REPORT OF THE DISTRICT ATTORNEY

INQUIRY INTO ALLEGATIONS OF WROUGDOING AT THE COUNTY ASSESSOR'S OFFICE

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COUNTY OF ORANGE

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Summary of Report

This Report is the Result of an Inquiry into allegations made against the County Assessor. The gist of the allegations was that the Assessor has cost the county millions of dollars in lost tax revenue by failing to timely assess the value of supplemental real property "possessory interests" (PI). Pls are defined as any exclusive, independent and durable interest in real property such as commercial leases, exclusive rights to occupy or do business on real property or improvements on land. Pls may be created or changed constantly, often daily, and in large numbers, and each change requires new assessment. Keeping pace with the many changes to properly and timely make such "supplemental" assessments is a substantial task which requires computer assistance. The Assessor's present computer system is outdated. In 2007 the Assessor launched an effort to upgrade this system. Contracts to do so were approved by the Board of Supervisors.

Originally scheduled for completion in 2010, the target completion date has been pushed forward to 2011 and the cost estimates for completion have increased. Assessor personnel have been assigned from other work to assist in completing the project. Recent County wide budgetary problems due to the decline in the economy also impacted economic conditions have resulted in the possibility of layoffs and furloughs in the Assessor's Office. Concern over possible layoffs impelled several employees to contact OCEA with their concerns that money being spent on the new computer system should be diverted to save jobs. These employees also asserted that the new computer system was not workable and that the money spent on it was wasted. One former employee alleged criminality and/or willful refusal to carry out the duties of office thereby engaging the jurisdiction of the District Attorney.

The District Attorney examined relevant documents including contracts, prior reports and agenda reports to the Board and interviewed relevant witnesses both in and out of the Assessor's Office. The inquiry concluded that the evidence did not sustain the allegations but in fact contradicted them. The evidence indicated that as with many other firms and government entities in the current difficult economic environment, the Assessor's Office is grabbling with having to do more with less. Other Assessor's Offices in the state are

experiencing a huge increase in workload due to the demands for reassessments prompted by declining real estate values which must be addressed even as their own budgets and available personnel are declining.

While under such circumstances, it is unlikely that perfection can be achieved, the evidence suggested that the Assessor's Office is assessing the larger supplemental PIs adequately and making good faith efforts to properly assess all of them. The evidence suggested that if any such supplemental assessments are missed they are smaller valued ones on public property. The amount of lost tax revenue, if any, due to such failure is nowhere near the millions alleged. To completely assess all of the smaller PIs would require the commitment of a huge workforce and other resources, the costs of which would likely exceed, by far, the amount of extra taxes collected. The most efficient and economical way to deal with this issue is to get the new computer system on line which appears to be what the Assessor's Office is doing.

A county district attorney is charged with the duty of investigating as well as prosecuting criminal acts. (Govt. Code § 26500) The district attorney may also seek from the grand jury the issuance of an accusation against a county official to remove him from office for "willful or corrupt misconduct in office." (Govt. Code § 3060) Willful misconduct is something more than an act or omission resulting from a mistake of judgment. It requires a finding of criminal conduct or a willful or deliberate refusal or failure to carry out the duties of office. The evidence adduced did not support probable cause to believe in the existence of either. Accordingly the District Attorney has terminated his inquiry without further action.

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Introduction:

This report summarizes the findings of an inquiry into allegations of wrongdoing at the County Assessor's Office. The allegations first came to light when Orange County Employees Association (OCEA) General Manager, Mr. Nick Berardino, raised them at a March 30, 2010 public meeting of the Board of Supervisor's.

On April 2, 2010 representatives of the County's Internal Audit Department brought to the District Attorney's Office a complaint received from a former employee of the Assessor's Office. The Auditor's Office referred the complaints to this office purportedly pursuant to an agreement reached between the District Attorney, the Sheriff and the County after the County bankruptcy in 1994. This was reiterated publicly by the CEO who said the referral "follows a protocol for handling complaints against public officials that was established by the county after the bankruptcy."

The Auditor's Office also provided the name and phone number of the former employee who had submitted the complaint to them. Subsequently, OCEA provided the names of several other witnesses. This office then began an inquiry into the allegations made to which this memo now turns.

I. Background to the Allegations:

The gist of the allegations was that the Assessor has cost the county millions of dollars in lost tax revenue by failing to do his constitutionally mandated duty to timely assess the value of supplemental real property "possessory interests" (PI). Possessory interests are defined as any exclusive, independent and durable interest in real property that has any substantial value. Examples may be commercial leases, exclusive rights to occupy or do business on real property or improvements on land. In a diversified, complex economy as exists in Orange County, such interests are created or changed constantly, often daily, and in large numbers. Each change requires the Assessor to render a new assessment to properly tax the new possessory interest created or changed. Under the law prior to 1975 such changes were placed on the taxation rolls the following year.

The Legislature found that this resulted in an inequitable distribution of the tax burden. While owners of newly acquired or improved possessory interests received the benefits of those interests immediately they were not required to assume the tax burden for them until the following year, meaning that other tax payers had to unfairly assume that much more tax burden. As a result the Legislature enacted a new law requiring "supplemental" tax assessments be made on property newly acquired or improved. These supplemental assessments would value the property at the time of the acquisition or completion of the improvement, resulting in a "supplemental" tax liability for the acquisition or improvement for the remainder of the tax year. Keeping pace with the many changes to properly and timely make such "supplemental" assessments requires teams of appraisers, aerial surveillance and intercommunications with other departments such as the County Recorder and Treasurer-Tax Collector.

Until recently the Assessor has relied on computer systems and programs that were developed beginning in 1988 well before the introduction of Microsoft Windows in the early 90s. This Assessment Tax System (ATS) is critical to the valuation, collection and administration of property tax assessments, especially "supplemental" ones. In addition it supports all of the County's Property Tax Administration (PTA) Departments, such as the Auditor-controller, Clerk of the Board and Treasurer Tax Collector. Each of these departments has operational control over their portion of the ATS and through the computer system interface with the other PTA departments as well as the Clerk Recorder.

