REPORT BY THE OFFICE OF THE 
SONOMA COUNTY COUNSEL 
TO THE BOARD OF SUPERVISORS 
IN REGARD TO THE 2012 GRAND JURY REPORT 
ENTITLED:

“SONOMA COUNTY PENSION 
INCREASES IN 2002 – LEGAL OR NOT?”

Prepared for the September 18, 2012 Meeting 
of the Sonoma County Board of Supervisors
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>1</td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>2</td>
</tr>
<tr>
<td>II. GRAND JURY’S ASSUMPTIONS REGARDING LEGAL REQUIREMENTS TO APPROVE ENHANCED RETIREMENT BENEFITS</td>
<td>4</td>
</tr>
<tr>
<td>III. STATUTES GOVERNING PROCEDURAL REQUIREMENTS</td>
<td>5</td>
</tr>
<tr>
<td>A. GOVERNMENT CODE SECTION 7507</td>
<td>5</td>
</tr>
<tr>
<td>B. GOVERNMENT CODE SECTION 23026</td>
<td>6</td>
</tr>
<tr>
<td>C. GOVERNMENT CODE SECTIONS 31515.5 and 31516</td>
<td>7</td>
</tr>
<tr>
<td>IV. HISTORICAL AND FACTUAL BACKGROUND</td>
<td>9</td>
</tr>
<tr>
<td>A. LEGAL DEVELOPMENTS AND ACTIONS LEADING TO APPROVAL OF A CONSENT DEGREE ORDERING ENHANCED RETIREMENT BENEFITS</td>
<td>9</td>
</tr>
<tr>
<td>B. LABOR NEGOTIATIONS LEADING TO MOUs PROVIDING FOR ENHANCED RETIREMENT BENEFITS</td>
<td>11</td>
</tr>
<tr>
<td>V. ANALYSIS OF HISTORICAL FACTS AND PROCEDURAL REQUIREMENTS</td>
<td>14</td>
</tr>
<tr>
<td>A. PROCEDURAL AND FACTUAL SUMMARY</td>
<td>14</td>
</tr>
<tr>
<td>B. THE COUNTY SUBSTANTIALLY COMPLIED WITH THE PROCEDURAL REQUIREMENTS</td>
<td>15</td>
</tr>
<tr>
<td>VI. LEGAL ANALYSIS OF IMPLICATIONS OF POTENTIAL PROCEDURAL DEFECTS</td>
<td>16</td>
</tr>
<tr>
<td>A. THE CONSENT DEGREE ORDERED THE ENHANCED RETIREMENT FORMULAS AND PREVENTS THE COUNTY FROM INDEPENDENTLY ALTERING THE NOW VESTED PENSION BENEFIT</td>
<td>17</td>
</tr>
</tbody>
</table>
B. THE ENHANCED PENSION BENEFIT'S VALIDITY IS NOT DEPENDENT UPON COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS IN GOVERNMENT CODE SECTIONS 7507, 31515.5, AND 31516 ............................................................ 18

C. PROMISSORY AND EQUITABLE ESTOPPEL RENDER THE COUNTY'S PENSION FORMULAS ENFORCEABLE OBLIGATIONS ................................................................. 22

D. JURISDICTIONAL AUTHORITY REGARDING BENEFIT SYSTEM CHANGES RESIDES IN THE SONOMA COUNTY EMPLOYEES' RETIREMENT SYSTEM .................................................................................. 24

VII. CONCLUSION ........................................................................................................ 25
EXECUTIVE SUMMARY

This report responds to the 2012 Sonoma County Civil Grand Jury Report entitled “Sonoma County Pension Increases in 2002 – Legal or Not?” The Grand Jury Report made a single Finding (F1) which stated: “The California Employees Retirement Law [“CERL”] requirements for approving the enhanced retirement benefits in 2002 do not appear to have been followed.” More specifically, the Grand Jury identified a set of Government Code procedural requirements (sections 7507, 31515.5 and 31516) related to approval of increased pension benefits. The Grand Jury recommended that the issue be examined and that the Sonoma County Board of Supervisors (“Board”) obtain the advice of counsel. In response, the Office of County Counsel conducted a review into the procedures and actions taken to approve the enhanced pension formulas to determine if the required procedures were followed and to provide legal advice regarding its findings.

As explained more fully below, the Grand Jury was generally in error regarding the timing of the approval and the procedural requirements it assumed applied at the time the benefits were adopted. Adoption of the enhanced retirement benefits took place pursuant to two distinct but interrelated processes – judicial approval of a settlement agreement to resolve pending class action litigation, and Board of Supervisors’ approval of Memoranda of Understanding (MOUs) with labor organizations which concluded union collective bargaining. While many of the pertinent records related to these deliberations no longer exist, based on the documents reviewed to date, it appears that at least one notice requirement discussed by the Grand Jury deserves further analysis. The applicable statutes (Government Code sections 7507 and 31516) required an actuarial report to be secured and the actuarial future impact of the retirement benefits to be made public, at a public meeting, at least two weeks prior to adoption.

Examsing the total factual background it appears that there was substantial compliance with the applicable statutes. This conclusion is based on the facts that: the County secured the services of an actuary; obtained a statement of the estimated actuarial valuation of the benefits; held at least six separate public meetings in which MOU’s containing the enhanced benefits were considered; approved a pension obligation bond and pension rates based, in part, on the actuarial information regarding the enhanced benefits; and specific actuarial estimates of financial impacts regarding the enhanced benefits were presented in at least two public Sonoma County Employees’ Retirement Association (“SCERA”) Board meetings. All of these events took place prior to court approval of a judicial consent decree where the benefits were ordered as part of a settlement of class action litigation. The court action appears to have been the final step for the enhanced retirement benefits to go into effect.

Notwithstanding the foregoing, this Report recognizes that an inference can be drawn from the available documentation that there was not full compliance with the relevant statutes when the enhanced retirement benefits were adopted in 2003. The legal analysis provided assumes that there was not full compliance with some or all of the procedural requirements. It concludes that even if there was not full or substantial
compliance with the statutorily required procedures, this cannot serve as a legal basis to invalidate or nullify the County's current pension obligations. The reasons include the following: First, the pension obligations were mandated by a judicially ordered class action consent decree that settled litigation in the wake of the Supreme Court’s decision in *Ventura County Deputy Sheriff's Association v. Board of Retirement of Ventura County Employees’ Retirement Association*. Second, the procedural requirements in sections 7507, 31515.5, and 31516 are directory rather than mandatory. In other words, non-compliance with the procedural requirements does not invalidate the approval action. Third, in light of the extensive reliance over the last decade by employees and the County on the pension terms in the bargained employment contracts, the County would be legally precluded or "estopped" from asserting that the pension formulas are invalid even if the approval process was flawed. This is particularly true today as over 2,000 employees have retired since the enhanced pension benefits went into effect. Finally, the County could not unilaterally make changes in the pension benefits due both to the court’s authority over the consent decree and SCERA’s sole authority under the California Constitution to administer the pension system.

To fully implement the Grand Jury’s recommendations, the County also engaged a national law firm, Steptoe & Johnson, LLP, with expertise in the area of public employee pension procedures, to independently review this Report and to provide its conclusions to the Board of Supervisors. The factual background and legal analysis are discussed more fully below.

I. INTRODUCTION

This report is in response to the Sonoma County Civil Grand Jury Report entitled “Sonoma County Pension Increases in 2002 – Legal or Not?”. The Grand Jury received a citizen’s complaint alleging that the required legal procedures for approving a new pension formula in 2002 were not followed by the Board of Supervisors. The Grand Jury launched an investigation; however, according to the Report, the Grand Jury was unable to complete its investigation due to time constraints and the difficulty of locating necessary documents and key people to verify whether or not proper procedures were followed in 2002.

