

RESPONSE TO GRAND JURY REPORT

Report Title: "Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency"
Report Date: June 30, 2015
Response by: Marin County Board of Supervisors

FINDINGS

- We disagree wholly or partially with the finding(s) numbered: F1-F6

RECOMMENDATIONS

- Recommendation number R2 has been implemented.
- Recommendation(s) numbered R1 and R3 will not be implemented because they are not warranted or are not reasonable.

Date:

6/30/15

Signed: _____

Kate Rice

Number of pages attached: 6

Marin County Board of Supervisors
Response to Findings and Recommendations from Grand Jury Report

“Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency” (April 9, 2015)

Given the extremely technical nature of this report, the County hired the law firm of Meyers Nave to review and advise the County on applicable Government Code sections, documents referenced in the Grand Jury bibliography and County actuarial reports.

FINDINGS

- F1.** The Employers appear to have repeatedly violated Cal. § Gov’t Code 7507 by using the same actuarial evaluation report for many different pension increases and by failing to publicly disclose those increased costs before adopting them. The evaluations did not review the proposed increases for each individual bargaining unit; the Employers continued using the evaluation after years had passed. These factors appear to have contributed to the current unfunded liabilities of MCERA.

Response: Disagree.

Section 7507 states that a local legislative body “shall secure the services of an enrolled actuary to provide a statement of actuarial impact upon future annual costs.” (Cal. Gov. Code § 7507) After full review by outside legal counsel, we have determined that in compliance with Section 7507 (and Section 31516, which also contains this requirement), the County secured the services of the actuarial firm William M. Mercer Incorporated (“Mercer”) which issued actuarial reports dated February 23, 1999, July 23, 1999, June 5, 2001, and the actuarial firm Gabriel, Roeder, Smith & Company, which issued updated reports in 2004. In those reports, the actuaries provided “a statement of actuarial impact upon future annual costs” for a number of different potential retirement benefit increases for both “miscellaneous” and “safety” employees of the County.

This finding states that the County appears to have violated Government Code 7507 “by using the same actuarial evaluation report for many different pension increases.” (Report at p. 10) Section 7507 does not preclude the use of a single actuarial report in connection with different pension increases. The actuarial reports commissioned by the County in fact addressed the cost of multiple different pension increases, for both “safety” and “miscellaneous” employees, including the pension increases that were ultimately granted by the County.

Our records indicate that the County has a practice of engaging an actuarial firm and evaluating costs if a pension change is contemplated. In certain situations, an actuarial study was requested, but predicted costs were too high so the change was not implemented by the County. For example, in 2005 there was a request to allow employees to buyback military and other qualifying public service time. After a full actuarial analysis, the County decided that the costs were prohibitive and determined that such a buyback was not feasible.

This finding goes on to state that the "evaluations did not review the proposed increases for each individual bargaining unit." (Report at p. 10) Section 7507 does not require that an actuarial study be conducted for each bargaining unit. Actuarial studies generally project the cost of a particular benefit increase, as a percentage of pay, for employees under a particular pension formula. Actuarial studies are not necessarily broken down by individual bargaining unit. Since the same pension enhancements were applied to all miscellaneous employees, using one study rather than a handful does not change the overall estimated costs. In addition, the County negotiated with all bargaining units to pay half of the estimated costs of the enhancement.

Although not specifically stated in Finding F1, the Grand Jury Report concluded that the Board approved 23 separate retirement enhancements between 2001 and 2005. The Grand Jury's count, however, was based on approvals of agreements with the County's numerous bargaining units. In fact, the Board approved four retirement enhancements during that period. Generally, employees were required to pay approximately half of the cost of the improvement.

Finding F1 states that employers "continued using the evaluation after years had passed." The documents reviewed by our outside legal counsel show that most of the pension increases approved by the Board occurred within 14 months of the date of the actuarial report that estimated the costs of those increases. The Grand Jury Report does not contain any analysis as to why the actuarial estimates were no longer valid at the time the Board voted on the pension increases.

- F2.** The County appears to have violated Cal. Gov't Code § 23026 by (a) failing to make the pension increases public through a "regularly scheduled meeting" of the Board, including through the use of consent agendas; (b) failing to provide public notice of that increase on a board agenda; (c) failing to provide a public notice of the "financial impact" that the increase would have on MCERA. These violations excluded the public from examining the fiscal impact of the pension increases and from participating in the board's decision process.

Response: Disagree.

Again, the County's outside legal counsel carefully researched this issue and reviewed all pertinent County documents prior to making legal conclusions. According to the legal analysis, the County substantially complied with Section 23026 in connection with every pension increase. The County made every pension increase public at a regularly scheduled public Board meetings by placing them on the Board agenda, sometimes on the regular agenda, sometimes on the consent agenda. At the time of the pension modifications, the Government Code did not prohibit placing these matters on the consent agenda. The Board provided public notice of the cost of the increased benefits in the Human Resources Director reports, which were included in the publicly available Board file created in connection with each agenda. The County made the agenda and reports available at least three business days in advance of the Board meeting. The County made the Human Resources Director reports available as hard copies in the Board's publicly available file. At some point, possibly beginning in mid-2002, the County also linked the reports to the on-line version of the Board agenda.

The County followed these procedures in every case, except that in some cases agenda items listed Board approval of CBAs with bargaining units, but did not specifically identify pension increases that were part of the agreements. In every case, however, the publicly available Human Resources Director's reports contained an explanation of the pension increases and the costs.

- F3.** The County appears to have violated Cal. Gov't Code § 31515.5 by (a) failing to make the pension increases public through a "regularly scheduled meeting" of the board, including through the use of consent agendas, (b) failing to provide prior public notice of that increase on board agendas, and (c) failing to provide a public notice of the "financial impact" that the increase would have on MCERA. The public appears to have been excluded from examining the fiscal impact of the pension increases and from participating in the approval process. It also appears that the public was unaware of potential future financial obligations.

Response: Disagree.

This finding states that the County appears to have violated section Cal. Gov. Code § 31515.5 for the same reason as in Finding F2. However, as stated in our response to Finding F2, our outside legal counsel has reviewed this finding and has concluded that the County listed the pension increase or CBAs on the agendas of regularly scheduled public Board meetings and provided a publicly available report from the Human Resources Director on their financial impact.