By the midpoint of the present decade, increasing difficulty in keeping up with the workload indicated that this computer system was outdated. Efforts by the Assessor's Office to upgrade the system led to the "ATS Re-engineering Project." The project was initiated in 2007 with an initial target completion date of 2010. Sole source agreements to support the project were contracted with several firms from the County's Master List issued by the County's Purchasing Agent with established terms and conditions. Such sole source contracts are routinely awarded for a commodity or service of a unique nature, supplier or market and involving a known capable supplier. The contracts and their justification was presented to, and approved by, the Board of Supervisors.

Since its initiation the target completion date has been pushed forward to 2011 and the cost estimates for completion have increased. Assessor personnel have been reassigned from other work to assist in completing the project. By late 2009, County wide budgetary problems due to the decline in the economy also impacted the Assessor's Office, threatening layoffs and furloughs. Concern over possible layoffs impelled several employees to contact OCEA for assistance. Contrary to the requests of these employees, OCEA's General Manager elected to publicly air allegations of wrongdoing and demands for an investigation. As noted, the complaint of one former employee was provided to the Auditor's Office who forwarded it to the District Attorney's Office.

III. Applicable Law:

The applicable law governing the accusations made is outlined in this section.

A. Criminal Appropriation or Diversion of Public Funds

Penal Code § 424 Entitled, Embezzlement and falsification of accounts, provides in pertinent part as follows:

- (a) Each officer of this state, or of any county...and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:
- 1. Without authority of law, appropriates the same, or any portion thereof, to his or her own use, or to the use of another; or,
- **2.** Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law ...

Is punishable by imprisonment in the state prison...and is disqualified from holding any office in this state.

Salaries are "public moneys" within the meaning of section 424, and one who authorizes the illegal payment of salaries has violated that section. Published cases on the diversion of public funds focus on their use for personal matters unrelated to the duties of the office. (See *People v. Battin* (1978) 77 Cal. App. 3rd 635, 650)

The allegations in this case have suggested that the Assessor violated this law by diverting employees away from performing their constitutionally mandated duties, to instead assist in the ATS Re-engineering Project. Since the County paid the contractors for the ATS Re-Engineering Project, and it was their obligation to get it completed, assigning paid county personnel to assist that effort it was alleged, may be an illegal diversion of public salaries in making the County "pay for the same thing twice." There is no reported case that holds these or similar facts to constitute a violation of Penal Code § 424.

B. Tax Assessment, Duties of the Assessor and Supervisory Powers of the Board of Supervisors over the Assessor.

California Constitution Art. XIII § 1 provides in pertinent part that "All property is taxable and shall be assessed at the same percentage of fair market value. Art. XIII A § 1 states that, "The maximum amount of any *ad valorem* [i.e. according to value] tax on real property shall not exceed One percent (1%) of the full cash value of such property. The one percent (1%) tax is to be collected by the counties...."

Revenue and Taxation (R&T) Code § 201 provides that, "All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code." "Property" includes possessory interests. R&T Code § 107 defines a "possessory interest" as "Possession of, claim to, or right to the possession of land or improvements that is independent, durable, and exclusive of rights held by others in the property, except when coupled with ownership of the land or improvements in the same person. Such interests are taxable.

'Possessory interests' in 'land or improvements' are taxable under section 107 of the Revenue and Taxation Code and in pursuance of the constitutional mandate that 'all property ... shall be taxed. (Citation) Privately held possessory interests in property owned by the federal government, the state, and municipalities are subject to taxation. (Connolly v. County of Orange (1992) 1 Cal. 4th 1105, 1118)

Such possessory interests not "coupled" with ownership of the real property on which they are located are referred to as "unsecured" possessory interests. Some examples

would be leases, easements or right of ways such as a utility pipeline running through the real property of others, cable or cellular phone towers or billboards. The values of such privately held interests are taxable, even if located on non-taxable government property.

Art. XI § 1 mandates that each county have an elected assessor." The assessor's duties are established by statute. "Every assessor shall assess all property subject to general property taxation at its full value," (R&T § 401) and "shall prepare an assessment roll... in which shall be listed all property within the county which it is the assessor's duty to assess." (R&T § 601) The role must list among other things the name of the assessee, a description of the possessory interest, an assessed value of the interest and the total taxable value of all property assessed and is to be completed and certified by the Assessor on or before July 1st annually. (R&T § 616)

R&T Code § 75 et seq was enacted with the intent to "to promote increased equity among taxpayers by enrolling and making adjustments of taxes resulting from changes in assessed value due to changes in ownership and completion of new construction at the time they occur." (Emphasis Added) In other words R&T Code § 75 et seq mandates that "supplemental" assessments be made at the time of the changes so that the appropriate "supplemental" taxes could be levied from the time when the changes occur, not delayed until the following tax year. The new total value assessed would be the new taxable basis.

[W]henever a change in ownership occurs or new construction resulting from actual physical new construction on the site is completed, the assessor shall appraise the property changing ownership or the new construction at its full cash value ... on the date the change in ownership occurs or the new construction is completed. The value so determined shall be the new base year value of the property or the new construction. (R&T Code § 75.10) (Emphasis Added)

"Supplemental" Assessments are required on all property subject to Art XIIIA. (R&T Code § 75.14) Whenever the Assessor makes a supplemental assessment, a notice of the assessment must be sent to the assessee (i.e. property owner) advising him of the supplemental assessment and his right to appeal it or claim exemption. (R&T § 75.31) Once all exemptions have been processed or the time for appeals has expired the

Assessor is to transmit the supplemental assessment to the auditor, (R&T Code § 75.40) who is then to compute the taxes due, (R&T Code § 75.41) and transmit the supplemental assessment tax to the tax collector for collection. (R&T Code §§ 75.50-75.51)

There are limited provisions for the cancellation of supplemental tax assessments or bills otherwise required to be imposed. These provisions require authorization by a county board of Supervisors. A county board may enact an ordinance canceling any supplemental bill, or authorizing the assessor to cancel any bill, if the amount billed is less than the cost of assessing and collecting it. (R&T § 75.55) The only limitation on this power is that no supplemental bill exceeding \$50.00 may be cancelled. (*Ibid*)

By statute the Assessor is subject *only* to the supervision of the county board of supervisors. In fact local boards are particularly mandated to supervise all officials whose duties relate to the assessment and collection of taxes.