---

1 The civil grand jury is comprised of 19 citizens and is impaneled pursuant to the State Constitution to investigate and report on the operations, accounts, and records of the officers, departments, or functions of the county. (Penal Code, §925.) Pursuant to Penal Code section 933, the grand jury is required to submit to the presiding judge of the superior court a final report of its findings and recommendations that pertain to county government matters during the fiscal or calendar year. The Grand Jury’s 2011-2012 Report addressing this pension question was issued in June 2012 and the specific article entitled “Sonoma County Pension Increases In 2002 – Legal Or Not?” can be found on pages 1-2 and at http://sonoma.courts.ca.gov/sites/all/assets/pdfs/general-info/grand-jury/2011-2012/FinalReport.pdf. The Board of Supervisors has 90 days to respond to the final report. (See Penal Code, §933(c).)

2 The Sonoma County Retirement Association is an independent legal entity governed by the County Employees Retirement Law of 1937 (referred to as the “CERL” or “’37 Act”). Twenty California counties have established retirement associations under the ‘37 Act.
Response to Grand Jury Pension Report

The Grand Jury Report made a single Finding (F1) which stated: “The California Employees Retirement Law requirements for approving the enhanced retirement benefits in 2002 do not appear to have been followed.” As a result of its Finding, the Grand Jury made two recommendations:

R1. The Board of Supervisors examine the procedures and actions taken when the pension increase was approved in 2002 to determine if the required procedures were followed.

R2. The Board of Supervisors obtain legal advice on how to proceed regarding current pensions if legal procedures were not followed in 2002.

To implement the Grand Jury’s two recommendations, the Office of County Counsel reviewed the procedures and actions taken when the enhanced pension formulas were approved to determine if the required procedures were followed and to provide legal advice on how to proceed. In summary, the Report concludes that some of the “required” procedures stated by the Grand Jury did not apply when the benefits were approved. Although misstated in the Grand Jury Report, one procedural requirement in effect at the time provided for obtaining actuarial services and making public the actuarial fiscal impact of retirement benefit changes at a public meeting at least two weeks prior to adoption by the Board of Supervisors. Government Code sections 31516 and 7507.

Based on the available facts it appears that substantial compliance with the statutes occurred. This is due to the fact that: 1) an actuarial analysis was secured by the County; 2) at least six public Board of Supervisors’ meetings subsequently took place where the enhanced retirement benefits were considered as part of approval of collective bargaining agreements; 3) the Board of Supervisors also held separate meetings to consider a pension obligation bond and pension rates where the actuarial impacts of the enhanced retirement benefits were publicly available; 4) the SCERA Board held at least two public meetings where the actuarial valuations were specifically considered and discussed; and 5) all of these events took place prior to the court’s approval of the consent decree which included the enhanced benefit provisions.

However, based on the documents available to date, to the extent the statutes require a public meeting to consider the actuarial financial impacts of pension changes two weeks in advance of the action to adopt the enhanced benefits, full compliance may not have occurred. As a legal matter any such notice defect cannot serve to invalidate the Board of Supervisors’ actions. This is due to the following considerations: 1) the benefits also were approved as part of a judicial consent decree to terminate class action litigation; 2) the procedural requirements were “directory and not mandatory”; and 3) after ten years of reliance on the pension changes the doctrines of promissory and equitable estoppel would preclude overturning the decision.
II. GRAND JURY’S ASSUMPTIONS REGARDING LEGAL REQUIREMENTS TO APPROVE ENHANCED RETIREMENT BENEFITS

The Grand Jury Report sets out the legal procedures which the Grand Jury believed are required for the Board of Supervisors to approve a new pension formula. According to the Grand Jury Report, the legal procedures are:

1. “A public notice is required to be published two weeks prior to a Board of Supervisors meeting at which a pension increase is to be discussed and voted on.”
2. “The CERL requires that the pension increase action item be listed on the regular meeting agenda,” rather than on the consent calendar.
3. “The CERL requires actuarial reports from two different actuaries, one hired by the Board of Supervisors and one hired by the Sonoma County Employees’ Retirement Association.”
4. “Attendance of an actuary at the Board meeting to answer questions and to explain the changes that might occur as a result of the vote.”

(See Grand Jury Report at page 1, paragraph 3.)

The above listed procedural requirements referenced in the Grand Jury’s Report are not accurate. It appears that the Grand Jury was referring to the 2012 version of a statute (Government Code, §7507), and to requirements that were not in place in 2002. Specifically, in 2002, there was not any restriction preventing an agenda item on enhanced retirement benefits from being on a Board of Supervisors’ consent calendar. Similarly, there was not a requirement that an actuary be present at a Board of Supervisors meeting. These requirements were enacted in 2009. Additionally, as explained more fully below, the code sections do not require that two different actuaries be hired.

The main surviving legal procedural issue raised by the Grand Jury, although misstated, is whether the County held a public meeting, in which a statement of the actuarial impacts was considered, two weeks prior to adoption of the enhanced retirement benefits. This report therefore focuses its examination on whether such a statutorily required public meeting took place, and, if not, what is the legal impact of the notice defect on the enhanced retirement benefits adopted by the Board in 2003. The starting place for the analysis is the applicable procedural statutes.

3 Added by Stats. 2008, c. 371 (S.B. 1123), sec. 3.

4 See Government Code sections 31516 and 7507.

5 The Grand Jury Report mistakenly states that the enhanced pension benefits were enacted in 2002, as discussed below in Section IV, the benefits were approved in 2003.
III. STATUTES GOVERNING PROCEDURAL REQUIREMENTS

The Grand Jury reviewed various Government Code sections which pertain to noticing and actuarial requirements when approving salary and benefit increases. The sections most pertinent to the issues regarding legal procedures for approving salary and benefit increases, including the adoption of an enhanced benefit formula are: Government Code sections 23026, 31515.5, 31516, and 7507. The code sections are addressed in the order they became law.

A. GOVERNMENT CODE SECTION 7507

Government Code section 7507 was added in 1977, following the passage of 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 public at a public meeting at least two weeks prior to the adoption of such increases.

The 1977 law required that the local legislative body secure the services of an enrolled actuary to provide “actuarial evaluations of future annual costs . . . .” The 1980 amendment changed the law to require that the local legislative body secure the services of an enrolled actuary to provide “a statement of the actuarial impact upon future annual costs . . . .”

Section 7507 was amended again in 2009, pursuant to Senate Bill 1123. SB 1123 described the proposed changes as follows:

---

6 According to the Grand Jury Report, the Grand Jury reviewed the following Government Code sections 23000-23027; 31515-31517; 54950-54963; 7507. Grand Jury Report at page 2, Bibliography.

7 Government Code section 23026 is found in Division 1 of Title 3 of the Government Code, which pertains to county governance. Sections 31515.5 and 31516 are found under the County Employees Retirement Law of 1937. Section 7507 is found in Title 1 of the Government Code under the Public Pension and Retirement Plans division.

8 Government Code section 7507 provides that: “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 . . . .” [Emphasis added.] 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.” (Emphasis added.)

9 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.
Response to Grand Jury Pension Report

This Bill would revise and recast provisions regarding the services of an enrolled actuary and the disclosure of public retirement plans benefits, as described above. The bill would redefine the qualifications of actuaries for these purposes. The bill would include other post retirement benefits, with specified exceptions, within the subject matter of the actuary's statement that is provided by the Legislature or a local legislative body may authorize an increase in benefits to be made public, as specified, and would require local legislative bodies to have an actuary present to provide information at the meeting where the adoption of a new benefit will be considered, subject to certain exceptions. The bill would prohibit the adoption of any benefit to which its provisions apply by means of a consent calendar. (Emphasis added.)

