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Complaint 06-07-09: County District Attorney/Superior Court

The Grand Jury declined to investigate since it involved criminal activity and outside the jurisdiction of the Grand jury.

Complaint 06-07-10: Dos Palos City council

The Grand Jury declined to investigate the complaints against the Dos Palos City Council since the complaints were primarily based on disagreements with the actions of the City Council and the November 7, 2006 election resolved the issues.

Complaint 06-07-11: Merced City Police Department

The Grand Jury declined to investigate since the complainant made general accusations about murders, kidnappings and rapes that are allegedly unresolved throughout the central Valley.

Complaint 06-07-12: Dos Palos, a City in Turmoil

Introduction

The Grand Jury has been involved in a number of complaints related to city governance and police department operations. Pursuant investigations evolved from several complaints including:

- 1) The Chief of Police allegedly failing to return a police dog purchased with funds provided by the Dos Palos Police Association.
- 2) Citizen complaint against the Dos Palos police officers for a forced entry in to a residence knowing there was no one in the residence.
- 3) Other complaints included: allegations the Dos Palos Police Department was poorly managed; the police were “stalking” elected officials, and complaints against the elected officials of the City of Dos Palos.

Further inquiry revealed elected officials of the City of Dos Palos have been at odds with the City Manager and the Chief of Police over a variety of issues. This conflict has caused considerable polarization within the community that ultimately resulted in 1) termination of the City Manager due to his refusal to fire the police chief, 2) Chief of Police being on paid administrative leave with the Sheriff Department managing the Dos Palos police department, 3) resignation of one city council member, 4) a recall effort against an other council member, and 5) the defeat of the Mayor and two council members in the November 7, 2006 elections.

To date, this is the current status of said complaints:

- 1) Case Number 06-07-07 (Forced entry complaint) Report completed and available on the Grand Jury website.

2) Case Number 06-07-10 (Complaint against City Council) Rejected by Grand Jury due to recent election of a new Mayor and Council.

3) Case Number 06-07-08 (Police dog complaint) Investigation in progress.

Method of Investigation

- First hand observation & tour of facilities (including police and dog pound)
- City Council minutes
- Interviews with prominent participants from all reported agencies and elected officials

It is evident that relations between the City Manager, Chief of Police, and the City Council have been deteriorating for some time. The Mayor and the Council lost confidence in the ability of the two appointed leaders to manage police issues and the elected officials responded by micro managing the City and its Police Department. There is no question the Dos Palos Police Department was poorly managed. When the Grand Jury first visited the Dos Palos Police Department in September, they found the police department in total disarray. The Department was severely understaffed, officers being terminated during probation, an officer was placed on paid administrative leave while being investigated for failure to perform required duties. The Officer was ultimately terminated and indicted by the District Attorney. The turmoil in the police department escalated when the Mayor sided with the officer, and the officer started reporting internal department issues directly to the Mayor and Council members. The officer's rationale for going to elected officials was alleged personal relations between the Chief and favored officers, including a female officer, and the Chief failing to discipline select officers.

As the Mayor and Council members became more involved in the police department issues, the tension between the Mayor/Council and the City Manager and Chief of Police continued to escalate. At some point the Mayor and Council members initiated their own investigation to determine what department members were doing while on-duty.

Eventually, elected officials claimed the police were "stalking" them and police officers accused elected officials of "spying" on them and interfering with their duties. Elected officials (Mayor/Council) responded with a memo (also approved by the City Attorney) to police officers commanding them to "stay away from the elected officials and their residences". Police officers responded by accusing the Council of interfering in police department duties as officers attempted to provide law enforcement to the entire community.

The turmoil further escalated as the City Council ordered the City Manager to fire the police chief. The City Manager refused on grounds that he considered council actions illegal. At one point, both the Chief of Police and the City Manager were accused of taking documents related to city business out of their offices. Members of the council, who called the Merced County Sheriff Department to prevent the removal of the documents, observed these actions of the two city employees.

The Chief of Police requested the Grand Jury Foreman take possession of confidential documents related to Internal Investigations on individual police officers. The Grand Jury refused acceptance of documents citing violations of police officer rights under the Peace Officers Bill of Rights.

When the Grand Jury Foreman later questioned the Chief of Police on the location of the documents, the Chief stated, "They are on my kitchen table". When advised the documents belonged to the City of Dos Palos and should be returned, he stated that the City Attorney also had copies of the documents.

At the conclusion of a meeting with the Mayor, the Mayor handed a stack of documents to a member of the Grand Jury. Upon later reviewing the documents, it was discovered that among the documents provided by the Mayor, were copies of Internal Investigation reports on Dos Palos police officers. All copies of said Internal Investigation reports have been shredded by the Grand Jury as confidential records not subject to Grand Jury or third party review except by noticed Court Order. It should be noted most of the copies provided by the Mayor, were related to the officer who was terminated.

The City Council attempted to schedule meetings to fire the City Manager, however, they were cancelled because of poorly prepared agendas in violation of law. Had those meetings proceeded, the meeting would have been in violation of the Brown Act. Following posting of a legal meeting agenda, the City Council fired the City Manager and appointed an interim City Manager. The interim City Manager placed the Police Chief on paid administrative leave and entered into negotiations with the Chief to obtain his resignation. The City Manager also prepared documents to terminate the Chief's employment.

Dos Palos Police Department Visit by Grand Jury

Prior to a visit to the Dos Palos Police Department (on September 25, 2006) members of the Merced County Grand Jury obtained subpoenas to examine the Department's complaint log, complaint files, evidence log and evidence and presented the Chief with said document.

Physical examination of the facilities revealed the entire office, including the officers' report room, as filthy and unkempt.

- Chief's office disorganized and crowded with random materials
- Over-flowing trashcans throughout facility
- Paper, books, boxes and equipment randomly stacked on the floor
- Missing ceiling tiles exposing wood frame construction
- Evidence and supplies stored in holding cells with no apparent organization
- All holding cells were dirty and disorganized, with one cell also containing a bed, blankets and pillows
- Some officers possessed unauthorized weapons and/or were not certified to operate said weapons (Note: No officers are qualified to operate a fully automatic Colt M-4 rifle located in a patrol vehicle which is apparently available to whomever is assigned to this unit while on duty.)
- Dirty patrol vehicles (inside and out) with several having unusually high mileage
- DPPD weapons were in need of maintenance or parts, including rust, dirt, grime and mold on some weapons

- Severe understaffing (note records indicate that although population as significantly increased, the department is currently working with seven (7) fewer officers than in 2002)
- Staffing does not reflect an adequate chain of command within the department, including no middle management positions (Sergeant vacancy since 2004) between department head and patrol officers
- Inadequate staffing does not adequately cover normal patrol or vacation, sick leave, holidays or required training; officers required to work 12 hour shifts
- Only one (1) patrol officer covers duties beyond patrol including detective position, evidence management, training and the review and approval of existing reports and scheduling (Note: With proficient staffing, these positions are normally executed with 3-4 additional officers qualified in these specific obligations)
- Unable to locate files containing training of officers, including annual qualification requirements for weapons (non-compliance according to P.O.S.T. standards) - only 2 officers' certificates could be produced documenting training compliance and 3 full-time officers were clearly out of compliance
- Only two officers have completed a P.O.S.T.-certified 24 hour training
- Although officers may have formally been cleared, personnel files do not have documented clearance from California Department of Justice/F.B.I or D.M.V; others do not have results from the required psychological testing, credit card clearance, Selective Service registration or even high school diploma or specialized training for supervision or working in K-9
- Evidence room
 - Inadequate space with numerous pieces without tags or documentation; no over-all legal system of documentation; items not identified as evidence, police or personal property
 - Unidentified pieces of property located in patrol units (including clothing, knives & bats)
- Preliminary scrutiny of existing reports indicate 60 open felony files (dating from 2005 to present) including:
 - 11 sex crimes
 - 5 felonious assaults
 - 44 property violations

When originally asked about examining the evidence room the chief stated he did not have a key. When advised he was required to have a key, he had no response. Additionally, the Chief could not produce a complaint log, adding that he had just one citizen complaint that he kept on his computer. The Chief was advised that the Grand Jury had received three citizen complaints this year and two from last year, all involving the Dos Palos Police Department. The Chief continued to insist he had received just the one citizen complaint this year. (Note: It was not one of the complaints received by the Grand Jury). The Chief further related he was aware of state laws requiring police departments to maintain a complaint log and the chief's obligation to investigate all citizen complaints.

Regarding a sexual assault complaint (June 2005), the Chief said the City Manager had advised him of such a complaint, adding that the City Manager had forwarded the complaint to the District Attorney. The Chief stated the first time he actually read the complaint May 2006 as shown to him by the District Attorney's investigator. The

Grand Jury advised the Chief the complaint mentioned him and that he was required by law to conduct an internal investigation to which he replied he was not aware of the details or the mention of his name.

Other issues discussed with the Chief included the status of the Dos Palos Police Department dogs. The Chief stated he was training the dog, Cubby, when he was appointed as the Chief of Police. The Police Officers Association paid for the dog. Upon completion of the dog's training, the city was going to pay for it. The Chief said his Police Association dues were doubled to assist with purchase of the dog, and to help pay for food and veterinarian bills. After becoming Chief, he said he requested the Dos Palos Police Association take back the dog but was told they did not want the dog. The Chief said the Association sent him a letter stating he could keep the dog and did not owe the Association, yet he was unable to provide proof of a letter to the Grand Jury. With no documentation or written agreement regarding the ownership of the dog, the dog is considered to be city property. The Police Association has since purchased another dog from the Monterey County Sheriff's Department and this dog is neither trained nor certified.

