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Mayor

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LUZ VARGAS T.

James C. Jimenez
Cabinet Secretary
State of New Mexico

VIA HAND DELIVERY

August 19, 2003

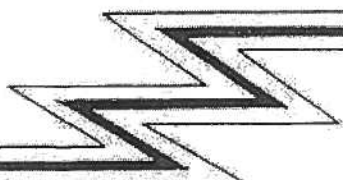
Department of Finance & Administration
180 Bataan Memorial Building
Santa Fe, New Mexico 87501

**Re: City of Sunland Park Response to Special Audit dated June 30, 2003
(the "Audit").**

Dear Secretary Jimenez:

The governing body of Sunland Park met on August 18, 2003 and approved this response to the Audit, received by Sunland Park on July 14, 2003. The City thoroughly reviewed the audit submitted by the State Auditor and respectfully submits our response for the Department of Finance and Administration's review. The City is responding as best as possible under the circumstances, given the limited time and resources available. The stated objective of the Audit was to determine if there were grounds to suspend the publicly elected officials of Sunland Park. The State Auditor "based on the results of audit procedures and findings documented... recommends that the Secretary of DFA suspend the City's Mayor and Governing Council...and for the Secretary of DFA to take charge of the City."

On July 14, 2003 you wrote to the governing body of Sunland Park "offering...the opportunity to provide...a timely written response to the Auditor's report Although the DFA agreed to comply with the provisions of §12-6-5(A) NMSA 1978 by not releasing the Audit to the City and public until July 24, 2003, the Audit was "leaked" by the State Auditor's Office to the press on July 22, 2003. Thereafter, Sunland Park was



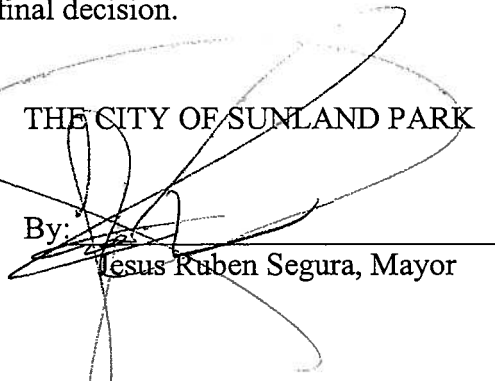
informed that the DFA would not make any decision on Sunland Park's invitation to enter into a Joint Powers Agreement with the DFA, until the DFA received Sunland Park's response to the Audit.

According to the Audit Act, Sunland Park may "notify the auditor of any errors in the report" within 30 days after receipt of the report, e.g. August 13, 2003. See §12-6-5(C) NMSA 1978. On August 6, 2003, Sunland Park requested a one week extension from the State Auditor, or until August 20, 2003, to prepare its response to the Audit. On August 7, 2003, State Auditor informed Sunland Park's attorneys that he did not object to the requested extension.

Sunland Park is deeply concerned over the apparent irregularities in the manner in which the audit was conducted. As the result of its investigation into the manner in which the special audit and the considerable inaccuracies contained therein, on August 18, 2003 the Governing Body adopted the following resolution:

RESOLVED, that it is the governing body's intention and commitment to continue to fully exercise the governance of the City which has been bestowed by the people of Sunland Park, and further,
RESOLVED, that the City enter into an agreement with the Department of Finance and Administration for purposes of correcting factual errors and inaccuracies contained in the Special Audit, and there after to work in cooperation with the DFA to resolved those matters which need to improved or modified.

Please be assured that Sunland Park stands ready to answer any questions regarding the City's response to the Audit, and is committed to diligently working with your Office to assure implementation of any and all recommendations. The governing body and City administration desires an opportunity to discuss the course of action Sunland Park will need to undertake pursuant to your final decision.

THE CITY OF SUNLAND PARK
By: 
Jesus Ruben Segura, Mayor

cc Patricia Madrid, State Attorney General (via federal express)
Domingo P. Martinez, State Auditor (via federal express)
City Councilors



CITY OF SUNLAND PARK RESPONSE TO AUDIT

I. EXECUTIVE SUMMARY

Sunland Park's response to the Audit is organized as follows:

- I. EXECUTIVE SUMMARY
- II. VIOLATIONS OF DUE PROCESS
- III. AUDIT ERRORS AND DEFICIENCIES
- IV. INJURIES
- V. REQUESTED ACTION

The requirements of the Audit Act and the State Auditor's regulations were not followed. Sunland Park was never given an opportunity to respond to the Audit's findings prior to making the Audit a public document. Given the serious charges against the governing body and the recommended suspension of all of its elected public officials, these failures constitute an inexcusable violation of the due process rights which must be afforded to Sunland Park and its elected and appointed officials.

Had the Audit Act and the State Auditor's regulations been complied with by providing the City with the opportunity to review and respond to the Audit prior to it becoming a public document (as is legally required), many of the "findings" contained in the Audit would have been corrected. Of the 175 separate conditions contained in the report, 122, or over 70% are disputed by the City. Unfortunately, the Audit was carelessly disseminated to the public and the media, resulting in serious injury to the reputation of the City of Sunland Park, the City staff, and individual members of the governing body.

Sunland Park respectfully requests that: (1) the DFA review the methods and procedures followed in the preparation of the Audit, and the manner in which the Audit was authorized for release to the public; (2) the DFA issue an amended Audit; and (3) the DFA enter into an agreement with Sunland Park to assist Sunland Park in establishing policies and procedures to prevent future unintended violations.

II. VIOLATIONS OF DUE PROCESS

The Office of the State Auditor failed to provide the City with an "exit interview" prior to releasing the special audit. The Special Audit states that the audit was not "conducted in accordance with auditing standards generally accepted in the United States of America." In particular, the regulations adopted by the State Auditor pursuant to §21-6-12 NMSA 1978 which authorizes the State Auditor to "promulgate reasonable regulations necessary to carry out the duties of his office, including regulations required for conducting audits in accordance with generally accepted auditing standards," as well as Generally Accepted Government Audit Standards ("GAGAS") were not followed with respect to the June 30, 2003 special audit of the City.

We want you to be aware that, according to the State Auditor, the DFA "jumped the gun," by releasing the audit to the public before the City was provided with an opportunity to review and respond to the audit. According to Mr. Martinez, the audit should not have been released by DFA until the City had an opportunity to respond.

A. THE STATE AUDITOR'S REGULATIONS. The regulations adopted by the state auditor provide that "audits shall be conducted in accordance with: (1) Generally Accepted Government Auditing Standards (GAGAS)...." §2.2.2.10(E)(1) NMAC (2003). The GAGAS states as follows:

If the auditors' report discloses deficiencies in internal control, fraud, illegal acts, violations of provisions of contracts or grant agreements, or abuse, auditors should obtain and report the views of responsible officials concerning the findings, conclusions and recommendations, as well as planned corrective actions.

One of the most effective ways to ensure that a report is fair, complete and objective is to obtain advance review and comments by responsible officials of the audited entity and others, as may be appropriate. Including the views of responsible officials results in a report that presents not only the deficiencies...but also what the responsible officials of the audited entity think about the deficiencies...and what corrective actions officials of the audited entity plan to take. Emphasis added.

GAGAS (2003 ed.) §§5.26, 5.27

Moreover, the State Auditor regulations also prescribe that an audited agency: (i) should have 10 workdays to respond to "potential audit findings;" (ii) should be granted an "exit conference;" and (iii) should be given an additional period of time of at least 10 workdays to respond to a "draft" of the audit report. The regulations state:

A memorandum on potential audit findings should be prepared and submitted to agency management as soon as the IPA¹ becomes aware of the findings so the agency has time to respond to the findings prior to the exit conference.... The agency shall respond, in writing, to the IPAs memorandum of findings within 10 workdays. Responses to the audit findings should be included in the audit report. Emphasis added.

§2.2.2.10(J)(3)(b) NMAC (2003).

After the audited agency's response to the memorandum of potential audit findings is received, the auditor "must hold an exit conference with representatives of the agency's governing authority and top management." §2.2.2.10(K)(1) NMAC (2003). At the exit conference, the auditor "shall deliver to the agency a draft audit report (must be stamped "Draft")." The agency is then given an additional period of time of "at least ten workdays" to review the draft audit report and report any issues that need to be resolved prior to submitting the report to the state auditor. §2.2.2.10(K)(2) NMAC (2003). The state auditor then releases the final audit to the audited agency and 10 days later the audit becomes a public record. §12-6-5 NMSA 1978; §2.2.2.10(K)(3) NMAC (2003). Finally, the state auditor's regulations provide that "[b]ecause the audit process will not have been completed at the time of the exit conference, neither the IPA or agency personnel shall release any information relating to the audit...until the audit becomes a public record. §2.2.2.10(K)(5) NMAC (2003).

B. PRIVILEGED MATERIAL. Another troubling issue is the inclusion of Attorney/Client privileged and protected communications in the special audit's findings.

¹ IPA is an "Independent Public Accountant." The same standards apply to an audit conducted by the State auditor.

According to GAGAS, "[i]f certain pertinent information is prohibited from general disclosure, the audit report should state the nature of the information omitted and the requirement that makes the omission necessary." GAGAS (2003 ed.) §5.31. On July 21, 2003, the City attorneys provided the Attorney General's office with a list of attorney-client communications that the City requested be redacted from the special audit prior to it becoming a public document. Unfortunately, no redactions were made to the special audit, resulting in public disclosure of attorney-client communications relating to ongoing litigation.

C. Conclusion The Special Audit violated the Sunland Park's procedural due process rights under the N.M. Constitution and the U.S. Constitution, as follows:

- The special audit was not done in accordance with Generally Accepted Government Auditing Standards, § 2.2.2.10(E)(1) NMAC (2003).
- State Auditor regulations for conducting audits pursuant to § 21-6-12 NMSA 1978 were not followed.
- The Special Audit acknowledges that the Audit was not "conducted in accordance with auditing standards generally accepted in the United States of America."
- The City of Sunland Park was not provided a "draft" of the Audit or given an opportunity to prepare a response to the "potential findings."
- The City of Sunland Park was not provided with an "exit conference," and additional time to respond before the Audit became public. See §2.2.2.10(K)(1)(2)&(3) NMAC (2003).
- The City of Sunland Park's staff, mayor, individual councilors, city clerk, and city attorney were never interviewed and permitted an opportunity to provide "Reporting Views" concerning all the alleged findings.
- Inclusion of attorney-client privileged communications in Audit released to the public.

The failure to follow State Auditor Regulations and Generally Accepted Government Auditing Standards resulted in substantial investigative "fact" deficiencies [see infra, II Resulting Deficiencies] and in particular, harm to the City of Sunland Park and its Governing Body [see infra, III Injuries].

III. AUDIT ERRORS AND DEFICIENCIES

As an initial matter, it bears pointing out that because the City was not afforded an opportunity to interact in the Audit process or respond to findings or "conclusions" in the Audit before it became a public document, the City staff were required to devote hundreds of hours in order to respond to comply with the DFA's request for "a timely written response." Due to the time constraints placed on the City, some of the responses are not as complete as they might otherwise have been.

Finding No. 1 – Noncompliance with the Open Meetings Act (Because of many discrepancies in this area, Finding No. 1 has been divided into subsections A through K)

A. Untimely Notice of Meetings

Condition:

- 1.1 The agenda for the November 16, 1999 meeting indicated the Clerk-Treasurer filed the addendum to the minutes on November 18, 1999.

Response:

Condition noted. There are actually two (2) addenda to the minutes; both of which were added to the agenda on November 15, 1999 (See Exhibits A, B, C & D). After some discussion with Mr. Juan Fuentes (City Clerk at the time) it was concluded that the date on Addendum to No. 5. Public Hearing was incorrectly dated by Mr. Fuentes, due to the fact that the official agendas filed of record were usually filed one or two days after the Council meeting. (See explanation of former City Clerk attached Exhibit E)

Condition:

- 1.2 The agenda for the April 17, 2001 meeting indicated the Clerk-Treasurer filed the agenda on April 24, 2001.

Response:

Condition contested . Please note that the Audit Findings are based on draft agendas and do not reflect the agendas as filed by the City Clerk. Enclosed are the minutes and agenda which were filed in the minute book.. According to the minutes filed in the minute record book the actual date of filing is 10th day of April and not the 24th of April. Please see enclosed minutes dated April 17, 2001(Exhibit A).

Condition:

1.3 In three special minutes and one regular meeting did not indicate the date the Clerk-Treasurer filed the Agenda.

Response:

Unable to note or contest condition. After reviewing the Auditor's working file we were unable to locate the specific agendas the Auditor is referring to in the above condition.

Condition:

1.4 Required to sign agendas, but did not sign the agenda in nine instances.

Response:

Condition contested. Apparently after reviewing the Auditor's working file, the Audit findings are based upon draft agendas and do not reflect the agendas as filed by the City Clerk. Most of the agendas and minutes in the auditor's work papers are in draft form. The Mayor has signed all the agendas in the official minute book since, after the requested corrections were done in the drafts..

Condition:

2.1 The City staff posted the agenda for the August 1, 2000 meeting only 4 ½ hours before the meeting, per statement made by the City worker who posted the agenda.

Response:

Condition contested. August 1, 2000 – Please note that such claim is in direct contradiction with finding 1 –B-6.1 .. Please see both finding 1-B-6.1 and July 31, 2000 City Attorney response packet RE: Special Meeting August 1, 2000 at 4:00 p.m. If attorney claims that adequate advance notice was provided and there is a written confirmation by Ms. Meraz dated July 28, 2000 of posting request at 2:30 p.m., then factually this allegation inaccurate. (See Exhibit A, B & B-1).

Condition:

2.2 In addition the Clerk filed agendas for the January 29, 2002 and February 5, 2002 regular meetings on the same day before the meetings rather than seven days in advance as required by City Open Meetings Resolution No. 02-01.

Response:

A. Condition contested. Apparently the Audit findings are based upon draft agendas and do not reflect the agendas as filed by the City Clerk. The first part of this condition is incorrect. Attached please see the agenda for the Special Meeting on January 29, 2002. Please note that this meeting is posted as a Special meeting and has a filing date of January 25, 2002 (Exhibit A). Per the City of Sunland Park's Open Meeting Act Resolution, Resolution No. 02-01, there is only a forty-eight (48) hour public notice requirement as per section five (5)(Exhibit B). The City is in full compliance with Resolution 01-01 and states that finding 2.2A is without merit.

B. Condition contested. Apparently the Audit findings are based upon draft agendas and do not reflect the agendas as filed by the City Clerk. The second part of this condition is incorrect. Attached please see the agenda for the Regular Meeting for February 5, 2002 with a filing date of January 29, 2002 (Exhibit A). Per the City of Sunland Park's Open Meeting Act Resolution, Resolution No. 01-01, Regular Council Meetings are to be held the 1st and 3rd Tuesday of each month at 7:00 p.m. and a seven (7) day public notice requirement, as per section five (4), is required (Exhibit B). The City met this requirement and states that finding 2.2B is without merit.

Condition:

3 In a December 14, 2000 letter to the Mayor, a Councilor complained that the Clerk Treasurer called her on the same day to inform her of a meeting scheduled for that day. She informed the Mayor that he was violating the constitutional rights of the people who elected the Councilor to represent them.

Response:

Condition contested. No City Council meeting was held on December 14, 2000.. On December 15, 2000 the City Council did hold an emergency meeting (see Exhibit A, B. & C).

Finding 1

B. Improper Agenda Addition and Notice Posting Denials

Condition:

1. On March 24, 1998, Councilors by themselves approved an agenda for a special organizational meeting to submit names of candidates to fill the appointive offices of the City. The Mayor stated he considered the meeting illegal because he believed that the governing body had already held the official meeting on March 17, 1998. The City was unable to provide written minutes of a March 17, 1998 meeting.

Response:

Condition noted in part and contested in part. Please see agenda for the organizational meeting of March 17, 1998, along with the addendum (Exhibit A). Please note that the agenda for this meeting along with the addendum was in the minute book. However, the minutes are not included in the minute book. A copy of the minutes was provided by Mr. Fuentes, former City Clerk, who had kept a diskette copy of the minutes (Exhibit B). The minutes for the March 17th meeting were presented and approved at the May 19th, 1998 City Council Meeting, indicating that a meeting was held on March 17, 1998 and minutes were made available and approved by the City Council (Exhibit C).

Condition:

2. On October 8, 1999, Councilors requested the Clerk-Treasurer add items to the agenda for the next regular meeting. The Mayor did not replace those items in the agenda.

Response:

Condition contested.

a.

Four Councilors requested to have two items included as action items for the upcoming agenda. Of which, the Saddle Club Subdivision was one of the items of request. Enclosed please see the provisions outlined in Chapter 2 of the City Code Book referencing the zoning provisions dictated in Ordinance 85-03, and Chapter 2, of the City Code Book referencing the subdivision provisions (Exhibit A & B). Please note that this item had been an ongoing item since October 20, 1998 when the developer requested to have a zone change from R1 to TC-2 which was tabled(Exhibit C). On December 5, 1998 the issue was readdressed in a form of a presentation by the developer of the site(Exhibit D). By December 17, 1998 the City Council addressed the zoning issue changing the zoning of the property from R-1 and M-2 to TC(Exhibit E). The councilor's request was not placed in the agenda as an action item due to the fact that Mr. Karam had not submitted any proposed preliminary plat for consideration (Exhibit I). It was not until the beginning of May that the developer, Mr. Karam, submitted his proposed preliminary plat for consideration. A committee to formally review the proposed preliminary plat was established on May 8, 1999(Exhibit F). And, on May 15, 1999 the Council in a workshop reviewed the preliminary plat for Saddle Club Subdivision in which a number of major significant modifications were asked by staff, in addition to a number of residents from our adjoining City of El Paso, Texas and our community who were in opposition to this project. As a result, Mr. Karam decided not to pursue his development and subsequently the property has been sold and a horse training facility is now in place(Exhibit G, H, J & K).

b.

As to the request to the place an item for an October 8, 1999 calling for a private prison to be located within close proximity to the boundaries of its municipality, the Mayor stated that he would be out of the country and to hold this proposal until his return(Exhibit A). Even though some members requested the same item at a later meeting, this meeting was cancelled after no quorum was present because the majority of the governing body was not present (Exhibit B, C, H). The requested item was placed at the Tuesday, January 4, 2000 regular meeting, after an execution of a preemptory writ of mandamus (Exhibit D, E, F & G). The item was denied(Exhibit G) after great community concern was expressed.

Condition:

3. At the April 18, 2000 meeting, the governing body discussed that a Councilor requested the Clerk-Treasurer to add an item to the agenda. The Mayor stated the request was not in accordance with statutes that indicate the addition of items is at the discretion of the Mayor and at least four members of the governing body.

Response:

Condition noted and is being corrected. The Mayor followed the guidelines in effect since the previous administration. The previous City attorney, Mr. Frank Coppler, had advised the Mayor that the addition of items to the agenda is at the discretion of the mayor and four city councilors. This policy was followed even when the Mayor was a City Councilor.

