

August 25, 2009

The Honorable Jamie Jacobs-May
Presiding Judge
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

FILED

AUG 31 2009

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY D. ALDYCKI

Re: Citizens Watchdog Committee, Santa Clara Valley Transportation Authority

Dear Judge Jacobs-May:

The 2008-09 Civil Grand Jury Report relating to Santa Clara Valley Transportation Authority (VTA) focuses mainly on the Citizens Watchdog Committee established by Santa Clara County citizens voting approval of 2000 Measure A. The Citizens Watchdog Committee (CWC) discussed this Report, commenting on numerous misstatements and factual inaccuracies in the Report, at its meetings on June 10, 2009, July 8, 2009, and August 12, 2009. It appointed a subcommittee to further review the Findings and Recommendations and report back to the full CWC.

The CWC acknowledges the VTA response to the Grand Jury Report Findings and Recommendations. However, as the focus of the Grand Jury Report is primarily on the CWC, the committee determined it would respond directly to the Findings and Recommendations.

It is important to note that CWC, like any organization, is committed to continual improvement. Prior to receiving the Report, the CWC had both identified and was pursuing improvement on many of the findings subsequently contained in the Report. This process began far in advance of issuance of the Report, in some cases up to two years prior, and continues forward. The Committee feels it is a different committee than it was prior to the investigation, which was the point of reference in the Report.

It is respectfully requested that you attach this response from the Citizens Watchdog Committee to the Report and that where the Report is posted on a website within your control, that this response from the CWC is posted side-by-side with the Report.

Finding 1a

The term "watchdog" is a misnomer. The structure and composition of the CWC called for in 2000 Measure A, as well as how the CWC responsibilities are interpreted by VTA staff and the Board, prevents the CWC from performing its duties effectively.

Response

The Citizens Watchdog Committee disagrees with Finding 1a. The structure and composition established by 2000 Measure A are well thought out and provide for CWC effectively to perform its duties as required by that Measure.

Finding 1b

Although arguably the CWC may have technically complied with the minimum functions specified by Measure A, the CWC is failing the public by not providing reliable information to make intelligent decisions regarding transit in the county.

Response

CWC disagrees with Finding 1b. Accurate, reliable information is regularly provided to the community. CWC meetings are publicly posted, the public is invited to make presentations to the committee, a public hearing is held annually, an annual report is widely published, and both invitations to the public hearing and the annual report are published in various city and regional newspapers including those published in several different languages.

Recommendation 1a

The CWC should reevaluate its scope and expand its functions beyond the minimum standards stated in 2000 Measure A and operate as a true "watchdog" committee.

Response

CWC disagrees with Recommendation 1a. CWC will continue to operate as mandated by 2000 Measure A. Expanding its functions would require voter approval of a new ballot measure.

Recommendation 1b

The Board should provide the CWC with independent advisors, including legal counsel, to assist them in this effort.

Response

CWC disagrees that independent advisors, including legal counsel, are required; it does not see any need. Experience has been that when information is requested from staff, the CWC studies diligently the information provided. The level of expertise and experience of CWC members is such that no further advisors are required. Additional advisors would be a waste of taxpayer resources.

There has been no issue on which the committee felt the need to ask for outside advice.

Finding 2

The CWC is not independent. CWC members are appointed or have their appointment approved by the VTA Board, the very people they are charged with overseeing. In other transportation agencies in California, citizen oversight bodies are appointed and/or approved by independent third parties. (See Appendix A).

Response

CWC disagrees. Members are nominated by third party stakeholder groups and by the organizations they represent. The Board does not and has not denied approval to them or to members representing stakeholders.

Recommendation 2

The Grand Jury recognizes that the assignment of members of the CAC as the CWC is part of existing law and cannot be changed without a new ballot measure. However, the Board is at liberty to change the CAC bylaws and hence change who approves membership in this combined committee. The Grand Jury recommends that the Board change the bylaws so that the selection process is conducted by, and selections approved by an independent third party.

Response

CWC disagrees with Recommendation 2. While this recommendation is directed to the Board, CWC has determined it will respond.

CWC does not recommend a bylaw change or the involvement of a third party. The current structure includes a wide spectrum of stakeholder groups and community organizations, who nominate their representatives.