When asked about the Dos Palos Police Officer's Association, the Chief stated he previously had been an Officer of the Association until his promotion to Chief. He was authorized to sign checks against the Police Officers Association checking account but it also required two signatures. When specifically asked if he was still on the checking account he stated he did not know. When questioned about checks written on that account, he replied that he did not know. When specifically asked who was in charge of the checking account he named a Corporal who is a department member. The Grand Jury is continuing its investigation of the finances of the Dos Palos Police Association including subpoenaing Association bank records.

Members of the Grand Jury, who inspected the dog pound, questioned the Chief regarding the deplorable conditions of the facilities under his jurisdiction. The members advised the Chief there were complaints of animals that were not being provided food or water, and left in the animal control truck over the weekends. Some of the animals had died at the pound. The chief admitted awareness of the problems including poor condition of the old dilapidated building. He added he bought dog food with his own money, as well as, other citizens have also donated food. He hired an animal control person last month and anticipates improved conditions.

The Chief discussed his staffing and budget concerns including a sergeant's position, vacant since 2004. He concluded he was understaffed and did not have a sufficient budget to provide the required community services.

The Chief was asked about the August 2006 incident in which several officers went to a house searching for a suspect, forced entry into the house but found no one home. The damage to the door and frame cost the city \$947.00. The Chief stated when the residence's owner contacted him, he told the owner he was looking into this incident and that he had some issues with the officers involved with this incident. He would not comment further. (See Grand Jury Complaint # 06-07-07)

The Chief was asked about the officer on paid administrative leave and stated the officer was a "whistleblower" who went to the city council and complained about departmental internal operations. The Chief stated he was told by the City Council not

to take action against the officer. When asked about the removal of the Internal Investigation files from his office, he stated he removed them from his office for "safekeeping". He subsequently gave the files to the City Attorney, after attempting to give the files to the District Attorney and the Grand Jury. When the Chief was asked if he had observed any Brown Act violations, he refused to comment.

The Chief also told the Grand Jury about a meeting with School Board members when he was asked to run background checks on some non-students who would be attending a school dance. The Chief complied with that request and later told members of the School Board that there were some non-students who did not pass the background check but he would not provide specifics as to why they did not pass. This created some controversy between the School Board and Police Department. He also mentioned an incident in which a city council member's son had been arrested and tased. The city council member blamed the Dos Palos Police Department for the tasing, however a follow-up investigation indicated a sheriff deputy had tased the councilperson's son.

The Chief volunteered that he occasionally patrols the city in his own personal vehicle. He was asked to justify how his personal vehicle qualifies as an emergency vehicle, including a red light, siren, radio, first aid kit and fire extinguisher, but he could not provide any reasonable explanation.

The Grand Jury obtained pictures of the Chief and a female subordinate officer, taken at parties attended by the Chief and other members of D.P.P.D. These pictures show a level of fraternization between the Chief and his subordinates that would preclude the disciplining of subordinates or credible leadership, especially in disciplinary matters.

Interview with Former City Manager

On October 18, 2006, Grand Jury members interviewed the former City Manager regarding D.P.P.D. Issues discussed included the complaint log and investigations of citizen complaints. The former City Manager was advised state law requires police agencies maintain a citizens' complaint log with the Chief of Police required to investigate all citizen complaints against the police. He stated he was unaware of such legal requirements. Asked how citizen complaints were handled in the City of Dos Palos, he said the City Manager received all complaints and handled them from a city liability standpoint. He added no complaint documentation was maintained except when it involved potential city financial liability. He mitigated the remainder of the complaints and was unable to provide documentation on the previously mentioned complaints.

He was also adamant that council members had been in violation of the Brown Act. He recounted an incident on August 26th (Saturday) when he claims five council members had unlawfully met away from their usual meeting place. He said he warned them about the possible Brown Act violations. He also stated these same members later appeared at his office, where he again warned them about discussing city business in violation of the Brown Act. He claims he is aware of three to four other

similar occasions of meeting and discussion contrary to law, with one such meeting allegedly conducted at a councilman's home.

The council members complained that the police were patrolling near council members' homes thus effectively "harassing" them. The council members also stated that they believed the Police Chief was removing sensitive documents from his office. The former city manager said he left a message for the City Attorney to inform him of the possible Brown Act violations.

When questioned regarding Police Department problems, the former City Manager denied responsibility, although he is the immediate supervisor with clearly defined responsibility for oversight of the police department. The Grand Jury feels he should have been aware of all issues including a serious lack of compliance by the police of departmental rules and regulations, as well as state regulations. This negligence includes failure to hire competent police managers. Citing that crime and graffiti problems were down, and as far as he was concerned the police were doing a good job. Despite what appeared as micro-management of city departments by the City Manager, he adamantly denied knowledge of any problems associated with the police department. When questioned about his conflict with the City Council, he blamed problems on the Mayor and city council. He claimed all the turmoil began when the city council appointed a new member following the death of an elected council member. When asked about the memo that ordered the police officers to stay away from council members, he blamed the City Attorney.

Regarding inferior staff work resulting in cancelled City Council meetings, the former City Manager replied that he used to make up the agendas, but the City Attorney was currently composing them and that he had not reviewed them for accuracy. Note: Although it is true the city attorney composed the agenda, but the City Manager is ultimately responsible and after 15 years as a city manager, he should have known how to produce a legally compliant agenda.

The City Attorney has failed to provide the City Manager and the City Council with sound legal advice relative to the City's agenda compliance with the Brown Act.

Sheriff Department Interview

October 23, 2006, members of the Grand Jury interviewed the Sheriff's Department members who took over the management of the Dos Palos Police Department. Issues regarding the evidence room and evidence log were mentioned. They concurred with Grand Jury findings that there was no evidence log, and that some of the property in the evidence room dated back to 1985. They located handguns and rifles with no evidence tags attached, as well as, undocumented evidence. They also explained the chief had given his key to the evidence room to a clerk who later misplaced it.

The Sheriff Department has provided the City Council and the interim City manager with detailed reports on the discrepancies found in the police department audit. The Sheriff's police manager is taking action to correct as many discrepancies as possible, citing that one of the major problems pertains to police reports. Approximately two

hundred plus reports are missing or incomplete with over one hundred reports that were solely the responsibility of the Chief.

Animal Control

The Animal Control Officer has been on the job for only one month. It is a minimum wage position, scheduled for five hours per day on weekdays plus weekends as required, and on-call hours as needed. Despite very poor facilities, lack of funds and vehicle maintenance needs, she does the best she can, and should be commended for her efforts. She claims she took the position primarily because she loves animals, not for the money, a sentiment the Grand Jury found credible. She feeds and waters the animals three times a day on weekdays and twice a day on weekends. Police Department patrol officers must assume her duties when she is sick or otherwise unavailable. She states her work hours are from 6 AM to 10 PM. These hours include periods during which she is on-call to pick up strays, not necessarily actually working at the facility. The facility is in very poor condition. It consists of a cinder block shack, with three cages designed for dogs and a number of cages for cats or other small animals. The three dog cages are built such that half of each cage is under cover, while the other half is outside; the two halves can be isolated from each other by means of vertical sliding doors. These doors can also be used to, in effect, make six cages out of the three. In such a case, however, three of the cages would be under cover, while the other three would be totally outside, exposed to the elements. At the time of our visit, two of the sliding doors were inoperative; so only one cage gave the dog access both inside and outside. The other dogs were confined to either inside or, for one dog, outside at all times. The building has no heating or cooling exposing animals to valley temperature extremes. The cages had just been cleaned, but the Animal Control Officer advised that the drains in the cages were plugged causing wastewater to drain very slowly. A new pre-fabricated building has been obtained by the city, but funds to erect it on the site are apparently not available.

The facility has no capability to handle large or atypical animals. When warranted these animals are brought to area "foster keepers". If veterinary services are required, a veterinary in Los Banos is contacted. When we asked about feed for the animals, we were told that all feed is either donated by local citizens or purchased by the Police Chief, presumably out of his pocket! One of our committee members informed the officer that the County Animal Control agency will provide feed if needed. The officer stated she doesn't have required data on some animals requiring special handling, including pit bulls or other potentially dangerous animals. She states she hasn't been given any guidance or procedure manual. Upon our return to the P.D., we located an animal control procedures manual and presented it to her. The animal control vehicle is in dire need of repair to its built-in cages. There are large holes in the wire mesh of the cages allowing small animals, including cats, to easily escape during transport.

Findings

- 1.The elected and appointed leadership of the City of Dos Palos has failed in their responsibilities to the citizens of the community.
- 2.The Mayor and City Council of the City of Dos Palos failed in their responsibilities to provide policy guidance to the City Manager.

