

BORREGO WATER DISTRICT

INTRODUCTION

The 2009/2010 San Diego County Grand Jury (Grand Jury) received a complaint alleging violations by the Borrego Water District (District) Board of Directors (Board). Specifically, the Board violated the provisions of California Government Code Sections 54950-54963, known as the Ralph M. Brown Act (Brown Act) which governs the rules for public meetings by government entities. The allegation was that for one regular and one special meeting, both conducted on December 17, 2008, there was insufficient notice given of the intent to vote on health care benefits for the members of the Board, their spouses and their domestic partners. Furthermore it is alleged that the requirements for the timely posting of agendas were not met; and, that unanimous, collective concurrence by the Board Members was developed prior to the meeting on accepting and implementing the health care benefits.

As a result of these allegations, the Grand Jury conducted an investigation to determine if there were grounds for the complaint. If Brown Act violations were affirmed, the complaint would then be referred to the San Diego County District Attorney's office.

BACKGROUND

The Borrego Valley is seventy square miles of unincorporated, privately owned properties in the northeast corner of San Diego County. Currently, the only source of water available for agricultural and District use in the Borrego Valley is the groundwater aquifer that lies beneath it.

The aquifer is shared by the District's commercial and residential customers, and local farmers who legally access it through private wells. A concern among District users is that the farmers are major users of the water, and that the aquifer may be exhausted. This could require importing water at a high cost.

The District is a local public agency whose responsibility is to acquire, plan, construct, maintain, improve, and operate the necessary works for the production, storage, transmission, and distribution of water. Presently the District serves 2,015 customers. It was originally formed in 1961, and, over time, developed into five internal Improvement Districts. The water rates in each Improvement District vary due to the differing circumstances under which it was annexed, facility requirements, and usage costs. Costs within each Improvement District are paid by its rate-payers; they are not apportioned to other Improvement Districts. Services provided grew to include not only groundwater management services (pumping, treatment, storage, distribution, and conservation), but also eye-gnat control, sewer, flood control, trash removal, and maintenance of a local golf course. A five member Board of Directors governs the Borrego Water District. The Board hires a General Manager by contract to direct the District's operations.

The Brown Act governs public meetings for local governmental bodies, with the objective of facilitating public participation in local governmental decisions and curbing misuse of the democratic process through secret legislation by public bodies, as follows:

- The public may comment on agenda items before or during consideration by a legislative body. Time must be set aside for the public to comment on any other matters (non-agenda public comment) under the body's jurisdiction.
- A majority of the members of a legislative body shall not, through direct or indirect communications, discuss, deliberate, or take any action on any business item outside of an authorized meeting.
- Any audio or video recording of an open and public meeting may be destroyed after 30 days.
- The agenda of any *regular* meeting shall be posted at least 72 hours prior to the meeting, and will contain a brief general description of each item of business to be transacted or discussed at the meeting. The agenda for a *special* meeting shall be posted at least 24 hours prior to the meeting.

INVESTIGATION

During the investigation the Grand Jury determined that three of the Board members had prior knowledge of the health care benefit agenda item. This was determined not to constitute a Brown Act violation since one of the three had proposed instituting the health care benefit to the General Manager, and the two other Board members were on the Budget & Finance Committee who reviewed the proposed benefit in order to make a recommendation to the full Board. The other two Board members were found to have no knowledge of the item prior to its inclusion on the agendas for the Board meetings of December 17, 2008.

The agenda for the regular meeting listed as Item E under Current Business Matters:

“Consideration of the Board to collectively participate in the BWD Medical/Dental/Vision insurance plans for term of office”.

The agenda for the special meeting listed as Item B under Current Business Matters:

“Consideration of the Board to adopt an attachment to policy NO. 83-2 to extend Medical/Dental/Vision/Life benefits to domestic partners of eligible employees/directors who register a domestic partnership”.

Review of minutes from meetings held in the months immediately before and after the December 2008 meetings contained the phrase “Consideration of...” under Current Business Items where a vote was taken. Some more recent minutes have enlarged the phrase to include "Consideration and adoption of..." or “Review and Consideration for approval....”

Interviews indicated that the paper copies of the agendas were posted in a timely manner, and there was no evidence to indicate the agendas were not posted properly.

During the investigation, additional possible violations or irregularities were brought forth. These included:

- whether extending health care benefits to the Board is a proper expense;
- restricting public input and discussion at meetings;
- possible conflict of interest;
- increasing costs of legal services;
- handling of the District reserve funds;
- length of time meeting recordings are maintained; and,
- long term use of the same auditing firm.

The Grand Jury's investigation included:

- interviewing members of the Board, District management, and concerned residents in the District;
- attending a Board meeting;
- auditing the District finances, conducted by the San Diego County Office of Audits & Advisory Services to address the allegations of fiscal irregularities; and,
- researching California Water Code, District policies and procedures, District legal expenses, and open meeting regulations.