Recommendation 2b

Former elected officials should not be allowed to sit on the Citizens Advisory Committee to eliminate the possibility of bias from prior responsibilities.

Response

CWC disagrees. The committee benefits from members with a history of service to the community.

Recommendation 2c

The CWC should have its own staff, independent of VTA staff, to set meeting agendas, coordinate project investigations, write reports and do other tasks assigned to the CWC.

Response

CWC disagrees. There is no need for duplicate overlapping staffs. This would not be a good use of Measure A funds. It would simply add an unnecessary layer of bureaucracy.

Finding 3

The CWC is not in control of its own agenda. CWC bylaws do not explicitly allow members to participate in setting the agenda for their own meeting. Other VTA committees such as the Policy Advisory Committee have this explicit right. The CWC chairperson reviews the staff-proposed agenda in advance and can suggest changes. Other members only view the agenda when formally published.

Response

CWC disagrees with Finding 3. The CWC chair and vice chair meet with staff to set the agenda. CWC members have opportunity both to amend the agenda and to submit issues for inclusion. In addition, the CWC Work Plan, which is reviewed by the CWC as its final action at each meeting, reflects items requested by members for inclusion on future CWC agendas.

CWC is currently involved in improving the process of developing agendas and the timing of placing items on the agenda.

Recommendation 3

The bylaws should be amended to allow the CWC to prepare and set their own agenda without involvement of VTA staff. If VTA staff wishes to place an agenda item, they should consult with CWC Chairperson, not the other way around.

Response

CWC disagrees with Recommendation 3. The committee's responsibility is to determine whether 2000 Measure A funds are spent appropriately. Agenda development is a partnership between the CWC chair, committee members, and VTA staff.

Finding 4a

While meeting the minimum requirement, CWC reports to the public have not been comprehensive, timely or complete. The CWC has published only two three-page status reports since its inception in July 2006. The financial audit for FY 2007 (June 2007) was conducted by an independent auditor retained by VTA staff, not an independent auditor retained by the CWC. In 2008, audits of 2000 Measure A expenditures will be conducted by BOTH an independent auditor retained by VTA and an independent auditor retained by the CWC.

The CWC has failed to take the opportunity to file more frequent reports on Measure A 2000 expenditures, such as monthly or quarterly reports.

Response

CWC disagrees with Finding 4a. The financial audit for FY 2007 was conducted by an independent auditor that was retained by the VTA board. For FY 2008, the audit of 2000 Measure A was conducted by an independent auditor that was retained by the CWC, and this auditor directly reported its findings to the CWC.

The committee disagrees that more frequent reports are necessary or worth the expenditure of Measure A funds.

Finding 4b

The CWC has failed to inform the public that the 2000 Measure A sales tax revenue is not sufficient to complete all of the Measure A programs, and state and federal funding has not been identified to fill the gap. This has been clear to VTA management for some time.

Response

CWC disagrees with Finding 4b. 2000 Measure A does not assign this responsibility to the CWC.

Recommendation 4a

CWC should independently decide on report frequency and content without VTA staff involvement or supervision.

Response

CWC disagrees with Recommendation 4a. The committee decides on frequency and content of reports and benefits from discussion with VTA staff.

Recommendation 4b

No recommendation.

Response

No response.

Finding 5

The VTA staff has forced its own perspective on the CWC regarding committee roles and responsibilities. VTA staff dictates have stifled independent thinking on the part of CWC members.

Response

CWC disagrees with Finding 5. This statement is absurd. Members are aware of their responsibilities under 2000 Measure A and freely express their ideas in overseeing expenditures. CWC takes umbrage at the implication that its members are incapable of independent thinking. CWC is proud of its performance overseeing the appropriate use of 2000 Measure A expenditures.

Recommendation 5

The Board should direct VTA staff to revise its training materials and memoranda to include best practices of other agency watchdog committees and encourage the CWC to establish its own priorities and responsibilities.

Response

CWC disagrees with Recommendation 5 and notes this Recommendation is directed to the Board. The CWC structure and responsibilities are set by the 2000 Measure A ballot measure.

Finding 6

Board work plans and meeting agendas are developed primarily by VTA staff.