- 3.The Mayor and members of the City Council micromanaged the city government causing conflict with the appointed managers.
- 4.The City Manager failed to provide sound advice to the Council and refused to comply with orders from the elected officials.
- 5.The City Attorney failed to provide proper legal advice to the Elected Officials and the City Manager regarding preparing agenda's under the Brown Act.
- 6.The Chief of Police failed in his duties as the manager of the Police Department
- 7.In excess of two hundred police reports have not been completed. Numerous reports are related to felony type crimes resulting in a failure to enforce laws.
- 8.The Chief of Police's fraternization with subordinate officers, including female officers, has undermined the authority of his position.
- 9.The Grand Jury also questions why the District Supervisor did not play a more active role in solving the governance problems in his district.

Recommendations

- 1.The Grand Jury finds that a complete "house cleaning" is needed to restore faith in local Government.
- 2.Citizens of the community should continue the recall effort initiated against the sole remaining member of the previous City Council since the member was part of the problem.
- 3.The newly installed City Council should fill the currently open City Council seat through a special election and not through appointment.
- 4.The Dos Palos City Council should hire a new City Manager to assure that the city is in competent hands.
- 5.The City Council should continue to obtain police management services from the Merced County Sheriff department until such time as the City is able to hire a competent police chief.
- 6.The City Council and City Manager need to evaluate the entire Police Department and assign resources to bring the department up to standards and legal compliance.
- 7.The Merced County District Attorney should investigate the missing police reports to determine if crimes have been committed and if due process of law has been followed.
- 8.The Merced County District Supervisor should take a more active role in solving governance problems in his district.

Response to report 06-07-12

December 15, 2006

Merced County Grand Jury
P.O. Box 2034
Merced, CA 95344

Dear Grand Jurists:

It's with great dismay and disappointment that I recently read the Grand Jury report pertaining to the issues in Dos Palos and specifically your criticism of me for not playing a "...more active role in solving the governance issues."

I take exception to the criticism for several reasons but primarily because I have always prided myself on representing my district and its issues at the County level. Moreover, as I've always demonstrated and advocated for, I also have great respect for municipal jurisdictions and local governance.

I find it quite interesting that the Grand Jury report found it appropriate to criticize me, yet I was never interviewed nor met with any member of the Grand Jury.

As to the validity of the report and its criticism of me as a County Supervisor, I simply had no jurisdiction by which to intervene. I refer you to the attached response of Merced County Counsel James Fincher. I simply asked him to review and determine whether a member of the Board of Supervisors would have any legal authority over a city. To this point, again as a County Supervisor, I was not privy to Dos Palos City Council closed session discussions; city documents, personnel records, nor was I ever asked for assistance by any member of the city council.

While it's easy to point fingers and assign blame, I should have - at minimum - been interviewed. Also, contrary to the opinion of Foreman Van Vanderzyde, I did not believe it was in my or the City's best interest to attend all of the City Council meetings when the turmoil was occurring. I can assure you I was aware of what was going on and responded when necessary as evidenced by presenting the City Council with a \$9,000 + check for roof repairs on a County/City facility.

As a lifetime Dos Palos resident, I love my community and have found our recent challenges troublesome but truly believe that our city will have better days in the future.

Respectfully,

Jerry O'Banion

County Supervisor, Fifth District

TO: Supervisor O'Banion

FROM: James N. Fincher, County Counsel

DATE: December 7, 2006

RE: Board Member's authority over city governments within the represented District's territorial boundaries

The Grand Jury Report regarding the City of Dos Palos, states in its Findings that it "questions why the District Supervisor did not play a more active role in solving the governance problems in his district"; and in its Recommendation further states that the "Merced County District Supervisor should take a more active role in solving governance problems in his district." The Grand Jury did not interview Supervisor Jerry O'Banion.

What the Merced Grand Jury fails to understand is that neither a member of the Board of Supervisors nor the County of Merced, acting through its Board of Supervisors, has the ability to override or intercede in city matters of governance and powers. A member of the County Board of Supervisors is no different than a private citizen or city resident in matters of city affairs. Even though a city may be within the boundaries of a county and supervisorial district, cities and counties are territorially and jurisdictionally exclusive of one another as to police powers. General law counties, such as Merced County, are created and governed by Section 1 Article XI of the California Constitution, while general law cities, such as Dos Palos, are created and receive their constitutional municipal powers and governance under Section 2 Article XI of the California Constitution. (See also Government Code section 23000-et. seq. regarding counties governance versus Government Code section 34000-et. seq. applicable only as to the governance of cities, their powers and duties.) Article XI Section 1 of the California Constitution has long been recognized by the California Supreme Court to distinguish county governments from that of municipal cities (*People ex rel. Graves v. McFadden* (1889) 81 Cal. 489.)

California Constitution Article XI Section 7 provides that: "A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." (Emphasis added; see also Article XI Section 11 of the Constitution as to similar effect.) While cities and counties may share common powers and duties within their limited jurisdictions as provided for under the California Constitution and California statutory law, counties are distinct political subdivisions of the State of California and separate legal entities from that of cities and other local agencies. (Section 23002 of the Government. *In re: Board Member's authority over city governments within the represented District's territorial boundaries*

Code; *Abbott v. City of Los Angeles* (1958) 50 Cal.2d. 438.) The consequence of the foregoing is that "A county is a governmental agency or political subdivision of the state, organized for purposes of exercising some functions of the state government, whereas a municipal corporation is an incorporation of the inhabitants of a specified region for purposes of local government." (*County of San Mateo v. Colburn* (1900) 130 Cal. 631, 636.)

Therefore while all counties are subdivisions of the state, cities are not legal subdivisions of the counties, leaving the cities also free of county regulation or control. As an example of the lack of authority a county has over a city, the California Supreme Court, in *Ex parte Roach* (1894) 104 Cal. 272, held that the city ordinances whose territory is within a county will supersede any ordinance of the county upon the same subject. *Ex parte Roach* has stood to this day for the legal recognition that a city "...is withdrawn from the legislative control of the county... and is placed under the legislative control of its own council..." (*Ex parte Roach* (1894), *id.* at p. 277; see also the Supreme Court decision in *Ex parte Pfirrmann* (1901) 134 Cal. 143 to the same effect.) The California Supreme Court subsequently rejected the argument that a county has any concurrent jurisdiction to enact or interfere with a city's police powers. (*City of Oakland v. Brock* (1937) 8 Cal. 2d 639, 641.) Incorporated cities, such as Dos Palos, are free of state legislative control in contrast to general law counties like Merced County, which is subject to and controlled by state general laws. (*Blum v. City and County of San Francisco* (1962) *supra*, 200 Cal. App.2d at p. 645.)

Except as provided by the California statutes and State Constitution, and the necessary implied powers they're under, neither a county nor city have any legal authority or ability to regulate or Legally act. (*McCafferty v. Board of Supervisors* (1969) 3 Cal.App.3d 190, 192; 68 Ops. Atty. Gen. Cal 175.) Government Code Section 25303 requires that a county board supervise the Official conduct of all county officers, but provides that board members, as a whole or individually, have no authority to investigate or supervise duly elected and appointed city officers. In fact, it is the county grand jury that is in the unique position and empowered, pursuant to its watchdog powers under the California Penal code, to monitor operation or corruption of government, including all cities, city offices and officials, and to recommend the removal of such elected officials.

If this office can be of any further assistance, please do not hesitate to contact me directly.

City of Dos Palos Response



THE CITY OF **Dos Palos**

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February 5, 2007

Van Vanderzyde, Foreman
Merced County Grand Jury
P. O. Box 2034
Merced California 95344

Thank you for your acknowledgement to staff via e-mail regarding the previous response to Grand Jury report 06-07-07.

The following is the official response from the City of Dos Palos to the Grand Jury's (report 06-07-12) Recommendations:

Recommendation:

1. The Grand Jury finds that a complete "house cleaning" is needed to restore faith in local Government.

Response:

1. During the months of September and October 2006, 250-300 residents (roughly 15% of the voters) attended each city council meeting to observe their city council in action. Many voiced their concerns. On November 7, 2006, the voters turned out in record numbers on election day. The previous mayor garnered only 19% of the vote, the former councilmembers only 8% and 11%. Thus the people spoke. A new mayor and two new councilmembers were elected in decisive landslides.

Recommendation:

2. Citizens of the community should continue the recall effort initiated against the sole remaining member of the previous City Council since the member was part of the problem.

Response:

2. This city councilmember resigned on January 17, 2007.

Recommendation:

3. The newly installed City Council should fill the currently open City Council seat through a special election and not through appointment.

Response:

3. A special election was called for March 6, 2007 to fill this seat. Only one person filed papers to run in this election. When only one person files, state law provides the council with the ability to appoint that person to save the cost of the election (approximately \$3,000). He was appointed on January 17, 2007.

Recommendation:

4. The Dos Palos City Council should hire a new city manager to assure that the city is in competent hands.

Response:

4. With two interim city managers in two months time, following one with 16 years of competent city leadership which resulted in balanced budgets, paying off debt from previous decades, new business recruitment, new housing growth, new parks, utilities improvements, downtown restoration funding, significant grantwriting, reduced crime, bridge and street reconstructions, professionalism in dealing with developers, legislators, and other agencies, and above all, the ability to motivate staff to work together under conditions of low pay scales and tight budgets, the new city council unanimously felt that rehiring the former city manager was in the city's best interests. Should competence become a problem, rest assured this city council would take appropriate action and seek a replacement.

Recommendation:

5. The city council should continue to obtain police management services from the Merced County Sheriff department until such time as the City is able to hire a competent police chief.