Condition:

- 4. For the May 2, 2000 meeting, the Mayor received identical requests to add items to the agenda. Three councilors signed one of the identical requests to add items to the Agenda, and another councilor signed the other identical request to add the same items. The Mayor refused to place the items on the agenda and indicated the state statute require the signature of four councilors. In addition the items to be added to the agenda were scheduled for closed session but did not comply with requirements for discussion in closed session. The items added were travel reimbursement for the Governing Body, discussion of public records, check signatures and discussion of minutes.

Response:

Condition contested. The City complied with the Councilors' request. Attached are the Councilors' request received by the City, the Mayor's letter to Mr. Lawrence Otero, Assistant Attorney General, responding to the allegations (Exhibit A, B & C). Also attached are the minutes for May 2nd, 2000, and May 5th, 2000 referencing the items requested (Exhibit D & E). Please note that under protest from the Mayor, two councilors were required to address the items for closed session in open session in order to avoid the Open Meeting Act requirements. Due to the posting timeframe, the items were not placed on the agenda on the date requested, but were placed on the agenda for the subsequent meeting.

Condition:

- 5. On May 25, 2000, Councilors requested the Clerk-Treasurer place items on the for the May 27, 2000 meeting. The Mayor did not allow items to be placed on the Agenda until June 8th 2000.

Response:

Condition contested. The items were placed on the May 27th, 2000 agenda, however (due to a lack of quorum) the meeting was cancelled (Exhibit A & B). On May 25, 2000, the items requested by the members of the governing body in their letter dated May 25, 2000 were undertaken as addendum items following the Special Workshop on May 27, 2000 at 9:00 a.m. Nevertheless, after a heated discussion at the workshop, Mayor Pro tem Alicia Roman, Councilor Luz Vargas-Troncoso, Victor Diaz, and Willie Duran left the Council Chambers and the meeting scheduled May 27, 2000 at 10:00 a.m. was cancelled for a lack of quorum. Therefore, these items were placed on the agenda for the meeting of June 8th, 2000 (Exhibit C). One of the requested items was addressed July 6, 2000 (Exhibit D), which was an administrative oversight.

Condition:

- 6.1 July 24, 2000, four Councilors submitted a request to the Clerk-Treasurer calling a special meeting. According to affidavits, the Mayor refused to allow the Clerk-Treasurer to post notice of the meeting, so the Councilors posted the notice themselves. In a July 26, 2000 letter to the Mayor, the City Attorney stated that according to the Clerk-Treasurer, the Clerk-Treasurer received the special meeting agenda signed by the majority of the governing body of the City at approximately 9:20 a.m. The Mayor instructed her not to post the agenda as requested. In this letter, the Mayor stated the agenda "was after the 10:00 a.m. deadline requirement".

Response:

Condition contested. The request by four Councilors was faxed on July 24, 2000 but could not be posted since the request was received after the 10.00 a.m. deadline (Exhibit A). The request for a meeting on July 26, 2000 at 10:00 a.m. was received by the City Clerk at exactly 10:00 a.m. on July 24, 2000, making it impossible to adequately post the request in the six (6) required public places. The posting route requires 35 to 40 minutes for posting. Please also see Finding 1-A-2.1 & Finding 1-B-6.2.

Attached is a response letter from the Mayor to all four councilors explaining the situation and requesting further direction. The meeting was rescheduled and posted for August 1, 2000 at 4:00 p.m. as further requested (See Finding 1-B-6.2) The Mayor and Staff were never asked by the State Auditor as to the specifics of this case.

Condition:

6.2 In July 31, 2000 letter to the Mayor, the City Attorney stated the Mayor informed the County Manager that the special meeting agenda was not posted. The Clerk-Treasurer signed the agenda indicating she filed and posted the agenda on July 28, 2000. The City attorney asked the Mayor to rectify any incorrect statements made regarding the posting of the special meeting agenda.

Response:

Condition contested. The City complied with the above condition. Please see Finding 2-A-1, Finding 1-B-6- A, Finding 8-1, and 8-2. Attached please find a letter from the Mayor regarding the request for July 27, 2000 at 10:00 a.m.(Exhibit A) along with second request by the majority of the governing body dated July 28, 2000 (Exhibit B), the minutes and agenda for August 1, 2000(Exhibit D), (the actual agenda request faxed July 28, 2000 from the office of the City attorney), a letter of request from the City Attorney, along with additional information supporting the request (Exhibit C). Regarding the allegation that the Mayor stated to the County Manager that the special meeting agenda was not posted, the Mayor notified the County Manager of the July 27, 2000 cancellation due to the time constraint, but a miscommunication occurred between the City Attorney and the County Manager - The Mayor was referring to the July 27th meeting, while the attorney might have been referring to the August 1, 2000 meeting. Nevertheless, the Governing Body did have a joint session with the Dona Ana County Commission on August 1st, 2000 (please see the minutes and agenda). The State Auditor did not question the Mayor or staff regarding this particular case.

Condition:

7. In December 13, 2000 letter to the Council, the Mayor stated that allowing Camino Real landfill representatives to make a presentation in front of the governing body violated the Open Meetings Act because it was not on the agenda. The Council argued that this was not an action item and the agenda allowed for items from the floor.

Response:

Condition contested. Camino Real Landfill (aka Garner-landfill) was not discussed under items from the floor. It was placed as an agenda item under Public Hearing but was never an approved agenda item. Enclosed are the minutes and agenda from the December 5, 2000 Council Meeting reflecting same(Exhibit A,B, & C). The Mayor’s December 13, 2000 letter addressed this issue (Exhibit D). The Mayor wanted to notify the mayor pro tem of an apparent and potential violation and avoid further future potential violations. Please note that the Mayor Pro Tem at the Time, (Councilor Alicia Roman), is no longer a City Councilor, since she was not re-elected to office in 2002. Please see response to Finding 1-D-3.3.

Condition:

- 8. In a May 17, 2001 letter to the Assistant Attorney General, a Councilor and the Mayor Pro Tem stated the Mayor had refused to allow posting of notices of special meetings called by the majority of the Council.

Response:

Unable to note or contest condition. Please note that the City was not privy to such letter and unable to adequately respond.

Condition:

- 9. January 10, 2002 request by Councilors to Mayor to add item for next meeting. No apparent letter of request at to files.

Response:

Condition contested. Please note after reviewing the State Auditor work papers the four councilors were attempting to readdress an item that had been previously approved by the governing body a meeting prior to their request. The City addressed this item under section E of the Public Hearing on January 4, 2002 (Exhibit A). Given the fact that the City had to meet the election deadlines for the March elections of that year and that such item was also under “item D” an ordinance would not have been able to adequately comply with the districting mandate imposed to municipalities over the 10,000 population level and still effectively run the March local elections. Please note that if the governing body was to readdress any modifications or changes to the ordinance, it would have had to undergo a 15 day prior notice before bringing it to the governing body for consideration, making it impossible to have the election. .

Condition:

- 10. a. On **August 14, 2002** and September 27, 2002, Councilors requested the Clerk-Treasurer add items to the agenda. The Mayor stated these requests were at his discretion and he could refuse, although he did add the items to the agendas.

Response:

Condition contested. Enclosed please see the August 20, 2002 agenda and minutes (Exhibit A) in which both items of request were placed in the agenda under items 8 A and 8 B. Modifications to the requested items were done when Mayor spoke to Councilor Hill over the matter.

Condition:

- 10. b. On August 14, 2002 and **September 27, 2002**, Councilors requested the Clerk-Treasurer add items to the agenda. The Mayor stated these requests were at his discretion and he could refuse, although he did add the items to the agendas.

Response:

Condition contested. Please note that such request was met and addressed in the October 1, 2002 City Council meeting under item 6G (Exhibit B & C). However, please also note that a particular Councilor, Luz Vargas-Troncoso, sought to change her vote in regards the Wells Fargo \$2 million interim loan which was approved through Ordinance 2001-01 May 21, 2001. The Mayor stated that the ordinance was passed, adopted, and approved by the Governing Body and that the contractual agreement was executed as duly authorized by the Council. A Councilor stated that once a vote was made it could not be changed after the fact especially after a year and a half. (See exhibit A)

Finding 1

C. Improper Meeting Cancellations and Failure to Postpone

Condition:

- 1. The Mayor refused to postpone an infrastructure meeting scheduled November 2, 2000 as requested by a majority of the Council.

Response:

Condition contested. The referenced meeting was an Infrastructure Capital Improvement Plan (ICIP) meeting that was part of the CDBG grant requirement to have public hearings (not a City Council) to obtain public input as to the types of projects the residents would like to see in their community. The meeting was part of a series of public hearings that were advertised by flyers circulated within the community prior to the November 2, 2000 Council request. The councilors who made the request assumed the public hearing was a city council meeting and reacted in such manner. Please note that the Infrastructure Capital Improvement Plan (ICIP) item was brought in front of the City Council on December 19, 2000 (Exhibit A).

Condition:

- 2. The Clerk –Treasurer cancelled the January 2, and January 16, 2001 regular meetings without governing body approval. Please see attached list entitled Government Body Meeting Check List indicating that individual members of the Governing Body were called and had expressed they did not have a problem with canceling the meeting.

Response:

a.

January 2, 2001- Condition contested. Please note this Council Meeting is just one day after a national holiday. The meeting was cancelled due to lack of quorum. Enclosed you will find the Governing Body Check List which details the polling of the Council. However, it is important to note that the check list contains a technical error which lists the dates as January 1st, 2001 (Exhibit A).

b. January 16, 2001 – Condition contested. It is common practice for City personnel to contact Councilors to determine Council attendance and in turn the Council notifies City staff of their non-attendance. The meeting was cancelled due to lack of quorum(Exhibit A).

Condition:

3. In a January 19, 2001 memorandum to the Mayor, the Mayor Pro Tem stated the Mayor should not unilaterally cancel regular meetings of the Council without obtaining approval of the majority of the Council.

Response:

Condition contested. Please see enclosed memorandum from the Mayor to Mayor Pro Tem dated February 5, 2001 where it is referencing the Finding 1- C-2-b incident (Please see Exhibit A & B of Finding 1- C-2-b).

Condition:

4. The Mayor cancelled the February 6, 2001 regular meeting to allow a Councilor to attend the school board election, but without posting the cancellation. Councilors discussed that this was not an adequate reason to cancel the meeting. Councilors also requested timelier notification of meetings and cancellations.

Response:

Condition contested. February 6, 2001-This day was a school board election day, and a councilor, Mayor Pro Tem Alicia Roman was running for the office of school board. After polling the Council it was determined that there was no quorum because some of the Councilors were going to be directly campaigning in the election, and others stated that they would not be able to attend (Exhibit A). The City is not privy to the Councilors' discussion regarding the adequacy of the reason for cancellation.

Finding 1

D. Meeting Discussion Included Items Not on the Agenda

Condition:

1. In eight instances the Council **closed** the meeting to discuss certain items, but the agenda did not indicate the closed meetings.

Response:

Condition contested. Unable to properly respond without specific dates to the allegations. Moreover, the State Auditor apparently misapprehends the Open Meetings Act requirements which allow closure of an open meeting even if no closure appears on the agenda. Section §10-15-1(I)(1) NMSA 1978.

Condition:

2. In a November 14, 2000 letter to a Councilor, the City Attorney indicated the City gave sufficient notice for the Governing Body to discuss emergency action to repair a well because the agenda item stated the purpose of the close session was to discuss pending litigation for the STSC assets. The Repair of the well and STSC assets litigation are separate issues.

Response:

Condition contested. The State Auditor concludes that “The repair of the well and STSC assets litigation are separate issues”. This is erroneous due to the fact that well # 8 is a condemnation asset. Well #8 failed, requiring the City to undertake immediate repairs pursuant to the Condemnation judgment and agreement with the condemnee, STSC. At the same time, the City received a threat from a land developer that he would sue the City for trespass if equipment was brought to repair/replace well # 8. The Council went into close session to determine what legal action, if any, should be taken with respect to the STSC asset. The State Auditor recognizes the connection between well # 8 and the STSC condemnation assets elsewhere in the Audit when he states “In addition, in a matter related to STSC, the Mayor authorized the City Attorney to file a condemnation action for well # 8”

Please also note that in areas of litigation, the Mayor and Council, along with staff, follow the direction of our city attorney and specifically to areas of likely and potential litigation. Please enclose minutes for June 8th, 2000 as an example of the above (Exhibit A, B & C).

Condition:

3. The Governing Body discussed and took action on the following items, although the items were not on the agenda.

.1. October 19, 1999 – The Council approved salary increases for each department.

Response:

Condition noted. The City agrees with the above condition. Mr. Juan Fuentes, former City Clerk, stated that he believes that this item was an addendum to the original agenda. In the past, the agenda and addendum were posted on separate sheets. Please note that the permanent agendas, addendums and minutes are printed on special legal size paper. It is conceivable that when the permanent agenda was filed in the minute book that the addendum was not included.

Condition:

.2. December 5, 2000 – Council Closed the meeting to discuss whether to hire a City Attorney or to keep contract with current attorney. The discussion does not appear to be exempt from discussion in an open meeting.

Response:

Condition contested. The December 12, 2000 agenda indicates a close meeting to discuss a settlement agreement with ECO Resources. The minutes to the December 5, 2000 meeting indicate that there was a discussion of legal services in the Public Hearing and not in closed session. Moreover, please see response to Finding 1-B-7.

Condition:

.3 June 16, 2001 The Council closed the meeting to consider a settlement agreement with American Eagle Brick Co. No close session was listed on the agenda.

Response:

Condition contested. The above condition is incorrect. Please note that the item in question is actually the only item on the agenda. Please see the enclosed agenda and minutes (Exhibit A).

Condition:

.4. The agendas for the September 21, 2000 and February 27, 2001 reconvened meetings included several items that were not on the original meeting agenda. At the February 20, 2001 meeting, the Mayor stated that the governing body could only discuss matters that appeared on the agenda of the original meeting at the reconvened meeting.

.1. September 21, 2000.

Response:

Condition noted. In regards to the original Special Meeting of September 20, 2000, items 6A, 6B, and 6C were included as part of the Reconvened Meeting of September 21, 2000. There were four items added on the posted agenda that were not part of the original meeting because the City Clerk was relatively new, and had not encountered the situation before as it related to reconvene meetings (Exhibit A).

.2. February 27, 2001

Response:

Condition contested. February 27, 2001- Please note that all the items were included in both the original agenda dated February 20, 2001 and in the Reconvene Meeting of February 27, 2001. The apparent problem as to the difference between the regular agenda meeting and the reconvene meeting was that Item A was already acted upon in the regular meeting and was not included on the agenda for the reconvene meeting, which changed the alphabetical sequence of the items on the agenda, no new items were included nor discussed. Please note that the posting on the agenda for the regular meeting indicated well 6, but in actuality it was well 11 and clarified in the meeting.

Finding 1

E. Inappropriate Method of Meeting Conduct

Condition:

1. May 17, 2001 letter to the Attorney General, Councilors complained that they spoke to the Mayor about allowing a Councilor on at least four occasions to attend council meetings on the telephone instead of in person. The letter did not state the reason that the Councilor could not attend meetings in person; however, the letter said that it was clear the Councilor was inebriated.

Response:

Condition contested. . The City takes issue regarding this condition. Attached is a copy of the agenda and minutes in which individual members of the Council took part telephonically (as exhibit A-F) in council meetings as of February 27, 2001, up to May 17, 2001, which show that it was common practice for members of the governing body who could not physically be present if the situation merited, pursuant to section 10-15-C of the Open Meetings Act. Included as part of the minutes are the minutes of the Councilor who on four occasions attended council meetings on the telephone. Please note that according to the minutes there is no reference or indication that this Councilor, or in fact any member of the Governing Body, was ever inebriated. Moreover, no member of the public or staff, or individual Councilor ever complained to the Mayor or administration of this alleged incident. The City takes issue with the State Auditor for failing to interview the City staff, the individual Councilor, the Mayor, or members of the public who were present in the alleged set meetings, thus bringing into question the allegation(s) in Finding 1-E-1. Such comments are libelous and were never fully investigated. Moreover, according to the State Auditor's telephone log, these same councilors have accused members of the Governing Body and City employees of:

1. Accepting Bribes from ECO (12/10/02)
 2. Using public money to benefit private parties (12/30/02)
 3. Police cover-up (01/9/03)
 4. Filing fraudulent candidacy notices (02/14/03)
 5. Accepting kick-backs (03/13/03)
 6. Corruption (04/03/03)
- (For all the above see exhibit G)

F. Final Action Not Specific

Condition:

1.
 - .1. At a November 30, 2000 Emergency Meeting, the Council voted to approve an interim 15-day operation and maintenance contract for the STSC utility as published in the agenda. However, the Council approved a second contract that was not on the agenda by providing a settlement agreement.

Response:

Condition contested. Please note that the Mayor, Council, and staff were all acting on the advice of our City Attorney in this matter. When it pertains to litigation, our attorney sends specific legal terminology for actions to our City Clerk (please see response 1-D-2). Please review the minutes for

November 30, 2000, in which there is no indication that a second settlement agreement was approved by the governing body (Exhibit A).

The City, in anticipation of taking over the operation of STSC pursuant to the Court's order in the Condemnation Action (See Exhibit B), notified ECO Resources that its contract with the City for operation of the City's utility was terminated. In response, on November 17, 2000, ECO filed suit against the City, seeking to prevent the City from terminating the existing contract(Exhibit C). At the same time, ECO attempted to intervene in the condemnation case seeking to prevent the City from taking over the operation of STSC (Exhibit D). Both matters were resolved by an agreement in which ECO agreed to amend its contract with the City to include a provision for termination of 60 (sixty) days written notice, and an agreement for temporary operation of STSC for 15 (fifteen) days (Exhibit E). The reasons the City did not pursue a contract with ECO for STSC beyond the 15 (fifteen) day temporary agreement are further discussed in response to Finding No. 4.

Condition:

.2. In a December 5, 2000 letter to the Mayor, the City attorney advised the City to add an item to the agenda for the next meeting to correct and approve the settlement agreement. The Mayor did not comply with the advice.

Response:

Condition noted. The Mayor and City administration do not recall receiving the above letter. After consulting with the City Attorney in this matter, the attorney did have a letter on file.

Condition:

2. The minutes of the October 15, 2002 meeting indicate the Council closed the meeting to discuss a purchase acquisition. When the open meeting continued, the Council granted the Mayor permission for a "specific project," not to exceed \$200,000, subject to final approval on such project; however, the Council did not define the "specific project".

Response:

Condition contested. Such motion was undertaken with the general guidance from our City Attorney (Exhibit A). Due to the fact that the prospective investors were undertaking a financial feasibility study, they were concerned that if this particular project would become public in any way, any potential competitors might decide to ruin their initial seed investment by gaining advantage to the project (Exhibit B). Attached is a letter describing the project (Exhibits C, D, E & F). Please note that the motion taken by the Council is subject to a future final approval by the respective body.

Moreover, according to the Attorney General's Compliance Guide for the Open Meetings Act, the purpose of §10-15-1(H)(8) exemption pertaining to "meetings for the discussion of the purchase acquisition or disposal of real property by the public body" is to "enable a public body to consider such matters without the risk of alerting those who could take action which would result in lost opportunities or greater cost to the public body." Identifying the property in the minutes could have resulted in lost opportunity and greater cost to the City.