Response

CWC disagrees with Finding 6. It has no further comment. This Finding is directed to the Board.

Recommendation 6

The VTA Board should prepare its own agenda and work plans. The Chairperson of the Board should consult with Board members, standing and advisory committees and VTA staff to formulate the agenda.

Response

CWC disagrees with Recommendation 6. This Recommendation is directed to the Board.

Finding 7

With the exception of members from San Jose and the County, Board members have inadequate staff support to fully participate in Board activities. The volume of information supplied to Board members can serve to obscure key issues that deserve focus.

Response

CWC disagrees with Finding 7. Again, this Finding is directed to the Board.

Recommendation 7

The Board should have its own staff, independent of VTA staff, to set meeting agendas, do project investigations, write reports, publish minutes and do other tasks required by the Board.

Response

CWC disagrees with Recommendation 7, and notes this Recommendation is directed to the Board.

Finding 8

Both the Hay Report and the State Auditor Report recommended that the VTA Board make every effort to ensure that new board members have transportation experience by appointing new members with previous transportation experience and reappointing members for multiple terms. Nevertheless the Mayor of San Jose recently appointed two new board members to represent San Jose who have no previous transportation experience.

Response

CWC disagrees, and notes Finding 8 is directed to the Board.

Recommendation 8

New VTA Board members must have transportation knowledge. The VTA Board should require at least one full year on the PAC or another VTA advisory committee prior to being appointed to the Board.

Response

CWC disagrees, and notes this Recommendation is directed to the Board.

Finding 9

VTA failed to provide an updated Measure A Revenue and Expenditure Plan per their published schedule. As a result, voters were deprived of critical information necessary to make an informed decision regarding 2008 Measure B, an additional 1/8-cent sales tax to fund operating costs for a BART extension to San Jose/Santa Clara. The VTA had sufficient time and information to complete this update and made a deliberate decision not to publish it prior to the election. As a result, voters were never told that full funding for the BART extension would jeopardize the completion of other Measure A projects.

Response

CWC declines to comment. This is strictly a Board responsibility and VTA has already responded.

Recommendation 9a

The VTA Board should explain why these facts were withheld from the public.

Response

This is a Board matter and has already been responded to by VTA.

Recommendation 9b

In future elections, the VTA Board should ensure that VTA staff provides the public with a comprehensive explanation of the ramification of each measure, including the impact on both capital and operating fund projections and budgets, as well as the effect on other projects.

Response

This is a Board matter and has been responded to by VTA.

Finding 10

VTA effectively suspended the shovel-ready light rail extension to Eastridge, without informing the VTA Board or the CWC in advance. Additionally, they used evasive language to prevent the Board and the public from understanding the true status ("reaffirming" support) of the project. The people of the east Valley deserve better from the representatives of San Jose on the VTA Board.

Response

CWC disagrees with Finding 10. The Eastridge project is on the program list, not suspended. Development continues on this project, which has never been and still is not "shovel-ready."

Recommendation 10a

The Board should amend the CAC/CWC bylaws to provide the CWC with the authority to review and make recommendations regarding any changes to the priority and status of all Measure programs. This is a specific request over and above the responsibilities assigned by the 2000 Measure ballot wording.

Response

CWC disagrees with Recommendation 10a. CWC operates under 2000 Measure A ballot wording. CWC does not set policy for the VTA. That is a Board responsibility.

Recommendation 10b

The staff should not make unilateral changes regarding Measure A projects without prior CWC review and Board approval. Specific procedures should be put into place to assure that the VTA Board has reviewed and approved all changes to the scope, funding and schedule of Measure A projects before VTA staff proceeds.

Response

CWC disagrees with Recommendation 10b. Its responsibility is to ensure that 2000 Measure A revenue is spent responsibly. It does not determine policy.

Finding 11

The Board approved Measure C and D to be placed on the November 2009 ballot as part of the consent agenda and without prior review by advisory committees. This occurred on the day prior to the deadline for the submittal of ballot measures for the November 2008 election.

Response

CWC points out that Finding 11 applies to the Board. CWC agrees that good government practices require effective use of advisory committees.