- F4.** The County appears to have violated Cal. Gov't Code § 31516 by (a) failing to secure an actuarial statement that explains the financial impact of the specific pension increase on MCERA and by (b) failing to make that actuarial report public at least two weeks prior to the adoption of the increase of benefits. This appears to have excluded the public from examining the fiscal impact of the pension increases, from participating in the board's decision-making process, and from understanding their potential future financial obligations.

Response: Partially Disagree.

Cal. Gov. Code Section 31516 contains the same requirements as section 7507. The County complied with the requirements by securing an actuarial statement on the impact of the specific pension increases, and making the actuarial information publicly available at a Board meeting in the reports authored by the Human Resources Director. However, in review of all pertinent documents, our outside legal counsel has determined that the County did not fully comply with sections 7507 and 31516 because it did not make the future costs available at a public meeting two weeks in advance of adoption of benefit increases.

- F5.** If the pension increases were not made in accordance with the California Government Code, the citizens of Marin County were never given proper notice about pension increases that are now costing them millions of dollars. These increases and associated liabilities are a contributing factor to why MCERA has a collective unfunded pension liability of approximately \$536.8 million.

Response: Disagree.

The County substantially complied with the notice requirements of Government Code sections 7507, 23023 and 31515.5, 31516.

The unfunded liabilities are higher than what was previously projected in 2001 largely because investment earnings returned below the estimated 8.25% level, and because people are living longer today than projected 14 years ago – factors experienced by all other public employee retirement systems nationwide, particularly in the context of the most severe recession since the Great Depression. It is worth noting that MCERA's most recent unfunded liability estimate for the County, as of June 30, 2014, is \$217.8 million.

- F6.** Because there appear to have been statutory violations, the future pension benefits provided for by the enhancements may or may not have vested as rights of the public employees under California law.

Response: Disagree.

Outside legal counsel has reviewed relevant case law and has advised that the Government Code sections at issue do not state that failure to comply makes pension increases void, and the County substantially complied with the requirements of the Government Code. In the opinion of outside legal counsel, based on the County's substantial compliance, there is no basis under the Government Code sections at issue to void the pension increases.

RECOMMENDATIONS

The Marin County Civil Grand Jury recommends that:

- R1.** The Employers develop, adopt and implement a policy and procedures (including staff training) to prevent future violations of the California Government Code when increases in pension benefits are proposed. The Employers should consider making their legal counsel responsible for ensuring compliance with the Government Code.

Response: This recommendation will not be implemented because it is not warranted. Given our efforts to reduce our unfunded retiree liabilities, we have no plans to offer increases in pension benefits. As a practical matter, statewide pension reform in 2012 does not allow it.

If a future Board is legally able to grant increased benefits and desired to do so, the County will ensure full compliance with the California Government Code by requiring written confirmation from MCERA's legal counsel that legal requirements have been fulfilled before any benefit increases can be implemented.

- R2.** The Employers develop, adopt and implement a policy for "reporting out" to the public regarding the employment and pension costs in terms of the amount and the Employer's ability to pay on a current cash flow basis.

This recommendation has been implemented. We have been very open and transparent about our unfunded retiree health and pension liabilities. We routinely report our long-term liabilities as part of our budget process and on an ongoing basis post on our County website relevant actuarial reports detailing our long-term pension and retiree health obligations. In addition, we send all property taxpayers information detailing our retiree liabilities as part of an insert to our property tax bills.

- R3.** Each Employer establish a Citizens' pension Oversight Committee comprised of resident tax payers who would: 1.) review pension funding levels in light of the Employer's ability to pay; 2.) review proposed pension changes before final Employer approval of my collective bargaining agreement; 3.) review the Employer's compliance with Government Codes related to pensions; 4.) develop written quarterly reports for the public as to the financial security of the pension fund.

This recommendation will not be implemented because it is not warranted. Existing structures are in place to monitor the County's financial stability and progress on efforts to reduce our unfunded retiree obligations.

Over the past several years the Board of Supervisors has taken several actions to reduce our long-term retiree liabilities including:

- allocating \$32 million for accelerated payments to MCERA

- allocating over \$50 million in payments to a retiree health trust and a commitment to annual payments of approximately \$12 million
- negotiating a new, substantially lower-cost retiree health plan for all employees hired after 2008
- negotiating lower miscellaneous pension plans for employees hired after 2012
- implementing lower costs tiers for all employees hired after 2013 and dedicating any savings to paying down our existing unfunded liabilities

The MCERA board has fiduciary responsibility to ensure that the retirement plan is structurally sound and that annual contribution rates are set so that the system is financially secure over the long term.

The County's financials are regularly reviewed by independent bond rating agencies and the ratings are based on the ability to pay for their current and long-term obligations. One of the reasons we've consistently received the highest rating available to California counties is that we are proactively addressing our long-term retiree health obligations while most local governments are simply on a pay-as-you-go basis.

Lastly, our Fiscal Audit Advisory Committee, which includes two residents as well as representatives from our schools, cities and special districts, annually reviews our financial audits, which include our progress on meeting our long-term pension and retiree health obligations.



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MEMORANDUM

DATE: June 24, 2015
TO: Matthew Hymel, County Administrator
Angela Nicholson, Assistant County Administrator
FROM: Meyers Nave
RE: **Analysis of Grand Jury Report on County Pensions
Released April 16, 2015**

I. SUMMARY

The Marin County Administrator's Office asked us to analyze findings made by the Marin County Civil Grand Jury ("Grand Jury") in a report entitled "Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency" dated April 9, 2015 and publicly released on April 16, 2015 ("Report").

A. Grand Jury Report

The Grand Jury Report concluded that the County of Marin and three other public employers located within the County "granted no less than thirty-eight pension enhancements from 2001 to 2006, each of which appears to have violated disclosure requirements and fiscal responsibility requirements of the California Government Code." The Grand Jury Report made six findings, including four findings of Government Code violations ("Findings") and made three recommendations ("Recommendations") as a result of those Findings.