G. No Written Minutes

Condition:

1. The auditors asked to review 161 minutes from January 1, 1998 to December 17, 2002, but the City could not locate written minutes for the following 12 minutes.

Response:

Attached please see the minutes in question.

- Condition contested. Please note that the apparent minutes for 8/21/00 are not available because the tape for this special meeting was taken by Ms. Hazeldine Romero, Audit Manager from the Office of the State Auditor and never returned to the City. Enclose is the agenda for this meeting (Exhibit A).
- Condition contested. January 18, 2001: there are no such minutes because there was no such meeting, but there are minutes for January 18, 2000 which are on file and match the corresponding agenda, which were approved June 5th, 2001 (Exhibit B). The apparent confusion may be due to a typographical error.
- Condition contested. The meeting held on July 19, 2001 was a public hearing conducted at the request of Department of Finance & Administration to address the fiscal year 2000- 2001 budget. Please see the attached agenda (Exhibit C). Since the meeting was held at the request of and by DFA, DFA stated that City staff was not responsible for taking minutes for this meeting. The City Clerk has requested a copy of the minutes from DFA several times, with no response as of this date.
- Condition noted. The March 19, 2002 minutes. Please note that these minutes were presented in front of the Council on April 16, 2002, however the Council tabled the item. Unfortunately, the minutes were never represented for Council consideration, but are placed for consideration on the August 5th, 2003 agenda (Exhibit D).
- Condition contested. The May 15, 2002 was the workshop held by the Attorney General and an explanation is provided in 1-G-3.

Condition:

2. The Clerk-Treasurer stated the City does not require minutes for workshops so she did not prepare them. The former Clerk-Treasurer, who left City employment approximately mid-2000, however, did prepare written minutes for workshops and the governing body approved those minutes.

Response:

Condition contested. The former City Clerk, Mr. Juan Fuentes, prepared written minutes, but our current City Clerk, Maria Elena Vargas, does not. She states that she is not required to prepare written minutes of workshops according to the advice she obtained from the New Mexico Municipal League. The Clerk stated that state statutes requires that minutes be taken only in instances where public policy will be formulated or action is going to be taken by the governing body.

Condition:

3. In an April 24, 2002 letter to the Mayor, the Attorney General Office stated that despite prior direction by the office of the Attorney General to correct Open Meetings Act (OMA) and Inspection of Public Records Act (IPRA) violations, the City continued to violate these laws. The Assistant Attorney General requested a public meeting to address the Governing Body and staff of the City on the OMA and IPRA. On May 15, 2002 an Assistant Attorney General met with the Governing Body to discuss the OMA and the IPRA. No minutes were prepared for this meeting as the Clerk-Treasurer considered it a special workshop.

a. April 24, 2002 letter to the Mayor.

Response:

Condition noted The letter in question was received (copy enclosed). Subsequently, the City Clerk with the Governing Body coordinated a date and time to hold the meeting requested. Since no specific instances were referenced in the letter, the Governing Body was unable to provide a response other than to arrange the requested meeting.

Condition:

b. The Assistant Attorney General requested a public meeting to address the Governing Body and staff of the City on the OMA and IPRA. On May 15, 2002 an Assistant Attorney General met with the Governing Body to discuss the OMA and the IPRA. No minutes were prepared for this meeting as the Clerk-Treasurer considered it a special workshop.

Response:

Condition contested. The special workshop was held on May 15, 2002 in compliance with the Attorney General's request. As to the minutes on the workshop, please refer to prior response for condition 1-G-2 and (Exhibits A, B, C & D).

Condition:

4. In an August 23, 2002 letter to the Mayor, the Attorney General's Office requested the City respond in fourteen days to a May 7, 2002 investigation letter regarding OMA and IPRA violations. In a September 18, 2002 letter, the Mayor indicated that the Attorney General's May 7, 2002 letter was sent to the wrong address and asked for an additional 14 days to respond once the City received the complaint. The Mayor did not subsequently respond to the complaint.

Response:

Statement of fact noted, condition contested. During the City Council meeting of September 17, 2002 (minutes enclosed: Exhibit E), Councilor Luz Vargas gave reference to the August 23, 2002 letter from the Assistant Attorney General, unbeknownst to the Mayor and City Clerk. Therefore, on the following day the Mayor sent a letter (please see attached: Exhibit C) to the Assistant Attorney General, Mr. Otero, concerning his request. Please note that our office only received a letter from the Attorney General asking the City to respond, but the City never received a specific case or circumstances of the alleged incident, and was unable to response to the allegations (please see the enclosed information). According to the City Clerk and the Assistant Clerk there was no request or

incident(s) on May 7, 2002 concerning the Open Meetings Act and Inspection of Public Records Act. The Mayor was unable to officially respond having never received the complaint. The State Auditor never questioned the Mayor or staff regarding this issue.

Condition:

- 5. The Housing Authority board did not prepare written minutes for meetings even though the housing authority is a component unit of the City and the Council acts as the housing authority board. The Clerk-Treasurer prepared agendas for the meetings. The housing director recorded the minutes and tapes were available; but do to a proclaimed lack of personnel, the director was unable to transcribe the tapes and present them for board approval.

Response:

Condition noted and corrected. As of this date, our housing director has been instructed to draft the minutes from previous meetings and from now on to keep and maintain records of their meetings as per state requirement. Tape records of the minutes are available and maintained. As of May 20, 2003 the Governing Body appointed a Housing Authority Board, which will assume the responsibilities and functions of public housing.

H. Incorrect Minutes

Condition

- 1. Minutes do not document the vote taken on the motion or the vote of each member of the governing in 32 of the 148 minutes reviewed.

Response:

Condition noted. The condition is non specific and makes it difficult to adequately respond. Nevertheless, the City does not question this finding given the political circumstances of the time. Please note that the staff reflects individual votes of the governing body during ordinances and resolutions votes pursuant to the advice of the New Mexico Municipal League. All other actions are recorded in the form of a motion. Second, the staff also identifies the individual councilor who made or seconded the motion, and an aggregate account is taken for those in favor and those against. Please note that the City, particularly the Finance Department (Clerk-Treasurer) was under-staffed making it impossible to meet expectations during 2000 – 2002. Given the political environment at the time, the Councilors consisting of the majority refused to allow additional personnel. Moreover, if there is ever any question as to the votes of the governing body, any member or person present may request a roll call taken.

Condition:

- 2. On November 19, 2002, the Mayor asked for the record to reflect that when two abstentions are present, they become ayes or approvals for all purposes. He further stated that the Mayor does not have to vote or break a tie.

Response:

Condition contested. Although the City admits to the Mayor's comments, it denies such claim. Attached please see 1-6-2-B of the City Code book, which references Ordinance No. 1992-4B (Exhibit A & B). The vote was a technical tie, as per the November 19, 2002 minutes, and a vote from the Mayor was required (Exhibit C). Given this fact the minutes were reintroduced for consideration and action, and passed on the following meeting of December 3, 2002(Exhibit D), and the apparent error was corrected. In this meeting, the Mayor explained the apparent confusion to the Governing Body and the motion was carried. The City questions the finding in lieu of the corrective actions the City undertook.

Condition:

- 3. There were instances of minutes that indicated motions carried, but the recorded votes indicate the motions failed, as follows:

Condition:

.1. Meeting date (5/10/99) – The minutes indicate the governing body approved the Memorandum of Understanding with Dona Ana County (County) for joint ownership and operation of the STSC utility. The votes, however indicate three nays, and three ayes, and then the Mayor voting nay.

Response:

Condition noted. Please note that an error clearly occurred in placing the wording of the “motion carried” in this section of the agenda. It is clearly evident by reviewing the May 10, 1999 minutes that the motion did not carry(Exhibit A). Both the individual vote count and the overall aggregate count indicate that the motion failed.

Condition:

.2. Meeting date (9/07/99) – The minutes indicate the governing body accepted a deed of 0.566 acres that Jack Pickel of POST Land Ltd. Donated to allow the City to have presence at the port of entry. The recorded votes, however indicate three nays and two ayes.

Response:

Condition noted. Please note that an error clearly occurred in placing the wording of the “motion carried” in this section of the agenda. It is clearly evident by review of the September 7, 1999 minutes that the motion did not carry(Exhibit A). Both the individual vote count and the overall aggregate count indicate that the motion failed. In addition, the comments in the minutes expressed by a number of individual Councilors after the vote reflect that the motion indeed failed.

Condition:

.3. Meeting date (1/18/00) – The minutes indicate the governing body voted unanimously to approve a salary increase for an employee. The governing body approved the minutes on September 21, 2000 after amending the minutes to indicate that two Councilors voted nay.

Response:

Condition contested. The apparent mistake was noted and has been corrected to reflect the corrections taken in the September 21, 2000 meeting after the Council amended the minutes (please see enclosed minutes, Exhibit A & B).

Condition:

.4. Meeting date (6/27/01) – The minutes indicate a Council voted in favor of tabling a motion; however, the minutes also indicate the Councilor left the meeting before the Clerk-Treasurer took the vote.

Response:

Condition contested. Based on the minutes of June 27, 2001, it is clearly evident that the sentence stating the time when the Councilor left the meeting was incorrectly placed in the minutes (Exhibit A). Based on the time when the meeting was adjourned (9:50 p.m.) and when the Councilor left (9:40p.m.), there is only a 10 minute disparity. Given that there was a public comment period item (6) that was addressed prior to adjournment, the Councilor most likely left subsequent to the vote.

Condition:

.5. Meeting date (10/01/02) –

The minutes indicate the motion carried to close the meeting, but the votes indicate three ayes and three nays.

Response:

Condition contested. This finding is factually incorrect (enclosed see the approved minutes for October 1, 2002). There is a 4 to 2 vote mentioned, but no ties reflected.

Condition:

4. Our review of 148 minutes show that the Clerk-Treasurer has not corrected minutes in 25 instances and 14 minutes contained errors.

Response:

Condition noted and is being corrected. Since the condition to this finding is nonspecific there is no way to substantiate or deny the finding. Nevertheless, given the political circumstances during 2000 – 2002, (in which the Mayor and some members of the governing body were politically at odds) such condition in this finding is possible.

The Mayor and staff during this time made numerous requests for additional personnel, which was denied. It was not until the beginning of this new Council administration in 2002 that the City was able to hire a new Finance Officer and an Assistant Clerk.

Condition:

.1. The roll call for June 8, 2000 minutes indicate one councilor was not present but discussions in the minutes indicate the Councilor was present. Another Councilor on the roll call twice.

Response:

Condition contested. Apparently the Audit findings are based upon draft agendas and do not reflect the agenda as filed by the City Clerk. Please note that based on the minutes on record the above error is not present and this finding is incorrect(Exhibit A).

Condition:

.2. November 30, 2000 minutes indicate a councilor attended the meeting but the Clerk Treasurer hand written meeting notes indicate the Councilor did not attend the meeting period.

Response:

Condition contested. Apparently the Audit findings are based upon draft agendas and do not reflect the agenda as filed by the City Clerk. The minutes that were approved by the Governing Body on June 19, 2001 do not reflect the above claim (Exhibit A). The minutes reveal an actual vote count of a full quorum and a six (6) vote count.

Condition:

5. Numerous minutes contained typological errors, nonsensical statements, incomplete sentences and discussions and actions taken were difficult to understand.

Response:

1. Condition noted and is being corrected. Please note that this finding was clearly evident during the transitional period described in finding 1-H-4. The city continues to correct and improve its operations

I. Minutes Not Approved Timely

Condition:

1. The governing body did not approve, amend, or disapprove the meeting minutes at the next meeting where quorum was present in 123 of 148 meetings reviewed.

Response:

Condition noted and is being corrected. Due to the fact that the above condition is non specific it makes it very difficult to adequately respond to this condition. Please note that the City has been taking corrective action to mend any apparent deficiencies. Also, see the City's response 1-H-4 and 1-H-5.

Condition:

- 2. As of December 17, 2002, the governing body had not taken action to approve, amend or disapprove minutes for the August 21, 2000 special meeting.

Response:

Condition noted and is being corrected. Please see the City's response to 1-G-1.

Condition:

- 3. The governing body approved 13 minutes more than two years late.

Response:

Condition noted. The above finding is factually correct given the circumstances outlined in finding 1-H-4 and finding 1-H-5. The majority of these minutes were taken during the transitional period between two Clerk-Treasurers and when the City administration was requesting approval of additional staff. When additional staff was hired, the City was able to correct many of the previous deficiencies.

Condition:

- 4. In addition, the governing body approved 6 minutes more than one year but less than two years late and 14 minutes more than six months but less than one year late.

Response:

Condition noted and is being corrected. Please see the City's responses to 1-H-4, 1-H-5, and 1-I-3.

Condition:

- 5. On numerous occasions the Governing Body tabled approval of minutes to future meetings. In most cases, the Governing Body received the minutes at the meeting and did not review them before approving them. Councilors continually requested the Clerk-Treasurer prepare the minutes for approval as required by the Open Meeting Act, for example;

Response:

Condition noted. Since the items referenced in condition 1-I-5 alludes to the continued political environment and lack of staff, see the City's responses in Findings 1-H-4, 1-H-5, 1-I-3, and 1-I-4 and enclosed information referenced in this condition (See exhibit B).

Condition:

- 6. The minutes indicate the Council approved the minutes on one date; subsequent minutes indicate the Council approved them on a different date as follows:

Meeting 9/16/98
Meeting 9/18/98
Meeting 2/15/99

Response:

Condition noted and has been corrected. The above condition-finding is correct and a technical oversight on the City's part, and the City has made the necessary corrections. (Exhibit A& B). As to the minutes of February 15, 1999, please note that the actual date of approval was March 16, 1999. (Please see Exhibit C & D). According to the former City Clerk the term "tabled" should have not been placed in the agenda, and instead should have been "approved".

Condition:

- 7. Our review of 148 minutes reveal:
 - * There was no approval date in 72 instances,
 - * The Mayor did not sign the minutes in 80 instances; and
 - * The Clerk-Treasurer did not sign the minutes in 82 instances.

Response:

Unable to note or contest condition. It is not clear as to the time span regarding the 148 minutes reviewed, and the review does not refer to specific instances. The City is unable to adequately respond. Nevertheless, the City is inclined to admit to these facts, but once again refers to Findings 1-H-4, 1-H-5, 1-I-3, and 1-I-4.

J. Employee Actions Not in Compliance with the Open Meetings Act, State Law, City Ordinance or City Attorney Opinion

Please note that under the Criteria subheading, the audit report refers to an ordinance which states that the **Mayor shall work Monday to Friday** from 8:00 a.m. to 5:00p.m.

There is no such ordinance adopted by the City of Sunland Park

Condition:

- 1. November 17, 1998, the police chief announced that he promoted an employee, but the City did not present the promotion to Council for approval.

Response:

Condition noted. Finding is an apparent oversight on the City's part. The November 17, 1998 minutes indicate that the staff, Mayor and the City Council did not object to the comment made by the Police Chief at the time (Exhibit A). Please note that the employee was no longer employed by the City as of December 16, 2000.

Condition:

- 2. In a November 21, 2000 a memorandum to the Mayor a councilor indicated that the City had failed to dismiss an employee after the Governing Body disapproved the employment.

Response:

Condition contested. Please note that although Ms. Molina was denied for the temporary position of Secretary/ Receptionist for the Child and Family Development Department on November 13, 2000 (Exhibit A), she was later approved as a permanent employee for the same position in a December 5, 2000 (Exhibit B& C) Council meeting.

Condition:

- 3. In a November 22, 2000 memorandum to the Mayor, a Councilor stated that a part-time employee was now working full-time. The Mayor did not bring the change of employee status or related budget matters to the Governing Body for approval.

Response:

Condition contested. Attached please see letter dated November 22, 2000 in which a particular Councilor makes an allegation as a part-time employee now working full-time (Exhibit A) Also included are the minutes dated February 15, 999 (Exhibit B) along with a separation notice (Exhibit C) and the minutes dated November 17, 1998 (Exhibit D). According to the employee file the employee work a time period as a temporary employee (full time), starting November 17, 1998, and was not a part time status employee (Exhibit D). On February 15, 1999 the employee became a full time permanent employee where the motioned carried unanimously, of which the Councilor who complained actually voted in support of the employee's hiring status (Exhibit B& C).

Condition:

- 4. At a February 7, 2001 meeting, the Council approved the appointment of two part-time Community Organizers for the Child and Family Development Department. The City did not seek Council approval for the Community Organizer job description until March 6, 2001. The two employees are now working full-time as Educators. The Mayor has not brought a recommendation for these employees to the Council for approval as full-time employees.

Response:

Condition contested.. After the February 7, 2001 meeting (Exhibit A), the staff realized a procedural error had occurred. Therefore, on March 6, 2001 (see Exhibit B) the job description for the Community Organizers was placed on the City Council agenda and passed. Please note that the Community Development Department was a newly-formed department at the time and was facing many launching challenges.

Both positions are still under the original job descriptions of Community Organizers (see Exhibit C). The City agrees that if the Director seeks to change their titles or modify their tasks, roles and responsibilities, then a new job title is warranted. Currently one position is vacant and the other is a part-time position that (according to the proposed budget FY 2003-04) will become a full time position, but must come before the Council.

Condition:

5. In a May 17, 2001 letter to the Assistant Attorney General, Councilors stated:

.1. The Mayor was teaching part-time at a community college without the Council's authorization and he was teaching during working hours. The City Ordinance pertaining to the Mayor states the Mayor shall work Monday to Friday from 8:00 a.m. to 5:00 p.m.

Response:

Condition contested. The above allegation is incorrect. There is no such City Ordinance that requires the Mayor to work an 8:00 a.m. to 5:00 p.m. mandatory work schedule. Enclosed is an Ordinance List (see Exhibit A) highlighting all the ordinances adopted by the City since its incorporation, along with the ordinances referencing the position of the Mayor (Exhibit C,D, E & F), with Chapter 6 of the City Code (See Exhibit B) referencing the Mayor's obligations. The City's Personnel Rules and Regulations likewise do not reference any item in the above claim. Please note that neither the City's ordinances, codes nor regulatory provisions allude to or reference the number of hours the Mayor is required to work. Furthermore there is no New Mexico statutory provision requiring or defining the Mayor's hourly work schedule.

Condition:

.2. The Mayor appointed personnel to positions without them having the required minimum qualifications.

Response:

Condition contested. Without knowing specifically to whom the Auditor is referring, the City is unable to adequately respond. Nevertheless, the Mayor takes issue over such allegation. Please note that as a matter of procedure, all positions must go before the Governing Body for review and confirmation.

Condition:

.3. The Mayor used unqualified and unlicensed City employees to renovate a park, and the Mayor did not bring the project to the Governing Body for approval.

Response:

Condition contested. Due to lack of specificity, it is difficult to respond to this allegation. See the attached minutes [4/3/01(Exhibit A), 6/27/01(Exhibit B), 7/3/01(Exhibit C), 12/4/01(Exhibit D)] indicating that that the governing body was fully aware and involved in the Elena Memorial ongoing enhancement project (also see Exhibit E). As to whether the City used unqualified unlicensed employees, all related work falls under the directive of the Public Works Department, which must adhere to the specific construction standards. Moreover this was an ongoing enhancement relegated to the Public Works Department as part of their daily work functions to upgrade our City Parks. Also note that the Council approved the budgetary increases for this project (Exhibit A), and the Governing Body approves all individual hires, not only in the Public Works Department, but all departments. The same upgrades were undertaken at the River Levy Park and as part of the same

series of ongoing improvements; the City is currently undertaking the same type of enhancement at the Anapra-Red Mender Memorial Park.