[T]he board of supervisors **shall supervise** the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly insofar as the functions and duties of such county officers and officers of all districts and subdivisions of the county **relate to the assessing**, collecting, safekeeping, management, or disbursement of **public funds**. It shall see that **they faithfully perform their duties**, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection. Govt. Code § 25303 (Emphasis Added)

The California Supreme Court has affirmed this power. "The duties of the assessor are established by statute. (Citation) As a county officer, the assessor is subject to supervision by the board of supervisors of the county." (Gov. Code, § 25303).... (Connolly v. County of Orange, supra, 1 Cal. 4th 1105, 1113) That supervision is limited, however. Although a board may have the power to supervise under section 25303, "[it] has no power to perform county officers' statutory duties for them or direct the manner in which duties are performed. (Steiner v. Superior Court (1996) 50 Cal. App. 4th 1771, 1789)

C. Powers and Limitations of the District Attorney to Investigate and Prosecute Government Officials:

Govt. Code § 26500 delineates the powers of the District Attorney: "The public prosecutor shall attend the courts, and ... shall initiate and conduct on behalf of the people all prosecutions for public offenses." These powers have been held to include the investigation as well as prosecution of crime. "Investigation and the gathering of evidence relating to criminal offenses is a responsibility which is inseparable from the district attorney's prosecutorial function. That the district attorney is charged with the duty of investigating as well as prosecuting criminal activity has been recognized by an unbroken line of California cases." (*Hicks v. Board of Supervisors* (1977) 69 Cal. App. 3rd 228, 241) Clearly a district attorney has the power to investigate anyone including government officials for criminal conduct.

The district attorney may also seek from the grand jury the issuance of an accusation against a county official to remove him from office for "willful or corrupt misconduct in office." (Govt. Code § 3060) The matter is tried by jury in the same manner as the trial on an indictment. (Govt. Code § 3070) Upon conviction the court must pronounce the judgment of removal from office. (Govt. Code § 3072)

In *Steiner v. Superior Court* supra, 50 Cal. App. 4th 1771 the Fourth District Court of Appeals restricted the power of the district attorney to invoke Govt. Code § 3060 to remove other government officials from office where no crime had been committed. After reviewing historical cases involving the application of that section, the court noted that,

Taken as a whole, these cases affirm that **something more than neglect** is necessary to constitute willful conduct. Virtually all of them involved conduct that was otherwise criminal, conduct which was corrupt and *malum* in se [i.e., an act involving illegality from its very nature based upon principles of natural, moral or public law.]" (Id at 1781) (Emphasis Added)

The court held that mere negligence or belief that the official is exercising poor judgment is insufficient and that, "Willful misconduct is something more than an act or omission resulting from a mistake of judgment." (*Id* at 1780) In seeking to remove two supervisors from office, the district attorney had argued for a negligence standard. The court rejected this argument stating that to adopt such a standard would have "ominous" implications by making the district attorney a "performance monitor" of other government officials.

To adopt the district attorney's proposed negligence standard would have ominous public policy implications. It would effectively make the district attorney a performance monitor of elected officials, and allow him to subject them to the expense and rigors of accusation and trial if he deemed their performance to fall below that of the "reasonable" public official. In plain terms, he could try to oust them for getting a C minus on their report cards. We cannot believe the Legislature intended to give the district attorney that power when it enacted section 3060. The procedure must be reserved for serious misconduct, such as that found in the cases we have reviewed, misconduct that involves criminal behavior or, at least, a purposeful failure to carry out mandatory duties of office. (Id at 1782) (Emphasis Added)

The court noted that to hold otherwise and make the district attorney a 'performance monitor," would violate the constitutional separation of powers doctrine. Allowing a district attorney to remove an elected official from office in the absence of criminal or similar behavior would in effect grant the district attorney power never contemplated, and potentially cripple elected government.

[I]t would put the district attorney in the position of a super-governor in the county. Supervisors would look over their shoulders before taking any discretionary action for fear the district attorney would find they had not passed muster and would subject them to the expensive and protracted proceedings we have seen in this case. On the other hand, if the supervisors failed to act, they would fear "criminal" prosecution for a negligent omission. They would be hard pressed to function adequately in such an environment. (*Id* at 1790)

Accordingly, this inquiry looks into the limited question of whether the County Assessor could be found to have engaged in serious misconduct that involves either criminal behavior or a purposeful failure to carry out mandatory duties of office.

IV. Developed Evidence

A. Genesis of Present Complaint:

In December of 2009 the Assessor had a managers meeting regarding the implementation of budget cuts for the 2009/2010 fiscal year. He announced his intention to begin employee furloughs beginning in February 2010. In the latter part of December

the Assessor indicated that he intended to impose mandatory furloughs on every other Friday beginning in February 2010.

In mid January 2010 several employees* of the Assessor's Office, concerned about the impact of furloughs, met with representatives of OCEA. They did so under an assurance that their identities would be protected. At that meeting they expressed concerns about the "ongoing problems" of the ATS Re-Engineering Project. One attendee refused to continue as "he did not like the way things were being handled."

In February 2010 at another managers meeting to discuss pending 2009/2010 budget cuts, the Assessor disclosed that his department was going to lay off seventeen (17) newly hired appraisers and initiate furloughs. The Assessor stated that department staff needed to fully support ACS staff in the ATS Re-engineering project even if "roll production suffered." During this same period a "small team" of appraisal staff was reassigned from real property roll production to assist the ATS Re-engineering project. In mid February several employees* again met with OCEA representatives. One expressed "concerns" about the impact the ATS RE-engineering project had on the Assessor's ability to fulfill its constitutional duties and responsibilities.