B. Applicable Legal Requirements

During the 2001-2006 time period, Government Code Sections 7507, 2306, 31515.5 and 31516 required a county board of supervisors to take the following actions before

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authorizing an increase in county employee pension benefits.¹

- (1) Local legislative bodies “shall secure the services of an enrolled actuary to provide a statement of actuarial impact upon future annual costs.” (Sections 7507; 31516.)
- (2) “[T]he future annual costs as determined by the actuary shall be made public at a public meeting at least two weeks prior to the adoption of any increases in public retirement plan benefits.” (Sections 7507; 31516.)
- (3) “[A]ll salary and benefit increases” shall “be made public, at a regularly scheduled meeting of the board.” (Sections 23026; 31515.5.)
- (4) “Notice of any salary or benefit increase shall be included on the agenda for the meeting as an item of business in compliance with the requirements of Section 54954.2.” (Sections 23026; 31515.5.)
- (5) “Notice shall occur prior to the adoption of the salary or benefit increase, and shall include an explanation of the financial impact that the proposed change or salary increase will have on the funding status of county employees’ retirement system.” (Sections 23026; 31515.5.)

C. Summary of Conclusions

Based on the documentation and information provided by the County, the County substantially complied with the above code sections.

During the time period 2001 to 2005, the County Board of Supervisors approved the following four pension increases for County employees.

- In 2001, the option for probation officers to move from a miscellaneous retirement formula of 2% @ 61.25 to a safety retirement formula of 3% @ 55;
- In 2002, a change in benefit for miscellaneous employees from a retirement formula of 2% @ 61.25 to 2% @ 55;
- In 2002, a change in benefit for safety employees from a retirement formula of 2% at 50 to 3% at 55; and

¹ All statutory references are to the California Government Code unless otherwise designated. The statutory references are to the Government Code sections as they existed in 2001-2006.

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- In 2002-2005, a further change for safety employees from a retirement formula of 3% @ 55 to 3% @ 50.

In compliance with sections 7507 and 31516, prior to approval of these increases the County commissioned an actuary, William M. Mercer, to report on the costs of these potential pension increases. In 1999 and 2001, Mercer issued reports to the County concerning the cost of a number of different pension increases for both miscellaneous and safety employees. In 2004, actuary Gabriel, Roeder, Smith and Company updated some of the cost estimates. The reports covered the increases approved by the Board.

In compliance with sections 23026 and 31515.5, prior to approval of these increases, the County provided public notice of proposed pension increases and their financial impact. Because County employees are members of many different bargaining units, the Board approved the changes by individual bargaining unit. The Board of Supervisors' meeting agenda listed the proposed pension increases or the collective bargaining agreements ("CBAs") in which they were included. The County's Department of Human Resources provided staff reports on the financial cost of the pension increases as determined by the actuary. The County made the Board agendas and Human Resources reports publicly available prior to the Board meetings at which the Board approved the pension increases.

Based on the information we received, the County complied with the statutory requirements in Government Code sections 7507, 23026, 31515.5 and 31516 with two exceptions. First, some Board agendas included an item for approval of a collective bargaining agreement, without specifically mentioning a pension increase. In those cases, however, the publicly available Human Resources Department reports stated that the collective bargaining agreement included a pension increase and reported on its projected cost. Second, we did not receive documentation showing that projected costs were made public two weeks prior to Board adoption of the increases. Again, however, the Human Resources Department reports made the projected costs publicly available before Board adoption of the pension increases.

In this memorandum, we address the Grand Jury's question as to whether any procedural irregularities made the pension benefits void. This is not a case in which the Board had no legal authority to approve the pension increases. The County Employees Retirement Law (CERL) permitted the increases in pension formulas that the Board adopted. The Grand Jury did not raise any issue as to their substantive legality. The Grand Jury Report raises the different issue of whether the procedures followed by the Board were insufficient and thus affected the validity of the pension increases.

We found no case law that directly addresses a public entity's substantial, but not perfect, compliance with the above Government Code statutory requirements. However, there is a large body of case law that addresses whether a governmental action is void for

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failure to meet procedural requirements set by statute. A procedural defect invalidates a governmental action only when the procedural requirement is “mandatory” rather than “directory.” (*City of Santa Monica v. Gonzales* (2008) 43 Cal.4th 905, 923 (“*Santa Monica*”).)

The use of the term “shall” does not make a procedural requirement mandatory. (*Coastside Fishing Club v. California Fish and Game Com.* (2013) 215 Cal.App.4th 397, 425 [“The word ‘shall’ in a statute does not necessarily denote a mandatory requirement; it may be construed as directory or permissive.”].) “In California, it is not uncommon for obligatory statutory provisions to be accorded only directory effect.” (*Santa Monica* at p. 924.) Rather, in determining whether a statute is “mandatory” courts look to whether the statute itself states that noncompliance makes an action void, and whether the noncompliance defeats the purpose of the statute. (*Ibid.*) Substantial compliance with statutory directives is sufficient if the overall objectives of the statute have been satisfied. *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 668.

In this case, the Government Code sections do not state that a failure to follow them results in pension increases being void. Moreover, the County substantially complied with the statutory objectives of the Code sections as a whole. As stated above, the County employed an actuary to estimate future costs, placed the pension increases or CBAs on the Board agenda, and included Department of Human Resources report on costs in the public file. Although the County did not comply with the Government Code sections in every respect, the County’s public disclosures constituted substantial compliance sufficient to satisfy the statutory objectives of the Government Code. Based on the County’s substantial compliance, there is no basis under the Government Code sections at issue to void the pension increases.

Our analysis in this memorandum is limited to whether the County’s failure to completely comply with the Government code can be a basis for invalidation of the pension increases. Our analysis does not extend to any other aspect of the law of vested rights, which has numerous requirements and exceptions beyond the scope of this opinion.

D. Analysis Of Grand Jury Findings F1 Through F6

The documentation and information we received support the following analysis of Grand Jury Findings F1 to F6.

