

# SANTA ANA'S PROPERTY BASED IMPROVEMENT DISTRICT

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## CITY OF SANTA ANA SPECIAL ASSESSMENT DISTRICT

### **SUMMARY:**

In July of 2011, the Orange County Grand Jury received a complaint requesting that it conduct an inquiry into the establishment of a Community Management District (CMD) in the City of Santa Ana, Ca. Such specially established assessment districts are frequently referred to as "Property Based Improvement Districts" or PBIDs.

After a preliminary investigation, it appeared that certain irregularities took place regarding the election process that established the district. It was also alleged that a sufficient number of property owners within the district objected to the process and have sought relief through a petition to "disestablish" the district and filed a petition to do so with their elected representatives on the Santa Ana City Council. This petition has been repeatedly re-calendared by the Santa Ana City Council without making any definitive decisions as to the substance of the petition. These actions or lack thereof, have prevented these petitioners from receiving their rightful consideration.

### **METHODOLOGY:**

The 2011-2012 Orange County Grand Jury took the following steps to investigate the citizen's complaint letter. They:

- Compiled and read documents related to the complaint;
- Interviewed by phone and in person individuals related to the complaint;
- Interviewed city officials;
- Researched public documents relating to ethics of public officials;
- Reviewed applicable statutes and case law;
- Evaluated the compiled information; and
- Generated this report.

### **HISTORY:**

For many years, almost from its very inception, the City of Santa Ana has had a downtown shopping and business district known as "Fourth Street." It has a long cultural history of Hispanic influence and atmosphere.

Approximately twenty-five (25) years ago, it came to be known as the "Fiesta Marketplace", a reference to a business entity which began private development in the immediate area. Fiesta Marketplace initially consisted of majority and minority partners, each of whom owned various parcels of commercial property within the immediate vicinity of this "downtown" area. The "Fiesta Marketplace" originated in 1985 for the purpose of the general improvement of Fourth Street. Some of the improvements were to be financed through various funding sources

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including the United States Department of Housing and Urban Development, as well as tax-exempt bonds.

While the original intent appeared to be an effort to preserve the area's Hispanic and cultural identity, subsequent efforts began to erode the very proposition that was supposed to preserve this "redevelopment" area.

By 2006 and 2007, actions by the city and the developers were perceived as efforts to "gentrify" the downtown area in what one newspaper reporter referred to as an "obvious effort to replace the city's Mexican themed atmosphere with something more in keeping with a yuppie clientele." Additional planning proposals included efforts to change the housing and business identities of the downtown area with the addition of new apartment and condominium projects. Some citizens saw this as a "Forced Gentrification Plan" along with other descriptions such as the "Remove the Poor Mexicans from Downtown Santa Ana Plan."<sup>1</sup>

Under any terms or descriptions, the changes being proposed were destined to create a cultural conflict. As explained by the city planners in the "Renaissance Plan", "The community's heritage needs to be celebrated to express and enjoy the important aspect of daily life. Often when communities forget their past they lose their cultural meaning and stand to seriously dilute any future identity."<sup>2</sup>

In response to the concerns being voiced, by 2008, city officials were making promises to amend their earlier redevelopment plans giving more consideration to the cultural history of the downtown area.

But in 2008, the City of Santa Ana initiated a program that offered financial rebates to the business owners in the downtown area to improve the facades of their buildings. The "Fourth Street Façade Program" allocated one million, two hundred and fifty thousand dollars (\$1,250,000) for improvements to building fronts with a supposed limitation of \$75,000 per storefront. However, for various reasons, the money went to only three (3) property owners:

CM Theater LP (West End Theatre).....	\$ 63,814.77
Gumm & Livingston Investments (Pacific Building).....	\$110,191.00
Fiesta Marketplace Partners (S & A Properties).....	\$765,000.00

The vast majority of these rebate dollars went to the same property owners/developers who comprised the majority interest in the "Fiesta Marketplace" entity, i.e. those developers who were the primary interests in changing the culture of the area.