In mid March 2010 Assessor employees* met with OCEA including its General Manager, Mr. Nick Berardino. They believed that the situation at the Assessor's Office had become a "labor issue" and they wanted to talk with the General Manager about protecting jobs. Again concerns were expressed of how the ATS Re-engineering project impacted the department's ability to fulfill its constitutional duties and responsibilities. When an example was asked for, the employees mentioned "Unsecured Possessory Interests Supplemental Assessment Issues." In the last week of March Assessor employees* met with Mr. Berardino and a member of the Board of Supervisors. The employees were asked to "elaborate" on the assessment issues. During the same period Assessor employees* met with members of the Auditor's Office to discuss the supplemental assessment issues.

On March 29, 2010, employees again met with OCEA representatives. Members of the Auditor's department were also present. They discussed the "specific allegation that [the Assessor] had deliberately and consciously failed to issue Supplemental Assessments for Unsecured Possessory Interests." When a former employee signed an allegation to this effect, a deputy County Counsel instructed Auditor's personnel to withdraw from the meeting and have no further contact with the complainants. Since the former employee had alleged what could constitute a criminal matter, the County Counsel instructed the Auditor's representatives to refer the matter to the District Attorney for investigation.

In the meetings with the OCEA, the employees* had suggested to the OCEA officials that they were desirous of meeting with representatives of the District Attorney and the Grand Jury to determine the best way to approach the problem. OCEA General Manager, Mr. Nick Berardino, stated that was not the best way to go about it. Instead, he asserted, they must attract public attention. Otherwise it is probably going to get swept under...."

On March 30, 2010 Mr. Berardino publicly raised allegations of wrongdoing at the Assessor's Office in a Board meeting. He alleged that the Assessor was assigning county staff to do work on the computer system that a contractor was hired to do, in effect, making the county pay twice for the work. He wanted the DA to investigate whether that's an illegal gift of public funds. He also accused the Assessor of failing to collect millions of dollars in supplemental taxes from large corporations.

Within a short time the same statement of another employee appeared in a local news blog. One of witnesses called OCEA to say he was concerned about his name being revealed and that he was no longer willing to provide any information relating to this matter to OCEA. Soon thereafter another witness received a telephone call from Mr. Berardino who indicated that if the first witness did not cooperate "his information may get released to the media."

B. The District Attorney is Contacted and Begins Inquiry:

On April 2, 2010, in compliance with the County Counsel's instruction, the Auditor Deputy Director and a senior audit manager brought the former employee's written

complaint to the DA's Office. The complaint alleged a deliberate failure on the part of the Assessor to perform the duties of office, specifically that the Assessor "has deliberately and consciously failed to pursue supplemental tax billings for unsecured possessory interest properties for years despite the fact that his staff has repeatedly brought this to his attention over the last ten (10) years in discussions and briefings." In addition the complaint stated that the Assessor's "staff have repeatedly identified supplemental billings for unsecured property that could have easily been pursued immediately with the results of collecting 10s of millions of dollars." The complainant termed this a "deliberate act" since the Assessor could have directed that the supplemental taxes be pursued manually or by the current computer system "on a case by case basis." The complainant stated, "I believe that the Assessor is willfully not complying with Revenue and Taxation Code Section 75.14."

A cover letter also stated that the Orange County Employee's Fraud Hotline had received complaints from "several senior staff, both retired and currently working for the Assessor." These complaints alleged "willful disregard for state law directing the Assessor to collect supplemental possessory interest taxes." In addition it was noted that in a 2006 Report the State Board of Equalization had stated that possessory interests are subject to supplemental assessments which are required whenever there is a change in ownership. The report also stated that the "Assessor's practice is contrary to the requirements of law and could result in the loss of revenue." The 2006 Report was attached. There were also particular parcels alleged to have not been properly assessed.

The former employee who had made the written complaint to OCEA was contacted and he provided a written statement of his allegations, a copy of written comments made to OCEA, copies of internal memos, Agenda Staff Reports presented by the Auditor to the Board, Power Point presentations to the Board, Contract Agreements with ATS Vendors, the Assessor's 2009 Business Plan, news articles and several pages of the Assessor's campaign statement showing several contributions. These documents were reviewed.

The former employee made numerous allegations against the Assessor. In his introduction to them he summarized his allegations as follows:

Because of the Re-Engineering Project, [the Assessor] has forgotten and neglected his fiduciary responsibility of managing the production of the Annual and Supplemental Assessment rolls. Instead, he has shifted his focus, attention, assets, and staff to the design, development and delivery of the ATS Re-Engineering project, to the detriment of good people within the department, county government, and ultimately to the citizens of Orange County.

This former employee stated that he and one other were "the only lone voices dissenting over these proposed ideas, and voiced opposition to the mismanagement of this Re-Engineering project and its impact on the Department." Among the specific numerated allegations made (there were 18), were that the Assessor has: 1) "willfully, recklessly and consciously failed to fulfill his constitutionally mandated duties in order to dedicate assets. fund, and staff to the ATS Re-Engineering Project;" 2) the Assessor and sole source contractors have "failed to meet performance standards; 3) ATS Re-Engineering contracts were made without competitive bidding; 4) the Assessor deliberately misled the Board of Supervisors; 5) the Assessor "has wasted over \$25 million on a failed ATS Re-Engineering Project that is past its deadline, is over budget and simply does not work: 6) "Inappropriate" campaign contributions; 7) Failure to pursue unsecured supplemental assessments; 8) "Favoritism and Special Treatment" for the ATS Re-Engineering contractors; 9) the assessor has an "inordinate fascination" with one of the contractors: 10) the Assessor and a contractor have willfully and recklessly exposed the County...to copyright infringement liability;" 11) the Assessor has displayed willful and reckless refusal "to be governed by internal audit control assistance from the Internal Audit Department;" 12) conspiracy to circumvent the Board's Retiree Extra-Help Policy; and 13) using the threat of employees' retiring as a pretext to ask for additional resources from the Board while diverting resources to the ATS Re-Engineering Project.