In short, in 2009, Government Code section 7507 was amended to require that an actuary be present at the meeting and that the adoption of any benefit be on regular calendar, as opposed to consent calendar. Although assumed otherwise in the Grand Jury Report, these two requirements did not exist in 2003 when the Sonoma County Board of Supervisors adopted an enhanced benefit formula.

B. GOVERNMENT CODE SECTION 23026

Government Code section 23000 et seq. sets forth the general statutes for the government of counties. Section 23026 was added by statute in 1992. Section 23026

10 Legislative Counsel's Digest, SB 1123, January 28, 2008.

11 Government Code section 23026 provides that:

"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 nonrepresented 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 enrolled actuary and publicly disclosed two weeks prior to an adoption of the increase in public retirement plan benefits."
Response to Grand Jury Pension Report

has three basic requirements. First, it requires the Board of Supervisors to notice, at a regularly scheduled meeting, all salary and benefit increases. Second, it authorizes the Board of Retirement (in this case, the Sonoma County Employees' Retirement Association) to prepare an actuarial on the impact of the salary and benefit requirements. And, third, it provides that the section does not lessen the requirements set forth in Government Code section 7507.

C. GOVERNMENT CODE SECTIONS 31515.5 AND 31516

Government Code sections 31515.5 and 31516 became effective in 1996. The source for the bill which enacted these sections was the State Association of County Retirement Systems ("SACRS"). The purpose of the bill, according to SACRS, was "to eliminate pension spiking and ensure the financial integrity of the twenty county retirement systems: which operate under the CERL." 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. Section 31515.5 mirrors the notice and actuarial requirements set forth in section 23026. Section 31516 replicates the actuarial and public meeting requirements set forth in section 7507.

Like section 23026 set forth above, section 31515.5 requires the Board of Supervisors to notice, at a regularly scheduled meeting, all salary and benefit increases. Second, it authorizes the Board of Retirement (in this case, the Sonoma County Employees' Retirement Association) to prepare an actuarial estimate on the impact of the salary and benefit requirements. And, third, it provides that the section does not lessen the requirements set forth in Government Code section 7507.

12 Government Code section 31515.5 provides that:

"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 nonrepresented 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 requirement imposed by Section 7507 that the costs associated with increases in benefits be determined by an enrolled actuary and publicly disclosed two weeks prior to an adoption of the increase in benefits."

(Emphasis added.)

13 See Senate Committee on Public Employment and Retirement, Teresa P. Hughes, Chairwoman, Background Information Request.
Response to Grand Jury Pension Report

Like section 7507, set forth above, section 31516 requires that the Board “secure the services of an enrolled actuary to provide a statement of the actuarial impact” and requires that a public meeting on the fiscal impact be held at least two weeks before any increase in benefits is approved. The evidence discussed below demonstrates that the first prong of this requirement was met in that actuarial services were secured and a fiscal impact statement provided. The remaining procedural requirement most at issue in this Report is whether actuarial fiscal impacts of enhanced retirement benefits were made public, in a public meeting, at least two weeks prior to the adoption of the benefits.

Sections 31516 and 7507 pertain only to increases in retirement plan benefits. These sections do not mention “salaries.” In addition, both sections are silent on what it means to “secure” the services of an actuary. None of the sections – 23026, 7507, 31515.5, or 31516 – explicitly require the Board of Supervisors to retain its own actuary, separate from the retirement association. In fact, it is our understanding that it is common practice for counties with ‘37 Act retirement plans to utilize the services of the retirement association’s actuary. Sections 7507 and 31516 only require that the Board of Supervisors “secure” an actuary. Section 31516 is also silent on what kind of public meeting is to occur two weeks before the adoption of any increases in benefits.

Curiously, section 31515.5 requires that a regularly scheduled meeting occur consistent with section 54954.2 of the Brown Act, but section 31516 does not have this requirement. Accordingly, it is unclear whether the public meeting required under section 31516 actually has to be before the Board of Supervisors. With that said, for purposes of this Report, we assume that since the public meeting requirement is in the same section as the requirement that the Board of Supervisors secure an actuary, presumably the public meeting should be before the Board of Supervisors pursuant to a properly noticed meeting under the Brown Act.

14 Government Code section 31516 provides that:

“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.”

(Emphasis added.)

15 Sections 23026 and 31515.5 pertain to both salaries and benefits. Sections 23025 and 31515.5 do not require the Board of Supervisors to obtain an actuarial report. Rather, both sections authorize the retirement association to have an actuary prepare an estimate of the actuarial impact and to report that to the Board of Supervisors.
IV. HISTORICAL AND FACTUAL BACKGROUND

To properly analyze the Board’s approval of the enhanced pension formulas in 2003, it is important to understand not only the statutory framework but the factual context in which the Board took its actions. Of particular relevance is that the granting of the enhanced pension formulas culminated in a negotiated consent decree arising from a class action lawsuit regarding disputed pension obligations, and was concurrently part of labor negotiations governed by the Meyers-Milias-Brown Act (Government Code, §§3500 et seq.) At that time, the County was faced with containing the potential extreme financial liability associated from potential pension court rulings while at the same time attempting to resolve labor negotiations which were driven, in part, by changes in state law providing for enhanced benefit formulas.

A. LEGAL DEVELOPMENTS AND ACTIONS LEADING TO APPROVAL OF A CONSENT DECREE ORDERING ENHANCED RETIREMENT BENEFITS

In 1983, the California Court of Appeals decided the case of Guelfi v. Marin County Employees’ Retirement Association. The case concerned the statutory interpretation of the provision of the CERL defining what is included in determining an employee’s “final compensation” for purposes of calculating retirement benefits. The Court held that the payment received by employees for overtime, uniform allowance, and educational incentive pay, was excludable from the final pensionable income calculation. More importantly, the Court of Appeal held that for compensation to be includable in retirement it must be paid to all employees in comparable positions. For fourteen years, the twenty CERL counties relied upon Guelfi to calculate retirement compensation.

In 1997, in the landmark case of Ventura County Deputy Sheriffs Association v. Board of Retirement of Ventura County Employees’ Retirement Association (“Ventura Decision”), the California Supreme Court rejected the Guelfi decision. It held that, with the limited exception of overtime compensation, all items of compensation paid in cash, even if not earned by all employees in the same grade or class, must be considered “compensation earnable” upon which an employee’s retirement is based.

Following the Ventura decision, the County and SCERA surveyed all compensation items paid to County employees. On April 22, 1998, SCERA passed a resolution to address the application of Ventura to the identified compensation items for purposes of calculating retirement benefits. SCERA’s 1998 Resolution applied the Ventura Decision prospectively only. Attached to the Resolution was a matrix on the items of remuneration which would be considered part of final compensation.

17 Ventura County Deputy Sheriffs Assn v. Board of Retirement of Ventura County Employees’ Retirement Assn., 16 Cal.4th 483 (1997).
18 Resolution of the Board of Retirement, Sonoma County Employees’ Retirement Association, Resolution No. 24 (April 22, 1998).
As a result of the Ventura Decision, class action lawsuits were filed, seeking to have ‘37 Act counties recalculate current employee and retirees’ retirement benefits, and to apply those changes retroactively. In the class action lawsuit, San Francisco Superior Court Judge Stuart Pollack held that the Ventura Decision was retroactive. Subsequent to Judge Pollack’s order, in 2001, three lawsuits were filed against the County of Sonoma and SCERA. These lawsuits were consolidated and then coordinated with the already pending class action lawsuit.