These same property owners/developers have, and continue to have, extensive connections to the newly formed non-profit business group called Downtown, Inc. As of this writing, these developers presently serve as the officers and directors of Downtown Inc., the entity the City of Santa Ana chose to manage the proceeds from the special assessment.

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<sup>1</sup> Orange County Register, Dec. 23, 2007

<sup>2</sup> Ibid

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Also, in 2008, the City of Santa Ana began efforts to establish a new "CID" or Community Improvement District for the same area.

### **FACTS:**

In 2007, the City of Santa Ana began to review various options on how to increase revenues available for improvements in that business district commonly referred to as "downtown."

In January of 2008, the city formed the Management District Formation Committee for the purpose of developing a Community Management District (CMD). The committee also began working with a consultant in an effort to define the specific area to be considered as part of any district and to develop the actual management plan.

From June through October of 2008, the petitioning process took place.

On July 7, 2008, the City of Santa Ana City Council added Article XX to Chapter 13 of the Municipal Code allowing for the establishment of CMDs. This ordinance differs significantly from state law in that the ordinance set "pre-formation petitioning" at 30% of the proposed district value while the state normally required 50%. Also, the life span of the CMD was set for 10 years while state law limits the life span to five years, with renewals of 10 year periods.

On August 5, 2008, Downtown Inc., the newly formed non-profit organization filed Articles of Incorporation with the Secretary of State with the intention of becoming that organization which would manage the proceeds from the new CMD. This non-profit organization had a board of directors that consisted of the very same developers who were pursuing the developmental changes for the downtown area.

On August 18, 2008, the Santa Ana City Council adopted Ordinance No. NS-2771..."An Ordinance of the City Council of the City of Santa Ana Adding Article XX to Chapter 13 of the Santa Ana Municipal Code Related to Establishment of Community Management Districts."

On August 29, 2008, the Santa Ana City Council adopted the CMD plan, and on October 6, 2008, declared its intention to go forward with the establishment of the CMD. On October 16, 2008, a notice of public hearing in this regard was issued, and a public hearing was set for December 1, 2008.

The voting process to establish "property based improvement districts" is based upon the assessed value of the properties and not on an individual or "one man-one vote" rule.

On December 1, 2008, the following voting tabulations were reported to the City Council. The tabulations were reported in two ways, i.e. one including the ballots from the Town Square Condominium project and one excluding the project:

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### Including Town Square:

In support: (31) representing \$301,510 or 59.7% of total assessed value.

Opposed: (73) representing \$203,556 or 40.3% of total assessed value.

### Excluding Town Square:

In support (27) representing \$301,252 or 60.03% of total assessed value.

Opposed (42) representing \$200,558 or 39.97% of total assessed value.

A cursory review of this tabulation shows that a minority (27) of the "in support" votes controlled a majority of the total assessed value. This became a critical issue as the district became operational.

On December 15, 2008, the clerk of the City Council "certified" the voting results and certain items are of significant note.

Ballots mailed: 421

Ballots returned: 107

Ballots returned from Town Square Condominium Project: 35

Ballots returned (excluding Town Square): 69

### Total weighted assessment amounts of returned ballots:

All ballots: \$505,066

Excluding Town Square: \$501,810

These numbers are problematic in that only twenty-five percent (25%) of the ballots were returned. This would indicate the existence of administrative problems with the procedure, disinterest by the voters, a lack of understanding as to the ramifications of the voting, or a combination thereof.

However, based upon these results, the City Council moved forward with a resolution to establish the "Downtown Santa Ana CMD." On April 21, 2009, the Santa Ana City Council authorized the execution of an agreement with Downtown Inc., the non-profit corporation.

On May 4, 2009, the Council approved a resolution to modify the original plan to change the dates of implementation to reflect a new and different period from January 1, 2010, to December 31, 2014.