Recommendation 11

The Board should ensure the ballot measures are submitted for Board approval on the regular agenda (never the consent agenda) after thorough review and discussion at both advisory and standing committee meetings.

Response

CWC notes that this Recommendation is directed to the Board.

Finding 12

The Board put 2008 Measure D on the ballot, assigning responsibility for citizen review of future VTA long-range strategic plans to the CWC, without notifying the CWC of its intent to do so. In addition, the CWC will cease to exist on June 30, 2036, leaving the subsequent responsibility for review of the long-range plan in limbo.

Response

CWC agrees that we were not notified. But it should also be noted that the CWC quickly expressed our concern to the Board. We have since been assured that, in the future, appropriate notification and consultation will occur.

CWC disagrees with Finding 12 in that it is factually incorrect that the committee will cease to exist in 2036.

Recommendation 12

The hastily implemented Measure D needs to be rethought before 2036. The Board should assign the responsibility for reviewing the long-range strategic plan to an organization that will remain in existence permanently.

Response

CWC disagrees with Recommendation 12. CWC will continue to exist to oversee 2000 Measure A funds and their expenditure and audit some time beyond 2036.

The long-range strategic plan issue will have to be addressed in the future by the Board.

Finding 13

The Board allowed Measure C to be placed on the November 2008 ballot asking voter approval of the VTA 2035 plan when neither the Board nor the public had seen a draft of the full plan.

Response

CWC disagrees with Finding 13. However, this Finding is directed to the Board.

Recommendation 13

The Board should ensure that VTA's long-range strategic plans are thoroughly reviewed and vetted by the public prior to being offered for approval by whatever body is deemed responsible.

Response

CWC notes that Recommendation 13 is directed to the Board.

Finding 14

Measure A funds were used on non-Measure A projects. The Measure A fund exchange violated 2000 Measure A ballot requirements that 2000 Measure revenue was to be spent only on 2000 Measure A programs. But VTA believes it is entitled to use these funds for other programs as long as repayment is certain. It appears that there is in fact repayment uncertainty. Even though the initial \$50M swap was approved in February 2007, the CWC certified (over the chairperson's signature) in the FY 2007 2000 Measure A Status Report that all Measure A revenue was spent only on Measure A programs. It is clear that the CWC does not fully understand its responsibility with respect to the requirement.

Response

CWC disagrees with Finding 14. CWC notes that statements in this Finding are incorrect.

Recommendation 14

The Board should give the CWC the opportunity to review all 2000 Measure A fund transfers. The CWC should point out such usage of funds to the public in their reports. The CWC should make a public decision whether this usage of funds is consistent with the intention of the voters with respect to 2000 Measure A.

Response

CWC partially agrees with Finding 14.

We agree that the Board should allow the CWC opportunity to review Measure A fund transfers prior to their execution and to review the repayment plan.

We agree that CWC should point out such usage of funds to the public in its reports.

We also agree that the CWC should make a public determination on whether these fund transfers are in accordance with the intent of the 2000 Measure A ballot. However, the report fails to note that the CWC already does this, as is evidenced by the Committee's request at its March 11, 2009 meeting for the CWC's independent compliance auditor, Macias Gini & O'Connell, LLP (MGO), to assist the CWC with its fiduciary role by researching whether the fund swap was

consistent with the Measure A ballot. The CWC's determination on this fund swap is being included in its Annual Report for FY 2008.

Finding 15

Measure B on the 2008 Ballot approved a 1/8-cent sales tax for BART operations. Tax collection is slated to start when the BART project receives full federal and state funding. However, VTA intends to start collecting this tax when only the first 2.2 miles of the BART project are funded, not the complete project.

Response

CWC disagrees with Finding 15. However, this is directed to the Board.

Recommendation 15

The Board should consider the intention of the voters as well as the specifics of the ballot measure when considering the issue. This tax should only be collected when funding for the full 16.1 mile BART extension is obtained from the state and federal government.

Response

CWC disagrees with Recommendation 15. It notes that this Recommendation is directed to the Board.

CWC also notes that to wait for full funding for the entire BART line would effectively stop all progress on the BART extension.

Sincerely,



Noel Tebo

Chair, Citizens Watchdog Committee

C: VTA Board of Directors
Michael Burns, VTA General Manager