In general, the lawsuits sought to challenge SCERA’s determination on what types of pay were to be included in an employee’s final compensation for purposes of calculating retirement benefits and sought to apply the holding retroactively to current and prior employees. Of particular importance was the claim that the so-called “terminal pay,” cash payments of various types made at employment separation, must be included in retirement eligible compensation. It was estimated that this claim alone could expose SCERA and the County to over $150 million in liability. In light of Judge Pollack’s prior decision on the retrospective effect of the Ventura Decision, it became increasingly important for the County to attempt to negotiate a settlement to resolve past claims as a result of the retroactive effect of the Ventura Decision.

There were frequent settlement negotiations between the parties and records indicate that the Board of Supervisors met in closed session several times over the next two years to discuss the litigation. During that period of time, settlements were reached in several other counties which included provisions for increased retirement benefits under the CERL. As early as April, 2002, the plaintiffs submitted a comprehensive settlement proposal, which included a proposal to resolve the retrospective and prospective Ventura Decision claims in exchange for enhanced retirement benefits. A settlement was eventually negotiated and, after notice to the class, a consent decree was approved by the court. The consent decree required, in part, the approval of enhanced retirement formulas for both safety and general members, in exchange for the release of claims arising out of the Ventura Decision, including its retrospective effect, and for other concessions made during the collective bargaining process between the County and the employee organizations. The original settlement proposal was therefore a roadmap, and the labor negotiations the required route, to reach resolution in the litigation. The settlement agreement was approved by the Board of Supervisors and

19 The Court Docket from the Class Action lawsuit indicates that Judge Pollack issued his order regarding retroactivity on August 31, 2001.


21 The Court Docket from the Class Action lawsuit indicates that the County of Sonoma and the Retirement Board filed its answers to the petitions on October 31, 2001 and January 15, 2002.

22 See April 30, 2002, correspondence from plaintiffs’ attorney Steve Silver to County and SCERA.
Response to Grand Jury Pension Report

documented in a Resolution dated May 20, 2003.\textsuperscript{23} The consent decree was approved by the Court on June 30, 2003. See http://sonoma-county.org/counsel/legal.htm.

B. LABOR NEGOTIATIONS LEADING TO MOUs PROVIDING FOR ENHANCED RETIREMENT BENEFITS

In assessing what historical documents were available in regard to the adoption of the enhanced retirement benefits, the Clerk of the Board, the Human Resources Department, the Auditor-Controller, and the Sonoma County Employees' Retirement Association were all contacted. In addition, the former Employee Relations Manager, who was the lead negotiator for the County in 2001-2004, the County actuary, and the lead attorney representing the County and SCERA in the class action lawsuit were all interviewed.\textsuperscript{24} The information provided is based on a review of the documents and discussions held with the identified key participants.

As early as 1999, County unions anticipated that the California Legislature would approve changes to the retirement laws to allow for new enhanced retirement benefits. At least one Sonoma County safety group sought and obtained a reopener in its MOU (1999-2000) for a discussion on enhanced retirement benefits.\textsuperscript{25} In 1999, the State legislature adopted Senate Bill 400 which provided enhanced retirement benefits to Highway Patrol officers and other state workers.

\textsuperscript{23} Board of Supervisors, County of Sonoma, Resolution No. 03-0565. (May 20, 2003).

\textsuperscript{24} An extensive search for documents was undertaken and is on-going. The Clerk of the Board conducted a computer search on the availability of records pertaining to enhanced retirement benefits. According to the Clerk, generally only resolutions and minutes exist from this time period as agendas and supporting documents are retained for one year and then destroyed.

The Human Resources Department ("HR") also conducted a document search for labor negotiation records from the 2000 to 2004 time period. HR was able to locate some relevant documents, including actuarial reports prepared by Gabriel, Roeder & Smith. HR was also able to identify boxes in storage that appear to relate to labor negotiations for the time period 2002-2004 that are still undergoing review.

Auditor-Controller files were reviewed in regard to Pension Obligation Bonds approved on April 29, 2003, which revealed that the disclosure documents referenced the enhanced retirement benefits. In addition, the Auditor-Controller searched its records in regard to payments made to Gabriel Roeder Smith & Company during the time period 2001-2004. This search revealed that Gabriel Roeder Smith & Company was paid approximately $63,000 by the County for actuarial studies during the 2001-2004 time period.

SCERA’s website was reviewed for archived documents, including agendas, minutes and SCERA’s Comprehensive Annual Financial Reports ("CAFR"). Resolutions were also obtained related to the prospective effect of the Ventura Decision and SCERA’s recommendation to the Board of Supervisors in setting yearly contribution rates.

The actuary, Rick Roeder was contacted and requested to provide relevant documents and, while continuing to search, believes that he no longer has the files from this time period. In addition, Court files regarding Sonoma County, available electronically from the post-Ventura litigation, were also reviewed.

\textsuperscript{25} The SCLEMA MOU for 1999-2000 included a reopener for a discussion on enhanced retirement formula.
In 2000, AB 1937 was adopted which allowed counties to consider enhanced retirement benefits for safety employees under the CERL.\textsuperscript{26} In 2001, the CERL was amended to allow for enhanced retirement benefits for general employees.\textsuperscript{27} By January 2002, in addition to the California Highway Patrol, the city police departments of Santa Rosa, Petaluma, Sonoma, Cotati, Sebastopol and Healdsburg all had adopted enhanced retirement benefits.\textsuperscript{28}

In November, 2001, the County began to meet internally to prepare for SEIU labor negotiations, which were set to commence in January 2002 on a new MOU. Several things took place leading up to the negotiations. Prior to commencement of the negotiations, HR sent out a memo template form for departments to raise negotiation issues. A member of the Sheriff’s Department management team returned a completed form and suggested that the County consider an enhanced retirement formula. He cited recent changes in CERL to allow for enhanced benefits. In addition, according to the Employee Relations Manager’s notes, SEIU made a request for information on actuarial information for going to 3% @ 60 for general members.

In December, 2001, it appears that the County Administrator directed the Employee Relations Manager and the Assistant County Administrator, who were leading the SEIU negotiations, to secure actuaries.\textsuperscript{29} Located within the Employee Relations Manager’s files were three actuarial reports prepared by Gabriel Roeder Smith & Company. The reports are dated: 1/19/2002, 2/26/2002, and 3/28/2002. The actuarial reports focus specifically on the potential cost of the enhanced benefit formulas. A number of additional Roeder actuarial studies also examined the impacts of the proposed enhanced benefits in 2002. The actuarial evaluations were coordinated through SCERA, but the Auditor-Controller records show that the County paid for actuarial services from Gabriel Roeder Smith & Company during the time period for February, 2002 and February, 2004. The total amount paid was $63,175. The payments were made from the County (Employee Benefits Account).

In June 2002, the County approved the SEIU MOU (2002-2008). The MOU was for a term of six years, considered unusually long for a labor contract. The MOU provided for an enhanced retirement formula to be effective in June 22, 2004; however, as required by the CERL, the benefit increase was expressly subject to similar agreements being reached between the County and other unions for represented employees.\textsuperscript{30}

\textsuperscript{26} Safety benefit 3%@50 (Gov’t. Code, §31664.1) and 3%@55 (Gov’t. Code, §31664.2) were both enacted as part of Stats. 2000, AB 1937.

\textsuperscript{27}See Government Code section 31676.17.


\textsuperscript{29} See 11/30/01 and 12/03/01 email exchange between Mike Chrystal, County Administrator, and Joanne Sidwell, Employee Relations Manager, regarding SCERA and the County splitting the cost of having an actuarial report prepared.