Response:

5. The city council voted on January 16, 2007 to terminate a previous memorandum of understanding between the Sheriff and the previous city council which provided a full time law enforcement manager. Three sergeants were successively assigned to this duty on a part-time basis. During this time two rival gangs became visibly present on our streets and parks, a stabbing occurred involving rival youths, graffiti skyrocketed, and burglaries were up considerably. In fairness to the Sheriff's

Office, sergeants and deputies were given a caretaking role, not a command presence. Each of the new city councilmembers campaigned to the public that they would make every effort to bring back the chief of police and restore the Dos Palos Police Department. The chief's administrative leave was revoked, his termination has been rescinded. Upon the chief's reinstatement, two local gang members requested probation transfers to other jurisdictions. The new City Council believes that with adequate support, staffing, and resources, this chief of police can meet and exceed the demands expected of a competent chief of police. Should competence be determined as a problem, rest assured, this city council would take appropriate action and seek a replacement.

Recommendation:

6. The City Council and City Manager need to evaluate the entire Police Department and assign resources to bring the department up to standards and legal compliance.

Response:

6. Evaluation and direction are underway. With the support of the city council, the city manager and chief of police have completed a review of applications and have conducted oral board interviews. Background checks are underway to fill vacant positions of sergeant, patrol officer, reserve officer, and administrative assistant with competent personnel. The city manager and police chief have prepared and sent to the city council for adoption, a new mission statement, new police policy manual, and a new animal control policy. The chief of police has contacted POST for a updated review of all documents and evidence. The city manager has contacted the Risk Management Authority to obtain accepted guidelines, policies, procedures, and other evaluation tools. A plan to review evidence, training, complaints, is underway (see summary attached). Progress reports will be made to the city council at every regular council meeting (twice monthly) beginning February 6, 2007 and individually upon request.

Recommendation:

7. The Merced County District Attorney should investigate the missing police reports to determine if crimes have been committed and if due process of law has been followed.

Response:

7. An investigation by the District Attorney may be underway. The mayor, city manager, and chief of police have been in contact with the DA in regard to police reports. The city has provided the DA with the city's plan to inventory, research, prioritize,

and complete all reports. Updates of this process will be made to the city council at each meeting and every 30 days to the District Attorney. The city has agreed to keep the District Attorney informed and seek assistance should it determine an inability to complete the ambitious plan (see summary attached).

Recommendation:

8. The Merced County District Supervisor should take a more active role in solving governance problems in his district.

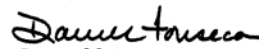
Response:

8. While cities and counties are each units of the state rather than of each other, it behooves local governments to work together in resolving common problems. Since the new city council regime began, the council, city manager, and police chief have made an effort to keep the Merced County Supervisor representing District Five involved, informed, and "in the loop" of major decisions affecting the City of Dos Palos. We will likewise expect the County Supervisor to continue to keep city officials informed of pertinent county matters.

The City Council will review these actions to determine if any further action, changes, or direction is needed. Thank you.

Sincerely,


Michael Burns
Mayor of Dos Palos


Darrell Fonseca
City Manager

Enclosure: Plan Summary.

Copy: Supervisor Jerry O'Banion

Reports

Beginning February 07, 2007, a two-week review of all reports that are missing or incomplete will be conducted.

Purpose:

To identify each and every report that needs to be address and to address them. Each report will be completed.

Any report that lacks the information to be solved and filed in a criminal action, will at a minimum, have a follow-up report done each 30 day period there after until such time that particular investigation can be closed.

Target completion date:

It is the intent to have the above completed no later than **March 23, 2007**.

EVIDENCE

Beginning February 21, 2007, a 100% review of the Dos Palos Police Department evidence will be conducted.

Purpose:

To identify each item of evidence that is maintained by the Dos Palos Police Department, to enter each item into the new Veri-Pic bar code evidence system, to generate disposition notices on all items that no longer require storage, and to obtain court approval for destruction.

To utilize this same system to generate monthly, quarterly, and yearly inventory audits of all items that are entered into the Dos Palos Police Department evidence system.

TRAINING

The Dos Palos Police Department has a new range training officer who is qualifying officers on a quarterly basis. He has received his qualifications in pistol, shot, and patrol rifle qualifications.

Dos Palos Officers were scheduled to take Post mandated courses in October 2006, however, during the events that occurred, all courses were cancelled. Each officer will be scheduled again to take courses when they are available to bring them up to standards.

OPEN POSITIONS

The Dos Palos Police Department held interviews for a second in command position as well as a patrol position on January 23, 2007. There are two applicants currently in the background stage of the hiring process.

In July 2007, The Dos Palos Police Department will make every effort to add an additional patrol officer to its on hand allotment of officers, if approved by the City of Dos Palos, City Council.

POLICY MANUAL

The draft of the Dos Palos Police Department Policy Manual has been completed. The Draft will be put before the City Council, and Operating Engineers Local 3, for adoption.

COMPLAINT LOGS

The Dos Palos Police Department has a complaint log that is separated into different categories. The categories are as follows;

1. Citizen Complaints
2. Employee Complaints
3. Internal Investigations

Citizen Complaints and employee complaints may generate an internal affairs investigation. Internal Affairs Investigations may also be generated by internal policy violations.

These logs are maintained in the Office of the Chief of Police

Merced County District Attorney Response

DISTRICT ATTORNEY

DISTRICT ATTORNEY
Larry D. Morse II

ASSISTANT DISTRICT
ATTORNEY
Joseph M. Tresidder



CHIEF DEPUTY
DISTRICT ATTORNEY
David Moranda

CHIEF DEPUTY
DISTRICT ATTORNEY
Harold Nutt

2222 "M" STREET, MERCED, CA 95340
TELEPHONE (AREA CODE 209) 725-3601
FAX (209) 725-3669
March 6, 2007

Van Vanderzyde
Foreperson
Merced County Grand Jury
PO Box 2034
Merced, CA. 95344

RE: Grand Jury Complaint 06-07-12
Dos Palos: A City in Turmoil

Dear Mr. Vanderzyde and Grand Jury Members:

In response to your recommendation Number 7, that the District Attorney "should investigate the missing police reports to determine if crimes have been committed and if due process of law has been followed," the following actions were taken:

In January I met with Dos Palos City Manager Darryl Fonseca and Merced County Supervisor Jerry O'Banion in my office to express my concern about the alarming number of police reports that had not been investigated by members of the Dos Palos Police Department. I noted that delays in the investigation of these cases and irregularities in the collection and preservation of evidence compromised my office's ability to successfully prosecute the underlying crimes.

Investigators in my office had been assigned to review the number of cases that had not yet been investigated. I've attached a report (attachment 1) I requested from District Attorney Investigator Anna Hazel in which she identified the number and nature of outstanding reports. As you can see, Ms. Hazel found that there were over 200 reports of open cases missing and/or incomplete. Forty-six were classified as felonies, including gang offenses, child molestation and domestic violence. Another 90 were classified as misdemeanor violations for such crimes as assault and battery, theft and vandalism.

Of particular concern to me was Ms. Hazel's calculation that the statute of limitations on five cases had already expired and that 69 others had statutes of limitations that would expire within six months of the date of her report. That means those cases have to be investigated, forwarded to our office and filed before the statute of limitations expires.

In response, Mr. Fonseca handed me a document (attachment 2) which stated that a two-week review of all missing and incomplete reports was to commence on February 7, 2007. The

document also outlined the process by which Dos Palos intended to complete the outstanding investigations. The date by which these outstanding cases are to have been reviewed is March 23, 2007. I expressed to Mr. Fonseca our concern that the investigations need to be prioritized both by the nature of the cases, i.e. felonies vs. misdemeanors, and also by the statute of limitations for each case. I was assured that was going to be done.

Mr. Fonseca also indicated that changes in the collection and preservation of evidence and training of officers were being implemented. I expressed to him that we would not be able to file cases in which serious questions regarding the chain of custody of evidence and the training of officers arose if those matters were at issue in a case.

Like you, I am greatly troubled by the chaos in the Dos Palos Police Department and concerned that the pursuit of justice in criminal cases may have been compromised as a result. I have taken Mr. Fonseca at his word that the necessary changes are being made. I intend to verify that the investigations of the outstanding and missing reports are, in fact, completed by March 23, 2007 as promised, and would encourage the Grand Jury to make similar inquiries.

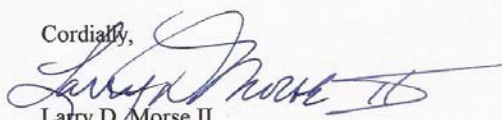
I concluded our meeting by informing Mr. Fonseca that our office was already exploring the possibility of contacting the Attorney General's office for guidance should the reforms outlined in the Grand Jury report, and promised by Dos Palos, not be forthcoming.

At present I am waiting to see what progress has been made before pursuing any additional response.

You are to be commended for a thorough and illuminating investigation and one that I sincerely hope results in improved police services for the citizens of Dos Palos.

Please don't hesitate to contact me if you have additional questions or concerns.

Cordially,



Larry D. Morse II
District Attorney

Complaint 06-07-13: HSA/County Bidding Practices

Introduction:

The complainant alleges Merced County Human Services Agency (H.S.A.) failed to make public, information relating to a formal bidding process in order for private entities to obtain contracts. He further stated, through two meeting with H.S.A., he did not receive satisfactory information regarding an opportunity to participate in the process.