Condition:

- 6. At the April 16, 2002 meeting, the Council tabled appointment of an individual as Library Assistant. A Councilor asked when the Council approved the job description. The City Clerk clarified that the Council approved the position at the last regular meeting. A review of the minutes indicated that the issue neither was on the agenda nor acted on by the Council. Later at a May 21, 2002 meeting, the Council approved a resolution establishing the Library Assistant position.

Response:

Condition noted. Please note this was an oversight, but the incident was corrected once the error was discovered. The director had already drafted the job description and apparently there was a miscommunication between the director and the City Clerk's office. (Exhibits A and B are attached for reference).

Condition:

- 7. The Mayor transferred the Purchasing Officer from the Finance to the Motor Vehicle Department and a Motor Vehicle Department employee to Finance. The Mayor did not seek Council approval for the transfers and the City continues to pay the employees out of the budgets of their former departments.

Response:

Condition contested. The Mayor transferred the Purchasing Officer from the Finance Department to the Motor Vehicle Department and the Motor Vehicle Department employee to the Finance Department (Exhibit A). Please note that action taken by the Mayor is outside the definition of "promotion" and does not fit the definition of reclassification. Lateral transfers can only be executed within closely related classifications (3-14-3 [Exhibit B]) of which the above transfer adheres to. Pursuant to the City's Personnel Rules and Regulations Section 3-14-3 (Exhibit B) & 3-8-4 (Exhibit C), the Mayor is entitled to undertake lateral transfers at his discretion.

- 8. On February 10, 2003 , the Mayor appointed an individual to the Community Development Department. The Mayor has not brought the appointment to the Council for approval.

Response:

Condition contested. The employee in question works under the Workforce to Work Program and does not officially work for, nor does she get paid by, the City. She aids the Secretary-Receptionist in the Community Development Department. During the maternity leave of the Secretary – Receptionist, she was placed as a temporary employee due to the level of expertise and knowledge that she has obtained while assisting in the department. She was hired as a temporary employee, and was appointed February 13, 2003 (Exhibit B) and confirmed by Council on March 17, 2003 (Exhibit A).

K. Noncompliance with Officer Appointments

Condition:

1. At the March 24, 1998 meeting, the governing body voted not to affirm the City Clerk's position. The Mayor stated he considered this a direct threat to his administration. Subsequently minutes indicate the Mayor did not submit another name to fill the position, as required. At the March 21, 2000 meeting, the governing body voted not to accept submission of appointed positions for the Fire Chief, Police Chief and Clerk-Treasurer and for the individuals filling these positions to vacate them immediately. Although the Mayor submitted names to fill the positions at the next meeting, he did not immediately vacate the positions. The former Clerk-Treasurer remained in the position until May 13, 2000 when the Mayor submitted another name to fill the position.

Response:

Condition contested. There is no requirement that appointed officials vacate their positions before a succession is appointed. Instead §3-11-5(B) NMSA 1978 specifically provides that "any person holding an appointed office shall continue in his office until his successor has been appointed..."

Condition:

2. In a May 17, 2001 letter to the Attorney General, Councilors stated the Mayor refused to comply with the Council's decision to terminate the Clerk-Treasurer, Police Chief and Fire Chief. As a result, in the litigation that followed, the Mayor refused to cooperate with the City Attorney leaving the City exposed to a wrongful termination claim. The City settled with payment to the Police Chief.

Response

Condition contested. The litigation brought by the Police Chief and the Fire Chief alleged that the City Council terminated their employment without just cause. The City received an opinion from the Municipal league concerning the manner in which the City Council terminated these employees (see Exhibit A). The City was defended by attorneys hired by the City's Insurer. The litigation was resolved by a re-hiring of the Fire Chief and a settlement with the Police Chief. The Mayor was not involved with the wrongful termination.

Condition:

3. The Mayor did not bring all the appointed Department Directors to the Council for approval. The Mayor only brought the Clerk-Treasurer, Community Development Director, Police Chief and Fire Chief to the Council for approval.

Response

Condition contested. The Mayor brought all the appointed Department Directors to the Council for approval, except the Public Works Director, a position which is still vacant (since the split of the water and wastewater divisions) (Exhibit A). Enclosed please see the job descriptions for Police Chief, Fire Chief, City Clerk-Treasurer, Community Development Director, the Public Works

Director, and City Attorney (see Exhibits E, F, G, H, & I). All these job descriptions are at will or exempt positions. Nevertheless, the job description was approved in June 2000. The City has advertised a number of times, but has been unsuccessful in hiring an in-house attorney. The positions for Motor Vehicle Division Manager, Child and Family Development Director, and Housing Administrator are all classified employees according to their job description and fall under the provisions of the City's Personnel Rules and Regulations (Please see Exhibit B, C & D). Please see Finding 1-B-1.

Finding No.2 – The City Did Not Comply With the Inspection of public records Act (see A and B below).

Condition:

1. February 25, 2000 – request for the early voting signature roster. A councilor requested this information in six different occasions.

Response:

Condition contested. The former City Clerk, Mr. Juan Fuentes, advised the City that he does not recall ever receiving any written request for an early voting signature roster (see Exhibit A). Mr. Fuentes responded to verbal and written requests for inspection of public records. However, he did advise of the constant harassment of two City Councilors, more specifically former Mayor Pro Tem Alicia Roman and Councilor Luz Vargas-Troncoso. Mr. Fuentes advised that the Secretary of State's Office conducted an investigation and found no evidence of wrongdoing during the time of this incident.

Condition:

2. November 30, 2000 – request for the Open Meetings Resolution.

Response:

Condition contested. The current City Clerk does not recall receiving any request during this time period. The governing body adopted the Open Meetings Resolution on January 18th 2000 and it was available for public inspection during this period.

The Open Meeting Resolution is provided every year at the first Council Meeting; it is adopted as the first item for the upcoming year. Copies are available at all times upon request. There is no reason to deny any request for the Open Meetings Resolution.

Condition:

3. February 7, 2001 – Request for the cost to the City of a river jump attempt. The Clerk-Treasurer did not respond. The Clerk-Treasurer stated at a later meeting that the amounts were not available.

Response:

Condition contested. Please note that no written request was made by anyone during this period. However, according to City Clerk Maria Elena Vargas, at a public meeting on February 7, 2001,

Councilor Luz Vargas-Troncoso asked if a total of the cost to the City (see Exhibit A, E) of a river jump attempt was available. The Clerk stated that the information she requested was not available at the time of the meeting. However, Councilor Vargas had already requested this information on August 16, 2000, which was provided to her that same day (Please see Exhibit B, C, D).

Condition:

- 4. August 8, 2001- Request for a vendor and a copy of the approved fiscal year 2002 budget.

Response:

Condition contested. There are no written requests made for the above two items, and therefore the City could not respond. In order to adequately respond to the first request the City would need information on the vendor in order to provide the voucher support. In an August 7, 2001(Exhibit A) meeting under the items of the Mayor and Council, a Councilor questioned the cost of the publishing in a newspaper and requested the total cost expense to the City. Subsequently, the Clerk-Treasurer provided the information as requested to the councilor.

The budget was approved by DFA on July 19, 2001; after that date copies were available. There was no reason to fail to respond to this request.

Condition:

- 5. March 28, 2002 – Request for the signature roster for the election held March 5, 2002.

Response:

Condition contested. The roster is in the possession of the County Clerk and not the City Clerk.

Condition:

- 6. May 29, 2002 – Request for the Declaration of Candidacy for the Office of the Council.

Response:

Condition contested. The City Clerk neither recalls nor has record of any written correspondence for such requested item.

Condition:

- 7. July 31, 2002 Request for the findings or report the auditors gave the City after the exit conference. The Mayor denied the auditors provided anything, but the auditors stated they provided the audit report to the Mayor.

Response:

Condition contested. The Mayor met with the auditors to discuss issues regarding the ongoing audit, but does not recall receiving any proposal, written findings or report of the audit at that time. The auditors presented their findings in front of the Governing Body on September 3, 2002 (Exhibit A),

and according to the Mayor, the auditors could not have provided him with a copy of the final written report in July, if the auditors did not come before the Council until September 3, 2002.

Condition:

- 8. October 17, 2002 – Request for advertisements of the request for proposals for audits for the fiscal year 2002 City audit.

Response:

Condition contested. The City Clerk Vargas provided Councilor Vargas with the information she requested. Enclosed as Exhibit A is information provided to Councilor Vargas.

Additional correspondence indicates information requests were a continuous problem, as follows:

- 8.1 In an August 21, 2000 letter to the Mayor, a Councilor expressed concern over the Clerk-Treasurer's refusal to comply with reasonable Councilor requests for information regarding City business. On September 24, 2001, the Councilor read the letter at a public meeting.

Response: Condition contested. (Same as to response to Finding 2-8.4).

According to the City Clerk she has never refused to provide any Councilor with any information. Please note that the letter referenced by Councilor Vargas from the Attorney General's Office is addressed to the Mayor and Council and refers to three main issues: adequate timeliness of minutes, appropriateness of tele-conferences in meetings, and closed session requirements, along with a final paragraph which referred to statements on responding to public request of what the above at issue. Please note the Attorney General's letter references a file containing allegations to which the City has not been privy (Exhibit B).

Condition:

- 8.2 In a May 17, 2001 letter to the Attorney General's Office, Councilors complained the Mayor instructed City employees not to inform or to call Councilors about issues. Employees were to refer Councilors to the Mayor, but when Councilors attempted to meet with the Mayor, he was often inaccessible.

Response:

Condition contested. As to the Mayor being inaccessible; the Mayor denies such claim. The Mayor for the most part is at his office during the working hours. He does not understand such claim especially when he has provided Councilors with his cell phone number. In the second matter, the Mayor recalls advising employees to follow the chain of command regarding all inquiries in order to ensure adequate accountability, proper service, and an efficient and effective response. Please see Mayor's memorandum (Exhibit A).

Condition:

8.3 In a July 12, 2001 memorandum to a Councilor, a City employee indicated that all requests for information must go through the Mayor or Clerk-Treasurer as per a July 11, 2001 memorandum to City staff.

Response

Condition noted. After employees expressed concern that they were being placed in very difficult positions by Councilors who requested particular items and later stating that they never received them, a memorandum by the Mayor was circulated to employees to provide guidance and instructing them to direct all inquiries to the appropriate and designated officials. Finding 2-8.3.

Condition:

8.4 In an August 21, 2001 letter to the Mayor, Councilors requested the check register on a bi-weekly basis and a resolution requiring Councilors to approve all City checks on a bi-monthly basis. The Councilors stated that examination of these records was a prudent control on the Councilors' part. In a September 6, 2001 letter to the Mayor, the Assistant Attorney General stated it is important that the City respond to requests to inspect public records timely, in accordance with the law. In a September 10, 2001 letter to the Council and Mayor, DFA clarified that the City was not to deny any member of the governing body the right to inspect and review any documents from their respective municipality. The Mayor responded that all requests had been complied with in a timely manner and there were no pending matters regarding requests. The Mayor responded to the Councilors stating that as of September 10, 2001, all Councilors would receive the check register. He also stated he gave direction to the City Attorney to draft a resolution requiring Council approval of City checks. In a September 17, 2001 letter to DFA, the Mayor indicated the majority of the Council expressed, at a June 19, 2001 meeting, that if a particular Councilor wished to inquire of a particular issue or item that he/she could, on an individual basis.

Response:

Condition contested. Enclosed please find the following: See also §10-15-1(B) NMSA 1978 regarding meetings covered by the Open Meetings Act.

- a letter dated August 21, 2001 from some Councilors to the Mayor requesting the City's Check register;
- the Assistant Attorney General's letter dated September 6, 2001;
- the Mayor's response dated September 7, 2001;
- DFA's September 10, 2001 letter to the Mayor;
- Mayor's response letter to DFA dated September 17, 2001; and
- Mayor's letter to Council members.

Please note that the City complied with the August 21, 2001 request, as noted in the Mayor's letter (Exhibit C). The City also complied with the Assistant Attorney General's letter that was received shortly thereafter and with the September 10, 2001 letter from DFA (Exhibits A, B, C, D & E).

The City also took the recommended items from DFA to the council, and responses are enclosed (Exhibit F & G).

Condition:

8.5 At the September 24, 2001 meeting, the Council discussed a letter from the Attorney General regarding compliance with the Act. At the meeting, a councilor mentioned a specific occasion where the Clerk-Treasurer did not provide her request. The Clerk-Treasurer stated that she was in a middle of a meeting with the Mayor, Representatives of HIDTA, and certain members of her staff. The Mayor recommended request for information be put in writing and for the Clerk-Treasurer to comply within three days to avoid future problems. The Council also discussed the letter from DFA regarding the right of the Governing Body to review documents.

Response:

Condition contested. Please be advised that the incident that prompted the Attorney General letter dated September 6, 2001(Exhibit A) occurred when Councilor Luz Vargas demanded to see the City Clerk when the Mayor, City Clerk, and a number of city staff were in a middle of a meeting with HIDTA representatives. The Clerk asked if it was possible to set a meeting later in the day with Councilor Vargas, at which time she claimed that the Clerk was non responsive to her request and left, prompting a letter to the Attorney General and DFA. Please also see Finding 2-8.4 and Finding 2-8.1.

Condition:

8.6 In an April 24, 2002 letter to the Mayor, an Assistant Attorney General requested a public meeting to address the Governing Body and staff of the City on the Open Meeting Act and Inspection of Public Records Act. On May 15, 2002 an Assistant Attorney General held a meeting with the Governing Body to discuss the Open Meetings Act and the Inspection of Public Records Act. Minutes were not taken for this meeting.

Response:

Condition contested, but concurs with factual statements. Please see Finding 1-G-2. See also §10-15-1(B) NMSA regarding meetings covered by the Open Meetings Act.

Condition:

8.7 At a May 21, 2002 meeting, a Councilor asked that the agenda for the next regular meeting include discussion of the custodial hierarchy for City records. At the June 4, 2002 meeting, the Governing Body approved the custodial hierarchy of records in the absence of the Clerk – Treasurer. The first contact is the Clerk-Treasurer, in her absence the Clerk Assistant, and in both of their absence, the receptionist. On August 27, 2002, a Councilor requested that the Clerk-Treasurer provide the letter sent to DFA responding to DFA’s August 12, 2002 letter. On August 28, 2002, the Clerk-Treasurer responded to the Councilor that the City did not have knowledge of letter; yet on August 27, 2002 the City Attorney sent a letter to DFA requesting public information that pertained to the August 12, 2002 letter.

Response:

Condition contested. The City has no knowledge of the correspondence between the City Attorney and DFA. The City attorney requested information from DFA not from the City. Attached as Exhibit A is a copy of the August 27, 2002 letter from the City Attorney to Harold Field. It does not appear that this letter was copied to the City of Sunland Park.

Condition:

8.8 According to a Councilor in a September 7, 2002 letter, the Mayor stated that he had requested the City Attorney draft a resolution regarding Council bi-weekly check register examination and approval, but the City Attorney stated the Mayor never instructed him to draft such a resolution.

Response:

Condition contested. The Mayor recalls notifying the City Attorney of the request, however it is unclear whether the attorney remembers. In addition, the date of the letter referenced is September 7, 2001 not September 7, 2002. See Exhibit C to Finding 2-8-4. The need for a resolution regarding inspection of checks was nullified by the Council's subsequent decision. See letter dated September 17, 2001 from Mayor Segura to Kim Abeyta, page 2, item 2 attached as Exhibit A.

Condition:

8.9 At a September 17, 2002 meeting, the Mayor stated that he had not seen the May 7 or August 23, 2002 letters from the Attorney General, but at an October 15, 2002 meeting, the Mayor stated the City responded to the August 23, 2002 letter.

Response:

Condition contested but factual statements accepted. .Please see 1-G-4.

Condition:

8.10 At an October 15, 2002 meeting, Councilors requested copies of the personnel rules and regulations. The Mayor stated the copies would be available at the next Council meeting, but as of December 2002, the copies were not distributed to the Council.

Response:

Condition noted. Please note that although an oversight occurred on the Mayor and Staff's part, a number of the Councilors already have copies of the personnel rules and regulations. Councilors may request a regulations packet at any time.

Condition:

8.11 In a December 11, 2002 memorandum to DFA, a Councilor stated that she went to City Hall to listen to tapes of Council minutes. The Clerk-Treasurer had told the Councilor to come in to review the tapes but the Assistant Clerk informed the Councilor she could not provide the tapes because the Clerk-Treasurer was not in. On December 6, 2002, the Councilor received a response that the City destroyed the tapes but on December 6, 2002, the Auditor overheard the Mayor suggest the Clerk-

Treasurer have the Councilor review the tapes. The Council had voted to amend certain minutes because of errors and requested the tapes.

When the Auditor began the audit on October 15, 2002, the City had boxes of tapes for most Council meetings. The tapes were in envelopes along with draft minutes and handwritten notes, and the Auditor listened to some of these tapes and used this information to conduct the audit. On December 4, 2002, however, the Clerk-Treasurer informed the Auditor that most tapes had been destroyed. She said it was the City's policy to destroy the tapes after meetings. On December 11, 2002, the auditors, after consulting with the New Mexico Attorney General's Office, informed the City not to destroy and more tapes. At that time, the Auditor confiscated 12 tapes dating from May 5, 1999 to May 28, 2002.

Response:

Condition contested. Please see the enclosed memorandum by Laura Ortega, Clerk Assistant, which details the December 4th, 2002 (Exhibit A) incident with Councilor Luz Vargas-Troncoso. Please note that after the incident, Laura Ortega informed the City Clerk, Maria Elena Vargas, about the request to review the minutes of December 3, 2002 and subsequent minutes. On December 6, 2002, the City Clerk informed Councilor Luz Vargas Troncoso that the tapes of the approved minutes on December 3, 2002 were destroyed the following day. Please note that the tape for the December 3, 2002 meeting was still available for review, the tape had not been transcribed into minutes and approved by the governing body.

Regarding the destruction of certain tapes, please see the Audit Manager's letter to the Mayor and the Mayor's response letter dated December 15, 2002. Please note that the City adopted Resolution 99-11(Exhibit C), which establishes the management program for the City. The resolution specifically delineates the procedures for the retention and disposition of records, including tapes. Nevertheless, upon receipt of the Audit Manager's letter requesting the City to cease destroying tapes, the City ensured no destruction of tapes would take place until the end of the audit, pursuant to the request of the Audit Manager (Exhibit E).

B. Criteria

Condition:

The City did not have written rules and regulations regarding the Inspection of Public Records and therefore, did not post the required notice.

Response:

Condition noted and has been corrected. The notice of right to inspect public records has now been posted (Exhibit A).

Finding No 3 – Noncompliance with Statutes for a \$2 Million Loan

Condition:

1. The City awarded a professional services contract to ECO Resources (ECO) to operate City and STSC utilities; however, the contract included a \$1.8 million loan from ECO to the City so that the City could purchase STSC. Municipalities do not have authority to borrow from private entities. The City was to repay the loan through an increase in the management fee. The City published and posted an ordinance approving the ECO loan to acquire STSC assets without prior Council approval.