1. Grand Jury Finding F1

“The Employers appeared to have repeatedly violated Cal. Gov’t Code § 7507 by using the same actuarial evaluation report for many different pension increases and by failing to publicly disclose those increased costs before adopting them. The evaluations did not review the proposed

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increases for each individual bargaining unit; the Employers continued using the evaluation after years had passed. These factors appear to have contributed to the current unfunded liabilities of MCERA.” (Report at p. 10.)

Legal Analysis. Section 7507 states that a local legislative body “shall secure the services of an enrolled actuary to provide a statement of actuarial impact upon future annual costs.” (Gov. Code § 7507.) In compliance with Section 7507 (and Section 31516, which also contains this requirement), the County secured the services of the actuarial firm William M. Mercer Incorporated (“Mercer”), which issued actuarial reports dated February 23, 1999, July 23, 1999, and June 5, 2001, and the actuarial firm Gabriel, Roeder, Smith & Company, which issued updated reports in 2004. In those reports, the actuaries provided “a statement of actuarial impact upon future annual costs” for a number of different potential retirement benefit increases for both “miscellaneous” and “safety” employees of the County.

Finding F1 of the Grand Jury Report states that the County appears to have violated Government Code 7507 “by using the same actuarial evaluation report for many different pension increases.” (Report at p. 10.) Section 7507 does not preclude the use of a single actuarial report in connection with different pension increases. The actuarial reports commissioned by the County in fact addressed the cost of multiple different pension increases, for both “safety” and “miscellaneous” employees, including the pension increases that were ultimately granted by the County.

Finding F1 states that the “evaluations did not review the proposed increases for each individual bargaining unit.” (Report at p. 10.) Section 7507 does not require that an actuarial study be conducted for each bargaining unit. Actuarial studies generally project the cost of a particular benefit increase, as a percentage of pay, for employees under a particular pension formula. Actuarial studies are not necessarily broken down by individual bargaining unit.

For example, in this case, the Mercer study dated June 5, 2001 analyzed the cost of increasing a pension benefit for “miscellaneous” employees from the 2% at 61.25 formula to the 2% at 55 formula. The Mercer study estimated that this increased benefit would cost an additional 2.28% of each employee’s pay per year. Similarly, the Mercer study estimated the cost of increasing a pension benefit for “safety” employees from the 2% @ 50 formula to the 3% @ 55 formula. The study estimated that this increase would cost an additional 7.28% of each employee’s pay per year. These estimates applied across bargaining units.

Although not specifically stated in Finding F1, the Grand Jury Report concluded that the Board approved 23 separate retirement enhancements between 2001 and 2005. The Grand Jury’s count, however, was based on approvals of agreements with the County’s numerous bargaining units. In fact, as stated above in the Summary, the Board approved

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four retirement enhancements during that period. Generally, employees were required to pay approximately half of the cost of the improvement.

Finding F1 states that employers “continued using the evaluation after years had passed.” (Report at p. 10) The documents we reviewed show that most of the pension increases approved by the County Board occurred within 14 months of the date of the actuarial report that estimated the costs of those increases. The Grand Jury Report does not contain any analysis as to why the actuarial estimates were no longer valid at the time the Board voted on the pension increases.

2. Grand Jury Finding F2

“The County appears to have violated Cal. Gov’t Code § 23026 by (a) failing to make the pension increases public through a ‘regularly scheduled meeting’ of the Board, including through the use of consent agendas; (b) failing to provide public notice of that increase on a board agenda; (c) failing to provide a public notice of the “financial impact” that the increase would have on MCERA. These violations excluded the public from examining the fiscal impact of the pension increases and from participating in the board’s decision process.”

Legal Analysis. The County substantially complied with Section 23026 in connection with every pension increase. The County made the pension increases public at regularly scheduled public Board meetings by placing them on the Board agenda, sometimes on the regular agenda, sometimes on the consent agenda. At the time, the Government Code did not prohibit placing these matters on the consent agenda. The Board provided public notice of the cost of the increased benefits in the Human Resources Director reports, which were included in the publicly available Board file created in connection with each agenda. The County made the agenda and reports available at least three business days in advance of the Board meetings. The County made the Human Resources Director reports available as hard copies in the Board’s publicly available file. At some point, possibly beginning in mid-2002, the County also linked the reports to the on line version of the Board agenda.

The Board followed these procedures in every case, except that in some cases agenda items listed Board approval of CBAs with bargaining units but did not specifically identify pension increases that were part of those agreements. In every case, however, the publicly available Human Resources Director’s reports contained an explanation of the pension increases and costs.

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3. Grand Jury Finding F3

“The County appears to have violated Cal. Gov’t Code § 31515.5 by (a) failing to make the pension increases public through a ‘regularly scheduled meeting’ of the board, including through the use of consent agendas, (b) failing to provide prior public notice of that increase on board agendas, and (c) failing to provide a public notice of the “financial impact” that the increase would have on MCERA. The public appears to have been excluded from examining the fiscal impact of the pension increases and from participating in the approval process. It also appears that the public was unaware of potential future financial obligations.”

Legal analysis. Finding F3 of the Grand Jury report states that the County appears to have violated Section 31515.5, for the same reasons as in Finding F2. However, as stated in response to Finding F2, the County listed the pension increases or CBAs on the agendas of regularly scheduled public Board meetings and provided a publicly available report from the Human Resources Director on their financial impact.

4. Grand Jury Finding F4

“The County appears to have violated Cal. Gov’t Code § 31516 by (a) failing to secure an actuarial statement that explains the financial impact of the specific pension increase on MCERA and by (b) failing to make that actuarial report public at least two weeks prior to the adopting of the increase of benefits. This appears to have excluded the public from examining the fiscal impact of the pension increases, from participating in the board’s decision making-process, and from understanding their potential future financial obligations.”

Legal analysis. Section 31516 contains the same requirements as Section 7507. As stated above in connection with Finding F1, the County complied with the requirements by securing an actuarial statement on the impact of the specific pension increases, and making the actuarial information publicly available at a Board meeting in the reports authored by the Human Resources Director.

However, based on the information provided to us, the County did not fully comply with sections 7507 and 31516 because it did not make the future costs available at a public meeting two weeks in advance of adoption of benefit increases.