\textsuperscript{30} See section 17.14 of MOU; this section includes the amount to be paid by employees for past unfunded liability (3.03%) related to the enhanced benefits.
Subsequent to entering into the SEIU MOU, the County continued with labor negotiations with other represented groups. The counties consistent position in those negotiations was that final action to increase benefits was contingent on reaching a settlement of all outstanding claims in the Ventura class action litigation. All other groups entered into MOUs with the enhanced retirement formula in 2003.\(^{31}\) It appears that the official action to adopt the enhanced retirement formulas was consummated on February 25, 2003, when, at public meetings, held with appropriate Brown Act notice, the Board approved several MOUs with represented employee groups.\(^{32}\) However, according to those involved in the negotiations, ultimately the MOUs were dependent upon approval of the Pension Obligation Bonds and court approval of the class action settlement which included the MOU contract terms. The pension obligation bonds were approved at the April 29, 2003 Board of Supervisors meeting.\(^{33}\) The court approved the class action consent decree on June 30, 2003.

Prior to entering into the MOUs, additional actuarial studies were prepared. Gabriel Roeder Smith & Company prepared an actuarial report dated December 31, 2002, which included an analysis of the enhanced retirement formula. This report was presented

\(^{31}\) Set forth below is a list of the represented employee groups, the terms of the contracts that implemented the enhanced retirement benefits, and the date considered and approved by the Board of Supervisors at a noticed public meeting.

DSA 2003-2007 (Approved December 17, 2002; Effective February 4, 2003)
DSLEM 2003-2007 (Approved December 17, 2002; Effective February 4, 2003)
SCPA (Approved December 17, 2002)

The County amended its Salary Resolution on December 10, 2002, which covers unrepresented employees to reflect the anticipated change in enhanced retirement benefits of 3% at 60 for general members. See Resolution No. 02-1305. The Salary Resolution was amended again on January 28, 2003 to provide for retirement benefits for the classification of Sheriff. Resolution No. 03-0076. Similarly, on July 1, 2003, the Board adopted an ordinance regarding elected officials' retirement benefits. Ordinance No. 5430.

\(^{32}\) The Board of Supervisors approved the SEIU MOU in June 2002. However, the enhanced benefit was conditioned on the County entering agreements with the other represented groups on the same terms. Accordingly, the SEIU MOU was only a tentative agreement as to the enhanced retirement benefits. It appears that the official date that the Board of Supervisors approved the enhanced retirement benefits was February 25, 2003. See SCERA Comprehensive Annual Financial Report FY 12/31/2003 ("CAFR"). The CAFR provides that the new benefit formulas were the result of collective bargaining which culminated on February 25, 2003. See also, SCERA's newsletter in August 2003 which also referred to February 25, 2003, as the date that the County Board of Supervisors approved the enhanced retirement formulas.

\(^{33}\) April 29, 2003, Board of Supervisors Meeting Agenda Report.
Response to Grand Jury Pension Report

in detail to SCERA, at noticed public meetings on both May 22, 2003 and June 19, 2003. At that time, SCERA passed a resolution, recommending the setting of retirement rates by the Board of Supervisors based on the actuarial information. The item appeared on the Board of Supervisors regular meeting on June 24, 2003, where the Board adopted a resolution for setting the rates for 2003/2004. The actuarial report is not listed as an attachment for this Board item; however, the Board Resolution references the Gabriel Roeder Smith & Company actuarial report dated April 29, 2003, which is based on conditions as of December 2002.

V. ANALYSIS OF HISTORICAL FACTS AND PROCEDURAL REQUIREMENTS

A. PROCEDURAL AND FACTUAL SUMMARY

As referenced above, Government Code sections 7507 and 31516 provide that the County obtain an actuarial analysis and conduct a public meeting to discuss the actuarial statement of changed pension costs to be held two weeks before the Board approves benefit increases. Because the decisions related to the approval of the enhanced retirement benefits were made nearly 10 years ago, documents related to those decisions could not be located and perhaps were destroyed many years ago. These missing documents may well contain actuarial information regarding the enhanced benefits that were available at a public meeting. Accordingly, the determination of all the information before the Board surrounding the enhanced retirement benefit approvals may never be complete.

Based on the documents available, however, it appears clear that the Board’s decision to approve the enhanced retirement benefits related to two distinct processes—the negotiation and approval of a settlement agreement to resolve pending class action litigation, and the approval of MOUs with labor organizations as the result of collective bargaining. The processes occurred concurrently and were interrelated.

The represented employees were seeking enhanced retirement benefits as part of labor negotiations, which began in earnest in early 2002, when labor negotiations with SEIU commenced. Separately, the County was a defendant to a class action lawsuit, in which plaintiffs were seeking to have their compensation for retirement purposes recalculated and applied retrospectively in light of the Ventura Decision. In late 2001 and early 2002, the County authorized and paid for actuarial valuations to be completed on the impacts of enhanced retirement benefits; though, as is the common practice, the actuarial reports were sent directly to SCERA.

The facts also establish that the Board of Supervisors was aware of the December 31, 2002 actuarial report prepared by Gabriel Roeder Smith & Company because it is referenced in the April 29, 2003 agenda packet for the approval of the issuance of pension obligation bonds. SCERA held public meetings on May 22, 2003 and June 19, 2003, at which time the December 2002 actuarial report was received and discussed. The
actuarial report is referenced again in the Board of Supervisors’ June 24, 2003 resolution when it approved the retirement rates for 2003/2004.

The documents also establish that the Board of Supervisors approved a Resolution at a regular meeting, which authorized a settlement in regard to the class action. That consent decree with the specified enhanced benefits was then approved by the Court, subject to civil class action noticing requirements.

**B. THE COUNTY SUBSTANTIALLY COMPLIED WITH THE PROCEDURAL REQUIREMENTS**

The key statutes at issue in the Grand Jury Report are Government Code sections 7507 and 31516 which contain virtually identical procedural provisions. A close look at the statutes and County actions indicate that the County substantially complied with the requirements. The sections’ provisions and relevant facts (all cited above) are analyzed below.

1) The Board of Supervisors “shall secure the services of an enrolled actuary.” The County obtained the services of Gabriel Roeder Smith & Company, an enrolled actuary, by early 2002, paying over $63,000 for the services. Working with the relevant retirement association to obtain actuarial services was common practice among ‘37 Act counties.

2) The actuary shall “provide a statement of the actuarial impact upon future annual costs” of the proposed enhanced retirement benefit. The actuary analyzed the fiscal impact of the enhanced benefit and provided actuarial estimates of the future costs in reports, including but not limited to, those dated 1/19/2002, 2/26/2002, 3/28/2002, and 12/31/2002.

3) “The future annual costs as determined by the actuary shall be made public at a public meeting.” At least six separate public meetings were held to approve MOUs for various employee groups which contained the enhanced benefits. Full documentation of these meetings and possible reference to actuarial information appears to no longer exist. However, documentation shows that actuarial information regarding the costs of the enhanced benefits was included in the Board of Supervisors item regarding consideration of the pension obligation bond on April 29, 2003, and on June 24, 2003, when the Board adopted a resolution setting pension rates for 2003/2004. Further, the SCERA Board specifically reviewed the actuarial estimates related to the County enhanced retirement benefits in public meetings on May 22, 2003 and June 19, 2003.

4) The actuarial cost information shall be provided “at least two weeks prior to the adoption of any increases in public retirement plan benefits.” The factual

---

34 May 20, 2003 Board of Supervisors Meeting Resolution No. 03-0565.

35 Pertinent sections of the statutes are fully set forth in footnotes 8 and 14.
background makes clear that the labor negotiations were part of a process to resolve the post-Ventura class action litigation. As indicated by the April 30, 2002, Plaintiffs’ settlement offer, agreement on the enhanced benefit package was an essential element to resolve the litigation. From the County and SCERA’s perspective, enhanced benefits would not be made available in collective bargaining without resolution of the litigation. The litigation was resolved through approval of a consent decree by the Court on June 30, 2003. The consent decree specifically provided for, among other things, the enhanced benefit formulas. As shown above, the actuarial cost information regarding the enhanced benefits were available at a public meeting at least two weeks prior to the final adoption of the enhanced benefits by the Court.