Method of Investigation:

Grand Jury committee members for Health, Education, and Welfare interviewed or made contact with the complainant, the Director for H.S. A, an individual Buyer from Merced County Purchasing and the Assistant Director of Administrative Services-Support Services (Purchasing). Review of the public website for Merced County Government and Purchasing was also conducted.

Findings:

1. Complainant stated he had two meetings with H.S.A. regarding the bidding process. During the last interview he was referred to someone within the agency who oversees contractual compliance. Because the complainant admitted never contacting this individual for further information, the committee feels H.S.A. was not actually negligent as stated in this complaint.
2. H.S.A. stated they do not directly negotiate contracts for their services. The procedure involves the individual (s) submit inquiries through Merced County Purchasing. Merced County Purchasing provides the information, applications, Requests for Proposal (RFP), and related bidding workshops for obtaining contracts with the individual county agencies. Each agency is then responsible for compliance to the resulting contract. Purchasing is located in the Merced County Administration building.

Obstacles or barriers to process:

- ❑ When asked for the location of the office that processes contract bidding for the county, the person in the information office (located in Merced County Administration lobby) was unable to direct the committee member until given the name of the Assistant Deputy Director.
- ❑ The office is located in the basement. There was no visible room number. After further inquiry at two open offices, the committee member was directed to Purchasing.

- Upon contact with the Purchasing receptionist, the committee member was presented a hand-written website address and the department phone number on a 3 x 3 post-it, then directed to research the website. The committee member further requested to speak directly with the Assistant Deputy Director in order to learn more about the process and a meeting immediately ensued. The procedure for the individual agency requesting Purchasing services varies with the amount of the contract. Services in excess of a certain amount are submitted for approval through the Merced County Board of Supervisors. Merced County ordinances and Federal and State “rules” also govern the process. Individual agencies can advise the department regarding the needs, including drafting the actual contract regarding specifications, salaries, and related descriptions. They also have influence regarding the final approval.
- In a phone call to a Buyer for Purchasing regarding the process, the committee member was again directed to the website. The Buyer carefully explained how to submit for a Bidder Number and future notification when a contract is available. When directly asked if Purchasing did in fact handle this particular contract, the committee member was told this was handled within the H.S.A. This is contradictory to previous information from H.S.A.
- In re-contacting H.S.A. and the department which works directly with the services provided by the specific bidder, it was learned there is a team within the agency that actually drafts the contract, submits it to Purchasing for the bidding process and then ultimately monitors the delivery of services within the agency.

Recommendations:

1. Re: Merced County Administration
 - a. Information staff be given overview of Purchasing in order to direct public to appropriate office.
 - b. Offices be clearly marked for prompt access
 - c. Purchasing provide professional brochure regarding referral to website and instructions for process
 - d. Purchasing be commended for a comprehensive and concise website
2. Re: Merced County Human Services Agency
 - a. Ensure staff is briefed regarding bidding process information in order to direct inquiries in a proficient and expedient manner.



DEPARTMENT OF
ADMINISTRATIVE SERVICES
SUPPORT SERVICES DIVISION

Paul D. Clanton
Director Administrative Services/
Chief Information Officer

Leon "Sandy" Teague
Assistant Director Administrative Services/
Support Services

2222 "M" Street
Merced, CA 95340
(209) 385-7690

Presiding Judge John Kiriha
Superior Court of California
County of Merced
2260 N Street
Merced, CA 95340

Judge Kiriha:

This letter is in response to Merced County Grand Jury Compliant 06-07-13.

Recommendations and corresponding responses are:

1. Re: Merced County Administration
 - a. Information staff be given overview of Purchasing in order to direct public to appropriate office.
Response: A department directory is currently available to the Information staff and staff is well acquainted with that directory. They have been informed that "contract bidding" is Purchasing staff's responsibility.
 - b. Offices to be clearly marked for prompt access
Response: The room number is affixed to the open door of the department. A room number and sign identifying the location of Purchasing will be affixed to the outside wall for easier identification. This will be in agreement with the room number listed on the Directory Board immediately across from the elevators.
 - c. Purchasing provide professional brochure regarding referral to website and instructions for process.
Response: A tri-fold professional brochure has been accessible and provided to the public as needed for a number of years. This brochure specifically addresses procedures surrounding the procurement process for potential bidders and includes a reference to the website. Staff will ensure that a sufficient quantity of the brochures is available and accessible to the public.
 - d. Purchasing be commended for a comprehensive and concise website.
Response: Thank you; however, the current website is a compilation of efforts by a number of departments to present a professional approach to assist anyone desiring to do business with the County of Merced.

Should you have any question regarding these issues do not hesitate to contact me or my Assistant Director, Leon Teague, at your convenience at 385-7690.

Sincerely,

Paul D. Clanton
Director of Administrative Services/
Chief Information Officer

STRIVING FOR EXCELLENCE



HUMAN SERVICES AGENCY

Ana Pagan
Director

2115 W. Wardrobe Avenue
(209) 385-3000
(209) 383-6925 Fax
www.co.merced.ca.us

Mailing Address
P.O. Box 112
Merced, CA 95341-0112

Equal Opportunity Employer

May 14, 2007

The Honorable John Kiriara
Presiding Judge
Superior Court of California, Merced County
2222 M Street
Merced, CA 95340

Regarding: Grand Jury Findings #06-07-13 – Related to Purchasing Practices

The Grand Jury recommendation states Merced County Human Services Agency (HSA) should “ensure staff is briefed regarding bidding process information in order to direct inquiries in a proficient and expedient manner”.

HSA has an in house Buyer and a unit of Analysts and Accounting staff who are designated to handle all contract and procurement matters, in coordination with the County General Services/Purchasing Department. Protocols have been reviewed to ensure understanding of procedures.

HSA staff has been advised that all inquiries regarding contracting and procurement matters are to be referred to the Buyer or Contracts staff.

Please contact me if you have any further questions.

Sincerely,


Ana Pagan

STRIVING FOR EXCELLENCE

Complaint 06-07-14: Merced District Attorney

The Grand Jury declined to investigate the complaint was against an individual outside the jurisdiction of the Grand jury and the issues had been investigated as part of Grand Jury complaint 06-07-02.

Complaint 06-07-15: City of Livingston

Sewer Trunk line

Introduction

The complainant stated that the City of Livingston, with the knowledge of Merced County, entered into an agreement with a developer, Ranchwood Homes, to design and construct a 42 Inch sewer trunk line of over a mile in length plus additional miles of sewer lines to facilitate future urbanization of thousands of acres of agricultural land. The complainant further stated that since the land, on which the construction of the sewer trunk line took place, is outside the Livingston city limits and the Livingston sphere of influence, the City of Livingston had no jurisdiction over the project. In addition, the project was initiated without the required environmental reviews as spelled out in the California Environmental Quality Act. (CEQA).

Method of Investigation/Background Information

The Grand Jury interviewed the complainant to clarify the issues raised in the complaint. In addition, interviews were conducted with the Livingston city manager, city attorney, and the planning and public works staff. The grand jury also interviewed the planning and public works staff of Merced County, and the President of Ranchwood Homes. Each of the entities involved provided large volumes of documentation related to the Livingston sewer trunk line project. These documents were extensively reviewed by the Grand Jury, including minutes from city council meetings, which were generally very brief and made it almost impossible to determine what occurred during the meetings. In addition, staff turnover during the period in question made finding answers difficult. Members of the Grand Jury also visited the project site to observe the work that had been done.

In 2004, Ranchwood Homes proposed to the City of Livingston, to install 24 Inch sewer lines from the Livingston sewage treatment plant on Vinewood Dr. south to Magnolia Ave. and east to Lincoln Ave., and at some future point beyond Lincoln Ave. During the discussions with Livingston city officials, the size of the line was increased to 42 inches at the sewer plant and gradually reduced in stages along

the length of the project. The Ranchwood proposal was intended to serve future development of Ranchwood property located along Magnolia Ave. and the project would also serve the long-term development interest of the City.

In the early stages of the development of this project there was extensive discussion among the Livingston contract planning staff and Ranchwood management on whether the project would have to follow the requirements of the CEQA or whether the project was exempt. The Ranchwood Homes Director of Land Acquisition and Development requested a consultant study the issue and make a recommendation. In a memo dated August 26, 2004, the consultant quoted Public Resource Code Section 21080.21 saying "This section does not apply to any project of less than one mile in length within a public street or highway or any other public right-of-way for the installation of a new pipeline or the maintenance, repair, restoration, reconditioning, relocation, replacement, removal, or demolition of an existing pipeline. For the purpose of this section, "pipeline" includes subsurface facilities but does not include any surface facility related to the operation of the underground facility". Based on the above CEQA interpretation, it was decided to limit the sewer trunk line to 5115 ft. even though the total length of the project was much longer. The consultant stated that if the pipeline was longer than a mile, the project could be done with "minimal environmental review" and he ended his memo with "If for some reason, substantial public controversy arises relative to the project, the City can always decide to expand the level of environmental review in response to those concerns, but it seems reasonable at this stage to proceed with a streamlined environmental review process, most likely an exemption, or an initial study and Negative Declaration".

