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## Brown Act Blues

**The DA doesn't file criminal charges against CAPO Unified School trustees, but their violations of the state open-meeting law will go on their permanent records**

**BY DAFFODIL J. ALTAN**



Times are strange for four boardmembers of the beleaguered Capistrano Unified School District, who are the subject of a report released last week by the district attorney's office. Though none of the trustees will be charged criminally, the board was found to have violated the law that governs meetings by elected officials when it held closed meetings and failed to report discussions and decisions to the public on numerous occasions in 2005 and 2006.



The closed sessions and day-long "performance evaluation" meetings of now-indicted former Superintendent James Fleming were used to discuss building contracts, how to manage the press and public opinion, change orders for big projects, and a slew of other topics, and were not reported to the public, the DA found.



"That such discussions are undertaken in secret by a body charged with the community's most important obligation, to adequately educate its young, is nothing short of disturbing," the report states.

The closed meetings were a subject of a year-long investigation by the DA that led to the indictments of Fleming and former assistant superintendent Susan McGill on separate charges last May. Both Fleming and McGill have pled not guilty, and pretrial hearings are scheduled for Dec. 7.

"This is blatant secrecy; they knew what was going on," says Jennifer Beall, a leader of the recall group that is currently trying to recall two of the board's four "old guard" trustees. The group attempted to recall all seven of the old trustees in 2005 (see "Hard Knocks," Oct. 5). Beall says the "performance evaluations" that are being called into question occurred during the group's first recall attempt in 2005. Among the many subjects discussed at the meetings was the district's multimillion-dollar administration building—the issue that galvanized the first recall.

While that recall never made it to the ballot, three candidates supported by recall leaders did oust incumbents in the regularly scheduled 2006 board elections.

Senior Assistant District Attorney William Feccia says the Brown Act—the state open-meeting law that gives the public access to all matters discussed by their elected officials—was designed with special instructions for the various topics discussed in the so-called “performance evaluation” meetings. “The purpose always is to evaluate the past performance and set goals for the future, not to discuss pending litigation, settlements of pending litigation, construction contracts,” says Feccia.

The DA further found that none of the 36 items discussed in the “performance evaluations” was lawful under an exception cited by Fleming when he put the items, which ranged from school conversions and public comments to administration reorganizing and requirements for teacher dismissal, on the 2005 agenda. The DA investigation also found that the board and superintendent attempted to limit public participation in public meetings and that there was “a desire to manipulate press and public opinion behind closed doors.”

During one of these meetings, on Saturday, July 30, 2005, a cost increase to the administration-building contract was discussed. The cost overrun was never identified on the agenda and was presumably talked about under the “New Education Center” item. The superintendent negotiated a \$3.8 million agreement, and the board voted on it in closed session on Aug. 8, 2005. None of this was ever reported to the public.

“They had their clowns screaming bloody murder that we were all liars, and at the same time, they’re making a \$3.8 million change order and keeping it a secret,” Beall says. “They knew. The pressure was unbearable for them about the cost of that building.” The CUSD Recall group issued a statement calling for the resignation of the board members involved in the violations after the DA released its report last week.

Past board president Marlene Draper contended in her grand-jury testimony that the closed meetings and the board’s non-disclosure were legal because all of the agendas for Saturday performance-evaluation meetings were pre-approved by counsel from the Orange County Department of Education. But Ron Wenkart, general counsel for the department and the attorney who would have approved such agendas at the time, says he has no records of him or anyone in his office ever having conversations with Fleming about the Brown Act or of approving CUSD closed meeting agendas.

“I went back and double-checked the records,” he says. “I didn’t speak with them. . . . I was not involved with that.” His office was advising the district

on "other legal issues" at the time, he says, but nothing relating to closed meetings or the Brown Act.

The board was the subject of an investigation in 1990-91; then, the DA found that the board had violated open-meeting laws. Draper is the only current board member who was also serving at that time.

Trustees Draper and Sheila Benecke could not be reached for comment; current board member Duane Stiff said he had no comment. "None of us have discussed it at all," he said. The district is planning to hold a special board meeting about the report on Monday. According to a statement released by district spokesperson Beverly De Nicola, "This is a serious matter, and the board will need time to review the findings of this report."