From a factual perspective, the above analysis demonstrates substantial compliance with the statute’s requirements. However, based in part on the lack of complete documentation, this analysis recognizes that an inference also can be drawn that the notice requirements of the statute may not have been fully satisfied. Assuming for this report that such notice defects did occur, what are the implications?

VI. LEGAL ANALYSIS OF IMPLICATIONS OF POTENTIAL PROCEDURAL DEFECTS

The Grand Jury recommends that “the Board of Supervisors obtain legal advice on how to proceed regarding current pensions if legal procedures were not followed in 2002.” Although the documentation and records remain incomplete, the Office of the County Counsel has prepared the following legal analysis. The analysis assumes that the requirements for adopting the enhanced retirement formulas were not fully met. A national law firm, Steptoe & Johnson LLP, with expertise in pension law, was retained to provide an independent analysis of this report to the Board of Supervisors.

Assuming that there was a failure to comply with some or all of the procedural requirements of Government Code sections 7507, 31515.5, and 31516, this does not invalidate or nullify the County’s current pension obligations. The reasons include the following:

- First, the pension obligations are mandated by a judicially ordered class action consent decree that settled litigation in the wake of the Supreme Court’s decision in Ventura County Deputy Sheriff’s Association v. Board of Retirement of Ventura County Employees’ Retirement Association, 16 Cal.4th 483 (1997) (Ventura).

- Second, the procedural requirements in sections 7507, 31515.5, and 31516 are directory rather than mandatory. In other words, under the applicable legal doctrine, the procedural requirements in these statutes are obligatory, but non-compliance does not result in the invalidation of the action.
Response to Grand Jury Pension Report

- Third, in light of the performance of the agreement and the extensive reliance interests in the agreement, the County would be estopped from asserting that the pension formulas are invalid even if there was a basis to claim that the action was flawed based on procedural failure.

- Fourth, SCERA has sole authority to administer the pension system and the County would not be able to independently alter or change the formulas established for current employees and retirees.

Each of these reasons is explained more fully below.

A. THE CONSENT DECREED ORDERED THE ENHANCED RETIREMENT FORMULAS AND PREVENTS THE COUNTY FROM INDEPENDENTLY ALTERING THE NOW VESTED PENSION BENEFIT

In late 2001 the County was named as a defendant in post-Ventura class action litigation which sought to make retroactive as earned income various forms of compensation made newly pensionable by the Supreme Court’s Ventura decision. The County settled this litigation in June, 2003, by entering into a consent decree that, among other things, required that the County change its pension formulas. See Order of Judgment, Sonoma County Deputy Sheriffs Ass’n v. Bd. of Retirement, Judicial Council Coordination Proceeding No. 4049, Superior Court of San Francisco (Sonoma County Case No. 228526), June 30, 2003 (“Consent Decree”). With respect to safety employees, the Consent Decree states:

[E]ffective July 1, 2003, the retirement allowances of active safety members shall be computed pursuant to the enhanced 3% at age 55 retirement formulas set forth in California Government Code section 31664.2, with all prior service as a safety member to be credited under that formula. Effective February 1, 2006, the retirement allowances of active safety members shall be computed to the enhanced 3% at age 50 retirement formula set forth in California Government Code section 31664.1, with all prior service as a safety member to be credited under that formula. Consent Decree § 8.

With respect to general employees, the Consent Decree states:

Effective June 22, 2004, or any earlier date determined by the County, the retirement allowances of general members shall be computed pursuant to the enhanced 3% at age 60 retirement formula set forth in California Government Code section 31676.17, with all prior service as a general member to be credited under that formula. Consent Decree § 9.
Response to Grand Jury Pension Report

The Consent Decree thus required the current retirement formulas, although it allows remuneration to be prospectively altered as a result of future collective bargaining. Consent Decree § 9.

The Consent Decree also contains an amendments clause, stating:

The terms and provisions of this Settlement Agreement may be amended, modified, limited or expanded only by the express written agreement of those Parties and Class Members affected by the particular change sought, or, in the case of affected Class Members included in units of representation represented by recognized employee organizations, by the express written agreement of their applicable recognized employee organization(s) in collective bargaining. Consent Decree § 24.

The Consent Decree is a final, binding court order that consisted of a compromise of disputes between the parties. As such, it is “forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated.” Code of Civil Procedure section 870. It notably can also be interpreted as a binding contract. California State Auto. Ass’ s Inter-Ins. Bureau v. Superior Court, 50 Cal.3d 658, 664 (1990). The parties agreed to these formulas to settle litigation, and the Consent Decree represents an independent judicial obligation separate and independent from the labor agreements entered into in 2002 and 2003. The validity of the order does not depend upon the County’s implementation procedures. In light of the passage of time since the entry of order, the most viable direct attack on the Consent Decree would be that it is void on its face. Connelly v. Castillo, 190 Cal. App.3d 1583, 1588 (1987); see Cal. Code Civ. Proc. section 473(b), (d). The Consent Decree, however, is not void on its face; the Order resolved a controversy that was within the court’s jurisdiction. The County does not have grounds to unilaterally seek modification of the Consent Decree, and under its terms, any modification would have to be agreed to by the other parties.

B. THE ENHANCED PENSION BENEFIT’S VALIDITY IS NOT DEPENDENT UPON COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS IN GOVERNMENT CODE SECTIONS 7507, 31515.5, AND 31516

Sections 7507, 31515.5, and 31516 impose notice requirements on the County when increases in public retirement plan benefits are made. Assuming for the purposes of this analysis that sections 7507, 31515.5, and 31516 were obligatory in the context of the County’s labor negotiations in 2002 and 2003, this on its own does not mean that non-compliance invalidates the County action. Statutory obligations may be either mandatory or directory. City of Santa Monica v. Gonzalez, 43 Cal.4th 905, 923-924 (2008). The Supreme Court has explained the distinction as follows:

36 See generally, 2-29 Mathew Bender Practice Guide: Trial & Post-Trial Civil Proc 29.05 (2012) (setting forth the time limits for various types of challenges to final court judgments).

Traditionally, the question of whether a public official's failure to comply with a statutory procedure should have the effect of invalidating a subsequent governmental action has been characterized as a question of whether the statute should be accorded 'mandatory' or 'directory' effect. 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. In the mandatory-directory context, the "mandatory" or "directory" designation does not refer to whether a particular statutory requirement is obligatory or permissive, but instead denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. In California, it is not uncommon for obligatory statutory provisions to be accorded only directory effect. Courts determine whether an obligatory statutory provision should be given mandatory or directory effect by ascertaining the legislative intent. Of course, when the Legislature imposes particular statutory requirements, it generally does not intend for them to be disregarded. But where, as here, the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. There is no simple, mechanical test for making this determination. 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. City of Santa Monica, 43 Cal.4th at 923-924 (emphasis added) (citations and internal quotations omitted).

The Legislature has not stated in either the County Employees Retirement Law or the Meyers-Milias-Brown Act that the notice requirements in sections 7507, 31515.5, and 31516 are mandatory. See Government Code sections 3505.1, 3505.7, and 25300. The fact that sections 7507, 31515.5, and 31516 use the term "shall" with respect to the procedures they require does not indicate that the statutes are mandatory rather than directory. See Rutledge v. Eureka, 195 Cal. 404, 424 (1925). ("The words 'shall' and 'must' are frequently construed as directory terms.")