The second significant issue relates to the status of the City as the "lead agency". The city planning staff did consult with county planning staff on this issue and county staff did agree that Livingston could be the lead agency, but also stated that the CEQA requirements must be followed. In addition, there was discussion with county staff over whether the Local Agency Formation Commission (LAFCO) would serve as the lead agency because the Livingston city attorney stated that could be done. However, county planning staff discounted that possibility because, as a "dry" pipe, it would not extend sewer services. The City Council also appointed two of its members to serve on a committee to study and expedite the implementation of the sewer project.

On December 7, 2004, city staff presented the staff report on the "Ranchwood Sewer Trunk Line" to the City Council.

The following significant issues were discussed:

1. Was the project exempt under Public Resources Code Section 21080.21?
2. Was the installation of the 5115 ft. of sewer line a whole action or a piecemeal attempt to avoid CEQA?
3. Was the project "growth inducing"?
4. Could the city serve as the "lead agency"?
5. City Waste Water Master Plan update.
6. City General Plan and Urban Growth.
7. Make a finding that the installation of the 5115 Ft. line is completely separate from any future actions related to Ranchwood development in Livingston.

According to the City Council meeting minutes dated December 7, 2004, following extensive discussion the following action was taken. **"The Council, by consensus, authorized the staff to proceed on determining support for the proposed CEQA exemption and status of a lead agency"**.

On December 14, 2004 the City Council found that a CEQA exemption could be utilized and that the city could serve as the lead agency.

On December 21, 2004 the parties signed, " Agreement to design, construct and dedicate section of sewer pipeline by and between City of Livingston and Ranchwood Homes Corp.". In the Recitals section of the agreement it states, "Whereas, City has determined that the New Section project is categorically exempt under the California Environmental Quality Act (CEQA)".

In December of 2005, after the necessary planning, permit processing and obtaining easement rights from affected property owners, construction began. The timing of the construction was such as to take advantage of the low activity levels on the farmland and the need to cross a Merced Irrigation District (MID) canal during the non-irrigation season. Almost immediately after the construction of the sewer trunk line started, the controversy over the project erupted.

There were accusations that Ranchwood failed to obtain permission from the landowners, trespassed on private property, failed to comply with OSHA standards for excavation and that Ranchwood Homes exceeded the 5115 ft of sewer pipe the City of Livingston authorized the contractor to install.

On February 16, 2006 Merced County Counsel transmitted to the Livingston City Attorney a lengthy legal analysis on the sewer line extension and listing the reasons why the City of Livingston failed to comply with California law.

On February 24, 2006 the Merced County Planning Department Director issued a STOP ORDER to Hostetler Investments, LLC and Ranchwood Homes

Corporation, and the City of Livingston per authority of Title 18 (Zoning) Chapter 18.53, Section 18.53.02C of the Merced County Code: "to prohibit further construction or use of structures or land on property which is in violation of the provisions of Titles 17 and 18 of this code". The order further states that to correct the illegal activity, "you must obtain the proper approvals and permits." As of the date of the stop order no further action has been taken on the sewer trunk line project.

FINDINGS:

1. The City of Livingston, faced with a rapidly growing population and a need for expanding its sewer system, accepted a proposal from Ranchwood Homes to design and construct a sewer trunk line extension that would clearly serve the financial interest of the developer, but would also serve the long-term interest of the city.
2. The City of Livingston violated the California Environmental Quality Act (CEQA) by accepting a dubious interpretation of Public Resource Code Section 21080.21 as provided by Ranchwood Homes.
3. The City of Livingston failed to consider the implications to future development by installing the sewer trunk line.
4. The City of Livingston approved the installation of 5115 ft of sewer line to circumvent CEQA. even though the entire sewer line extension project was nearly 6 miles.
5. The City of Livingston approved the construction of the sewer line on land that, according to the City General Plan of 1999, was neither within the city limits nor within the city's sphere of influence.
6. The minutes from the city council meetings are so brief that finding information is extremely difficult.
7. The management of Ranchwood Homes failed to adhere to the approved length of the pipeline and exceeded the approved length by approximately 1,400 linear feet.
8. The City of Livingston failed to properly coordinate its activities on county land with county officials.
9. County planning officials, when asked by the city planners about being the lead agency for the project, should have intervened when it was clear that the sewer line was on land under county jurisdiction.
10. County Public Works Department should have realized that when encroachment permits were issued to cross county roads, that a private contractor was working on a major project requiring environmental review.
11. The Livingston City Council placed two of its members on a committee working with developers and city staff on the implementation of the sewer trunk line project.
12. The Grand Jury also finds that even though the city and the permit process was poorly followed and violated CEQA law, no attempt should be made to force the removal of the currently installed sewer line.

Recommendations:

1. The City of Livingston must improve the records of council meetings. The City of Livingston must update the city's General Plan; conduct extensive public hearings on the updated plan and how the sewer trunk line fits into future plans.
2. The city must ensure that all environmental laws are complied with and permit procedures are adhered to.
3. City and county officials must coordinate their efforts to ensure that projects that cross City/County boundaries are fully coordinated.
4. The city council should avoid placing its members on committees that work with city staff and developers, since that puts unnecessary pressure on staff and makes the council members advocates for projects that they have to pass judgment on in the future.

Complaint 06-07-16: Board of Supervisors, Merced County Board of Supervisors

Introduction

The complainant alleged that Supervisor Kelsey violated Section 87105 (a) Subsection (3) of the California Government Code by being in the audience during the hearing on an issue before the Board of Supervisors that involved aggregate mining. Supervisor Kelsey's family is also involved in mining operations in Merced county and based on advice from county counsel, Supervisor Kelsey recused herself from the hearing, left the board room and then sat in the audience during the hearing.

Method of Investigation

The County Administration sub-committee contacted all members of the Board of Supervisors, including Supervisor Kelsey, to verify that Supervisor Kelsey was in fact in the audience during the hearing. All responded that Supervisor Kelsey was in the audience.

The committee consulted with the Grand Jury legal advisors and it was decided to seek guidance from the California Attorney General. The Attorney General responded to the request by stating "The fact that she was disqualified as a board member did not preclude her from observing or even commenting as a member of the public". See the attached letter from the Attorney general.

Findings

Supervisor Kelsey **did not** violate Government Code Section 87105 (a) (3).

Recommendations

None.

EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE



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May 22, 2007

Van Vanderzyde, Foreman
Merced county Grand Jury
PO Box 2034
Merced, CA 95344

re: Grand Jury Matter No. 06-07-16

Dear Mr. Vanderzyde:

I have reviewed the documents you provided.

In this matter, the facts appear to be as follows. On December 19, 2006, the Merced County Board of Supervisors met in public session. There was an item on the agenda designated General Plan Amendment GPA05-009, Zone Change No. ZC05-10 and major Modification Application No. MM05-016 to Conditional Use Permit No. 2870. The permit had been issued previously to Black Diamond Aggregates, Inc., and the application was to modify the current zoning status of approximately 154 acres at the intersection of Highway 59 and Snelling Road, and to permit below grade level mining. Prior to the Board taking up the matter, either Supervisor Kelsey or the Merced County Counsel noted that Supervisor Kelsey had a conflict of interest and would not be participating. Supervisor Kelsey left the dias and did not participate as a member of the Board. Although Supervisor Kelsey left the dias, she reentered the room through the public entrance and remained seated in the public area during public comment through the vote by the Board. Supervisor Kelsey noted in her letter to the Grand Jury that her family owns property on which aggregate mining has been conducted, but suggested that the property was located more than 500 feet away from the Black Diamond property. Supervisor Kelsey also denied that the modification of the Black Diamond use permit will benefit her family directly or indirectly.

The sole issue is whether Supervisor Kelsey's mere presence in the audience while the Board considered the item violated her duty to refrain from participating in matters where she has a conflict of interest. Under the facts here, where a conflict was identified and the elected official removed herself from participating in her official capacity, the conclusion must be that her mere presence in the audience did not rise to the level of a violation of her duty.

Several laws govern conflicts of interest. The Political Reform Act of 1974 (Gov. Code, § 87100 et seq.)^{1/} deals with financial conflicts of interest, section 1090 et seq. addresses conflicts in contractual matters, section 1126 addresses inimical duties, and section 8920 addresses prohibited acts generally. Additionally, common law rules regarding conflicts of interest may apply to non-economic matters (cf *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152).

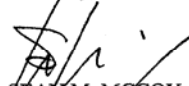
1. All unspecified statutory references are to the Government Code.

A violation occurs when an interested person participates the decision or attempts to influence the decision in an improper manner (see *Commission of California State Government Organization and Economy v. F.P.P.C.* (1977) 75 Cal.App.3d 716).

Section 87105 describes the steps that must be taken by any elected official who holds a financial interest. However, subdivision (a)(4) of section 87105 expressly permits an elected official operating under a conflict of interest to participate to the same extent as a member of the general public. The Brown Act requires that, with only specific exceptions, all meetings of local agency legislative bodies shall be open to the public, and that requirement of openness is construed liberally. (§ 54953, subd. (a); *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955.) It necessarily follows that an elected official who cannot vote due to a conflict of interest but who can comment to the same extent and in the same manner as a member of the public must also be able to observe to the same extent and in the same manner as a member of the public.