Response:

Condition contested. Please see the City’s response to **Audit Finding #4**. In addition please see the minutes of September 21, 1999, item 6(B) in which an ordinance was adopted establishing a special fund in the City budget as the water and sewer professional operations fund; setting for the purpose of the fund (Exhibit A & B).

Condition:

2. Because of questions regarding the legality of the ECO loan, the Mayor, acting on behalf of the City, obtained a \$2 million interim loan from Wells Fargo Bank; however, municipalities do not have authority to borrow funds from private entities. Doing so is in violation of the Bateman Act. Additionally, the City did not submit a budget increase request to DFA that reflected loans proceeds or loan repayment.

Response:

Condition contested. Attached are the minutes for April 30, 2001(Exhibit B), in which the Governing body approved the RUS Bond Issuance through Resolution 2001-09(Exhibit C), the minutes dated May 21, 2001(Exhibit A), and, a copy of Ordinance 2001-01(Exhibit D) in which the Governing Body unanimously approved the Wells Fargo Interim Loan, and subsequently renewed the interim loan in a May 28, 2002 meeting (Exhibit E). The actions taken by the Mayor and Governing Body were based on the legal advice of the City Attorney (please see May 21, 2001 minutes). At the request of DFA, after reviewing the tapes for the May 28, 2002 meeting the minutes were amended to include the specific wording the Attorney stated during the Council meeting (November 19, 2002 minutes).

A. In regards to the Budget increase request to DFA that reflected loan proceeds or loan repayments, it was customary protocol to have council take action fully aware of the financial status to proceed with such action. Therefore once approved the budgetary increase resolutions to reflect the council’s actions were done at a later time, as a procedural requirement. By the end of the year the City would undertake all budgetary readjustments and forward them to DFA by the end of the fiscal year, such action was never questioned.

According to the City Attorney, the State Auditor incorrectly states that municipalities do not have authority to borrow funds from private entities. Article IX, Section 13 of the New Mexico Constitution expressly authorizes municipalities, without limitation, to “contract debts...for the construction or purchase of a system for supplying water, or of a sewer system....” In addition, the

Batement Act, prohibits a municipality from borrow money only if the debt cannot be repaid at the end of the year. The Wells Fargo loan has been, from its inception, fully repayable by RUS bonds, the terms and conditions of which were approved by the PRC and upheld by the State Supreme Court. At the time, the City's intention was to quickly repay the loan with proceeds from the RUS bonds. The City was prevented from doing so by the County's appeal of the condemnation and concomitant automatic stay, which effectively froze the loan proceeds in the Court's registry. In any event, the issue of whether the Bateman Act can limit express borrowing power granted to Municipalities pursuant to the Constitution is a legal issue that goes beyond the State Auditor's authority to conduct special audits pursuant to the Audit Act. Moreover, the State Auditor apparently chose to ignore the context of the loan with Wells Fargo, unlike the DFA, when it approved the interest payment on the loan. The City was forced to borrow the money on a short-term basis by the condemnee, who informed the City that the condemnation would be deemed abandoned if payment was not made before the City could finalize the RUS funds, which had already been committed. If the condemnation was abandoned, the City would be responsible for payment of the condemnee's attorneys' fees during four years of litigation.

Condition:

3. In November 2001, the Mayor extended the Wells Fargo interim loan for six months without obtaining Council approval. On May 30, 2002, the Mayor extended the Wells Fargo loan for one year to May 2003 without obtaining prior Council approval. In addition, the City did not submit a budget increase request to DFA for the additional interest that resulted from extending the Wells Fargo loan.

In March 2003, the governing body approved a resolution authorizing the Mayor to repay the interim loan and interest due using unencumbered reserves in the general and enterprise funds. The Mayor repaid the loan using \$1,371,957 borrowed from the general fund and \$683,043 borrowed from a City enterprise fund. The City planned to repay the general and enterprise funds using water and wastewater revenues.

According to a DFA e-mail, DFA/LGD verbally approved the payoff of the loan subject to DFA/LGD review and approval of a proposed City Council resolution. The e-mail further stated that the LGD attorney had reviewed a draft of the resolution and he did not have a problem with the format or context of the draft. LGD said that a properly presented resolution by the City Council should satisfy LGD's requirements on this matter. DFA approved the resolution on March 27, 2003.

Response:

Condition contested. Attached is Ordinance 2001-01, which grants authorization, as follows: "...through its Mayor, shall forthwith obtain and Interim Loan, and shall pay over the proceeds of such Interim Loan to the Clerk of the Third Judicial District Court ..." In the ordinance, there are no provisions for the time span of the interim loan. The intent and purpose of the governing body was "to seek an interim loan to be secured by the Permanent Loan commitment (the "Interim Loan"), thereby allowing the City to complete its purchase of the Assets in a timely manner." The ordinance does not allude to a (6) six month interim period. Through the Mayor's administrative directive, the 6 months and renewal for an additional 6 months were undertaken, because the one year option had a higher interest rate, and the City had not obtained the RUS funding due to a legal stay by the Court of Appeals.

Based on the advice of the City Attorney, it was not necessary to go back to the Governing Body for renewal since that authority was already granted through the ordinance. It was not until the automatic renewal action was questioned after the fact by Councilor Luz Vargas that the City decided to renew the interim loan in May, 2002. Please note that the Governing Body approved the extension of the loan and subsequently has paid the interim loan.

Finally, the State Auditor incorrectly states that the City "did not submit a budget increase request to DFA for the additional interest that resulted from extending the Wells Fargo Loan." See letter dated May 29, 2002 from City Attorney to DFA (Exhibit A).

Condition:

- 4. The City indicated that it planned to secure the Wells Fargo interim loan with \$2,156,000 in USDA Rural Utility Service (RUS) funding. However, if RUS did not provide funding, the City then planned to issue revenue bonds to pay for the STSC acquisition and use utility revenues (water and waste water revenues) to repay the bonds and interest. Although the governing body approved the ordinance at the May 26, 2001 meeting, the City was unable to provide a copy of an ordinance signed by the Mayor.

Response:

Condition contested. A copy of the ordinance is attached as Exhibit A to the City's response to Finding 3-1. In addition, the ordinance provides that if the RUS did not provide funding, the City would repay the interim loan by a pledge of STSC utility revenues. In any event, since April 18, 2001, the RUS "obligated" \$2,156,000 for the acquisition of STSC (see Exhibit A).

Condition:

- 5. The RUS proposed \$500,000 in funding to be provided by the utility revenue bonds. The City encumbered utility revenues to secure the bonds. The utility revenues were also used to secure other loans with current balances totaling over \$1,000,000 and to pay for ECO management fees. Borrowing \$683,043, securing loans of \$500,000 and over \$1,000,000, and paying ECO management fees may have been over-committing the utility fund. According to the City's underwriter, the City would not be able to obtain \$2,000,000 in bonds to purchase STSC if the City's system was already encumbered by RUS loans, unless RUS would agree to take a second position and allow the bondholders to have a first lien on the system.

Response:

Condition contested. The State Auditor apparently has taken the City Attorney's comments out of context. In any event, not only are the City's utility revenues not over encumbered, but the terms and conditions of the \$2.1 million RUS loan were approved by the PRC, which was upheld by the State Supreme Court (Exhibit A). Furthermore, as to March, 2003 the City has paid the interim loan with the consent and approval of the DFA (see Exhibit C).

Condition:

- 6. In August 2001, the City began charging STSC customers at City rates. Some STSC customers refused to pay the increased rates. On February 1, 2002, the Public Regulation Commission (PRC) declared the rate increase void and ordered the City to refund the

difference in rates to STSC customers, but the City has not refunded the difference. In addition, the City submitted a rate increase plan to RUS without Council approval.

Response:

Condition contested. The City began charging STSC customers at City rates in December 1, 2000, when the City took possession of STSC. However, the PRC ordered Sunland Park to return the rates to STSC rates, claiming the City did not officially own the utility. Beginning in March 2001, STSC customers were charged STSC rates and got credit reimbursement for the apparent overcharge. Please see detailed memorandum by Mr. Toby Alvarado (Exhibit A).

The State Auditor states that the City "has not refunded the difference." While this is technically correct, the City credited the accounts of those customers whose rates were increased. This was also investigated by the PRC (see Exhibit B). The State Auditor also stated that the City took action on a rate increase plan without Council approval, when in fact, the rate increase plan submitted to the RUS was expressly conditioned on Council approval.

Condition:

- 7. The City paid the Bankruptcy Trustee \$20,000 in settlement of the STSC condemnation interest claim. The City did not obtain prior Council approval to pay this settlement. In addition, in a matter related to STSC, the Mayor authorized the City attorney to file a condemnation action for Well No. 8 without seeking prior Council approval, and the City paid \$75,000 in settlement of the lawsuit on Well No. 8 without seeking Council approval.

Response:

Condition contested. The State Auditor incorrectly states that interest payments to the Trustee were not approved by the Council. The Agreement regarding condemnation by and between the City and the Trustee dated October 6, 2000 required interest payments to be made to the Trustee. (See Exhibit B) That Agreement was approved by the City Council and by the Second Judicial District Court. The State Auditor is also incorrect when he states that the Council did not approve the condemnation of Well #8, an issue that was litigated by those attempting to prevent the condemnation (including two City Councilors), and was decided in the City's favor by Judge Duran (see Exhibit A). Finally, the State Auditor erroneously states that "the City paid \$75,000 in settlement of the lawsuit on Well No. 8 without seeking Council approval," when in fact, the \$75,000 was paid into the Court registry under the alternative condemnation statute See NMSA 42-2-6.

Condition:

- 8. The City purchased the debt of one of the STSC creditors for \$5,849 without seeking Council approval. Actually, the City attorney purchased the debt with the understanding that the City would reimburse the attorney through the attorney's billings. By doing this, the purchase was hidden from the council and DFA, and the amount involved was not reflected in the budget.

Response:

Condition contested. The State Auditor's statement that the purchase of a credit position in the Crowder Bankruptcy was hidden from the Council and DFA is without merit. The purchase of a creditor position was part of a litigation strategy designed to give the City Attorneys standing to argue issues directly related to the condemnation of STSC assets in the bankruptcy action. The purchase was a reasonable and necessary cost of litigation, and was undertaken by the City upon the advice of counsel. The Auditor finding would require any stage of litigation requiring expenditure to be separately approved by the City Council and DFA. Enclosed is various correspondence with the City Attorney and various City Councilors regarding the creditor claims and related pleadings (Exhibit A).

Finding No. 4 – Noncompliance with the Procurement Code in Entering a Contract with ECO Resources.

Condition:

1. On September 8, 1998, the City issued a request for proposals (RFP) for a professional services contract to operate and maintain the City and STSC water and wastewater utilities when the City acquired STSC assets. The RFP required the contractor to provide, in return, a \$1.8 million grant to the City to purchase STSC. The governing body approved the RFP on December 3, 1998, after, instead of before, the City issued the RFP.

Response:

Condition contested, even though the above statements are factually correct. Enclosed are the minutes for December 3, 1998 in which the above item was addressed in 4B,C, D under public hearing (Exhibit A). Please note that the Governing Body was receiving legal guidance from our City attorney, Mr. Frank Coppler at the time. Also note that the City Council action was specific to ratifying and approving the publication and issuance of the request for proposal, in addition to acknowledging receipt of the proposals in response to the request. Moreover, the governing body's action was unanimous.

Condition:

- 2a. At the October 1, 1998 meeting the governing body awarded ECO an eight-year contract. The Procurement Code allows a maximum of four-year contract.

Response:

Condition contested. At the time the ECO contract was executed, the Procurement Code allowed for an eight year maximum term for professional services. In addition, the ECO contract was amended to provide for a 60 day cancellation.

Condition:

- 2b. Contract provisions provided the City would pay a set amount to ECO for reserve accounts to pay expenses, plus 10 percent more if the reserves did not have enough funds at year-end to cover actual expenses. The City cannot pre-pay expenses or use cost-plus-a-percentage of cost contracts.

2c. A subsequent amendment extended the eight-year contract by one-year and committed ECO to fund a grant to the City of \$1.8 million so the City could purchase the STSC. The City was to repay the grant through increased management fees. The annual fees were to increase by \$1,289,393. The City does not have the authority to borrow funds from private entities.

2d. The budget and budget increases did not reflect the ECO contract fees.

Response to a, b and c

Condition contested. As the State Auditor should be aware, the City rejected the reserve account requirement in 2000. The City determined that it would not exercise the contract provision providing for a grant and as a consequence did not pay increased fees to ECO.

Condition:

3. In September 2000, the City began paying ECO to operate and maintain the STSC utility. There is no indication that the governing body approved a contract to do this and the City does not have a contract with ECO to operate and maintain the STSC utility.

The base fee of \$862,981 on this STSC-ECO contract with 1,000 customer accounts in Santa Teresa was higher than a base fee of \$696,118 on the City-ECO contract with 2,300 customer accounts. ECO management indicated that as part of the condemnation agreement with STSC, the City assumed ECO's contract. The condemnation agreement with STSC, the City assumed ECO's contract. The condemnation agreement does not state that the City was to assume the ECO contract with STSC.

4. The governing body notified ECO of contract termination on September 25, 2000; then, soon after, ECO sued the City seeking an injunction to prevent the City from terminating the ECO contract to operate and maintain the City's water and sewer utility. On November 30, 2000, the governing body approved an interim 15-day contract with ECO to operate the STSC utility. In a November 27, 2000 letter to the Mayor and Council, the City attorney suggested the City negotiate with ECO because of the required \$324,000 early termination clause. In a December letter to ECO attorneys, the City attorney stated the City agreed that ECO would manage the City utility in accordance with the City-ECO contract until March 24, 2001. The City would take possession of STSC on December 1, 2000, and the City would enter a temporary contract with ECO to continue to operate STSC for fifteen days. The actual motion on November 30, 2000 stated ECO would operate the City and STSC utilities. The agenda was not sufficient because the agenda only covered ECO's operation of the STSC utility, not the City utility. The City attorney indicated the governing body improperly approved the contract to operate the City utility. On December 5, 2000, the governing body subsequently approved a settlement agreement with ECO and authorized the Mayor to negotiate a second amendment to the 15 day ECO contract. As of December 31, 2002, the last day of our audit fieldwork, however, the City did not have an amended contract with ECO; and in a May 15, 2003 letter to Eco attorneys, the City attorney acknowledge that the City does not have a contract with ECO to approve the STSC utility.

5. The City paid ECO 2,862,687 from October to July 2002. The Clerk-Treasurer received the invoices and the Mayor and Clerk-Treasurer approved the checks. The City was in arrears to ECO for three to four months at any given time and the City did not pay the gross receipts taxes due on the invoices. In a May 15, 2003 letter to ECO attorneys, the City attorney offered to settle outstanding claims with ECO at \$468,776 and to keep current on a new base fee of \$70,000 per month, plus gross receipts taxes.

Response to 3, 4 and 5

Condition contested. The State Auditor fails to understand the context of the City's relationship with ECO with respect to STSC. ECO was granted a Certificate of Convenience and Necessity (CNN) by the PRC to operate STSC prior to the City's condemnation of STSC assets. After the condemnation judgment, but before the City deposited the \$2 million judgment into the Court registry pursuant to the condemnation statutes, the City entered into an agreement to operate STSC with the condemnee. However, ECO asserted that it, and only it, could operate STSC pursuant to its CNN with the PRC, because of the ongoing dispute over ownership of the condemned assets, which continues to this day. The City refused to pay and continues to refuse to pay ECO the fees for services to which it claims it is entitled pursuant to its contract with STSC and has agreed only to pay ECO for actual operating expenses relating to STSC.. This issue is still in dispute, although settlement negotiations are ongoing as described briefly in Condition #5 (Page 45). In any event, the Auditor's assumption that the procurement code was violated by the City is erroneous. Rather, the City was placed in a position by the existing CCN issued by the PRC to ECO and by various Court and PRC rulings, in which the City must wait until it has a final condemnation judgment in order to exert its ownership over the STSC condemned assets. Until that happens, ECO will continue to assert that it has the requisite authority to operate STSC. To suggest that the City violated the procurement code in this situation is simply a failure to comprehend the complexity of the situation, and the issues and legal arguments involving ECO's operation and management of STSC. Finally, it should be noted that ECO is also in legal dispute with the STSC condemnee regarding fees that it claims as a result of its operation of STSC.

Finding No. 5 – Noncompliance with the Procurement Code in Purchasing Legal Services.

Condition:

1. The City not did have a written contract agreement with Bauman & Dow, Attorney at Law. The City did not have a written contract with the attorneys and did not submit a request for proposals (RFP) for legal services. On May 5, 2000, the governing body approved a 30-day extension of legal services with Bauman & Dow as a sole-source contractor for the one month, or until the City hired a staff attorney, whichever came first.

On June 20, 2000, the governing body approved an ordinance establishing the position of City attorney. The duties and responsibilities were to serve at the pleasure of the Mayor and Council. On July 6, 2000, the governing body again extended the legal services with Bauman & Dow for one month. On December 23, 2000, the governing body voted to re-advertise the City attorney position and retain Bauman & Dow until the City made a final decision on the City attorney position. On December 28, 2000, the City issued an RFP for legal services for the City. The RFP indicated the City proposed to continue the practice of contracting for attorney services. The governing body did not take action on the RFP.

Bauman & Dow submitted a cost proposal and enclosed a contract from the response to the City's December 28, 2000 RFP. On February 27, 2001, the governing body voted to retain Bauman & Dow as City attorney and authorized the Mayor to negotiate and sign a contract with them. The Mayor did not sign a contract with Bauman & Dow and the governing body continued to discuss a City attorney position. The City continued to pay Bauman & Dow without a written contract. As of October 31, 2002, the City paid \$466,215 to Bauman & Dow from June 2000 to August 28, 2002.

Response:

Condition noted in part and contested in part. Attached please see contract and minutes granting authorization from the governing body to enter into the contract with Bauman & Dow, P.C.(see Exhibit B, C & F). The City did have a written contract agreement with City Attorneys, however the instrument was not signed because there was an issue regarding the termination clause. The Mayor did not agree that the proposed agreement initially sent by the City Attorney should include a termination clause that required a 90 day period, and a 120 day prior written notice. The attorney agreed to change the clause and was to send a revised version for signature. We waited for the attorney to send the new version of the signed contract, although the City was adhering to the overall provisions of the already agreed upon contract. Up until the actual date of signature, the City was receiving and paying for services, which became retroactive to the date of Council approval.

As to the issue of a City attorney as a paid employee, it is the intent of the City to hire a City attorney in-house, and eventually phase out the contract for legal services. However, the City perceives that the establishment of a full fledged legal department in the City will take a while. Therefore, during this interim period, our city attorneys, Bauman & Dow, will continue working for the City and upon hiring an employee, Bauman & Dow, P.C. will handle the more specialized cases. The City has advertised for a City attorney as an employee four times, without avail.