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5. Grand Jury Finding F5

“If the pension increases were not made in accordance with the California Government Code, the citizens of Marin County were never given proper notice about pension increases that are now costing them millions of dollars. These increases and associated liabilities are a contributing factor to why MCERA has a collective unfunded pension liability of approximately \$536.8 million.”

Legal analysis. As stated above, the County substantially complied with the notice requirements of Government Code sections 7507, 23026, 31515.5, 31516 as a whole.

6. Grand Jury Finding F6

“Because there appear to have been statutory violations, the future pension benefits provided for by the enhancements may or may not have vested as rights of the public employees under California law.”

Legal analysis. As stated above in the Summary, the Government Code sections at issue do not state that failure to comply makes pension increases void, and the County substantially complied with the requirements of the Government Code. The County’s substantial compliance sufficiently satisfied the statutory objectives of the Code sections. Based on the County’s substantial compliance, there is no basis under the Government Code sections at issue to void the pension increases. Our opinion is limited to this issue. The law of vested rights is complex and our opinion does not extend beyond the issues addressed in this memorandum.

II. STATUTES GOVERNING PROCEDURAL REQUIREMENTS

The Grand Jury made findings that the Board did not satisfy Government Code sections 7507, 23026, 31515.5, and 31516, as those statutes existed during the time period 2001-2006. We set forth each below.

A. Government Code Section 7507

Government Code Section 7507 stated:

“The Legislature and local legislative bodies shall secure the services of an enrolled actuary to provide a statement of actuarial impact upon future annual costs before authorizing increases in public retirement plan benefits. An “enrolled actuary” means an actuary enrolled under subtitle C of Title III of the federal Employee Retirement Security Act of 1974 and “future annual costs” shall include, but not be limited to,

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annual dollar increases or the total dollar increases involved when available.

The future annual costs, as determined by the actuary shall be made public at a public meeting at least two weeks prior to the adoption of any increases in public retirement plan benefits.”

In 2008, the Legislature amended Section 7507, pursuant to Senate Bill 1123 to require that pension increases be listed on the regular public meeting agenda and not the consent agenda. (Gov. Code 7507(c)(1)(A).) This amendment, however, occurred after the approval dates for the retirement enhancements at issue in the Grand Jury Report. Therefore, the amendment does not apply to those enhancements.²

B. Government Code Section 23026

Government Code section 23026 states:

“In any county which has established a county employees’ retirement system pursuant to the County Employees Retirement Law of 1937, ... the board of supervisors shall make public, at a regularly scheduled meeting of the board, all salary and benefit increases that affect either or both represented employees and non-represented employees. Notice of any salary or benefit increase shall be included on the agenda for the meeting as an item of business in compliance with the requirements of Section 54954.2. Notice shall occur prior to the adoption of the salary or benefit increase, and shall include an explanation of the financial impact that the proposed benefit change or salary increase will have on the funding status of county employees’ retirement system.

The board of retirement ... is authorized, consistent with its fiduciary duties, to have an enrolled actuary prepare an estimate of the actuarial impact of the salary or benefit increase. The actuarial data shall be reported to the board of supervisors.

Nothing in this section shall be construed to limit or lessen the requirements imposed by Section 7507 that the costs associated with increases in public retirement plan benefits be determined by an

² Accordingly, in this memorandum section 7507 is analyzed as it existed before the 2008 amendments.

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enrolled actuary and publicly disclosed two weeks prior to an adoption of the increase in public retirement plan benefits.”

C. Government Code Sections 31515.5 And 31516

Government Code section 31516 states:

“The board of supervisors, in compliance with Section 7507, shall secure the services of an enrolled actuary to provide a statement of the actuarial impact upon future annual costs before authorizing increases in benefits. An ‘enrolled actuary’ means an actuary enrolled under Sections 1241 and 1242 of Title 29 of the United States Code and ‘future annual costs’ shall include, but not be limited to, annual dollar increases or the total dollar increases involved when available.

The future annual costs as determined by the actuary shall be made public at a public meeting at least two weeks prior to the adoption of any increases in benefits.”

Government Code section 31515.5 states:

“The board of supervisors, in compliance with Section 23026, shall make public, at a regularly scheduled meeting of the board, all salary and benefit increases that affect either or both represented employees and non-represented employees. Notice of any salary or benefit increase shall be included on the agenda for the meeting as an item of business in compliance with the requirements of Section 54954.2. Notice shall occur prior to the adoption of the salary or benefit increase, and shall include an explanation of the financial impact that the proposed benefit change or salary increase will have on the funding status of the county employees’ retirement system.

The board of retirement ...is authorized, consistent with its fiduciary duties, to have an enrolled actuary prepare an estimate of the actuarial impact of the salary or benefit increase. The actuarial data shall be reported to the board of supervisors.

Nothing in this section shall be construed to limit or lessen the requirements imposed by Section 7507 that the costs associated with increases in public retirement plan benefits be determined by an enrolled actuary and publicly disclosed two weeks prior to an adoption of the increase in benefits.”

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III. FACTUAL BACKGROUND

We reviewed the following documentation produced to us by the County: Grand Jury Report, actuarial reports, Board of Supervisors' agendas and minutes, Memoranda to the Board of Supervisors by the Human Resources Manager concerning pension increases, CBAs and other agreements with public employee unions, and other documents. We also received information from the County on County procedures in connection with the posting of Board agendas and public availability of supporting documentation.

The documents and information provided by the County, demonstrated the following.

A. Actuarial Reports

The County provided us with actuarial reports provided by Mercer and Gabriel Roeder, Smith & Company. In reports to the County dated February 23 1999 and July 23, 1999, Mercer reported on the financial impact of providing probation officers with a "safety" retirement formula in the Marin County Employees' Retirement Association ("MCERA"). In a report dated June 5, 2001, Mercer reported on the financial impact of a number of different pension increases. The report included projections on the financial impact on a change for miscellaneous employees to the 2% @ 55 formula and 2% @ 5 formula. The report included projections on the financial impact of a change for safety employees to the 3% @ 55 formula and the 3% @ 50 formula. The reports included projections as a percentage of salary and in dollar amounts. In 2004, Gabriel, Roeder, Smith and Company updated the projections on the cost of granting the 3% @ 50 formula to additional safety employees. The County later adopted these formula changes by CBAs and other agreements with the associations representing County employees.