Whether or not Supervisor Kelsey had any direct financial interest necessitating her disqualification, her obligations under the Government Code were satisfied when she disqualified herself from participating and removed herself from the chamber as a sitting board member. The fact that she was disqualified as a board member did not preclude her from observing or even commenting as a member of the public. Thus, under the facts presented, there is insufficient evidence to conclude that Supervisor Kelsey violated any ethical duty.

Sincerely,



SEAN M. MCCOY
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

COMPLAINT 06-07-17: MERCED POLICE DEPARTMENT EXCESSIVE FORCE DURING AN ARREST

INTRODUCTION

The complainant alleged she went to the Merced Police Department to exchange her infant daughter with the father, who had the daughter after his visitation. Because of previous difficulties and altercations with the father, the complainant requested Merced Police to assist and standby for the child custody exchange. A Merced County Child Protective Services (CPS) representative was also present to assist with the exchange. There was a verbal altercation between the complainant and the father. Merced Police suggested that the infant be turned over to the CPS worker due to the complainant's mental state and behavior. The complainant subsequently got into a verbal altercation with the Merced Police, struck the Merced Police sergeant and other responding officers several times. The complainant was advised she was under arrest and continued to resist arrest. The complainant was struck 3-4 times with a baton before she was subdued and taken into custody. The complainant alleges the police used excessive force while placing her under arrest, by striking her 3-4 times with the baton.

METHOD OF INVESTIGATION

The Law and Justice Committee of the Grand Jury interviewed the complainant, Merced City police Sgt. West and the Merced County CPS representative. The complainant also provided copies of photos of bruises to her body, which she alleged came from being struck with the baton several times.

The complainant provided a three page written statement regarding her altercation with the Merced Police and the Grand Jury obtained a copy of the Merced Police Department arrest report. During the interview of the complainant, she stated she was argumentative and was probably guilty of disturbing the peace. She admitted to getting into a verbal altercation with the father of her baby over prior issues regarding visitation and custody. The complainant felt the use of the baton on her was excessive and did not understand why the police did not use pepper spray or a stun gun instead of the baton.

Sgt. West stated he was contacted by the complainant and asked to assist with a civil standby of a child custody exchange. A Merced County CPS representative was also present. He observed the complainant and the child's father get in an argument. The complainant was yelling and making accusations towards the father. Sgt. West contacted the CPS representative and suggested that the CPS representative take temporary custody of the infant due to the complainant's hostile behavior and agitated state. Sgt. West advised the complainant that he was going to allow the CPS representative to retain custody of the infant. At that

time, the complainant threw her cell phone at him then struck him several times. Sgt. West then advised her she was under arrest. The complainant continued to resist and Sgt. West struck the complainant 3-4 times with his baton. Two Merced Police Officers also responded to assist, wrestled the complainant to the ground and handcuffed her. The complainant was arrested for battery on a police officer and resisting arrest. She was transported to Mercy Hospital and medically cleared to be booked into the Merced County jail.

The Law and Justice Committee also interviewed the Merced County CPS representative. She confirmed she was present for the child custody exchange and observed the argument between the complainant and the father. She also observed Sgt. West make several attempts to calm down the complainant and restrain her. She saw the complainant throw the cell phone at Sgt. West then hit him several times. Sgt. West drew his baton and struck the complainant several times. Two other police officers responded and assisted in wrestling the complainant to the ground. She saw the complainant hit and kick the other two officers. The CPS representative was specifically asked if she thought Sgt. West used excessive force on the complainant by striking her with the baton and she replied no.

On March 7, 2007, the complainant pleaded "No Contest" to battery on a peace officer. She was placed on 36 months probation, ordered to attend anger management class, and complete 60 hours of community service.

FINDINGS

1. The complainant and father of the infant became involved in a verbal altercation unrelated to the arrest of the complainant.
2. Sgt. West made several attempts to calm down the complainant and restrain her during the verbal altercation with the father.
3. Sgt. West wanted the CPS representative to take custody of the infant for the infant's safety.
4. Sgt. West was hit several times by the complainant.
5. Sgt. West used reasonable force in subduing and placing the complainant under arrest.

RECOMMENDATIONS

1. None.

Complaint 06-07-18: Los Banos School Board

Introduction

The complainant alleged that the Los Banos School Board violated the Brown Act by having an unannounced meeting among a majority of its members and other parties including the Mayor of Los Banos, the Superintendent of Schools of the Los Banos Unified School District, and a local land developer. The alleged meeting took place in the developer's conference room.

Method of Investigation and Documentation

Members of the Grand Jury met with the complainant to clarify the exact nature of the complaint and verify what the complainant observed. Members of the County Administration Committee then interviewed the Superintendent of the Los Banos (LB) School District, the President of the LB School Board, the Mayor of LB and other members of the LB School Board. Each of these interviews was conducted independently of the others, and those interviewed were each admonished not to discuss the interviews or the subject matter of them with anyone else. One School Board member was interviewed by telephone, since he was out of town on business. There were no records of attendees at the alleged meeting available. Finally, the complainant was asked to appear before the Grand Jury in person to confirm the details of the complaint in sworn testimony.

Findings

A meeting of a committee of the LB School Board was held on the date stated in the complaint, and it was held in the developer's office conference room. However, the Grand Jury was only able to substantiate the presence of three members of the school board at the meeting, thus it was less than a majority of the board, and therefore not in violation of the Brown Act. The subject of the meeting was to discuss possible locations of future school sites, a legitimate purpose of a committee of the school board. It was abundantly clear that the Superintendent of the School District as well as the President of the School Board were fully aware of the requirements of the Brown Act and conducted school board business accordingly. A written record of attendees or subject matter of the meeting was not created, a shortcoming, which left the school board open to some criticism. As it is, the Grand Jury found insufficient evidence to substantiate the complaint.

Recommendations

Future formal meetings of committees, consisting of less than a majority of the members of the LB School Board, should be recorded in sufficient detail to identify members in attendance and subject matter discussed. This could be

done through whatever medium is used to later report the results of such meetings to the full board.

Complaint 06-07-19: Child Protective Services

The Grand Jury declined to investigate the complaint due to the fact that the issues in the complaint are still with the Juvenile Court and the Court being an Agency of the State of California and as such outside the jurisdiction of the Grand Jury.

Complaint 06-07-20: Merced County Sheriff Department

The Grand Jury rejected the complaint that the Sheriff Department was in violation of County nepotism policies after learning that the complainant was using an outdated county policy as the basis for the complaint.

Complaint 06-07-21: Unfair Political Practices

The Grand Jury declined to investigate the complaint because the complainant also filed a complaint with the California Fair Political Practices Commission (FPPC) and the Commission is investigating the complaint.

Complaint 06-07-22: Merced County Jail

The Grand Jury declined to investigate the complaint that the Merced County Board of Supervisors and the Merced County Sheriff Department failed to provide rehabilitation and educational services at the county jail. The complaint was also filed in the United States District Court, Eastern District of California.

Complaint 06-07-23: City of Livingston, Brown Act Violations.

The Grand Jury will refer this complaint to next years Grand Jury due to the complexity of the issues and the lack of time in the current term.

Complaint 06-07-24: Castle Redevelopment

The Grand Jury declined to investigate a complaint that the agreement between the County and the Master Developer did not include a provision for a legally required, licensed real estate broker. The County has since resolved the issue.

Complaint 06-07-25: Castle Redevelopment

The grand Jury declined to investigate a complaint submitted by the same complainant as the above complaint. The complainant submitted a series of questions that should be submitted to the County.

ADDENDUM

RESPONSE OF

CITY OF LIVINGSTON

RECEIVED

AFTER

PUBLICATION

OF THE

2006-2007

GRAND JURY REPORT



City of Livingston

1416 C Street
Livingston, CA 95334

January 16, 2008

Merced County Grand Jury
P.O. Box 2034
Merced, California 95344-2034

Re: City of Livingston Response to Grand Jury Report Complaint 06-07-15: City of Livingston Sewer Trunk Line.

Dear Members of the Grand Jury:

The City of Livingston has reviewed the findings and recommendations of the 2006-2007 Merced County Grand Jury Final Report regarding Complaint 06-07-15: City of Livingston Sewer Trunk Line. It should be noted that most City staff, including the previous City Manager, City Attorney and contract planners, involved in the early discussions of the project are no longer with the City of Livingston. Therefore, some details of what took place have been difficult to determine and hence our delay in responding to the Report. After careful consideration of the report and Livingston's review of the facts, the City responds to the Grand Jury's findings and recommendations as follows:

Finding 1: The City of Livingston, faced with a rapidly growing population and a need for expanding its sewer system, accepted a proposal from Ranchwood Homes to design and construct a sewer trunk line extension that would clearly serve the financial interest of the developer, but would also serve the long-term interest of the City.

City Response: The City agrees with this finding. Ranchwood Homes Corporation approached the City of Livingston and Merced County regarding the construction of one mile of sewer line west of the City of Livingston in unincorporated Merced County. The City and Ranchwood Homes Corporation entered into an agreement to do so.

Finding 2: The City of Livingston violated the California Environmental Quality Act ("CEQA") by accepting a dubious interpretation of Public Resource Code Section 21080.21 as provided by Ranchwood Homes.