Condition:

- 2. The City had a contract with Coppler & Aragon, now Coppler and Mannick, from July 1, 1993 through July 1, 1997. The contract stated the contract would continue in full force and effect from year-to-year thereafter unless either party notified the other, in writing, of termination. The City did not renew the contract with Coppler & Mannick, but continued to receive their services. The City paid Coppler & Mannick at least \$420,000 without a valid contract.

The governing body terminated Coppler & Mannick in March 2000, but the City continued to pay Coppler & Mannick after March 2000. The City paid \$85,640 for services from April 2000 through May 2001. The mayor told the Council that this was money owed to the former attorneys for prior services rendered, but the City was paying bills that showed services were provided after they were terminated.

Response:

Condition contested. Although the legal contract was officially terminated upon City Council vote, Coppler & Mannick was retained, at the new City attorney's request, due to the fact that the District Court refused to postpone the condemnation trial and in order to bring the new attorney up to date on all legal matters involving the City. (See Exhibit A) In addition, the total payment to Coppler and Mannick for services from April 2000 through May 2001 was \$42,379.53(See Exhibit B).

Condition:

- 3. The City did not have a contract with Fulbright & Jaworski for bond and disclosure counsel services, but on April 20, 1999, the governing body approved a resolution authorizing the retention of Fulbright & Jaworski as bond and disclosure counsel for issuance of its water and sewer revenue bonds not to exceed \$10 million. The Clerk-Treasurer did not have a signed and dated resolution in the City's official resolutions book.

On July 18 2000, the governing body tabled retention of Fulbright & Jaworski as bond counsel. On July 24, 2000 the City issued an RFP for bond counsel services. The governing body was to approve the four-year contract. The proposal due date was September 1, 2000. The City did not present the RFP to the Council for prior approval. On September 25, 2000, the governing body selected Fulbright & Jaworski as bond counsel.

Response:

Condition contested. The Governing Body tabled a resolution authorizing the retention of Fulbright & Jaworski for bond counsel services for issuance of revenue bonds not to exceed ten million dollars for the purchase of 3, 353 acre feet of water rights (see minutes dated March 16 and March 23, 1999 Exhibit A & B). Although the City did subsequently pass the resolution on March 20, 1999 the resolution was not acted upon because Fulbright and Jaworski was only bond counsel and not underwriters (they intended to subcontract with O'Conner & Company Securities for that service). The City determined that the award would be too far reaching, so the City decided to proceed with an RFP. Subsequently, the facts of the case changed in regards to the bankruptcy proceedings, making the purchase less likely and undesirable, and the Council decided to drop the issue. Fulbright & Jaworski was never paid by the city, nor did the City receive any services from them. No resolution is present because we never executed such actions. For more information please contact our former City Attorney, Frank Coppler.

Condition:

- 4. The City did not have a contract with Mendel, Guzman, Blumenfeld, LLP as bond counsel. On July 24, 2000, the City issued an RFP for bond counsel services. On September 25, 2000, the governing body selected Fulbright & Jaworski, but in September 26, 2000 letter to Mendel, Guzman, Blumenfeld, LLP, the Mayor informed the firm that the City Council selected their firm at a special meeting on September 25, 2000. The City could not locate a contract with Mendel, Guzman, Blumenfeld, LLP.

Response:

Condition contested. Attached please find the Mendel, Guzman & Blumenfeld LLP contract with the City dated January 17, 2002 (Exhibit A). Although the minutes for September 25, 2000 are incomplete as it relates to this section, the Governing Body unanimously approved the contract to Mendel, Guzman, & Blumenfeld LLP as stated in the attached in City Ordinance 02-02. (The City is unable to locate the Mayor's September 26, 2000 letter to Mendel, Guzman, & Blumenfeld). Please note that in regards to the RFP selection of bond counsel, Councilor Ordonez made a motion as specified in the minutes to approve Fulbright & Jaworski, and although the minutes do not reflect this, the motion was seconded by Councilor Estrada. However, the motion died for lack of support. Another motion was made as reflected by the minutes to approve Mendel, Guzman, & Blumenfeld,

LLP by Councilor Luz Vargas, seconded by Councilor Duran, and the motion carried 4 to 2. Councilor Luz Vargas-Troncoso, Victor Diaz, Mayor Pro Tem Alicia Roman, and Councilor William Duran voted in favor of and Councilor Maricela Estrada and Councilor Ordonez against the motion. The City will be taking the minutes up to the governing body for reconsideration to amend the minutes to reflect the action taken and correct this deficiency.

In addition, please see Finding 4.4

Condition:

5. On December 19, 2000, the governing body approved a firm (Mendel) as bond counsel for the 2.8 million loan and RUS bond ordinance. The minutes are incomplete.

Response:

Condition noted. Although the minutes for December 19, 2000 are not very clear, the City approved Mendel, Guzman, Blumenfeld, LLP as Bond Counsel for the \$2 Million RUS Revenue Bond issuance, which the City would be using for the purchase of the wastewater improvement project. Enclosed is the bond Ordinance 02-02 which was passed the 18th day of June, 2002(Exhibit C). The City will be taking the minutes up to the governing body for reconsideration to amend the minutes to reflect the action taken and correct this deficiency.

Condition:

6. On December 20, 2000 the Mayor, Clerk-Treasurer and RUS loan specialist entered an agreement with Modrall Sperling, Roehl Harris & Sisk as bond counsel for financing the wastewater treatment improvements. The City paid Modrall Sperling, Roehl Harris & Sisk \$12,348 for legal services in connection with \$500,000 Joint Water and Wasterwater Bonds, Series 2002, but the City did not seek proposals for these services.

Response:

Condition contested. Please see a fax from Molzen and Corbin referencing the RUS requirements for acquiring professional serives(Exhibit A). Please note that due to the special technical legal know-how and legal expertise, RUS recommends specific legal firms. In this case, the City accepted the recommendation of the loan specialist. Moreover, New Mexico State Procurement Code Regulations 1.4.1.32A-17 states: "...unless the value of the contract is to exceed \$20,000. . ." 13-1-125. small purchases. Also see response to finding 12, condition 2.

Condition:

7. On April 20, 1999 the governing body approved O'Conner & Company Securities as underwriter for an issuance of its water and sewer revenue bonds not to exceed \$10 million. The Clerk-Treasurer did not have a signed and dated resolution in the City's official resolutions book. At the July 6, 2000 meeting, O'Connor & Company offered to perform financial analysis and determine the bond rate at no expense to the City.

On July 18, 2000, the governing body tabled retention of O'Connor & Company as underwriter. The City issued an RFP and George K. Baum & Company and O'Connor & Company submitted proposal for bond underwriting services to the City on September 1, 2000. On September 25, 2000, the governing body selected O'Connor & Company as

underwriter. The City could not locate the RFP for bond underwriter services and the City did not present the RFP to the Council for prior approval. The City could not locate a contract with O'Connor & Company.

In addition, the O'Connor and Company proposal mentioned a June 14, 2000 presentation to the Council, but the City did not have minutes for a June 14, 2000 meeting.

Response:

Condition noted in part and contested in part. It is correct that there is no resolution which was signed and dated as to the approval of O'Conner & Company, in accordance with the City Council's action on April 20, 1999 (Exhibit A). This is explained in the response to Finding 5-3. According to the April 20, 1999 minutes, the entity that was approved was actually Fulbright & Jaworski for both bond counsel and underwriters. Given that bond counsel had to be independent of the underwriters, the agenda item was considered void.

Finding No. 6 – Noncompliance with the Procurement Code in Making and Approving Purchases

Notes to the findings:

- A copy of The New Mexico Procurement Code State Statutes and Regulations are in the purchasing agents office and are referred to on a daily basis
- Training has been provided to the Finance Officer and the Purchasing Agent on government budgeting and procurement processes.

Condition:

1.

A. The Mayor recommended Blackham, Underwood, Gunaji & Associates for the engineering contract for streetlights, Phase II. On April 2, 2002, the governing body awarded the contract to Molzen-Corbin. However, the City awarded the contract to Blackham, Underwood, Gunaji & Associates for \$28,000. There is no evidence that the governing body approved the award to Blackham, Underwood, Gunaji & Associates.

Response:

Condition noted in part and contested in part. The governing body awarded the engineering contract to Blackham, Underwood, Gunaji & Associates and not to Molzen-Corbin, for the streetlights,, Phase II (Please see Exhibits A, B & C). The Contract Administrator has supplied photocopies and documentation on the process and reasons why the engineering firm was chosen along with a memorandum dated April 2, 2002, indicating that the engineering firm that was chosen was Blackham, Underwood, Gunaji & Associates. The City will be taking the minute up to the governing body for reconsideration to amend the minutes to reflect the action taken and correct this deficiency.

Condition:

B. The City pre-paid the \$15,853 to Blackham, Underwood, Gunaji & Associates because the City was spending money before the end of the fiscal year, June 30, 2002. The Company has since performed the services.

Response:

Condition noted. Please note, that services were rendered and completed with the funds and, there was no misuse of funds. Please note that the transaction was pre-approved by DFA prior to its execution. The Contract Administrator has provided a detailed packet as to the mutual understanding between DFA and the City of Sunland Park. The Contract Administrator's packets consists of 12 pages of documentation:

- Memo dated July 16, 2003 from the Contract Administrator to recount the status of the Explanation of Street Lights I – Carryover Balance (Exhibit A);
- Summary of all pay requests (Exhibit B);
- The Grant Agreement dated June 5, 1998 from DFA/LGD (Exhibit C);
- A Final Report on Grants 98-L-NR-I-3-G-120, 98-L-NR-I-3-G-207 and 98-L-NR-I-3-G-693 (Exhibit D);
- Grant Agreement Number 1 (Time extension) from DFA/LGD (Exhibit E);
- Three (3) Incoming Wire Notification dated October 21, 2002 (Exhibit F);
- Memo dated September 19, 2002 with instructions for final payments from the three grants (Exhibit G)
- Correspondence from DFA/LGD dated October 21, 2002, notifying that the three grants had been formally closed (Exhibit H);
- Interoffice Memo dated August 27, 2002 to Finance Office for payment (Exhibit I); and
- Correspondence dated January 9, 2003 to Hazeldine Romero, Office of the State Auditor (Exhibit J).

Condition:

2. On September 2, 2000, the City pre-paid Airvac, Inc. \$57,500 as a down payment on vacuum station equipment. The City paid the balance of \$57,500 upon delivery on July 25, 2002.

Response:

Condition noted. Please note that services were rendered and completed with the funds; there was no misuse of funds. Please note that this transaction was pre-approved by DFA prior to its execution. The Contract Administrator has provided correspondence regarding prepayment to AIRVAC for a Vacuum Skid. Per the Contract Administrator's correspondence, this was a prior year audit finding, and has all ready been addressed. The Contract Administrator's correspondence is as follows:

- Interoffice memo to Mayor dated July 31, 2002, it appears that error was made on our part with complete detail. It also appears that this error in fact saved the City of Sunland Park money in the long run. (Exhibit A);
- Interoffice memo to Mayor dated July 18, 2003 regarding The Air-Vac purchase and the CDBG Involvement (Exhibit B);
- DFA/LGD Project Cost/Financing Summary (Exhibit C);
- Correspondence dated June 30, 2000 to Kenneth Norris, Project Manager, re: CDBG Project No 99-C-NR-I-7-G-17 request for payment number 1 (Exhibit D);

- Request for payment and Status of Funds report dated July 3, 2000 from the DFA/LGD – Federal Programs(Exhibit E);
- Photocopies of checks and deposit slips (Exhibit F); and
- Status Report prepared by CDD dated August 8, 2002 (Exhibit G).

Condition:

3. The central purchasing office is the only office authorized to procure services. Contractors made award recommendations without evidence of the City staff input or review as follows:

A. The governing body approved an emergency contract to repair Well No. 6 on November 13, 2000. A Molzen-Corbin and Associates in December 8, 2000 letter indicated that the City requested Molzen-Corbin engineers to negotiate directly with the well drilling contractors. Molzen-Corbin recommended West Texas Water Well Services. There was no evidence of City staff input or review of the recommendation. The Mayor and Clerk-Treasurer signed the contract on December 11, 2000.

Response:

Condition contested. The City requested Molzen-Corbin and Associates to take part in the negotiations with West Texas Water Well Services due to the technical expertise required to ensure the quality of the repairs needed (Exhibit A & B). Please note, however, that the central purchasing office had to review the documentation prior to its approval and prior to processing payment (Exhibit C & D). As the minutes state, this was an emergency repair that was required to maintain the public health, safety and welfare of the community (Exhibit D). The signature of the Mayor and City Clerk are part of the procedural mechanism infused in the process. Moreover, since March, 2003 the City has adopted a quotation sheet to ensure adequate documentation, per a recommendation by DFA (Exhibit E).

Condition:

B. On April 9, 2002, the governing body awarded a contract to West Texas Water Well Service to repair Well No. 8 for 160,650. The ECO manager made a presentation and recommended West Texas Water Well Service as the low bidder. There was no evidence of the City staff input or review of the bid.

Response:

Condition contested. Please see response to Finding 6-3-A and enclosed information (Exhibits A, B, C, & D).

Condition:

C. On April 9, 2000, the governing body awarded a contract to West Texas Water Well Service to repair Well No. 8 for 30,535. The ECO manager made a presentation and recommended West Texas Well Services as the low bidder. There was no evidence of City staff input or review of the recommendation. Although the governing body awarded the contract to West Texas Water Well, the City awarded the contract and paid \$32,458 to Alpha Southwest, Inc. There was no support for why the City awarded the contract to Alpha Southwest, Inc.

Response:

Condition contested. Please see response to Finding 6-3-A and enclosed information (Exhibit A, B, C, D, E, & F).

Condition:

- 4. The City purchased two pumps from James, Cooke & Hobson, but the purchase requisition and quote were for only one pump, at \$4,718. The purchase order and receiving report were for two pumps. In addition, the purchase requisition and purchase order indicated a sole source purchase, but the voucher packet and related files did not contain a written sole source determination. The City was aware of the requirement for a written sole source determination and the Auditor reviewed other transactions that contained the proper sole source documentation.

Response:

Condition contested. All enclosed documentation references the purchase of one pump (Exhibit A). The sole source determination was inadvertently placed on the statement. The City complied with the emergency purchase.

Condition:

- 5. There was no evidence of quotes or bids in the voucher packet or related files on two instances and no evidence of a contract for services, as follows:

Response:

Condition noted. The City has provided photocopies of these two transactions. As to the first claim involving redistricting, the City undertook an RFP and only received one proposal (Exhibit B). The second transaction is a purchase for HIDTA. The City does not know why there are no quotes or sole source documentation (Exhibit A & C).

Condition:

- 6. There was no evidence of Council approval for expenditure transactions in 23 instances. One instance lacking evidence of expenditure approval involved the Housing Board that does not maintain written minutes.

Response:

The City is unable to note or contest this condition. The City Council approves the budget for each department on an annual basis. If the expenditures are within a department's budget, it is assumed that the Council would not have to approve every single purchase; it is assumed that each department head is capable of maintaining its own budget. In addition, the Governing Body receives photocopies of all check registers.

Condition:

7. The voucher packet did not contain a purchase requisition of a purchase order in 27 instances.

Response:

Unable to note or contest. The City has no detail to respond to this condition. The City Council approves the budget for each department on an annual basis. If the expenditures are within a department's budget, then it is assumed that the council would not have to approved every single purchase, it is assumed that the department head is capable of maintaining their own budgets.

Condition:

8. There were instances in which the dates on the purchase orders or requisitions were after the dates on the invoices as follows:

(See page 62, Condition 8)

Response:

Condition noted in part and contested in part. In regards to the above finding, the City does not dispute the dates. However, in all instances the requisition date was prior to the purchase order date, except for Ink Impressions. After consulting the purchase department, this may be attributed to a number of factors, for example, the Mayor, City Clerk, Finance Officer or purchasing agent may be out of town or office, thus delaying the process. The City acknowledges the lack of training in the finance department but has initiated an implementation program with the new Finance Officer to address this issue.

Condition:

9. The City did not sign a receiving report in one instance.

Response:

Unable to note or contest due to the above condition being non-specific.

Condition:

10. The governing body approved a budget resolution that had an incorrect transfer of funds.

Response:

Unable to note or contest. Condition contested due to the above condition being non-specific. Moreover, the report has a time span of 1996 through March 2003, making it difficult to determine the specific instance to which the condition refers.

Condition:

11. The City purchased vehicles for \$147,058 from Salt Lake County Fleet Management in Utah, but the City did not present the purchases to the governing body for prior approval. In

addition, the files did not contain the cooperative procurement agreement or other justification for using this contractor.

Response:

Condition contested. The Governing Body approved the budget for the allocation of vehicles to be purchased. The purchasing agent does have a cooperative procurement agreement on file. The City was unaware that a photocopy needed to be attached to the payment. Enclosed is Exhibit A, a memorandum from the City's Chief of Police.
See attached procurement statute 13-1-98, Exemptions from the Procurement Code.

Condition:

12 The City did not make payment within 30 days of certification of receipt in six instances.

Response:

Unable to note or contest. The City is unable to respond due to the above condition being non-specific. Moreover, the report has a time span of 1996 through March 2003, making it difficult to determine the specific instance to which the condition refers.

Condition:

13 During our review of the travel and per diem expenditures, we noted there is no evidence that the City Council discussed and approved the \$5,000 sole source purchase for hazardous-materials course supplies. There is no written determination or evidence of a good faith review of available sources to support sole source procurement.

Response:

Condition contested. This condition states that the purchase was for supplies. However, the expense was for educational services. These services were charged to the training line item, given the fact that no professional services line-item exists. Enclosed is a memorandum from the City's Fire Chief.

Finding No. 7 – Noncompliance with the Mileage and Per Diem Act:

Condition:

1. Judgmentally, we selected a sample of 37 travel transactions. Testing of these transactions revealed a disregard for State Law, State Administrative Code and City Rules and Regulations. As shown in the following table, we discovered 72 exceptions in 33 of 37 transactions tested:

Response:

Condition unable to note or contest due to the above condition being non-specific. Moreover, the report has a time span of 1996 through March 2003, making it difficult to determine the specific instance to which the condition refers. Given the fact that the State Auditor used a judgmental criterion to select the specific travel transactions may lead to the outcome being exacerbated.

Condition:

- 2. One City Councilor, who was a member of a school board, submitted claims and was reimbursed by both the City and the School for the same trip. The City reimbursed the Councilor \$238 (Check No. 015654) and Gadsden Independent School District reimbursed him \$319 (Check No. 150756).

Response:

Condition contested. It appears that the State Auditor was privy to travel transactions from the Gadsden Independent School District. However, this situation depends on the integrity of the City Councilor. The City has no way of knowing whether the councilor submitted reimbursement to the City and to the School District. Please note that the Councilor submitted a letter providing an explanation for the incident and reimbursed the City at the time (see attached documentation). In addition, the State Police conducted an investigation of this incident at the request of Councilor Luz Vargas-Troncoso, without pursuing the matter further. The State Auditor did not speak to the Mayor, the Councilor or staff about this incident prior to making this condition. Moreover, the Councilor in question was a school principal at the time, and was not reelected in the 2002 local Governing Body elections.

Condition:

- 3. The City used affidavits in place of actual documents. For eleven travel advances after August 18, 2002 that had been advanced 80%, the travelers submitted signed affidavits in lieu of receipts to collect the remaining 20%.