On May 18, 2009, a public hearing was conducted related to the proposed amendment to the original plan.

On September 17, 2009, approximately 10 months after the votes were certified by the City Clerk, Downtown, Inc. sent correspondence to the property owners announcing the results of the vote and the subsequent establishment of the CMD and in November of 2009, the first assessments were delivered to the property owners in the newly established CMD.

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Many of the property owners claimed they were taken by surprise at the existence of the assessment much less the amounts. In many cases, their property taxes with the assessment doubled and in some cases tripled. Many assessments went unpaid and many properties were threatened with legal actions.

As more of the assessments became known, the protests from those most affected became more vocal and louder.

On August 1, 2011, a notice for a public hearing was issued indicating the city's intent to modify the boundaries for the downtown CMD. "Considerable dissention took place at this hearing alleging mismanagement issues associated with Downtown Inc., and the mayor pro tem directed staff to prepare a resolution for the "disestablishment of the PBID." A second city councilman indicated that any modifications to the original district area is considered a new district, and cites Proposition 218 in support of that position.

On August 24, 2011, a public hearing was held wherein numerous speakers addressed the city council. The majority of the speakers objected to the PBID indicating that proper procedures were not followed in its establishment, that the assessments being made did not provide a proportional benefit as required by applicable law, and requested that the PBID be "disestablished." Subsequent comments from city council members revealed a lack of consensus as to what actions if any could, or should, be taken. At least three (3) of the members of the city council agreed that certain changes had to take place, most notably in the manner in which Downtown Inc. was organized and conducting the business of administering the PBID. At this council meeting, the council agreed to allow an amendment to the boundary of the PBID.

On September 11, 2011, the city council again met to discuss the disestablishment of the PBID. Again, extensive discussions took place regarding the manner in which the PBID was established, whether it should continue, a lack of transparency by Downtown Inc., and mismanagement issues with Downtown Inc. The lack of consensus amongst the council continued and the matter was continued until October 3, 2011.

On October 3, 2011, a resolution was introduced before the city council to disestablish the PBID pursuant to Article XX, Chapter 13, of the Santa Ana municipal code. Multiple petitions had been received by the city calling for the disestablishment, "specifically, the City Clerk received fifty-six (56) signatures on petitions protesting against the existence of the CMD." The resolution also states that "there are questions regarding the overall support for the CMD from the remaining property owners during the vote if the City had not cast votes in support of the CMD." Comments at this meeting included statements that fifty-nine (59) signatures requesting disestablishment had been received, and that the proposed budget submitted by Downtown Inc. was "substandard." The matter was again continued until November 7, 2011.

On November 7, 2011, the Mayor Pro Tem asked the city council to "clean things up." She further stated that the council never approved the bylaws or the agreement, i.e. with Downtown Inc. Furthermore, she stated that "State Law has a Clause for Disestablishment that was deleted from the Resolution that approved the Santa Ana Ordinance." Three motions were made: (1) to set a public hearing for the disestablishment of the PBID; (2) to have an advisory election

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without the city's vote; (3) to add a process for disestablishment. All three motions died for a lack of votes.

### ANALYSIS

Fiesta Marketplace Partners owns 145,000 square feet of retail and office buildings, with approximately 45 tenants in downtown Santa Ana. When first developed in the late 1980s, Fiesta Marketplace was specifically oriented to Hispanic shoppers. Most recently, the area has been renamed East End.

The 66-block special assessment district includes 312 property owners and approximately 800 businesses. Property owners have been ordered to pay assessment fees for extra security, marketing and promotional events in the immediate area. A considerable portion of these expenses are related to the "newer" businesses such as restaurants and nightclubs.