B. Board of Supervisors Agendas

The County's employees are organized into a number of separate bargaining units represented by public employee unions. The County negotiated the increased retirement benefits as part of CBAs or other agreements between the County and its public employee unions. The CBAs and other agreements were submitted to the Board for approval. Before the Board voted on an increase in retirement benefits, the matter was placed on a Board agenda. Some of the agenda items were listed on the regular agenda and some on the consent agenda.

In most cases, the Board agenda specifically identified the item as an increase to a retirement benefit. For example, the Board agenda for May 14, 2002 included as agenda item CA-6 for Human Resources: "Request to approve tentative agreement on reopener with the Marin County Firefighters' Association for a safety retirement enhancement, effective July 7,

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2002.” Some of the agenda items also specifically referenced the new pension formula. For example, the Board agenda for June 18, 2004 included as an agenda item CA-5(b) for Human Resources: “Request approval of tentative agreement with Teamsters Union, Local 856 re: miscellaneous retirement (2% @ 55 enhancement) and safety (3% @ 55 enhancement).” In some cases, however, the Board agenda listed an item for the approval of a collective bargaining agreement without specifically referencing a pension increase that was part of that agreement.

C. Human Resources Department Reports

We are informed that every Board agenda is supported by staff reports. The Board agendas and staff reports are publicly available at least three business days in advance of the Board meetings. We are informed that staff reports are available in hard copies at the office of the Clerk of the Board. We are also informed that, at some point after 2002, the County began to link staff reports to the online versions of the Board agendas.

The Board agenda items for retirement benefit increases were supported by Human Resources Department reports that described the proposed increase and its fiscal impact. A number of the reports specifically referenced the Mercer actuarial study. For example, the Human Resources Department staff report for the May 14, 2002 Board agenda recommends approval of a tentative agreement with the “Firefighters Association on the reopener for a safety retirement enhancement, effective July 7, 2002” and notifies the Board of the following terms:

- “Effective July 7, 2002, 3% @ 55 safety retirement benefit for current safety retirement eligible bargaining unit employees.
- The parties agree to utilize the 7.28% from the 2002 actuarial study conducted by Wm. Mercer and Associates as the present actuarial value of the increased cost for the 3% at 55 retirement enhancement. The parties further agree that eligible bargaining unit employees will share in that cost increase by contributing 50% of the 7.28% increased or 3.64%.”

The Board minutes reflect the Board votes on the agenda items, including approvals of increased retirement benefits.

D. Pension Increases

Our review of Board agendas, Human Resources Department reports, Board minutes and CBAs and other agreements, demonstrates that between 2001 and 2005, the Board approved the following four general pension increases for County employees. As explained above, the Board approved the increases bargaining unit by bargaining unit.

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- (1) In 2001, the option for probation officers to move from a miscellaneous retirement formula of 2% @ 61.25 to a safety retirement formula of 3% @55;
- (2) In 2002, a change in benefit for miscellaneous employees from a retirement formula of 2% @ 61.25 to 2% @ 55;
- (3) In 2002, a change in benefit for safety employees from a retirement formula of 2% at 50 to 3% at 55; and
- (4) In 2002-2004, a further change for safety employees from a retirement formula of 3% @ 55 to 3% @ 50.

IV. LEGAL ANALYSIS

A. County Compliance With The Procedural Requirements In Government Code Sections 7507, 23016 31515.5 And 31516

Our review of the records and information provided by the County demonstrates the following County compliance with these code sections:

(1) Local legislative bodies “shall secure the services of an enrolled actuary to provide a statement of actuarial impact upon future annual costs.” (Sections 7507; 31516.)

The County complied with this requirement. The County commissioned actuarial reports from Mercer. Mercer provided the County with reports on the actuarial impact of the pension increases in reports dated February 23 1999, July 23, 1999, and June 5, 2001. In 2004, the actuary Gabriel, Roeder, Smith & Company updated certain cost estimates.

(2) “[T]he future annual costs as determined by the actuary shall be made public at a public meeting at least two weeks prior to the adoption of any increases in benefits.” (Sections 7507; 31516.)

The County did not fully satisfy this requirement. The proposed pension increases were listed on the agendas for Board meetings and the future costs were disclosed in written staff reports from the Department of Human Resources. Both the agendas and reports were publicly available at least three business days before the Board meetings. We did not receive any confirmation, however, that the County took the additional step of providing this information at a prior public meeting two weeks in advance of the public meeting where the Board approved the increase.

(3) “[A]ll salary and benefit increases” shall “be made public, at a regularly scheduled meeting of the board.” (Sections 23026; 31515.5.)

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This requirement was satisfied, as explained above. The Board agendas listed items for approval of pension increases or CBAs and the Human Resources reports provided information on the costs.

(4) “Notice of any salary or benefit increase shall be included on the agenda for the meeting as an item of business in compliance with the requirements of section 54954.2.”
(Sections 23026; 31515.5.)

This requirement was substantially satisfied. The Board agendas listed the pension increases. In a handful of instances, however, Board agendas listed the approval of collective bargaining agreements without specifically referring to the pension increase. There is no judicial interpretation as to whether the specific “benefit increase” – as opposed to a collective bargaining agreement – must be listed on the agenda. In all cases, however, the Human Resources Department reports provided information on the benefit increases.

(5) “Notice shall occur prior to the adoption of the salary or benefit increase, and shall include an explanation of the financial impact that the proposed benefit change or salary increase will have on the funding status of county employees’ retirement system.”
(Sections 23026; 31515.5.)

This requirement was satisfied. The Board agendas listed the pension increases or CBA that contained the increases, and the Human Resources reports provided information on the financial impact. Although there is some ambiguity, the statutes do not state that the “agenda” itself must include “an explanation of the financial impact” on the “funding status of the county employees’ retirement system.” Under Government Code section 54954.2, an agenda need include only “a brief general description” of the item and “need not exceed twenty words,” which would seem to preclude the agenda itself from containing any extended “explanation of the financial impact.”