In the "Opening Statement" of the written comments made to OCEA the former employee stated the desire that:

[T]he Re-Engineering project continue ONLY AFTER there has been a thorough and complete investigation of wrongdoing and that appropriate financial and IT systems oversight mechanisms are in place. I desire that the Re-Engineering project continue ONLY AFTER the Assessor is able to successfully complete his state mandated functions.

In his conclusion the former employee wrote:

It is critical that has (sic) to be an investigation conducted by an independent, forensic peer review IT team that fully understands the principles, fundamentals, and nature of the ATS Re-Engineering project. It is critical that this forensic team understand how to properly test and evaluate the performance of this project.

The sole source contracts provided were reviewed. The scope of each was identical. Each contractor was obligated to "provide **support** in the areas of system analysis, computer programming, database design, system development, testing of enhancements and maintenance of data base for the County's property tax system and software modules within the Assessment Tax System (ATS) used by the Assessor Department...." In addition to compensation the County was to provide building access, identification badges, work space, computers and telephones.

The contracting firms included ACS State and Local Solutions, Inc. (ACS), Modern eConcepts and ARK Technologies. Written justification for these sole source contracts, in the form of Agenda Staff Reports, had been submitted by the Assessor's Office to the Board of Supervisors. Request for the Board's approval was based on the fact that the firms contracted had done work for the county for many years and were familiar with the county's computer systems, especially those utilized by the Assessor's Office. This experience was deemed "necessary to migrate the functionality and capabilities of the current system into the new ATS." Each contract agreement was approved by the Board of Supervisors, and as to form by the County Counsel.

There appeared two small political contributions, totaling just over \$500.00, made by the manager of one of the firms to the Assessor.

Additional witness names were provided by OCEA. Contact was immediately attempted with the witnesses provided by OCEA. However, the first two witnesses contacted indicated that they would not provide an "official statement" to the DA without subpoenas to them and others "forcing" all to give statements so that they could not be "singled out" for retaliation. They did however briefly converse with the investigator.

Neither witness believed that they had any information that would support criminal charges against the Assessor, though one said he believed that the Assessor "was guilty of something but was not clear of what." Subsequently, both agreed to speak more extensively with the investigator. Both reiterated that they had no information that supported allegations of criminal wrongdoing at the Assessor's Office. They acknowledged that even if the Assessor was to stop diverting personnel to the ATS system, there was no way that all of the possessory interests (PI) in the County could be tracked and assessed manually. The best way to do so was to get the new ATS to work.

They also said that the problem of ascertaining and assessing PIs is a long standing one that predates the present appraiser by decades. They had heard that the number \$125 million in lost tax revenue had been raised in some press reports. They said that while they recalled talking numbers with OCEA representatives neither of them stated that the present Assessor was responsible for failing to assess so many PIs as to forgo that large of an amount. The amount of lost tax revenues per year from failing to assess *all* PIs could never exceed 2-3 million dollars. It would be difficult to arrive at a \$125 million loss even if it had accumulated as far as the year 1983 when State law first required assessors to make this supplemental assessment.

OCEA representatives were then contacted for further information. Mr. Berardino provided a copy of a report on the ATS Project prepared by two private public consulting firms dated August 2009. Mr. Berardino indicated that the report's conclusions were flawed because the "right people" were not talked to. He also affirmed that the Assessor employees who'd brought the matter to him wanted to have him arrange to meet with the DA but he refused to do so because he felt the DA wouldn't do anything. He stated he doesn't expect the DA to really do anything.

Additional employees referred to as the "right people" were contacted. One stated that he is "unhappy" with the progress of the ATS R-Engineering Project. He "felt" that the project has taken "so long" that it could not have been "handled properly." He acknowledged that when layoffs were threatened, Assessor employees became "concerned." They went to their union representatives. Their "goal" was to have the

Assessor "suspend the project" to free up money to avoid layoffs. This employee admitted that he'd never seen any of the contracts made with the contractors and was not aware of the details of their contents. This employee also had complaints regarding the management at the Assessor's office. Several years ago some managers had "mistreated" employees. When the Assessor was apprised of this, however, he "took care of the issue."

Another employee on the "right people" list was interviewed and stated that he believed that the failure to capture all of the unsecured supplemental PIs was "not intentionally done." A lot of this failure was due to "ignorance," or "not knowing what to do," on the part of Assessor employees. This employee acknowledged that at present no reliable mechanism to consistently catch and assess all unsecured supplemental PIs exists. However, whatever is the amount of tax revenues lost as a result, this employee insisted that it is "nowhere near" the \$125 million figure quoted in press articles.

The Assessor's Office was toured and the Assessor interviewed. He was cooperative and provided a contact list of all of his department's employees inviting DA investigators to interview anyone they wished at any time without his or any other member of his office being present. The Assessor indicated that he was aware of only a single area of unsecured supplemental possessory interests that his office was experiencing continued difficulty with, that being the laying of cable by cable companies. These companies may lay cable across numerous small pieces of property in the county throughout the year. It is difficult to assess the value of a cable laid across an individual piece of property before the entire cable is completed. Even then valuation is very difficult as the value of the cable may not be apparent until it has been operating for some period of time. Valuating the cable often involves a negotiated agreement with the company. In addition these possessory interests until only recently were often not of long duration. Until recently multiple cable companies bought, sold or traded cable access throughout the year. As a result these interests changed hands frequently, more than other types of interests.

The difficulty of determining and fully assessing such transitory interests is experienced by all of the populated counties in the State wherein such interests multiply and in many

of the other counties as well. The Board of Equalization has not come up with a totally satisfactory solution to this problem, and the Assessor is unaware of any other county in the State that has. Until a total solution is developed, the Assessor has attempted to deal with this situation by billing the cable companies for all existing cables in which they have a possessory interest beginning at the first of the year and for the *entire* year, even if they divest their interests in the taxed cables before the end of the year. As a result if a portion of the previous year is missed it is generally balanced out by a billing for the entire following year.