The developer in this matter has indicated publically that his relationship with the City of Santa Ana was, in many instances, "informal." He further indicated that this was possible because "city staff had a rough idea of whether the City Council would back their plans." "That's the kind of relationship I had with them. They said something, they did it. I said something, I did it." However, he also stated that after the allegations of "gentrification" were made, the "political atmosphere started to turn sour, and city staff became less confident in making agreements." "It was as if one day you could trust what staff was saying, then the next day they were scared and couldn't commit to anything."<sup>3</sup>

In regard to many of the smaller shopkeepers the developer stated: "They're in business because I'm propping them up. But I can't do that forever. Some of them are going to make it because they are going to change, and others are just going to keep doing things the way they've always done, and they will fail."<sup>4</sup> "In order for the retailer to adapt, they're going to have to figure out what to sell and how they're going to sell it," he said.

There is significant opposition to the PBID, the procedures used in its formation, and to how Downtown Inc. is managing the proceeds, from many area business owners. Many comments were made in local newspapers and neighborhood publications.

One shop keeper said some of the changes taking place are hurrying the trend of Spanish-speaking customers seeking other places to shop. "This plan should have, from the beginning, been inclusive and gotten all the merchants together so they're not forcing anyone out—but that didn't happen," he said.

The comments from that merchant reflected the attitude of many others. "What are we paying for? They don't do anything for us. They only care about nightlife and bringing in the wealthy, but those people aren't going to help my business." There have been additional allegations that the proceeds from the assessments from "struggling property owners" are being utilized for the

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<sup>3</sup> Voice of OC, July 22, 2011

<sup>4</sup> NY Times article October 30, 2011

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benefit of certain individuals. That merchant also stated "So many people donated their time and money to helping the downtown and to see this infuriates me so much."

By August of 2011, the level of discord and combative rhetoric had reached a high level of intensity. By this time, the special assessments had taken place, the actual amounts of the moneys due were known, many had gone unpaid, and actions were being taken to collect those in arrears. This was taking place during a time of economic distress as well.

The primary influences promoting the changes to this consistently historical area were the developer on the one hand with resistance by the cultural traditionalists on the other, with the latter being forced to pay for the changes which they vigorously opposed. They were being assessed monies that were being used to change the identity of the very area that they had long cherished.

Allegations of racism inevitably became an integral part of the dispute and further escalated the loudness of the discussion and the intensity of the differences.

Many property owners complained that the special assessment district was illegal in its formation, and that the promoters of the special district deliberately eliminated the disestablishment procedure. The petitions to disestablish the assessment district were in an amount representing numbers considerably in excess of the minimum required and have been submitted to the City of Santa Ana.<sup>5</sup> It is also alleged that the City of Santa Ana voted its interest in the formation process in violation of the proper procedures established by law and that their vote constituted 38% of the votes needed to establish the district. The results have caused, on average, a doubling of the financial burdens on the respective properties.

Additionally, these property owners point out that the majority of the proceeds of the assessment are being utilized in a manner that benefits a particular clientele, those related to the business interests of the developers with little or no benefit to the majority of the property owners. They believe that they are paying a significant surcharge on their properties that they cannot afford, for services that are of no benefit to them or their businesses, with the result that they will be driven out of business, and have become disenfranchised and disillusioned.

And, although numerous requests and proposals for relief were made to the Santa Ana City Council, continuing inaction by the city council has aggravated an already serious situation.

A significant number of issues have arisen related to the procedures required to establish a Community Improvement Districts. Many of these issues are directly related to the originating ordinance approved by the City Council while others are related to specific provisions of the California Government Code and the Constitution of the State of California:

*"Prior to levying a new or increased assessment, or an existing assessment that is subject to the procedures and approval process set forth in Section 4 of Article XIII D of the California Constitution, an agency shall give notice by mail to the record owner of each identified parcel. Each notice shall include the total amount of the proposed*

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<sup>5</sup> Streets and Highway Code Section 36670(a).

