laweekly.com/2008-10-30/news/proposition-t-the-mostdivisive/>

[http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/columns/FrankGruber/FG-2008/10\\_2008/10\\_06\\_08\\_Catch\\_my\\_RIFT.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/columns/FrankGruber/FG-2008/10_2008/10_06_08_Catch_my_RIFT.htm)

[http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2008/September-2008/9\\_23\\_08\\_Prop\\_T\\_RIFT.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2008/September-2008/9_23_08_Prop_T_RIFT.htm)

And just for fun:

[http://www.surfsantamonica.com/ssm\\_site/the\\_lookout/news/News-2008/September-2008/9\\_29\\_08\\_Tree\\_Activist\\_Unchained.htm](http://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2008/September-2008/9_29_08_Tree_Activist_Unchained.htm)

# **EXHIBIT 10**

**Rod Gould**

---

**From:** Rod.Gould@SMGOV.NET  
**Sent:** Friday, May 23, 2014 7:42 AM  
**To:** Elaine Polachek  
**Subject:** Re: FYI

Yes. That's where we are. Rod

Sent from my iPhone

On May 23, 2014, at 7:37 AM, "Elaine Polachek" <[Elaine.Polachek@SMGOV.NET](mailto:Elaine.Polachek@SMGOV.NET)> wrote:

I think Elizabeth is the right choice. She she has a keen understanding of communications for the City. However when Pam sets her mind on someone, she tends to be immovable. I do think that Kate can help at least open the door a little for Elizabeth. Then Elizabeth will have to try to establish trust with her.

On May 23, 2014, at 10:30 AM, "Rod Gould" <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

Our system is designed to separate politics from employment decisions. If she were a Tea Partier, there would be no need for her to disclose it or ability for us to ask. I will speak with Elizabeth today to be sure she can work with all members of the City Council and represent the City's views professionally. I think we made the right hiring decision, but am not at all sure Pam will give her a chance to prove herself. Any advice? Rod

Sent from my iPhone

On May 23, 2014, at 7:21 AM, "Elaine Polachek" <[Elaine.Polachek@SMGOV.NET](mailto:Elaine.Polachek@SMGOV.NET)> wrote:

-- Well she didn't disclose this at all. In fact the only thing we heard was from Kevin saying he had a photo with her from a few years ago on her website. This is definitely a trust issue for Pam.

Do you think it's salvageable?

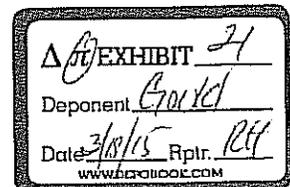
Elaine

On May 22, 2014, at 11:40 PM, "Rod Gould" <[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)> wrote:

Oh boy. Rod

Sent from my iPhone

Begin forwarded message:



**From:** Pam OConnor  
<[Pam.OConnor@SMGOV.NET](mailto:Pam.OConnor@SMGOV.NET)>  
**Date:** May 22, 2014 at 8:36:40 PM  
PDT  
**To:** Rod Gould  
<[Rod.Gould@SMGOV.NET](mailto:Rod.Gould@SMGOV.NET)>  
**Subject:** FYI

I will be extremely hesitant to work with Elizabeth Riel especially during the campaign season.

If I need support on Mayoral things I want someone else assigned.

In past elections SMCLC has attacked me.

<http://www.smgov.net/departments/council/agendas/2008/20080624/s2008062408-D-3.pdf>

Thanks!

Pam