The ATS computer system is expected to solve, some but not all, of this particular problem. However, once completed, it will be owned by the County not any of the contractors and can be further upgraded in the future when new programs come on line. As for the "diversion" of personnel, the Assessor pointed out that the private contractors were retained for "support" not to install the entire system themselves. In fact the contractors could not do so as they do not have the knowledge and experience of the job the deputy assessors do. As a result Assessor staff must work with them to develop the appropriate programs to do the job the deputy assessors need done. The particular contractors chosen had long previous experience with Orange County's computer system and were on the county's "no bid list," meaning with the Board's approval they could be contracted with without the need to have the job "bid out."

As for the delays and the cost overruns the Assessor conceded that the cost estimates have gone up and the estimated completion dates pushed back. However, the system remains on track to completion. He noted that other major metropolitan counties, that have upgraded their ATS computers, such as Los Angeles and San Diego, experienced similar difficulties and in fact their final costs ended up to be tens of millions of dollars more than Orange County's current completion estimate of \$25 million.

The Assessor denied allegations that he misrepresented the progress or completion status of the ATS Re-Engineering system in his presentations to the Board. He stated that he has always told the board that the system is in progress and not completed. The Assessor provided copies of his power point presentations given to the Board as

evidence. He pointed out that in addition he has made periodic progress reports and presentations to the CEO's Information and Technology (IT) department, the grand jury and the Auditor's department, in short, all of what he termed "stakeholders" in the new ATS system. He provided written documentation from those stakeholders.

Copies of the Assessor's power point presentations were referred to the IT personnel of the DA's office for review. They reviewed the documents and confirmed that they did not contain claims that the ATS system was completed or near completion but that it was in progress towards completion.

The Assessor acknowledged that the current economic difficulties have threatened layoffs. He noted, however, that suspending the ATS Re-Engineering Project to divert funds expended on it to pay employees so as to avoid layoffs is not an option. In addition to the need for the upgrade, the Assessor stated that the funds being expended on the project are a contractual obligation of the County and are specifically *earmarked* for the project's completion by the Board. The Assessor concluded that those funds therefore could not be lawfully allocated for any other purpose.

Employees* in the department responsible for supplemental assessments were also interviewed. Investigators were informed that, "Everything is being done to collect" supplemental PIs. The only problem appeared to be with PIs on government or public land which itself cannot be taxed. PIs on such land are "unsecured" and are on the unsecured roles. However, the larger valued ones are normally identified and moved to the "secured' rolls where they can more easily be tracked and assessed. PIs on private property are already on the secured rolls and consequently consistently assessed. Many PIs are long term leases, some decades long. These do not need to be reassessed until there is a change in ownership, new construction, or significant change in lease agreement that would mean a change in value. The Assessor's Office is able to capture such changes "easily." A list of PIs on government property in the county is sent to those government entities annually with a request to report any changes. Since they share in the supplemental taxes collected, it is to these government entities' advantage to respond with any changes that may be assessed, and they usually and consistently do so.

The only issue appears to be with small valued PIs on public land. Investigators were told that the new ATS system when completed will be of "great assistance" in this area. However, at present, there are many other competing and higher valued priorities confronting the limited personnel in the Assessor's office that need to be addressed. The low valued PIs on government property represent but a "small part" of these. It was reiterated to the investigators that "everything is being done that can be done to the best of their ability."

C. Reports on the Assessor's Office Reviewed

1. The 2009 Report

The report provided by OCEA was entitled Assessment Tax System (ATS) Re-Engineering Project Independent Verification and Validation Final Assessment Report. The report contained a statement that the consulting firms preparing it "are independent from" the Assessor, CEO and the CEO's Information Technology (IT) departments, "technically, managerially and financially." The report stated that the study which commenced in March 2009 was organized so that its staff members "were not subjected to undue pressure or inducement that might influence judgment or the results or quality of work." The assessment report's stated purpose was "to present the final findings and recommendations" regarding the ATS Re-Engineering Project. The assessment's objectives were to determine: 1) the process and procedures used for developing estimates, and whether those procedures are rational and were being followed; 2) whether current estimates were reasonable, accurate and based in historical project performance; 3) the probability that the project would be completed within current estimates; and finally, 4) to provide an independent assessment of current estimates.

The assessment team concluded the ATS Re-Engineering Project was functioning and moving forward within current budget and schedule estimates. Further the system being built was "clearly acceptable to users" and possessed "functionality." While project schedule appeared to have "shifted multiple times since the project initiation," the project continued "to move toward a successful completion," despite being "significantly delayed

from the original plan." The report noted that challenges remained that "could result in further project delays," but that "[t]he project appears on course to deliver application functionality that will meet the business needs of the Assessor Department in the timeframe currently estimated." The one area where the assessment gave the Assessor's Office a "minimal" progress status rating regarded "communication with stakeholders and documentation of progress (schedule and budget). In looking to the future the assessment report identified several risks to ATS Project completion, their probability of occurrence and the consequences to the project. Among those found probable were 1) the unavailability of sufficient funding to complete the project, and 2) inability to complete project stages by the estimated dates due to the Assessor's other ongoing business priorities.

2. The 2006 Report

In September 2006, the State board of Equalization released an "Assessments Practice Survey The survey noted "one area of concern" which was in the Assessor's processing of supplemental assessments. The survey noted that the assessor was issuing supplemental assessments for changes in ownership in, or new construction on, possessory interests on the *secured assessment roll*. However, the Assessor was not issuing supplemental assessments for such changes for possessory interests on the *unsecured roll*. The report further stated as follows:

[R&T Code] Section 75.14 provides that all property except as otherwise provided by section 75.5, subject to the assessment limitations of article XIIIA of the California constitution shall be subject to supplemental assessments. Possessory interests are real property and subject to supplemental assessments whenever there is a change in ownership or completed new construction. The assessor's practice is contrary to the requirements of law, and could result in a loss of tax revenue.