Because the relevant statutes are silent regarding the implications of noncompliance, whether sections 7507, 31515.5, and 31516 are mandatory or directory is a question of statutory interpretation. Id. The "intent must be gathered," not simply from an examination of the procedural provisions at issue, but "from the terms of the statute construed as a whole ..." Galbiso v. Orosi Public Utility Dist., 182 Cal.App.4th 652, 665 (2010) (citing People v. McGee, 19 Cal.3d 948, 962 (1977)). Considering the statute as a whole, it is well established that "pension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity." Miller v. State of California, 18 Cal.3d 808, 817 (1977); see Hittle v. Santa Barbara County Employees' Retirement Assn., 39 Cal.3d 374, 390 (1985); County of Orange v. Association of Orange County
Deputy Sheriffs, 192 Cal.App.4th 21, 41 (2011); Lesem v. Board of Retirement, 183 Cal.App.2d 289, 298 (1960); Baird v. Fresno, 97 Cal.App.2d 336, 342 (1950). This canon of construction is a critical part of evaluating whether the procedural requirements are mandatory or directory. In Galbiso, for example, the Court of Appeal found that the statutory time limit for initiating a tax sale under the Municipal Improvement Act of 1913 was directory, not mandatory, because the Legislature required that the statute be liberally construed to effectuate its purposes and because reading the statute otherwise "would impede the purposes of the 1913 act." Galbiso, supra, 182 Cal.App.4th at 665-667.

No decisions have addressed whether sections 7507, 31515.5, and 31516 are mandatory. No case has addressed section 31515.5 and 31516 at all, and only two cases have addressed section 7507. In California Statewide Law Enforcement Association v. Department of Personnel Administration, 192 Cal.App.4th 1 (2011), 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 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, 41 Cal.App.4th 1363 (1996), taxpayer groups brought an action against a county, and the county retirement association (and their respective boards), alleging that defendants unlawfully included certain benefits in the computation of "compensation earnable" (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.

Considering precedent addressing the distinction between mandatory and directory obligations, there is no basis to conclude that sections 7507, 31515.5, and 31516 are mandatory. First, and most fundamentally, a conclusion that current pension formulas are invalid based on procedural issues ten years ago is fundamentally at odds with the liberal construction of pension laws that courts have required. Miller, 18 Cal.3d at 817. Further, the canon of construction, that pension laws are liberally construed in favor of protecting pension beneficiary interests, has been vigorously asserted by the courts and the Legislature is presumed to know of this canon when it enacted these requirements. On this basis, one would expect a clear statutory statement that these procedures are mandatory if that was the intent. See Unzueta v. Ocean View School Dist., 6 Cal.App.4th 1689, 1697 (1992) ("The Legislature is presumed to know the existing law and have in mind its previous enactments when legislating on a particular subject."); 67 Ops. Cal. Atty. Gen 84 (1984). This is particularly the case where it is not clear how the Legislature would address partial or complete invalidity, and how this invalidity would relate to vested obligations and the prior and subsequent actions of the Board of Supervisors. Here, for example, subsequent actions of the Board of Supervisors continued the enhanced benefits, and these actions did not trigger the special notice requirements in sections 7507, 31515.5, and 31516.
Second, the notice requirements of sections 7507, 31515.5, and 31516 are designed to ensure that the decision-makers and the public have cost information relevant to the financial implications of retirement formulas. This analysis assumes, that a public meeting to consider the actuarial impact of pension changes did not take place two weeks prior to Board action to approve enhanced retirement benefits. However, as stated above there appears to be substantial compliance and in any event some of the broader purposes of the statutes appear to have been satisfied by the engagement of an actuary, the preparation of actuarial cost estimates of the enhanced benefits and the consideration of that information by the Board of Supervisors and SCERA.

The public notice purposes of the statutes, which arguably may not have been fully implemented, have a consistent purpose with the open meeting laws contained in the Brown Act. Analysis of the mandatory/directory distinction in the context of the Brown Act is useful in determining what approach is required in implementing the Government Code sections at issue in the Grand Jury Report. The Court of Appeal has repeatedly held that the Brown Act’s open meeting requirements are directory and not mandatory unless the Legislature states otherwise. See Old Town Development Corp. v. Urban Renewal Agency, 249 Cal.App.2d 313, 329 (1967) (“Plaintiff's contentions regarding purported violations of the Brown Act, which in effect proscribes secret meetings of any legislative body in the state, are unavailing, because, even if true, the ordinance would not be invalidated.”); see also Morris v. County of Marin, 18 Cal.3d 901, 908 (1977) (“[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 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.”).

As originally enacted, Brown Act violations could never result in the invalidation of an agency’s action. After subsequent amendments, only certain violations could result in invalidation, and these notably exclude any violations that involve reliance interests, such as agency actions with respect to contracts or bonds. Government Code section 54960.1. However, courts have also 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, 166 Cal.App.4th 1416, 1433 (2008). Courts have also held that statutory notice requirements must be intended to protect individuals, and not to “secure[] the orderly conduct of business,” in order for these notice requirements to be mandatory. See Western/California, Ltd. v. Dry Creek Joint Elementary School Dist., 50 Cal.App.4th 1461, 1499 (1996) (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).\(^{38}\)

The Legislature has not stated any enforcement mechanism with respect to sections 7507, 31515.5, and 31516. All of these provisions amount to procedural open meeting requirements, which are directory unless the Legislature states otherwise. These provisions are also intended to ensure the orderly conduct of business rather than to protect specific individuals. Accordingly, the requirements of sections 7507, 31515.5, and 31516 must be considered directory and cannot be a legal basis to invalidate the Board of Supervisors’ prior actions in adopting the enhanced retirement formulas.

C. PROMISSORY AND EQUITABLE ESTOPPEL RENDER THE COUNTY’S PENSION FORMULAS ENFORCEABLE OBLIGATIONS

California courts have long applied the doctrine of promissory estoppel to preclude infringement on pension promises. *Van Hook v. Southern California Waiters Alliance*, 158 Cal.App.2d 556 (1958); see also *Seymour v. Oelrichs*, 156 Cal. 782, 799 (1909). Promissory estoppel is a doctrine that seeks to avoid injustice by making even a non-contractual promise enforceable, if the agreement is reasonably and predictably relied upon by the other party. Restatement (Second) of Contracts (1981) § 90. Under California law, even absent an otherwise binding contractual obligation, a party will still be bound by promissory estoppel if there is “(1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages ‘measured by the extent of the obligation assumed and not performed.’” *Toscano v. Greene Music*, 124 Cal.App.4th 685, 692 (2004).

There is no question that the adoption of the various MOUs containing the changes in pension formulas constituted a clear promise. With respect to reliance, first, SCERA has relied upon the County’s approval of the enhanced retirement formulas, its approval of the pension obligations bonds, and its approval of the Settlement Agreement and Consent Decree. All these actions have impacted the decisions made by SCERA in its capacity to administer the retirement system, including its decisions on recommendations for setting contribution rates. Second, employees have relied on that promise in accepting offers of employment, continuing their employment and thus making payments into the system. In addition, *since July 1, 2004 over 2,000 County employees have retired in reliance on the stated enhanced retirement benefits*. Pursuant to the MOUs adopted by the County, employees’ actions based on this reliance also included increased payments into the retirement system. In addition, County employees relied upon these promises in settling litigation and foregoing the opportunity to argue their claims about what remuneration should have been “includable” and retroactive in compensation after the *Ventura* decision.