Response:

Condition contested. Attached is Exhibit A, which explains the City's policy regarding affidavits.

Condition:

- 4.
 - a. The City paid the hotel charges for the Mayor and another City employee on a trip to Chicago, but the Mayor and this City employee also requested for lodging on their Expense and Per Diem Request forms.

The City issued check number 023960 for \$319.42 to the Fairmount Hotel in Chicago for payment of purchase order number 11806. Purchase order number 11806 was for two rooms at the hotel on February 19, 2003. This \$95 reimbursement was for both meals and lodging at the state per diem rate. Because lodging was previously paid by the City and not the traveler, the Mayor made an inappropriate claim for reimbursement. The Mayor was overpaid \$72.50.

Response:

Condition noted and corrected. This was an oversight on the part of the City. Procedurally, the Purchasing Agent handles travel per diem requests and Accounts Payable processes payments. Payments were distributed, and the error was discovered during month-end procedures and rectified.

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Both the Mayor and the city employee were required to repay the City of Sunland Park. Please see Exhibit A.

Condition:

b. The City issued check number 023964 and 024211 to a City employee totaling \$101 that included \$95 per diem for February 19, 2003. This \$95 reimbursement was for both meals and lodging at the state per diem rate. Because lodging was previously paid by the City and not by the traveler, the City employee made an inappropriate claim for reimbursement. The City employee was overpaid \$72.50.

Response:

Condition noted and corrected. This was an oversight on the part of the City. Procedurally, the Purchasing Agent handles the travel per diem requests and Accounts Payable processes payments. Payments were distributed, and the error was discovered during month-end procedures, and the matter was rectified. Both the Mayor and the city employee were required to repay the City of Sunland Park. Please see Exhibit A.

Finding No. 8 – Items Not Brought Before the Council

Condition:

1. In a December 14, 2000 letter to the Mayor, a Councilor expressed concern that the City did not bring a host agreement for the landfill to the Governing Body for discussion. The Councilor was aware that negotiations were ongoing since July 2000 and was concerned about the expense that that City residents would have to bear without a host agreement. In a February 13, 2001 letter to the Mayor and Council, the City Attorney stated the landfill would begin to charge the City for all waste, including sludge from the sewer plant, at a cost in excess of \$10,000 per month because the City failed to negotiate a host agreement.

Response:

Condition contested. Please be advised that due to the prior history with the landfill, a specific strategy was undertaken. Prior to commencing the negotiations with the Camino Real landfill for a host agreement, key individuals who would assist the City in the negotiation process were contacted in order to defuse possible hostility from the public, who might perceive the negotiations as suspicious. Please see the following:

a. December 14, 2000 letter to the Mayor –

Attached is the Mayor’s letter to Camino Real Environmental Center, Inc. Landfill, in which the City outlines the procedure for the negotiation process (Exhibit G). Please note the process requires that the legal department review the host agreement prior to placing it on the agenda. The City did not receive the host agreement until after the December 14, 2000 letter requesting the item be placed on the agenda (Exhibit B). The item was placed on the agenda after an approved committee was formed, and a lengthy negotiation was completed. In reference to the \$10,000 cost to the City, no cost was incurred (Exhibit I).

Attached please see the lengthy negotiation process the City undertook with the Camino Real Environmental Center, Inc. Landfill. On June 27, 2000, Dr. Joe King sent a letter to the Mayor in which he included a draft copy of a host agreement that apparently had been developed by a number of councilors along with representative of the landfill (please see attached letter to the Mayor from Dr. Joe King dated June 27, 2000).

None of the Councilors who were mentioned in the June 27 letter had the authority to negotiate. On November 30, 2000, landfill representatives asked to have an agreement placed on the agenda. Given the fact, that the landfill agreement had not been negotiated, Mayor Segura sent a letter dated November 30, 2000. On December 5, 2000, representatives of the landfill went before the Council to do a presentation (see Mayor's letter dated December 13, 2000 and City Council Minutes dated December 5, 2000). During this time, the Mayor and staff were looking at options to make the City's position with the landfill stronger (see Mayor's letter to Mayor Ruben Smith dated January 31, 2001, Exhibit G).

Subsequently, on February 11, 2001, a letter was sent to Dr. Joe King, representative of the landfill, to advise him of the March 8, 2001 meeting to commence negotiations. On March 6, 2001, the City Council hired the New Mexico Environmental Law Center to assist the City in the negotiations with the Camino Real Landfill for the host agreement (See minutes dated March 6, 2001). On February 22, 2001, three members of the Governing Body alleged that they had previously requested to have the Camino Real's proposed host agreement in the next Council meeting for approval (See February 22, 2001 – Council request).

However, on March 12, 2001, four members of the Governing Body obtained a writ of mandamus, claiming that the City Clerk and Mayor had refused to place the host agreement (non-negotiated) into the agenda. After explaining to these members of the Governing Body why we had hired the New Mexico Environmental Law Center, Inc. and asked a representative of the Colonias Development Council, (Representative Antonio Lujan) to help in the negotiation process, see March 6, 2001 minutes (Exhibit A) if these members recanted and dropped their legal claim, as stated in the March 20, 2001 City Attorney letter. (Please see 1-B-7)

After a lengthy negotiation process, the Governing Body approved a host agreement with the Camino Real landfill on April 30, 2001 (please see April 30, 2001 minutes). As a result of the negotiation, the City did not have to pay any expenditure as outlined in Finding 8-1, and the City actually obtained a better deal than originally offered by the landfill.

Condition:

2. May 17, 2001- letter to the Assistant Attorney General, some councilors complained that the Mayor Expended City funds without Council approval on travel expenditures without proper documentation.

Response:

Condition contested. The 2001 budget includes a travel line item for \$5,000, contrary to the allegation. (See attached budget Exhibit A in condition 2A).

At this time the City was desperately seeking funds to pay the \$2 million for the STSC condemnation (see exhibit D& E). In prior conversations with the General Manager of the Sunland Park Racetrack and Casino, Mr. Harold a Payne, and the owner, Stan Fulton, the racetrack had shown an interest in assisting the City of Sunland Park in its infrastructure development of the City by possibly donating \$2 million dollars. This donation which would be used to further the City's endeavor to develop the necessary infrastructure to adequately support a border crossing (see Exhibit A). They indicated that they were willing to consider donating the money, and allowing the City to use the funds provided that the border infrastructure project would have an actual date for construction (1 year to 1 1/2 year). By doing this, the City could have actually used the funds as an interim loan, paying off the Court and reimbursing itself with the RUS Revenue Bonds.

This offer did not materialize for two reasons: one, the media obtained the story and announced that the racetrack was going to donate money to the City, when we were still in the negotiations stage. This prompted Mr. Stan Fulton to back-out, thinking that he was being forced or coerced into donating the money which was not the case. Subsequently, on July 20, 2001 the Mayor sent a letter to Mr. Fulton explaining what had occurred (see Exhibit B). Second, since the City was under a time constraint, our legal counterparts were trying to stop us from getting the funds (Exhibit C). Later, the governing body in a June 19, 2001 Council meeting the Governing Body approved and confirmed our travel to Las Vegas (Exhibit F).

Condition:

- a. Council did not approve budget that included money for travel or training for the governing body.

Response:

Condition contested. Please see the approved budget for the fiscal year 2000-2001 in the Executive-Legislative Budget Account under line item 2044 (Exhibit A).

Also, enclosed are the minutes for June 19, 2001, in which the City Council ratified the expenditures, conditioned that in future instances, any out-of-state travel have prior approved from the Governing Body (Exhibit B).

Condition:

- b They claimed the Mayor paid himself and two other Councilors for travel and per diem without proper documentation to back up the expenses.

Response:

Condition contested. See the City's response to Condition 2 and Exhibits A, B, C, & D there to. This trip was investigated by the New Mexico State Police at the request of the Councilors. The State Police investigated the incident and cleared the Mayor and the Councilors of any criminal wrongdoing.

Furthermore, backup receipts are not required when the expenses are within the approved per diem amount.

Condition:

c Public Works Projects

Response:

Condition contested. The Council was fully aware of the ongoing renovation projects. Please see the City's response to Finding 1-J-5-C. Also note that the City Council approved the budget increases to continue the project (see April 3, 2001, Exhibit A, August 7, 2001 Minutes, Exhibit B).

Condition:

d Carnival – Tommy Pierce

Response:

Condition contested. The City authorized the Tommy Pierce carnival-event (see July 6, 2000 minutes, Exhibit B). The City was not going to pay Mr. Pierce, and the Carnival was an integrated element of the entire jumping event to increase attendance. Proper documentation of insurance was provided to Fire Chief Monsivaiz, who coordinated the event with Mr. Pierce.

Condition:

e and paid legal fees without Council approval (see Finding 5. 2).

Response:

Condition contested. Please see the City's response to Finding 5-2.

Condition:

- 3. a. After repeated verbal attempts to review the **Check register**, Councilors at an August 21, meeting addressed a letter (Response)

Response:

Condition contested. The letter dated August 21, 2001(Exhibit A) was submitted by Councilor Vargas to the Mayor during the items from the Mayor and Council, claiming that the Mayor refused to provide them with the check register. The Mayor denies that Councilor Vargas made the request prior to presenting the letter in the Council meeting (see the Mayor's letter dated September 7, 2001, Exhibit A). Also note that as a general practice, Councilors received quarterly expenditure public reports from the finance department. Since September 10, 2001, Councilors have been receiving weekly check register reports, and the check register has always been available for Council review. Please see Finding 2-8-d (see Exhibit C).

Condition:

- 4. December 16, 2003 letter to the plaintiffs, City attorney discussed arbitration with plaintiffs in a legal case. Arbitration cost and settlement would have financial implications impacting City expenditures, but the Mayor and City Attorney did not bring this matter to the Council for discussion.

Response:

Condition contested. The City Attorney advised the Mayor that the District Court Judge, ordered in arbitration prior to trial (see Exhibit A). In a number of instances, the City Attorney informed the Council in close session and asked for direction on this case. The majority of the Council was adamant to move the case forward and not compromise the City's position.

Condition:

- 5. February 18, 2003, the Mayor chartered a bus for \$1,500 to transport citizens to Santa Fe for a legislative meeting. The Mayor did not seek prior Council approval for the expenditure or invite the Councilors.

Response:

Condition noted in part and contested in part. The Council was polled individually and advised that there was a legislative meeting set to discuss the Racetrack Gaming Tax Revenue Share issue. Upon polling the Council, the Council was informed and invited to attend if they so wished. The City staff inadvertently paid the invoice from the legal fees line item instead of from the travel line item.

Condition:

- 6. In an April 22, 2003 letter to the Dona Ana County Commission, the Mayor offered to assume the County's \$6 million utility system revenue dept. The Mayor did not seek Council approval before sending the letter to the Dona Ana County Commissioners.

Response:

Condition contested. Attached please see the April 22, 2003 Mayor's Letter (Exhibit A). The Mayor alludes to a "proposal" for consideration, and not to an apparent "offer" as an "alternative to the bond option." In that same sentence, the Mayor fully disclosed that the proposal was "...subject to both Council and Commission review and final approval..." Therefore, the letter was only an instrument of engagement for consideration of future negotiations if the proposal was of interest to the County Commission.

Finding No. 9 – Noncompliance with Budget

Condition:

- 1. In an August 16, 2000 letter to the Mayor and Council, DFA requested the City submit the final budget for Fiscal Year 2001. The governing body approved the final budget on September 5, 2000. DFA certified the budget 20, 2000.

Response:

Condition noted. Prior to the election of the 2000 Governing Body, the City was prompt in submitting its budgets to DFA. However, due to the ongoing tensions between the Mayor and the coalition of certain members of the City Council, the budget was not approved until September as indicated in Finding 9.1.

Attached as exhibit A to H are a number of minutes in which the Mayor and Staff placed the budget item for City Council consideration on 8 occasions, but the majority of times the 4 Councilor coalition of Mayor Pro tem Alicia Roman, Victor Diaz, Willie Duran, and Luz Vargas-Troncoso would not attend, and the meetings had to be canceled. (Please see 1-H-4, 1-H-5, and 1-I-3.)

Condition:

2. The Mayor approved and paid a different higher hourly salary rate to a police sergeant than the hourly rate approved by the governing body in the Fiscal Year 2001 budget.

Response:

Condition contested. Attached as exhibit A is a copy of the fiscal year 2000-2001 budget, identifying the police sergeants on payroll during that time (Exhibit B,C, & D). The police sergeants were paid at the same salary scale as other sergeants. The Council approved a salary policy ladder scale in which police officers could excel and have a rank and file incentive. Please note that it was the positions that were approved and not individuals for a specific salary rate; therefore, upon the resignation of Sergeant Caviness, Sergeant Keaton was promoted (Please see February 7, 2001 minutes, Exhibit E).

Condition:

3. On April 3, 2001 and June 27, 2001, the governing body approved resolutions to increase the budgets on various funds for expenditures already spent. The City did not obtain DFA approval for the budget increases before expending funds.

Response:

Condition contested. Please see Finding 3-2-A and Exhibit A & B.

Condition:

4. In a May 17, 2001 letter to the Assistant Attorney General, Councilors complained the Mayor submitted the City's fiscal year 2001 final budget without the proper corrections as the Council directed. The budget was to reflect salary adjustments for police and maintenance workers and no budget for special fund to pay ECO.

Response:

Condition contested.. Attached please find a copy of City Resolution 00-24 (Exhibit A), along with the Mayor's sworn statement dated September 19, 2000, used in a legal proceeding (ECO) in which the above allegations are refuted, along with letters from DFA alluding to this fact. Please see response to Finding 9-2.

5. The governing body did not adopt the Fiscal Year 2002 budget prior to June 1. DFA allowed a one week extension for a special workshop to adopt the budget. In addition, the governing body did not adopt the final budget until October 16, 2001. DFA certified the final budget on November 29, 2001.

Response:

Condition noted. Please note that this was a time period when politically the governing body became very polarized and DFA had to come and approve the budget. Included is a letter from the Mayor asking the Department of Finance & Administration to allow the City a week time extension hoping to get a majority consensus (Exhibit A).

Finding No. 10 – Violation of Anti-Donation Clause

Condition:

1.
 - A. December 17, 1998 meeting indicates the Council approved salary increases for City personnel for bonuses ranging from \$100 to \$500.
 - B. December 18, 2001 meeting indicate the Council approved one-time merit increase for all employees of \$200 for the year 2001.
 - C. December 18, the Council again approved \$200 for the employees as a holiday incentive or holiday gift. (This is the same action as B, this is not a different action than B).

Response:

Condition contested. Conditions A & B deal with one-time employee pay increases. The intent of the City was to provide our employees with a one-time pay increase since our employees are one of the lowest paid employees in the state, and during the holiday season morale usually is hard to maintain. The intent of the City was not to provide the employees with a bonus.

Condition:

2. The April 17, 2001 minutes indicate that someone asked if ECO Resources used City vehicles. Eco management responded that it was common for ECO to use public works department vehicles.

Response:

Condition contested. Please see response from Eco Management, Mr. Toby Alvarado's letter(Exhibit B).

Condition:

3. At a June 18, 2002 meeting, the governing body discussed that a former Councilor used the City van to transport senior citizens from a private citizens' residence. The Council voiced their concerns about the liability to the City and took possession of the van.

Response:

Condition noted and corrected. The van was being used by a former City Councilor, Victor Diaz, who was ordered to leave the van on the City premises. After the above meeting the van was returned to the City. A policy had been established for vans to be used for senior citizens. Former Councilor

Victor Diaz was allowed to use the van provided that it was to assist seniors at the community center. The item was brought up as a concern after former Councilor Diaz was no longer a Councilor, creating a potential insurance liability.

Finding No. 11- Nepotism and Residency

Condition:

- 1. The former Clerk-Treasurer is the brother of a former Councilor. In a June 17, 1996 letter to the former Mayor the City Attorney stated that statutes prohibit employment of the brother of a Councilor as the Clerk-Treasurer, unless the remainder of the Council approves the appointment. The attorney said the illegally appointed employee is prohibited from being paid a salary.

Response:

Condition contested. The appointment of Mr. Juan Fuentes to the position of City Clerk on May 28, 1996 was approved by a four to two vote (four voted to appoint and two not to appoint), his brother, Daniel Fuentes, a Councilor at the time, voted as part of the majority to appoint (Exhibit C). City Code Chapter 1-6-C, referencing Ordinance 1992-04- C, calls that "a disqualification for conflict of interest purposes shall not be counted as a "yes" or "no" vote. The rule of reduction shall be applied in such a case."(Exhibit A & B). Mr. Juan Fuentes was actually approved by a three to two vote (three voted to appoint and two against). Therefore, Mr. Fuentes was entitled to a salary during the course of his employment (See Exhibit E-H). The remainder of the Council approved the appointment. Also see New Mexico State Statute 3-12-3-A (6) as it pertains to the municipality's authority (Exhibit D).

Condition:

- a. The Mayor refused to remove the former Clerk-Treasurer, although the subsequent Council voted in March 1998 and again in March 2000 to remove him.

Response:

Condition contested. The Mayor presented the names of the appointees to the Council in the March 17, 1998 meeting. However, the four members of the Council requested to have an organizational meeting on March 24, 1998 and voted to remove Mr. Fuentes. However, after a compromise, the Council retained Mr. Fuentes and gave him a salary increment in the June 1999-2000 fiscal year budget. Unfortunately, this item was not brought before the Council (see Exhibit A).

Condition:

- b. . March 2000- removal- council approved to remove Mr. Fuentes along with the fire Chief and Police Chief.

Response:

Condition contested. The lump sum of \$3,789 was not a settlement payment, but compensation to Mr. Fuentes for his unused accrued annual leave. Mr. Fuentes was removed and replaced with Mrs. Maria Elena Vargas. The enclosed amount is only the amount \$495.65 is the one week withholding

that all employees encounter when first hired and upon leaving, they receive the one week back withholding. As to the \$3,789 this is the annual leave as per our personnel rules and regulations.

Condition:

- 2. Two Councilors do not reside in the City.

Response:

a. Regarding Residency (Councilor Norma Garcia)

Condition contested. Councilor Garcia met with District Attorney Chief Investigator, Mr. Chris Jaramillo, on July 31, 2003 in Las Cruces. Mr. Jaramillo released a statement to the media that the DA's office would not be pursuing the issue of residency against Councilor Garcia and that there was no evidence proving that she resides outside the City of Sunland Park.

As a recommendation, the City suggests that a video tape not be used as the sole support for the allegation of improper Council residency status, if the source is ill construed.

b. Regarding Residency (Mayor Pro Tem)

Condition contested. Regarding Article V, Section 13, municipal Governing Body member Maricela Monsivaiz is a permanent resident at 152 Encino in the City of Sunland Park. Maricela Monsivaiz's residence at the time in question was 220 Linda Vista in Sunland Park. Ms. Monsivaiz married on March 17, 2001. She immediately started looking for a home in Sunland Park which she found shortly thereafter at 152 Encino in Sunland Park. She also sought legal counsel to prevent any future problems, since her husband owned a house in Santa Teresa. After their marriage, Ms. Monsivaiz continued living at her residence with her parents at 220 Linda Vista in Sunland Park, spending the majority of the time in Sunland Park (at least 4 days out of the week) According to Article V, "doubt concerning residency is to be resolved in favor of residence in the precinct wherein one casts his ballot." Maricela Monsivaiz voted and continues to vote in Sunland Park. The City concludes that the State Auditor received inaccurate information.