B. Legal Analysis Of County Compliance

As discussed above, the County substantially complied with the requirements of Sections 7507, 23026, 31515.5 and 31516. Before the County approved pension increases, the County obtained actuarial reports, provided notice on Board agendas and provided information on future costs in public Human Resources Department reports.

However, it appears that the County did not satisfy two specific requirements. First, in a handful of instances, although the law is not entire clear on what is required, Board agendas listed the approval of collective bargaining agreements without specifically referring to the pension increases. Second, the Department of Human Resources reports on financial impact were not made public two weeks in advance of the Board vote.

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There is no case directly addressing a failure to meet these requirements. However, a large body of case law addresses the general question of when a failure to meet procedural requirements invalidates governmental action.

1. A Procedural Requirement That Is “Directory” Does Not Invalidate A Governmental Action; The Requirement Must Be “Mandatory”

Whether a procedural defect invalidates a governmental action depends on whether the procedural requirement is “mandatory” or “directory.” (*Santa Monica, supra*, 43 Cal.4th 905, 923.) “If the failure is determined to have an invalidating effect, the statute is said to be mandatory; if the failure is determined not to invalidate subsequent action, the statute is said to be directory.” (*Ibid.*)

A procedural requirement, however, can be obligatory, without being mandatory. (*Santa Monica, supra*, 43 Cal.4th at p. 923.) “The word ‘shall’ in a statute does not necessarily denote a mandatory requirement; it may be construed as directory or permissive.” (*Coastside Fishing Club v. California Fish and Game Com.* (2013) 215 Cal.App.4th 397, 425.) “In California, it is not uncommon for obligatory statutory provisions to be accorded only directory effect.” (*Santa Monica* at p. 924.)

“Courts determine whether an obligatory statutory provision should be given mandatory or directory effect by ascertaining the legislative intent.” (*Santa Monica, supra*, 43 Cal.4th at p. 924.) As explained in *Santa Monica*:

Of course, when the Legislature imposes particular statutory requirements, it generally does not intend for them to be disregarded. (*Cox v. California Highway Patrol* (1997) 51 Cal.App.4th 1580, 1587, 60 Cal.Rptr.2d 159.) But where, as here, “the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them.” (*Ibid.*, quoting 3 Sutherland, *Statutory Construction* (5th ed. 1992) § 57.01, p. 2.)

There is “no simple, mechanical test” for making this determination. (*McGee, supra*, 19 Cal.3d at pp. 961-962, 140 Cal.Rptr. 657, 568 P.2d 382.) Invariably, “courts look to the procedure’s purpose or function. If the procedure is essential to promote the statutory design, it is ‘mandatory’ and noncompliance has an invalidating effect. If not, it is directory.” (*Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 673, 26 Cal.Rptr.2d 703.)

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Consistent with this directive, substantial compliance with statutory directives is sufficient if the overall purpose of the statute has been satisfied. (*Downtown Palo Alto Com. For Fair Assessment v. City Council* (1986) 180 Cal.App.3d 384, 395 [action not invalidated where there was substantial compliance with statutory requirement to notify “all” business owners located in proposed improvement district]; *Crane v. Board of Supervisors* (1936) 17 Cal.App.2d 360, 368 [action not invalidated by failure to obtain recommendation by superintendent of schools as required by statute].) As explained in *Cal-Air, supra*, 21 Cal.App.4th at p. 668, cited by *Santa Monica*:

“Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute. Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance. Substance prevails over form. When the plaintiff embarks [on a course of substantial compliance], every reasonable objective of [the statute at issue] has been satisfied.” (Citations omitted.)

2. The Legislature Did Not Make The Sections At Issue Mandatory

Sections 7507, 23026, 31515.5, and 31516 do not state that their requirements are mandatory. And no case has interpreted these code sections to determine whether the requirements are “mandatory” or “directory.”³ However, under the analogous Brown Act, the state law that requires public notice and open meetings, courts have held that its requirements are not mandatory except where the legislature specifically states.

As originally enacted, Brown Act violations did not result in the invalidation of an agency’s action. As explained in *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908 n.4, “[W]hile a governmental entity has an obligatory duty to observe the provisions of California’s ‘open meeting’ law (Gov. Code, §§54950 et seq.), and can be enjoined from

³ We found no case that addressed section 31515.5 and 31516, and we found only two cases that addressed section 7507. In *California Statewide Law Enforcement Assn. v. Dept. of Personnel Admin.* (2011) 192 Cal.App.4th 1, a union and the state’s Department of Personnel Administration disagreed about whether changes to certain employees’ designation as safety members was retroactive. Although the Court of Appeal mentioned the requirements of section 7507, the court’s simple holding was that the Department did not have authority to make the changes where the terms are not presented to the Legislature. The case does not address whether section 7507 is mandatory or directory. In *Howard Jarvis Taxpayers’ Assn. v. Board of Supervisors* (1996) 41 Cal.App.4th 1363, taxpayer groups brought an action against a county, and the county retirement association, alleging that defendants unlawfully included certain benefits in the computation of “compensation earnable” under Gov. Code § 31461) for purposes of calculating the retirement benefits of county employees and, under the facts of the case, section 7507 was found inapplicable.

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violating or mandated to follow such provisions (Gov. Code, §54960), California decisions to date have uniformly construed such provisions as having ‘directory’ effect, and thus have refused to invalidate governmental acts, such as the promulgation of an administrative regulation, even when the governmental entity improperly discussed the matter at a nonpublic meeting.”

Subsequent amendments specified which Brown Act violations could result in invalidation of official actions taken in violation of the Act. (Gov. Code 54960.1 (a) [providing for an action to obtain a judicial determination that “an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956 or 54956.5 is null and void under this section.”]) The Brown Act, however, also includes opportunities and a timeline to cure any violations (section 54960.1(b),(c)), and excludes any violations where there is *substantial compliance* with the Act or that involve *reliance* interests, such as agency actions with respect to contracts or bonds (section 54960.1 (b)(1)(2)).