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*assessment chargeable to the entire district, the amount chargeable to the record owner's parcel, the duration of the payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, and the date, time, and location of a public hearing on the proposed assessment. Each notice shall also include, in a conspicuous place thereon, a summary of the procedures for the completion, return, and tabulation of the assessment ballots required pursuant to subdivision (c), including a statement that the assessment shall not be imposed if the ballots submitted in opposition to the assessment exceed the ballots submitted in favor of the assessment, with ballots weighted according to the proportional financial obligation of the affected property.”<sup>6</sup>*

*At the conclusion of the public hearing conducted pursuant to subdivision (d) an impartial person designated by the agency who does not have a vested interest in the outcome of the proposed assessment (**emphasis added**) shall tabulate the assessment ballots submitted, and not withdrawn, in support of or opposition to the proposed assessment. For the purposes of this section, an impartial person includes, but is not limited to, the clerk of the agency. If the agency uses agency personnel for the ballot tabulation, or if the agency contracts with a vendor for the ballot tabulation and the vendor or its affiliates participated in the research, design, engineering, public education, or promotion of the assessment, the ballots shall be unsealed and tabulated in public view at the conclusion of the hearing so as to permit all interested persons to meaningfully monitor the accuracy of the tabulation process..”<sup>7</sup>*

Furthermore, in 1996, the voters of the State of California passed Proposition 218 (Cal. Const., art. XIII D). Considerable interpretation was given to this provision in 2008 by the courts:

*“Before Proposition 218 became law, special assessment laws were generally statutory, and the constitutional separation of powers doctrine served as a foundation for a more deferential standard of review by the courts. But after Proposition 218 passed, an assessment's validity, including the substantive requirements, is not a constitutional question. There is a clear limitation however, upon the power of the Legislature to regulate the exercise of a constitutional right. All such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it. Thus, a local agency acting in a legislative capacity has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect.”<sup>8</sup>*

The court further states that:

*“Under the plain language of Proposition 218 (Cal. Const., art. XIII D), a special benefit must affect the assessed property in a way that is particular and distinct from its*

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<sup>6</sup> California Government Code section 53753(b)

<sup>7</sup> California Government Code section 53753 Subsection (e)(1):

<sup>6</sup> Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority. 44 Cal.4<sup>th</sup> 431.

<sup>7</sup> Ibid

<sup>8</sup> Ibid

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*effect on other parcels and that real property in general and the public at large do not share.”<sup>9</sup>*

*A “tax” can be levied without reference to peculiar benefits to particular individuals or property. But, a special assessment, unlike a tax, must confer a special benefit upon the property assessed beyond that conferred generally. “An assessment can be imposed only for a “special benefit” conferred on a particular property”<sup>10</sup>. An assessment is “invalid” if it does not comply with the special benefit and proportionality requirement of Proposition 218, or if it fails to “directly connect any proportionate costs of and benefits received from the permanent public improvement.”<sup>11</sup>*

It has been alleged the tabulation of the ballots was not performed in a manner consistent with requirements of the Government Code. Because the City of Santa Ana placed its interest into the process by voting, it now had a vested interest in the outcome of the process, and thereafter used its own clerk’s office to conduct that tabulation, there is a lack of impartiality, or certainly the appearance of one.

The language of the applicable constitutional provisions is clear and unequivocal as to its intent as well as to when such assessments are to be allowed and the manner in which they are to be appropriated. As stated above: **“A special assessment must confer a special benefit upon the property assessed, beyond that conferred generally.”** (emphasis added)

Furthermore, in light of the history of this area over the past twenty-five (25) years, the way in which public money has been channeled to a select few, and with these select few continuing to exercise control over the proceeds produced by this assessment district, there exist strong reasons to suspect that appropriate procedures were not followed.