\(^{38}\) When actions take place in the context of litigation, courts are even more reluctant to find that procedural public meeting requirements are mandatory. See *S. Cal. Edison Co. v. Peevey*, 31 Cal.4th 781, 805-06 (2003) (open meeting laws are not construed to prevent settlements in closed session); *Johnston v. Sonoma County Agricultural Preservation & Open Space Dist.*, 100 Cal. App.4th 973, 989 (2002) (procedure normally required for transaction did not apply where transaction was in the context of threatened eminent domain action).
One limitation of this principle is that California courts have held that "promissory estoppel will not be applied against the government if doing so would effectively nullify a strong rule of public policy, adopted for the benefit of the public." *People v. Castillo*, 49 Cal.4th 145, 156 n.12 (2010). In the pension context, this rule has been limited to challenging the authority of the local government to increase benefits. For example, in *San Diego Firefighters, Local 145 v. Board of Administration*, 206 Cal.App.4th 594 (2012), the court rejected a promissory estoppel claim in a pension case on policy grounds where the city had not adopted a component of its retirement system in compliance with the city's charter. The court concluded that applying estoppel would defeat the charter, and namely, the charter's formal requirements for the establishment of retirement benefits (by ordinance rather than resolution) and the substantive requirement that retirement system members approve any changes to benefits. *Id.* at 610-11. Unlike *San Diego Firefighters*, the notice requirements of sections 7507, 31515.5, and 31516 address the availability of information required to evaluate pension changes, not the authority of adopting those changes.

Further, in part, the policy objectives of the statutes were met in that the County, unions, and SCERA all had access to the actuarial information and the agreements were considered and approved in public meetings. In addition, the agreements were subsequently ratified not only by performance by all parties but by the adoption of subsequent MOUs with the same pension formulas. *See City of Orange v. San Diego County Employees' Ret. Ass'n*, 103 Cal.App.4th 45, 57 (2002) (procedural irregularity had no effect on obligations where public decision-makers with authority to do so ratified agreement through performance); *Long Beach v. Mansell*, 3 Cal.3d 462, 501 (1970) (where the public agency acknowledged rather than denied the obligation, "exceptional circumstances" were present that justified estoppel). Promissory estoppel thus prevents the County from asserting that it is not bound by its pension obligations.

The doctrine of equitable estoppel is closely related to promissory estoppel, and also has been applied to maintain public pension obligations in California. Equitable estoppel prevents a party from making a representation, inducing others to rely upon that representation, and then later claiming that the representation was not in fact true. *Long Beach v. Mansell*, 3 Cal.3d 462, 488 (1970). "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Id.* (quoting *Seymour v. Oelrichs*, 156 Cal. 782, 795 (1909)). "The elements which must be present in order to invoke equitable estoppel are: '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.'" *Id.* Any claim that the County's pension obligations are simply invalid because of procedural defects in their adoption would be

---

39 This rule is applied by courts in the pension context with the recognition that pension statutes are liberally construed. *Baird v. Fresno*, 97 Cal.App.2d 336, 341 (1950).
equivalent in effect to a claim that the County has been misrepresenting its pension formulas for a decade. See Baird v. Fresno, 97 Cal.App.2d 336, 342 (1950) (where city had not questioned the action of its pension board for a lengthy period, but then changed its interpretation of a governing statute and sought to deny a retiree a pension, estoppel prevented the city from doing so). The Supreme Court has explained that:

[t]he cases which have applied estoppel to the narrow area of public employee pensions, have emphasized the unique importance of pension rights to an employee’s well-being, and have frequently arisen after employees were induced to accept and maintain employment on the basis of expectations fostered by widespread, long-continuing misrepresentations by their employers. In each of these instances the potential injustice to employees or their dependents clearly outweighed any adverse effects on established public policy. Longshore, 25 Cal.3d at 28; see, e.g., Baird v. Fresno, 97 Cal.App.2d 336, 342 (1950).

Accordingly, based on the foregoing, both SCERA and County employees have relied upon the County’s prior actions in implementing the enhanced retirement formulas. Based upon the doctrines of promissory and equitable estoppel, the County would be precluded from refusing to honor the enhanced retirement obligations.

D. JURISDICTIONAL AUTHORITY REGARDING BENEFIT SYSTEM CHANGES RESIDES IN THE SONOMA COUNTY EMPLOYEES’ RETIREMENT SYSTEM

Sole authority to administer the pension system resides with the Retirement Association. Determinations regarding current pension benefits, once those benefits have been established by the Board of Supervisors, are made by the Sonoma County Employees’ Retirement Association (SCERA). SCERA is an independent legal entity that is not under the supervision of the County Board of Supervisors. See Traub v. Bd. of Retirement of the Los Angeles Cnty. Employees’ Retirement Ass’n, 34 Cal.3d 793, 798 (1983) (“A county retirement board ... does not act as agent for the county, but as administrator of the county retirement system, an independent entity established pursuant to the County Employees Retirement Law of 1937.”). SCERA’s autonomy is mandated by article XVI, section 17 of the California Constitution, which states in relevant part:

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.
Response to Grand Jury Pension Report

(Emphasis added.) Cal. Const. Art. XVI, § 17. See City of San Diego v. San Diego City Employees' Retirement System, 186 Cal.App.4th 69, 79 (2010) ("This grant of exclusive authority over retirement system assets was intended to protect such boards from 'political meddling and intimidation' and to 'strictly limit the Legislature's power over such funds.").

As a result, in addition to the legal issues analyzed above which would preclude invalidation of the enhanced pension benefits due to potential procedural defects, there is a separate jurisdictional issue that would prevent the County from taking independent action as SCERA has sole authority to administer the pension system. That said, the same legal obstacles that would prevent the County from invalidating the prior action likely would apply equally to SCERA.

VII. CONCLUSION

The Grand Jury Report was in error as to the procedural requirements it assumed applied when the enhanced pension benefits were approved in 2003. The Report did cite to Government Code sections 7507 and 3516 which, at the time, required the County to engage an actuary and hold a public meeting where the actuarial financial impacts of retirement changes were available at least two weeks prior to adopting increased pension benefits. The facts show there was substantial compliance with these statutes.

The documents demonstrate that it is clear that the County did secure the actuary Gabriel Roeder Smith & Company to provide estimates of the costs of the proposed retirement enhancements. As identified in the comprehensive April 30, 2002 settlement proposal in the post-Ventura litigation, these enhanced retirement benefits were the key to resolving the high liability dispute as well as to negotiating labor contracts. The Roeder actuary statements showing the estimated valuation of the new retirement formulas were reviewed, at a minimum, by the County, SCERA, and the unions. Documents also establish that the County considered and adopted, in at least six separate noticed public meetings, the enhanced retirement benefits contained in employee contracts. Actuarial information regarding the enhanced benefits was available in other public meetings including the approval of pension obligation bond on April 29, 2003, and approval of pension contribution rates on June 24, 2003. SCERA also specifically discussed the estimated actuarial valuations of the enhanced benefits at public meetings on May 22, 2003 and June 19, 2003 -- all before the court approved the class action settlement agreement on June 30, 2003 -- considered the final step in the enhanced benefit negotiations. Taken together, these actions constitute substantial compliance with the applicable statutes.

However, a review of the available documentation could also lead to an inference that compliance with the notice provisions of the statutes was not fully satisfied. While the Grand Jury was incorrect as to a number of the procedural requirements it cited, based on the documents available to date, there may not have been a meeting at least two weeks prior to the benefits' adoption where the impacts were provided in a public meeting as contemplated by the statute.
Response to Grand Jury Pension Report

Assuming that substantial compliance is insufficient, and that there was a failure to fully comply with the procedural requirements of Government Code sections 7507, 31515.5, and/or 31516, this does not invalidate or nullify the County's current pension obligations. The judicially ordered Consent Decree, the directory as opposed to mandatory nature of the notice requirements, and the legal doctrines of promissory and equitable estoppel, all preclude invalidation of the previously approved enhanced retirement benefits.