The response of the Assessor was: "We concur. We will develop an action plan to implement this change."

D. Internal Memos

Preceding the 2006 report two managers sent a memo to the Assessor dated December 9, 2005. The memo noted that while supplemental assessments were currently being done on the "secured" roll, changes in possessory interests involving the "transfer of cable or cellular phone towers, billboard, etc. company PIs and any change in terms associated with an existing PI are not supplemented on the unsecured roll." The memo noted that the R & T Code required assessments for such changes and recommended that "appropriate procedural and system changes be instituted." It was also suggested that, "Computer Systems be authorized to begin examining system modifications needed to allow Unsecured Roll supplemental assessments similar to those done for the Secured Roll."

E. Contact with other Inquiring Agencies

1. State Board of Equalization

Contact was made with the State Board of Equalization. That department conducts audits of state assessor's offices every four-five years. Their last audit of the Orange County Assessor's Office was conducted in 2006 and the report referred to above was issued. Contact was coincidentally made as the Department's "Survey Group" was in the midst of conducting its 2010 audit of the Orange County assessor which will be completed and reported next year.

Department personnel were initially unaware of the present allegations upon contact by this office. They reported, that to date they had witnessed no evidence that would support an allegation of refusal to carry out the requirements of office. They noted generally that many of the counties in the state, especially the more populated ones, can't consistently collect all of the unsecured supplemental assessments due to their frequency and number. In addition their current computer systems are not designed or capable of ascertaining and assessing them all. It appeared to the Survey Group that the Orange County Assessor was trying to do something about this by pushing forward the implementation of its ATS Re-Engineering Project.

The Survey Group also noted that the figure of \$125 million in lost tax revenue that had been mentioned in press articles was an "impossible" figure. The amount of lost tax from missed unsecured supplemental assessments could not be anywhere close to such a figure. The Survey Group confirmed what Assessor employees had told our investigators: Most of the larger unsecured supplemental assessments had already been moved to the secured rolls where they could be tracked and assessed by existing computers. Only the smaller, unsecured PIs had remained on the unsecured rolls and these have been of less significance in recent years as the decline in the economy has meant less new construction to assess. The only way for any county to reliably and consistently capture all such interests is to do a "manual work around." That would essentially require a massive labor force to manually and continuously search the county for each and every unsecured supplemental PI, requiring the expenditure of "thousands and thousands" of labor hours, or other significant resources to acquire what may not be significant tax revenue.

In such circumstances, the fact that *all* of the unsecured PIs could not or had not been collected is not evidence of a willful refusal to carry out the duties of office. The recent economic climate has resulted in declining real estate values throughout the state. This has caused a "huge" increase in "workloads" among the State's county assessors as the reduced values of real estate have prompted a flood of demands for reassessments, a demand which *must* be met. With the concomitant decline in budgets and personnel this has resulted in more work for assessors with fewer resources or time to perform it. Deciding what to do in the face of an increased workload and limited resources is essentially a balancing of priorities. It appeared that the Assessor was trying to reasonably balance those priorities.

With respect to their 2006 Report which noted the need for improvement in the Orange County Assessor's collection of unsecured PIs, it appeared that the ATS Re-Engineering Project was started within a year after the report. The new system appeared to be such an improvement as recommended in that report. The ATS Re-Engineering Project appeared to be a "good faith attempt" to implement improved capabilities to track and assess supplemental PIs as recommended in the 2006 Report. The Survey Group was

continuing its survey and would report to and cooperate with law enforcement in the event that it uncovered any evidence of wrongdoing.

2. CEO's Office

The CEO's Office contracted with an independent management consulting firm to investigate the allegations made against the Assessor's office. This firm contacted this office soon after the allegations were brought forward. The firm had wished to establish contact with persons at the District Attorney's Office to whom it could forward any information of wrongdoing in case it was uncovered. Contact was maintained with this firm up until the conclusion of this inquiry, which freely shared its findings with this Office.

In its investigation this firm extensively interviewed numerous individuals in the Assessor's Office. It found no evidence of criminal wrongdoing or refusal to perform the duties of office. The firm did note that the ATS Re-Engineering Project is a new complicated computer system which is being designed to catch and assess supplemental property interests that are otherwise escaping detection. It is to be expected in such a new complicated system that there will be glitches and cost overruns. The firm reported that employees were upset with some of their supervisors, the progress of the ATS RE-Engineering Project and other labor related issues.

V. Conclusions

As noted above the District Attorney's jurisdiction to investigate and prosecute governmental officials or indict them for removal from office is limited to criminal offenses or *willful refusal* or *deliberate failure* to perform the duties of office. The evidence adduced does not support probable cause to believe in the existence of either.

Initially, it appears that the allegations were brought forward only after employees were informed potential layoffs and/or furloughs were being considered. These employees considered the matter a "labor issue." The goal was to get the ATS Re-Engineering Project "suspended" to free up funds to pay employees and avoid layoffs. Only one witness, a former employee, forcefully asserted criminal liability or refusal to perform the

duties of office, but these allegations were not sustained by any of the evidence developed in this inquiry. In fact the evidence in virtually all areas developed *contradicted* these assertions.

For example, the allegation that the use of Assessor employees to assist in the ATS project constituted an illegal "diversion" of public funds was not sustained. In fact the developed evidence contradicted this allegation. The contracts, as was noted by the Assessor, and confirmed by this inquiry's independent review, provided that the contractors were to "support" the Assessor's Office in instituting the new computer system, not that they were solely responsible for it. In fact under the explicit terms of the contracts, the contractors are not solely responsible for getting the ATS system on line, and the Assessor is free to assign additional personnel to assist the ATS project.

Nor was the allegation that "diverting" personnel to assist the ATS Re-Engineering Project was a willful refusal to perform the mandatory duties of office sustained. One complainant acknowledged that it would not be possible to manually track and assess all of supplemental interests in the County. Personnel from the State Board of Equalization's Survey Group also acknowledged that to do so would require a large increase in manual labor resources that would not necessarily be justified by the extra supplemental PIs thereby assessed. To do so with reasonable efficiency and economy required a new ATS system which the Assessor was striving to implement. Once fully operational the new ATS system will be able to better track supplemental assessments.