There was concern about a conflict of interest regarding employees and administration of some District contracts. The investigation found no present conflicts of interest between District personnel and contractors. Apparent but unproved conflicts that existed prior to 2007 no longer exist.

It was questioned whether the granting of health care benefits to the Board was a legitimate use of District funds. Board Policy No 83-2 provided for the Board to implement coverage, although it had not been implemented previously. The Association of California Water Agencies (ACWA) Health Benefits Authority Contribution and Eligibility Guidelines require that, if the Board elects to have coverage, that the Class coverage shall be the same as for employees, and that all Board members must be included. A 2009 ACWA survey determined that about 50% of the California Water agencies offer medical benefits to Directors.

District legal expenses increased from approximately \$47,000 in Fiscal Year (FY) 2005-06 to \$220,000 in FY 2007-08. The Grand Jury identified 19 reasons for these increases, including:

- There is increased reliance on legal advice because the District has become more proactive in addressing water issues and started taking on more projects.

- In FY 2006-07, the District pursued the establishment of a special assessment district to address the aquifer overdraft situation. That effort ultimately did not receive the required voter approval.
- The number of Board meetings was doubled every month, with General Counsel's attendance required at all Board meetings.
- Management of the District during the intermittent 2007 hospitalization and death of the former General Manager in September 2007 required additional General Counsel support. The Board President functioned as Chief Executive Officer during the absence of the General Manager until a new General Manager was hired in February 2008. The Chief Executive Officer relied heavily on General Counsel during this period.
- The new General Manager was not familiar with California State laws and regulations when he assumed office.
- The handling of bond issues, including the refinancing of Community Facilities District (Mello Roos) bonds in 2007 required additional legal services.
- The increasing legal requirements involved with acquisition/merger with the Borrego Springs Park Community Services District.
- Adoption of a new Board policy that requires General Counsel review of all document disclosure requests prior to production.

The Grand Jury had concerns about the amount and handling of the District reserve funds since they were unrestricted. The investigation showed that the funds are allocated by the District budget to specific capital projects and programs. Additionally, the District fund amount was the fourth lowest out of five of water districts selected by the Grand Jury for comparison, and is consistent with the retention of funds as unrestricted by the compared water districts.

District water rates were also compared to five other water district's rates and determined to be the lowest of the six districts.

In July 1996, the Borrego Water District formed the Community Facilities District (CFD). There were \$11 million in Special Tax Bonds (CFD No. 1995-1) issued against the Rams Hill area (Improvement District 1), that refinanced the existing debt and refunded prior bonds. In June 2007, the CFD issued new Special Tax bonds (CFD No. 2007-1) to pay off the 1995 bonds and refinance the remaining debt. The bonds are special obligations of the CFD, payable solely from net taxes collected in Rams Hill. They are not obligations of the District. The 2007 bonds defaulted. As of January 2010, the delinquency rate was 87.8%, or just over \$300,000.

The California Fair Political Practices Act and the District's Conflict of Interest Code require that the District's consultants file Statements of Economic of Interest (Form 700) disclosure forms unless the General Manager determines in writing that a particular consultant "is hired to perform a range of duties that are limited in scope and thus is not required to comply with the disclosure requirements". It was found that none of the District's consultants had filed a Form 700 since 2007 and the General Manager's written determination was not made until January 2010.

Members of the Grand Jury journeyed to Borrego Springs and attended a regular meeting of the Board. The intent of witnessing a Board meeting was to determine the interactions between the Board and the public attendees. The Jurors observed that during discussion of agenda items, there was an open exchange between Board members and public attendees. In fact, the public often spent more time in discussion than the Board members. No instances of restrictions on public discussion were noted. The limit of three minutes per speaker on non-agenda public comment was consistent with the practice of other government agencies, such as the San Diego County Board of Supervisors, San Diego Association of Governments, and the San Diego City Council.

FACTS AND FINDINGS

Brown Act Violations

Fact: Failing to post a meeting agenda 72 hours in advance of a regular meeting and 24 hours in advance of a special meeting constitutes a violation of the Brown Act.

Fact: Posting an agenda not adequate to provide an accurate description of every agenda item constitutes a violation of the Brown Act.

Fact: Discussing, deliberating, or taking action on any business item outside of an authorized meeting by a quorum of a legislative body constitutes a violation of the Brown Act.

Finding 01: The Grand Jury did not find any evidence that the agendas were posted late or inadequately worded.

Finding 02: The phrase starting with “Consideration of...” in the two agenda items was consistent with other Current Business Items where a vote was taken

Finding 03: The Grand Jury determined that, given the circumstances, three of the Board members having prior knowledge of the Health Care Benefit agenda item did not constitute collective concurrence or a Brown Act violation.

Medical Benefits

Fact: About 50% of the California Water agencies offer medical benefits to Directors.