These Brown Act sections demonstrate that the state legislature is aware of the serious consequences of invalidating governmental actions based on procedural irregularities. In the Brown Act, the legislature carefully crafted a statutory scheme to take into consideration the important interests at stake. The fact that the legislature did not address these interests in the context of pension increases is evidence that it did not intend that a failure to follow the notice requirements would void approval of the increases.

In sum, the Legislature has not stated any enforcement mechanism with respect to sections 7507, 23026, 31515.5, and 31516. Based on the similar purpose of the Brown Act’s notice and open meeting requirements, the case law on the Brown Act is persuasive here. Without a legislative statement that approval of a pension increase is void for failure to comply with every detail of Sections 7507 etc., substantial compliance should be sufficient.

3. The County Substantially Complied With The Statutes

Because the relevant statutes are silent regarding the implications of non-compliance, a court would look to legislative intent to evaluate whether a failure to strictly follow statutory procedures was “mandatory” or “directory.” (*Santa Monica, supra*, 43 Cal.4th, at p. 923.)

Government Code section 7507 was enacted in 1977, as Senate Bill 439. SB 439 described the proposed law as follows:

This bill would require the Legislature and local legislative bodies to obtain actuarial evaluations of future annual costs before authorizing increases in public retirement plan benefits and to make the information

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public at a public meeting at least two weeks prior to the adoption of such increases.

(See Legislative Intent Service, Inc., Senate Bill 439 (Russell 1977), Chapter 941, Statutes of 1977 – SB 439, *citing*, Enrolled Bill Report to the Governor prepared by the Legislative Secretary.)

Government Code sections 31515.5 and 31516 were enacted in 1996. The State Association of County Retirement Systems (“SACRS”) had promoted the bill. The purpose of the bill was “to insure that all benefits provided by ’37 Act counties are properly funded, and that all actions affecting benefit increases are made openly, in full view of the public.” (Analysis, Senate Public Employees & Retirement Committee, SB 226, Hearing date: 4/17/95).⁴ One of the objectives of the bill was to make sure that provisions in other government code sections, such as 23026 and 7507, were also set forth in the CERL. (*Id.*) Section 31515.5 mirrors the notice and actuarial requirement set forth in section 23026. Section 31516 replicates the actuarial and public meeting requirements set forth in section 7507. All of the legislative history we reviewed consistently reflected these purposes.

Based on the text and legislative history of these sections, their apparent intent was to require a board of supervisors, before the adoption of pension increases, to (1) obtain actuarial evaluations of future annual costs, (2) provide public notice at regularly scheduled Board meetings of salary and benefit increases, and (3) publicly provide the estimates of future costs.

Even if sections 7507 etc. are “mandatory” – which no court has found – the County substantially complied with the objectives of the statutes. As stated above, “substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute.” (*Cal-Air, supra*, 21 Cal.App.4th at p. 668.) The County “actually complied” with the “essential” elements of the statutes. The County engaged an actuary who prepared cost estimates of the increased benefits, the County posted on Board agendas the proposed pension increases or the collective bargaining agreements containing those increases, and the County publicly provided the cost projections in Human Resources Department reports. “Where there is compliance as to all matters of substance technical deviations are not to be given the stature of noncompliance.” (*Cal-Air, supra*, 21 Cal.App.4th at p. 667.)

⁴ See also Senate Committee on Public Employment and Retirement, Teresa P. Hughes, Chairwoman, Background Information Request (Bill seeks “[t]o eliminate pension spiking and ensure the financial integrity of the twenty county retirement systems which operate under the County Retirement Law of 1937”).

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Moreover, the lack of two week advance notice is an issue only of timing; public notice in fact did occur before approval of the increases. Generally, "requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary [legislative] intent is clearly expressed." (*Edwards v. Steele* (1979) 25 Cal.3d 406, 410) [rule that appeal of denial of building permit must be heard between five and 15 days of filing was directory]. And requirements intended to "secure the orderly conduct of business," as opposed to individual rights, are not mandatory. (See *Western/California, Ltd. v. Dry Creek Joint Elementary School Dist.* (1996) 50 Cal.App.4th 1461, 1499) [school district was obliged by statute to give notice of a fee to the county, however fee was still valid where the District failed to give the required notice.] Moreover, courts have held that even where the statute will allow for invalidation, a concrete showing of prejudice associated with the violation is required for invalidation. (*North Pacifica LLC v. California Coastal Comm'n* (2008) 166 Cal.App.4th 1416, 1433.)

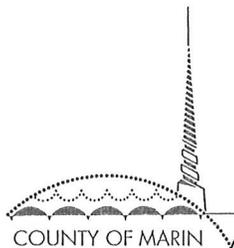
In summary, from the documentation we have reviewed, the County substantially complied with the Government Code sections at issue. Given this substantial compliance, the County's failure to comply with all statutory requirements does not make the Board's approval of the pension increases void.

V. CONCLUSION

Based on the above analysis, we conclude that the County substantially complied with Government Code sections 7507, 23026, 31515.5 and 31516 before the Board approved pension benefit increases during the time period 2001 to 2005. These Government Code sections do not state that noncompliance renders any pension increases void. Moreover, the County substantially complied with these sections by retaining an actuary to provide projections of future costs, posting notice of pension increases or CBAs on Board agendas, and providing public notice of cost increases in Department of Human Resources reports. Based on this substantial compliance, there is no basis under the Government Code sections at issue to void the pension increases.

The analysis in this memorandum focuses on the issues raised in the Grand Jury Report concerning compliance with the Government Code. The law of vested rights includes many requirements and exceptions also not addressed in this memorandum. Therefore this memorandum does not address whether the pension benefits at issue are vested rights.

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BOARD OF SUPERVISORS

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June 30, 2015

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Honorable Faye D'Opal
Presiding Judge
Marin County Superior Court
3501 Civic Center Drive
San Rafael, CA 94903

Dear Judge D'Opal:

The Marin County Board of Supervisors' response to the 2014-2015 Civil Grand Jury Report "Pension Enhancements: A Case of Government Code Violations and A Lack of Transparency" (April 9, 2015) is attached. The attached document responds to all the requests made for responses from the Board of Supervisors.

Respectfully submitted,

Katie Rice
President, Board of Supervisors

C: Marin County Civil Grand Jury