Given the evidence developed in this inquiry it cannot reasonably be concluded that the Assessor's decision to "divert" personnel to help get the new ATS system operational even at the expense of failing to consistently assess all unsecured supplemental PIs is a willful failure or refusal to perform the duties of his office. Rather, under the circumstances the Assessor faces, it appears to be a rational choice among competing priorities in the face of a huge increase in workload and a decline in resources prompted by the current adverse economic climate. The fact that other current or former employees, or their union representatives may disagree with that judgment does not make it a criminal offense or a refusal to perform the duties of office. The fact that

budgetary shortfalls prompted by the current economic climate may threaten potential furloughs or layoffs, even as resources are being applied to the ATS Re-Engineering Project and that some employees or union representatives feel the money should go to employees to avoid layoffs likewise does not alter the analysis or change that conclusion.

The allegation that the sole source contracts were illegal was also not sustained by the evidence. Each was approved by the Board and was made with contractors with prior experience with the County, who were familiar with its computer systems and on the County's Master contract list. There was also no credible evidence that the Board was intentionally misled into approving the contracts. An independent inquiry by this Office's IT personnel into the presentations made to the Board revealed that no false claims of completion were made. Other "stakeholders" including the CEO, Auditor and the Grand Jury have periodically received presentations by the Assessor detailing the progress. There is no evidence developed that these entities were misled either.

With respect to the modest political contributions made to the Assessor by one manager of one of the contracting firms: The Orange County Campaign Reform Ordinance ("Tin Cup," OCCO, Title 1, Div. 6, Art. I, § 1-6 et seq.) was reviewed as were applicable state statutes. (Gov. Code §§ 1090, 87100 and 84308). The contributions were duly reported and not in violation of any of these laws.

The vague allegations by one former employee that there was "favoritism" or "special treatment" or that the assessor has an "inordinate fascination" with one of the contractors did not allege any potential illegality and is more in the nature of a complaint of labor conditions not within the jurisdiction of, nor warranting further inquiry by, the District Attorney's Office.

The only difficulties in assessing and collecting unsecured supplemental assessments acknowledged by the Assessor concerned possessory interests in cable lines. It appeared that the Assessor was trying to compensate for these difficulties by negotiated agreements with the cable companies on valuation, and by billing them for the entire year following the laying of the cables irrespective of whether the companies possessed those

interests for the entire year or not. Under the developed evidence it cannot be concluded that this practice constitutes an illegality or refusal to perform the duties of office as contemplated by Govt. code 3060. In the first place, if these interests are transitory in nature, it is not entirely clear that all would constitute "possessory interests" (PIs) as defined by R&T Code § 107 and therefor subject to supplemental assessments. Assuming these interests are "sufficiently durable" and constitute taxable PIs, the Assessor's judgment in this regard does not appear to be an unreasonable election among competing priorities in the face of limited resources and a large increase in workload.

It cannot be fully determined through this inquiry to what extent the Orange County Assessor's Office has been unable to consistently identify and assess all supplemental possessory interests. The State Board of Equalization has indicated that many of the State's counties share this difficulty and the new ATS computer system is intended to address that concern. Some of the complainants themselves have acknowledged this has been a long standing problem predating the administration of the present Assessor by decades. To what extent, if any, the Assessor's Office has been unable to fully and consistently assess all supplemental assessments of unsecured Pls, it does not appear to be the result of criminal conduct or a willful refusal to perform the duties of office. Further inquiry into this area, however, may involve matters which fall within the supervisory powers of the Board of Supervisors.

It appears that the Board is, and has properly been, exercising those supervisory powers. The Board recently contracted with a private consulting firm to inquire into the operations of the Assessor's Office. That inquiry has maintained continuous communications with this office and has reported no findings different from those independently reached herein. In addition to the Board's current inquiry and its oversight of the contracts, the Board previously commissioned another private, independent consulting firm to conduct an inquiry into the system in 2009. Contrary to the allegations of some of the complainants, that firm's report concluded that the ATS Re-Engineering Project was "functioning," "moving forward" and was "acceptable to its users." While there had been

delays in the completion date and costs increases, the project was progressing forward "on course," though further delays should not be unexpected.

The Auditor's Office was also inquiring into the Assessor's Office until the single former employee referred to above made allegations of criminal wrongdoing prompting the Auditor's Office to cease its inquiry and refer the matter to this office. Those allegations having been determined to be unfounded, the Auditor's office remains available to continue its inquiry, even as a Survey Group of the State Board of Equalization conducts its own. That would make four independent inquiries into the Assessor's Office in less than a year. This Office's inquiry would make it five.

The allegation that the prior inquires had not reached appropriate conclusions because they did not talk with the "right people" was also not sustained. When interviewed in the course of this inquiry none of these "right people" produced convincing evidence of either criminal activity or a willful refusal to perform the duties of office. All but one stated that they considered the matter a "labor issue." Only a single complainant, a clearly unhappy former employee, has forcefully alleged criminal wrongdoing and produced what he considered evidence thereof. That evidence, however, was not sustained but in fact contradicted by the results of this inquiry. That same complainant had suggested that an independent agency familiar with the ATS project review it. As noted that has been performed multiple times within the past year, and is currently being done.

As this inquiry neared completion this same former employee submitted additional allegations of a similar nature. These were reviewed, appeared cumulative to the earlier ones and within the supervisory powers of the Board of Supervisors. Accordingly, they will be referred back to the Auditor's Department for their review along with the earlier allegations. This inquiry, however, has generated no evidence that warrants or justifies further action by the District Attorney at this time and accordingly it is recommended that it should be deemed closed.

^{*} When employees* appears the number has been left purposefully vague to help preserve confidentiality as desired by the witnesses interviewed.