Fact: The total monthly premium for health care benefits for all Directors and their dependents was \$5,472.58 in December 2009 which amounts to a \$65,671 annualized cost.

Finding 04: The adoption of health care benefits for members of the Board is a legitimate business expense.

Legal Expenses

Fact: Legal expenses increased from approximately \$47,000 in FY 2005-06 to \$220,000 in FY 2007-08.

Finding 05: The 364% increase in legal expenses was adequately explained.

Conflict of Interest

Fact: There was a concern that there could be (or could have been) conflicts of interest on the part of some District employees and some District contractors.

Fact: The State Fair Political Practices Act requires consultants to government agencies to file a Statement of Economic Interests (Form 700), unless the agency's chief executive determines that such filing is not required.

Finding 06: No current conflict of interest situations were found.

Finding 07: None of the District's consultants have filed a Form 700 since 2007 and the General Manager's written determination was not made until January 2010.

Public Input

Fact: The ability for the public to testify on both agenda and non-agenda items at an open meeting of a governmental body is required under the Brown Act.

Finding 08: No restriction on public discussion of agenda items was found.

Finding 09: The limit of three minutes per speaker on non-agenda public comment was found to be consistent with the practice of other governmental agencies, such as the San Diego County Board of Supervisors, San Diego Association of Governments, and the San Diego City Council.

Reserve Funds

Fact: A Grand Jury audit reviewed and analyzed the Borrego Water District's (District's) audited financial statements from FY 2004-05 through FY 2008-09 and made comparisons with several other water districts.

Fact: The District currently has unrestricted total reserves of \$5,385,891.

Finding 10: All the reserves of the compared water districts are unrestricted, and the District's amount of reserve funds ranked fourth out of the five districts compared.

Audio Recordings

Fact: Audio recordings of all public meetings used to be held for five years. This policy was changed at the Board meeting of February 13, 2008, when audio recordings retention

was changed to a minimum of 30 days in compliance with the Brown Act minimum requirements.

Fact: Many residents do not live in Borrego Springs year-round; rather, they are seasonal or part time residents.

Finding 11: A longer retention time would provide additional time for all residents to inspect, or obtain a copy of, the audio recordings and would be in the best interests of the residents.

District Auditor

Fact: The Sarbanes-Oxley Act of 2002 reformed auditing standards for private corporations.

Fact: The Sarbanes-Oxley Act requires private corporations to change principal auditors every five years.

Fact: The District has used the same auditing firm for fifteen years.

Finding 12: Many governmental entities, including the City of San Diego, have voluntarily adopted the Sarbanes-Oxley standards as best practice.

RECOMMENDATIONS:

The 2009/2010 San Diego County Grand Jury recommends that the Borrego Water District Board of Directors:

- 10-12: Increase the retention time for audio recordings of all public meetings to 120 days.**
- 10-13: Assure that the District's financial records are available to any citizen to facilitate transparency of the District's economic status.**
- 10-14: Develop internal control procedures to ensure that all employees, consultants, and Board Members adhere to all Statement of Economic Interest (Form 700) filing requirements.**
- 10-15: Change the auditing firm at a maximum of every five years, as a better business practice.**

REQUIREMENTS AND INSTRUCTIONS

The California Penal Code §933(c) requires any public agency which the Grand Jury has reviewed, and about which it has issued a final report, to comment to the Presiding Judge of the Superior Court on the findings and recommendations pertaining to matters under the control of the agency. Such comment shall be made *no later than 90 days* after the Grand Jury publishes its report (filed with the Clerk of the Court); except that in the case of a report containing findings and recommendations pertaining to a department or agency headed by an elected County official (e.g. District Attorney, Sheriff, etc.), such

comment shall be *within 60 days* to the Presiding Judge with an information copy sent to the Board of Supervisors.

Furthermore, California Penal Code §933.05(a), (b), (c), details, as follows, the manner in which such comment(s) are to be made:

- (a) As to each grand jury finding, the responding person or entity shall indicate one of the following:
 - (1) The respondent agrees with the finding
 - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.
- (b) As to each grand jury recommendation, the responding person or entity shall report one of the following actions:
 - (1) The recommendation has been implemented, with a summary regarding the implemented action.
 - (2) The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
 - (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the grand jury report.
 - (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation therefor.
- (c) If a finding or recommendation of the grand jury addresses budgetary or personnel matters of a county agency or department headed by an elected officer, both the agency or department head and the Board of Supervisors shall respond if requested by the grand jury, but the response of the Board of Supervisors shall address only those budgetary or personnel matters over which it has some decision making authority. The response of the elected agency or department head shall address all aspects of the findings or recommendations affecting his or her agency or department.

Comments to the Presiding Judge of the Superior Court in compliance with the Penal Code §933.05 are required from the:

<u>Responding Agency</u>	<u>Recommendations</u>	<u>Date</u>
Borrego Water District Board of Directors	10-12 through 10-15	8/4/10