City Response: The City disagrees with this finding. The City of Livingston believes it complied with all environmental laws. As noted above, Ranchwood Homes Corporation approached the City of Livingston and Merced County regarding the construction of less than one mile of sewer line west of the City of Livingston in unincorporated Merced County. The City Council determined that the project was statutorily exempt under CEQA because the project length was less than one mile. The City Attorney at the time, and the City's prior contract planning consultant, determined that reliance on the statutory exemption in California Public Resource Code Section 21080.21 was legal and appropriate. Notably, by exempting new pipeline projects that are less than one mile from the requirements of CEQA, the California Legislature has concluded that such projects may proceed regardless of any potential

CITY OF LIVINGSTON

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environmental impact. Merced County was consulted and raised no objections to the City's determination that the pipeline was statutorily exempt under CEQA.

Finding 3: The City of Livingston failed to consider the implications to future development by installing the sewer trunk line.

City Response: The City, Merced County and Ranchwood Homes Corporation were aware that the proposed sewer line extension is outside the City limits and City Sphere of Influence. Because no specific plans for any future development had been formulated at the time that the City and Ranchwood Homes entered into that agreement, there was no information available that would allow for meaningful environmental review of any potential future uses of the pipeline at that time. Any future development that would subsequently be proposed would undergo CEQA review at that time. Thus, the City appropriately evaluated the project that was the proposed; i.e., a pipeline that was less than one mile in length and to be constructed within easements obtained by Ranchwood Homes Corporation. Further, now that the pipeline's surroundings are proposed to be in the City's Sphere of Influence, the City is currently updating its General Plan and has already conducted extensive public hearings on the updated plan and how the sewer trunk line fits in future plans. The City will continue to hold public hearings on the Draft General Plan and Draft EIR. The City's planning consultants are aware of the pipeline's location. The pipeline will be in the new City Sphere of Influence if the proposed expanded Sphere of Influence is approved by the Merced County Local Agency Formation Commission (LAFCO).

Finding 4: The City of Livingston approved the installation of 5115 ft of sewer line to circumvent CEQA, even though the entire sewer line extension project was nearly 6 miles.

City Response: The City disagrees with this finding. The City gave permission to construct less than one mile of sewer line. Ranchwood Homes Corporation, despite being warned by the City not to do any construction beyond the one mile mark, proceeded to construct an additional 1,400 feet of pipeline without the City of Livingston's or Merced County's permission.

Finding 5: The City of Livingston approved the construction of the sewer line on land that, according to the City General Plan of 1999, was neither within the City limits nor with the City's Sphere of Influence.

City Response: The City agrees with this finding. The City, Merced County and Ranchwood Homes Corporation were aware that the proposed sewer line extension is outside the City limits and City Sphere of Influence. Following discussions between the City, Merced County and Ranchwood Homes Corporation, the City concurred that it would be the lead agency for CEQA purposes for the pipeline installation because the pipeline could ultimately connect to the City's infrastructure and because no other development had been proposed at that time. The City is currently updating its General Plan and has already conducted extensive public hearings on the updated plan and how the sewer trunk line fits in future plans. The City will continue to hold public hearings on the Draft General Plan and Draft Environmental Impact Report (EIR). The City's planning consultants are aware of the pipeline's location. The pipeline will be in the new City Sphere of Influence if the proposed expanded Sphere of Influence is approved by the Merced County Local Agency Formation Commission (LAFCO).

Finding 6: The minutes from the City Council meetings are so brief that finding information is extremely difficult.

City Response: The City disagrees with this finding. All City Council meetings are digitally recorded so that there is no question about what has taken place in the meeting. In addition, City record keeping has improved with the hiring of new staff.

Finding 7: The management of Ranchwood Homes Corporation failed to adhere to the approved length of the pipeline and exceeded the approved length by approximately 1,400 linear feet.

City Response: The City agrees with this finding. Livingston gave permission to construct only one mile of sewer line. Ranchwood Homes Corporation, despite being warned by the City not to do any construction beyond the one mile mark, proceeded to construct an additional 1,400 feet of pipeline without the City of Livingston's or Merced County's permission.

Finding 8: The City of Livingston failed to properly coordinate its activities on County land with County officials.

City Response: The City disagrees with this finding. Merced County was aware of the pipeline construction, approved of its location and issued encroachment permits across Merced County-owned rights-of-way. Throughout the process, there was extensive discussions and coordination between Merced County officials and Livingston officials. After extensive discussions with Merced County officials, the County gave permission to the City to oversee the sewer line installation and construction. County officials were also aware and concurred that lead agency status for California Environmental Quality Act (CEQA) should be with Livingston since any future discharge from the pipeline would be at the Livingston Wastewater Treatment Plant.

Finding 9: County planning officials, when asked by the City planners about being the lead agency for the project, should have intervened when it was clear that the sewer line was on land under County jurisdiction.

City Response: The City disagrees with this finding. After extensive discussions with Merced County officials, the County gave permission to the City to oversee the sewer line installation and construction. County officials were also aware and concurred that lead agency status for California Environmental Quality Act (CEQA) should be with Livingston since any future discharge from the pipeline would be at the Livingston Wastewater Treatment Plant.

Finding 10: County Public Works Department should have realized that when encroachment permits were issued to cross County roads, that a private contractor was working on a major project requiring environmental review.

City Response: The City disagrees with this finding. Merced County was aware of the installation and construction of the sewer line. After extensive discussions with Merced County officials, the County gave permission to the City to oversee the sewer line installation and construction. County officials were also aware and concurred that lead agency status for California Environmental Quality Act (CEQA) should be with Livingston since any future discharge from the pipeline would be at the Livingston Wastewater Treatment Plant.

Finding 11: The Livingston City Council placed two of its members on a committee working with developers and City staff on the implementation of the sewer trunk line project.

City Response: The City agrees with this finding. In February 2006, the City changed its development review process from a 21 member committee, which included 2 Council Members to a 4 member Development Management Committee, which includes the City Manager, Public Works Director, City Engineer, and Community Development Director. All development is now processed through the Development Management Committee, which only includes City staff.

Finding 12: The Grand Jury also finds that even though the City and the permit process was poorly followed and violated CEQA law, no attempt should be made to force the removal of the currently installed sewer line.

City Response: The City disagrees in part and agrees in part with this finding. The City disagrees that the City violated CEQA law. The City of Livingston believes it complied with all environmental laws. The City Council determined that the project was statutorily exempt under CEQA because the project length was less than one mile. The City Attorney at the time, and the City's prior contract planning consultants, determined that reliance on the statutory exemption in California Public Resource Code section 21080.21 was legal and appropriate. Merced County was consulted and raised no objections to the City's determination that the pipeline was statutorily exempt under CEQA. The City agrees that no attempt should be made to force the removal of the currently installed sewer line.

Recommendation 1: The City of Livingston must improve the records of Council meetings.

City Response: The City has already implemented this recommendation. All City Council meetings are being digitally recorded so that there is no question about what has taken place in the meeting. In addition, City record keeping has improved with the hiring of new staff.

Recommendation 2: The City of Livingston must update the City's General Plan, conduct extensive public hearings on the updated plan and how the sewer trunk line fits into future plans.

City Response: The City is in the process of implementing this recommendation. The City is currently updating its General Plan and has already conducted extensive public hearings on the updated plan and how the sewer trunk line fits in future plans. The City will continue to hold public hearings on the Draft General Plan and Draft Environmental Impact Report (EIR). The City's planning consultants are aware of the pipeline's location. The pipeline will be in the new City Sphere of Influence if the proposed expanded Sphere of Influence is approved by the Merced County Local Agency Formation Commission (LAFCO).

Recommendation 3: The City must ensure that all environmental laws are complied with and permit procedures are adhered to.

City Response: The City already implements this recommendation on an on-going basis. City staff works closely with the City Attorney's Office to discuss a project's compliance with environmental laws and closely monitors permits to ensure compliance.

Recommendation 4: City and County officials must coordinate their efforts to ensure that projects that cross City/County boundaries are fully coordinated.

City Response: The City already implements this recommendation on an on-going basis. The City continues to work closely with the County in the event a project crosses jurisdictions to determine who will be lead agency for CEQA and to discuss potential impacts to each jurisdiction.

Recommendation 5: The City Council should avoid placing its members on committees that work with City staff and developers, since that puts unnecessary pressure on staff and makes the Council Members advocates for projects that they have to pass judgment on in the future.

City Response: The City has already implemented this recommendation. In February 2006, the City changed its development review process from a 21 member committee, which included 2 Council Members to a 4 member Development Management Committee, which includes the City Manager, Public Works Director, City Engineer, and Community Development Director. All development is now processed through the Development Management Committee, which only includes City Staff.

In conclusion, the City feels that it acted appropriately and complied with all laws regarding the installation of the sewer pipeline. Please note that the pipeline has never been accepted by the City of Livingston. The status of the pipeline is as follows: (1) it is a private pipeline; (2) installed by a private developer on private property; and (3) is located in unincorporated Merced County. Jurisdiction of the pipeline rests with Merced County and not the City of Livingston. The sewer pipeline is not being used to transport any wastewater to the City of Livingston at this time.

The Livingston City Council is appreciative of the Merced County Grand Jury's dedicated service to Merced County. The City shares the Grand Jury's commitment to effective governance in conformance with state law.

Sincerely,



Gurpal Samra,
Mayor