Regarding Nepotism (Mayor Pro Tem Monsivaiz and Fire Chief)

Condition contested. The Fire Chief was hired by the City of Sunland Park prior to the election of Mayor Pro Tem Monsivaiz. After their marriage in 2001, Mayor Pro Tem Monsivaiz has strictly followed counsel advice regarding voting on Fire Department issues (See attachment by Municipal League attorney Randy Van Vleck).

Subj: Conflicts of interest
Date: 7/15/2003 12:53:32 PM Eastern Daylight Time
From: "Randy Van Vleck" <RVanVleck@nmml.org>
To: <Valshadow@aol.com>

The question has arisen concerning whether a member of the governing body may participate in and vote on matters concerning the fire department when the spouse of the governing body member is also the Fire Chief. The short answer is YES. The law provides that if a governing body member has a direct financial interest in

the outcome of a matter before the council, the member must disclose that interest and have it entered on the record. The member may then participate in and vote on issues involved in the conflict unless the remaining members of the council vote that in good conscience the member with the conflict should not vote. See. NMSA 1978 section 3-10-5.

Randall D. Van Vleck
General Counsel

Furthermore, after the 2002 elections, Mayor Pro Tem Monsivaiz abstained from voting on the approval of the Fire Chief's position in the March 19th regular meeting. In addition, upon comparison of pay scales among department heads of the city, it is clear that the Fire Chief is one of the lowest paid department heads with other department heads earning 8,000 dollars more, despite the fact that they have been employed by the City for a shorter period of time.

Maricela Monsivaiz did not claim a new residence after her marriage. She continued to maintain residence at 220 Linda Vista in Sunland Park and it was always her intention to maintain residence in Sunland Park; therefore, Section 3-12-1.1 does not apply.

Condition:

3.

a. Policy – In September 10, 2001 letter to the Mayor and Council, DFA recommended the City revise its policy regarding signature authorization and require a second signature on checks written to persons having the authority to sign checks.

Response:

Condition contested. The current policy in which the Mayor and City Clerk are the authorized signatories has been in existence prior to 1996. On Tuesday, June 19, 2001, the Council opted to designate the Assistant Finance officer, Carmen Valdez, as the third authorized signatory on City checks. Please see the minutes of the Council meeting dated June 19, 2001. Also note that DFA only recommended the policy; it was not mandatory.

Condition:

b. As of December 17, 2002, the City Council had not drafted a code of ethics.

Response:

Condition noted. This is correct; nevertheless, please see finding 11-2 and note this is only a DFA recommendation and not a mandate. The City will pursue this item further in the future.

Finding No. 12 – Published Ordinance and Resolution Not Approved; Ordinance is Incomplete.

Condition:

1. February 19, 2001 City Attorney letter to the Mayor, the City published and posted the ordinance to approve the ECO grant to acquire STSC assets without prior Council approval. The attorney suggested the Council limit the vote to posting adoption of the ordinance.

Response:

Condition contested. The implication that the City must approve an ordinance prior to publication is not supported by statutory authority. §3-17-3 (A) NMSA 1978 provides that the “title and subject matter of any ordinance proposed for adoption by the governing body...” Two weeks after this publication, the City Council took action with respect to the ordinance. There is no requirement that the City Council give prior approval of the publication.

Condition:

2. City could not locate the payment schedule that identifies the principal and interest payments and the due dates for \$500,000 in series 2002 Revenue Bonds to finance improvement on the joint water and wastewater system. The governing body approved the Ordinance on June 18, 2002. The officially signed copy is incomplete. It contains many blanks; for example there is no definition of the form of the initial bond, no information on the original issue date, and no principal payment information.

Response:

Condition noted and corrected. Attached is a letter from Mr. Chris Muirhead, Modrall Sperling Law Firm, explaining the issue regarding the technical mechanics involving RUS Bonds and explaining Finding 12-2 (Exhibit A). Included is a copy of a revised bond payment faxed June 20, 2003 by USDA- Rural Utility Services Loan Specialist, Sandra Alarcon, along with a letter dated July 8, 2003 explaining a revised payment schedule reflecting a different interest, principal, and total than the previous one. This information is included to reflect the ongoing work with RUS representatives to finalize the apparent omissions.

Condition:

3. The Mayor did not sign the resolutions amending the Personnel Rules and Regulations and Supplemental Rules and Regulations for a Clerk Assistant, Library Assistant, Lead Teacher and Early Childhood Family Educator.

Response:

Condition contested. Attached please find Resolution No. 02-13, Resolution 2-18, and Resolution 02-14 in which the resolution was adopted and approved. Resolution 2-13 and 2-18 were signed and on file, while resolution 2-14 was on file, but unsigned. Since then, the resolution has been signed and is attached.

Finding No. 13 – Approval of Audit Report at a Public Meeting

Condition:

The September 3, 2002 minutes indicate discussion but not indicate whether the governing body accepted the audit report for the fiscal year ended June 30, 2001.

Response:

Condition noted and will be corrected. The City presented the above item on the September 3, 2002 agenda however, although a lengthy discussion was presented, the item was set on the agenda as a discussion item (Exhibit A). The City will go back and have the above item presented as an action item for Council consideration and/or approval.

Finding No. 14 – Compensation Not Reported

Condition:

The City does not have a mechanism to ensure vendors paid \$600 or more receive IRS Forms 1099. The City assigns a vendor information identification number to each vendor. The City also uses a miscellaneous vendor number for vendors that the City does not pay very often. During our expenditure review, we noted that the vendor list contained numerous duplicate vendors. In addition, the miscellaneous list contained several duplicate vendors. We note several vendors on the miscellaneous vendor list that did not receive IRS Forms 1099 as required.

Response:

Condition noted and corrected. The City intends to implement a procedure to ensure we comply with this mandate. The City recently hired a new finance officer and will be working to implement this procedure.

Finding No. 15 – Unreported Income for Vehicle Use

Condition:

1. The April 6, 1999 minutes indicate a citizen complained that the City was using the senior citizen van for purposes other than to transport senior citizens. The Mayor told staff not to lend the senior citizen van to any individual, and if an individual takes the vehicle outside the City, the Mayor's approval is necessary, per the City's Personnel Rules and Regulations.

Response:

Condition contested. The April 6, 1999 minutes (Exhibit A) referenced the city van after the stated incident is solely to be used strictly for senior citizens related business as of the date of the incident. The Mayor encouraged the concerned citizen to come before the City Council to implement the new policy. Ms. Terrazas, is an employee of the Senior Service Meal Program, and had expressed her discontent that certain members of the Council used the van for non-senior citizens purposes. A

logging procedure was implemented for the use of this van for individuals who wished to use it for non-senior citizens purposes.

Condition:

- 2. In May 17, 1999 letter to the Attorney General, councilors complained that the Mayor used a vehicle for personal use and not for City business only. The City purchased the vehicle using police fund monies for the police department's usage.

Response:

- a. Condition contested. The City disagrees with the condition to this finding. The Mayor is often called to work after normal business hours and during weekends, since he is often required to attend community meetings, ceremonies, and special functions.
- b. The City disagrees with the condition to this finding. Allegations of a vehicle purchase are erroneous. On July 9, 1996 the Mayor received a transferred 1996 Ford Bronco from the Public Works Department (Please see memo from Mr. Juan Fuentes, City Clerk, to Mark Boling, Public Works Director, dated July 9, 1996), to undertake City related functions (Exhibit A). On May 16, 2001 a transfer of vehicles occurred between the police department and the executive department in which it was jointly agreed that the police department needed a vehicle suitable for a K-9 unit and the Mayor would operate a vehicle from the police department (Exhibit B). The Ford Bronco was transferred to the police department, and the Mayor received a 1997 Ford Crown Victoria for his use. This car was later returned to the police department after the approval of the 2001-2002 budget, which contained funds for purchasing a vehicle(Exhibit C). The current vehicle, a Ford Crown Victoria, was purchased from funds from the Executive-Legislative General Fund, and obtained from the same stock of fleet from which the police department purchases vehicles.

Condition:

- 3. The June 19, 2001 minutes indicate the Council postponed the formation of a committee to create a City ordinance regarding use of City vehicles. The Council moved that the City Clerk-Treasurer provide copies of the personnel rules and regulations to the Council. The Ordinance contains language on the use of City Vehicles. On July 23, 2001 the Governing Body considered a motion to form a committee to create an ordinance on the use of City vehicles. The motion failed.

Response: See below

- 4. In a September 10, 2001 letter to the Mayor and Council, DFA recommended the City develop a policy regarding the use of City vehicles. In a September response, the Mayor provided a copy of the vehicle policy. The policy only covered employee use of City vehicles.

Response: To 15.3 and 15.4

Condition contested. The September 10, 2001 letter from DFA recommended that the City "develop a policy regarding the use of municipal vehicles" apparently because it was under the misapprehension that the City did not have a policy already in place. With respect to non-compliance use of City vehicles, the policy generally provides that the Mayor shall approve the use

of City vehicles. However, the City is working to revise its policy to ensure the City incorporates any new state mandate. Specifically, any personal use of City vehicles will be reported as additional compensation on the individual's W-2 form.

Condition:

- 5. A Councilor voiced concern over the Mayor's unauthorized use of City vehicles. The Mayor responded that he used the vehicles to undertake the functions and responsibilities of the Mayor. At a June 13, 2002 meeting, the governing body stated the City needed a policy for the governing body; use of City vehicles. The Mayor suggested the City contact the City attorney for recommendations of a policy. The City has not brought a policy to the Council for approval.

Response:

Condition contested. One City Councilor requested a policy for Governing Body use of City vehicles. In response, the Mayor suggested to the Councilor that the City Attorney be contacted for his recommendation. According to the City Attorney, no such contact was made (see Exhibit A).

Finding No. 16 – Not Records of Retention Policy

Condition:

The Clerk-Treasurer stated that the City does not have a written records retention policy. The March 2, 1999 minutes indicate the Council approved a resolution establishing a Records Management Program. According to a City Councilor, the Clerk-Treasurer uses a Personal laptop for City related business. The City needs to ensure the City related Information on the personal laptop is the property of the City, the City protects the Information and the City ensures the information will be passed on to a successor should The Clerk-Treasurer vacate office.

Response:

Condition contested. Enclosed is a copy of Resolution 99-11 describing the City's retention policy. The City takes note of the auditor's recommendation in Finding 16.

Finding No. 17- Employee Evaluations Not Performed.

Condition:

The City has not performed annual employee evaluations. In most cases the City has not performed the annual employee evaluation for two years.

Response:

Condition noted and will be corrected. The individual departments of the City of Sunland Park are undertaking performance evaluations of their employees for the most part. However, procedurally, the City admits it has to follow the set procedural approval by the Governing Body in accordance

with its personnel rules and regulations. The City already started with this process and will adhere to this finding.

Finding No. 18 – Lack of Organizational Chart.

Condition:

The City did not have a staffing organizational chart in accordance with its personnel rules and regulations.

Response:

Condition contested. Please note that the City of Sunland Park’s Rules and Regulations do not require that an organizational chart be formally adopted. The City does have an organizational chart which has been presented to the Council a number of times, but it has not been formally approved. Shortly after the elections the Council was presented with an organizational chart in addition to an overall review of the departments’ individual functions, roles, responsibilities, and current projects.

IV. INJURIES

Most egregiously, by prematurely releasing an audit that was woefully flawed, both from a substantive and procedural point of view, the reputations of the City, the Mayor, the City Clerk, and the individual Councilors have been seriously harmed. As previously discussed, the Audit was not performed in accordance with auditing standards generally accepted in the United States of America, and also failed to meet even the Department’s own regulations.

The Audit's working files confirm that most of the documentation received by the auditors was from sources swayed by politics. The vast majority of the “conditions” alleged against the City were made from one City Councilor with a clear animus against the City administration. Allegations were not checked for validity with the other councilors or the Mayor. Other accusations were made by the County, also widely known to be a contentious adversary of the City.²

The nature of this “special audit,” being to evaluate the need for suspension or removal of lawfully elected public officials, makes it more critical, not less so, for rigorous accuracy and

² The City and the County are cross-litigants in a number of lawsuits dating back to 1996, related to utility services in southern Dona Ana County. In March, 2003 counsel for the DFA informed the City attorney that representatives of the County had met with DFA officials to request removal of the Mayor.

independent analysis. Under such circumstances, not just minimal due process standards must be followed, but if anything, expanded due process requirements. This procedure, after all, impinges upon the reputation and professional careers of the Mayor, the City Clerk, the City Councilors and indeed the City employees as well.

Instead, facts and allegations were not checked, the City was not permitted to provide feedback, and a factually incorrect audit was prematurely released to the public. As a result, over a half dozen newspapers and numerous television and radio broadcast stations have published extremely damaging and inaccurate reports about the City and its representatives. Political rallies have been organized against the City administration and the Mayors' vehicle was vandalized. The political and emotional impact is enormous.

V. REQUESTED ACTION

A. REVIEW OF AUDIT METHODOLOGY. The State Auditor is obligated as a matter of procedural due process to follow its own regulations for conducting audits, and the N.M. Legislature has so directed. See, Miller v. City of Albuquerque, 89 N.M. 503, 507, 554 P.2d 665, 669 (1976). The failure to provide the City, its Mayor, the City Councilors and Clerk with an exit conference, notice of obviously unsupported allegations, and an opportunity to respond to the allegations in a timely and meaningful manner violated the State Auditor's duty to comply with its own implicit and explicit procedural safeguards and standards. These violations deprived the City of its right to a fair, meaningful and impartial audit process.³

³ See: Boespflug v. San Juan County, 114 N.M. 771, 845 P.2d 865 (Ct. App. 1992) (the removal of public officials requires "scrupulous fairness" and the administrative adjudicatory proceedings are bound by procedural due process); Santa Fe Exploration Co. v. Oil Conservation Comm'n, 114 N.M. 103, 835 P.2d 819 (1992) (due process requirements are applicable to the administrative proceedings of state agencies which adjudicate or make binding rules that affect the legal rights of individuals or entities); Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976) (a municipal legislative body is "bound to follow the regulations it has adopted" and to insure the recipient is not "deprived . . . notice and an opportunity to prepare an adequate defense."); Mills v. N.M. Stat Bd. Of Psychologist Examiners; 1997 NMSC 28, 123 N.M. 421, 941 P.2d 502 (a state board's grant of authority to regulate is subject to procedural due process constraints requiring at a minimum notice and an opportunity to be heard);

The State Auditor’s report seeks to determine if there are grounds to remove publicly elected officials, and as such, requires “scrupulous fairness” on the part of the State Auditor to “avoid the risk of erroneous findings.” See, e.g., State of New Mexico ex rel Children, Youth and Families Department v. Megan, 2000 NMCA 20, 128 N.M. 618, 995 P.2d 1060; Franco v. Carlsbad Mun. Schools, 2001 NMCA 42, 130 N.M. 543, 28 P.3d 531. Id. The inadequate investigation and failure to interview affected city officials constitutes an abuse of substantive and procedural due process that requires immediate investigation. State actions to terminate the substantial rights of elected officials must be conducted with utmost fairness. Because the consequences of an erroneous and inaccurate state audit can be severe, an immediate review into the Audit’s methodology is required. See, New Mexico State Racing Commission v. Yoakum, 113 N.M. 561, 829 P.2d 7 (Ct. App. 1991); Boespflug v. San Juan County, 114 N.M. 771, 845 P.2d 865 (Ct. App. 1992) (the removal of public officials requires “scrupulous fairness” and the adjudicatory proceedings incident thereto must be bound by fundamental principles of justice and procedural due process); Santa Fe Exploratory Company v. Oil Conservation Commission, 114 N.M. 103, 835 P.2d 819 (1992) (administrative agencies that administer adjudicatory proceedings (1) must be unbiased and may not have a predisposition regarding the outcome of a matter, (2) must maintain the appearance of fairness, and (3) must insure that the agency’s administrative and procedural safeguards are timely and fairly implemented).

For these fundamental constitutional reasons, the integrity of the audit process is directly at stake. Of particular importance are following lapses in procedural and constitutional safeguards more particularly addressed in Section I - Violations of Due Process:

Naranjo v. Bd of Education of Espanola Public Schools, 119 N.M. 401, 891 P.2d 542 (1995) (tenured school teachers are afforded procedural due process rights before termination); State of N.M. ex rel Children Youth and Families Dept. v. Megan, 2000 NMCA 26, 128 N.M. 618, 995 P.2d 1060 (the termination of parental rights requires “scrupulous fairness” and “careful [] scrutin[y]” of the “procedures used”); N.M. State Racing Comm’n v. Yoakum, 113 N.M. 561, 829 P.2d 7 (Ct. App. 1991) (because the consequences of suspending a horse trainer “can be severe, the opportunity to be heard must be at a meaningful time and in a meaningful manner”).

- The failure to abide by the standards mandated in § 2-2-2.10 of the New Mexico Administrative Code;
- The failure to abide by the American Generally Accepted Government Audit Standards or GAGAS;
- The City of Sunland Park was never provided an opportunity to respond to potential findings;
- The City of Sunland Park was not provided with an “exit conference;”
- The City of Sunland Park was not provided with a “draft” of the Special Audit or given an opportunity to respond.
- The City of Sunland Park’s staff, mayor, individual councilors, city clerk, and city attorney were never interviewed and permitted an opportunity to provide “Reporting Views” concerning all the alleged findings.

The City of Sunland Park respectfully requests the Department of Finance and Administration immediately review the Audit’s methodology and compliance with state constitutional and statutory law, the New Mexico Administrative Code, the Generally Accepted Government Audit Standards, and the Office of the State Auditor’s administrative and procedural audit requirements.

B. CORRECTION OF ERRONEOUS AUDIT FINDINGS AND SAFEGUARDING

PRIVILEGED DOCUMENTS. The City of Sunland Park requests the Department of Finance and Administration immediately and publicly correct the numerous factually and legally erroneous Audit “conclusions”. The Audit makes numerous false, inaccurate and/or inadequately investigated and legally unsupported accusations, which mandate public correction. “Scrupulous fairness” requires nothing less than immediate public correction of erroneous findings. Failure to correct inaccurate and erroneous findings by the State Auditor will adversely impact the credibility and integrity of the City of Sunland Park. In addition, the City requests that the DFA take the necessary steps to safeguard privileged documents and communications from public disclosures.

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C. AN AGREEMENT WITH THE DFA TO IMPLEMENT LEGITIMATE

RECOMMENDATIONS IS ENCOURAGED. The City of Sunland Park, its governing body and top administrative officials continue to stand ready, willing and able to address, explain, and resolve acknowledged deficiencies of the City, and renew the request that that the DFA enter into an agreement with the City for that purpose. Notwithstanding the City's offer to resolve diligently all recommendation by negotiating an agreement, all procedural methodology and erroneous findings must be fully investigated and remedied in an appropriate, public and fair manner before any such agreement is implemented.

THE CITY OF SUNLAND PARK