Most importantly, the actions taken by the developers, the confusion which took place in the voting process, the failure to comply with the legal requirements relating to special assessment districts, the difficulties associated with businesses in a period of economic limitations, and the lack of civility in the discussions, have resulted in tumultuous circumstances at best. These circumstances have become unmanageable and can only result in serious financial difficulties for all concerned. The developers will be in danger of having abandoned properties as the smaller business seek alternatives elsewhere, and those that cannot afford the change will be put out of business. The City of Santa Ana will continue to suffer the financial drawbacks associated with those conditions.

The City Council of Santa Ana has been placed on notice on numerous occasions as to their lack of compliance with the legal requirements well established in California law as related to the establishment, management, and continuance of special assessment districts. Its continuing disregard of the concerns of the majority of the citizens being impacted by these circumstances constitutes a disenfranchisement and disservice to its constituency. The time has long past for the city managers and the city council to step back, reflect on what has taken place and take

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<sup>11</sup> Ibid

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corrective actions. Continuing to ignore this matter can only result in further discourse, both conversationally and legally, which will be detrimental to all.

### **FINDINGS:**

In accordance with California Penal Code §933 and §933.05, the 2011-2012 Orange County Grand Jury requires responses from each agency affected by the Findings/Conclusions presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its study of the Santa Ana Property Based Improvement District, the 2011-2012 Orange County Grand Jury makes the following Findings/Conclusions:

**F1.** City of Santa Ana appears to be in violation of California State Law in the formation of this Improvement District.

**F2.** Monies collected from the improvement district appear to have only benefited a few and have not resulted in a direct benefit to the assessed property as required by California law.

**F3.** An appearance of impropriety exists in the relationship between the developer and the City of Santa Ana.

**F4.** An appearance of impropriety exists in the relationship between the developer and Downtown Inc., the administrator of the funds from the special district.

**F5.** The process by which the district was established in regard to the mailing of ballots, the process of tabulation, and the voting by the City of Santa Ana does not appear to be in compliance with the statutory requirements for establishing an assessment on property owners.

### **RECOMMENDATIONS:**

In accordance with *California Penal Code* §933 and §933.05, the 2011-2012 Orange County Grand Jury requires responses from each agency affected by the **Recommendations** presented in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

Based on its study of the Santa Ana Property Based Improvement District, the 2011-2012 Orange County Grand Jury makes the following recommendations:

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**R1.** The City of Santa Ana should request that its City Attorney or independent counsel conduct an investigation into whether the City of Santa Ana complied with the requirements of establishing a formation district; whether that district benefits all property owners proportionately; and whether there are any violations or conflicts of interest. If so, the City of Santa Ana should immediately take action to disestablish the district.

**R2.** The Santa Ana City Attorney and the Orange County District Attorney should investigate the alleged violations of election laws and procedures.

### **REQUIREMENTS AND INSTRUCTIONS:**

In accordance with *California Penal Code* Sections §933 and §933.05, the 2011-2012 Orange County Grand Jury requires responses from each agency affected by the **Findings/Conclusions and Recommendations presented** in this section. The responses are to be submitted to the Presiding Judge of the Superior Court.

*“Not later than 90 days after the grand jury submits a final report on the operations of any public agency subject to its reviewing authority, the governing body of the public agency shall comment to the presiding judge of the superior court on the findings and recommendations pertaining to matters under the control of the governing body, and every elected county officer or agency head for which the grand jury has responsibility pursuant to Section §914.1 shall comment within 60 days to the presiding judge of the superior court, with an information copy sent to the board of supervisors, on the findings and recommendations pertaining to matters under the control of that county officer or agency head and any agency or agencies which that officer or agency head supervises or controls. In any city and county, the mayor shall also comment on the findings and recommendations.”*

- (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 therefore.
- (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

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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 warranted or is not reasonable, with an explanation therefore.

(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 aspects of the findings or recommendations affecting his or her agency or department.

### **Responses Required:**

<b>Respondent</b>	<b>Findings</b>	<b>Recommendations</b>
City Council of Santa Ana Orange County District Atty.	F1, F2, F3, F4, F5	R1, R2 R2