

**Alum Rock School District Board:  
Time To Put 'Trust' Back In Trustee**



**2017-2018 Civil Grand Jury  
of Santa Clara County**

*June 21, 2018*

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### SUMMARY

Parents and residents of the Alum Rock Union Elementary School District (District) have criticized the actions of the District Board of Trustees (Board) for decades. The Santa Clara County Civil Grand Jury (Grand Jury) has issued reports on the District as far back as 1995.

The 2017-18 Grand Jury found the Board, controlled by a three-Trustee bloc, has failed to meet its governance standards and its fiduciary responsibility.

Many of the recent concerns question the Board and the District's relationship with contractor Del Terra Real Estate Services (Del Terra).

In September 2017, the Grand Jury received a complaint from a resident of the District. The new complaint focused on the actions of a three-Trustee bloc of the five-person Board.

By the time the Grand Jury received the complaint, the Board's actions regarding the Del Terra contracts and use of bond proceeds had already been questioned by District staff, independent consultant Ryland, the Santa Clara County Office of Education (SCCOE) and the State Fiscal Crisis Management Assistance Team (FCMAT). In addition, the Santa Clara County District Attorney (DA) had begun an investigation. The Securities and Exchange Commission (SEC) would soon begin its own investigation, and the District's bond rating would soon be lowered.

Three Trustees who frequently vote as a bloc have lost the community's trust. Elected officials including State Sen. Jim Beall and San Jose Mayor Sam Liccardo are asking for further investigations of the Trustees' actions. The Grand Jury recommends the three Trustees — Dolores Marquez, Esau Herrera and Khanh Tran — immediately resign their seats on the Board.

In addition, the District should terminate its contracts with Del Terra, and issue Requests for Proposals (RFP) to hire separate Construction Managers and Project Managers. Due to Brown Act open-meeting violations and the failure to follow Board By-Laws, the Grand Jury also recommends that Trustees receive comprehensive training on governance.

### BACKGROUND

The District serves more than 10,000 students in grades K-8 in 15 elementary schools, eight middle schools and two K-8 schools in East San Jose. District voters have approved two

recent bond measures, J in 2012 and I in 2016<sup>1</sup>, for school repairs, upgrades and new construction.

These measures granted the Board authority to issue a total of \$265 million in bonds. The Board approved contracts with Del Terra to act as both Program Manager and Construction Manager for the bond projects. Program Managers plan and oversee projects from start to finish. Construction Managers supervise daily activities for construction projects.

### Chronology of Key Events

- Sept. 5, 2016 — The District Chief Business Officer (CBO) issues a report to the District Superintendent that addresses possible fraudulent activity related to billings by contractor Del Terra.
- Oct. 13, 2016 — CBO report is presented to Board in closed session, but Trustees take no action.
- Oct. 13, 2016 — District-hired consultant Ryland releases report that also addresses the Del Terra contract and reaches similar conclusions as the report by senior staff about possible fraudulent activity. The Board refuses to discuss this report.
- October 2016 — In response to the CBO raising the issue about Del Terra's billing practices in the written report, Trustee Herrera tells the CBO that "by the time I am done with you, you won't recognize your name." FCMAT will later report that staff members at times felt threatened by Trustees.
- October 2016 – As reported by FCMAT, the Board tells the District Superintendent to reissue the Request for Proposal (RFP) for the Clean Energy contract to allow Del Terra to bid, though a number of contractors had bid on the RFP by the deadline.
- Oct. 13, 2016—The District Superintendent recommends the Board not approve a contract for Measure I Program Management and Construction Management without going through a Request for Qualifications (RFQ) process.
- Oct. 19, 2016 — The Board directs staff to prepare Measure I and Measure J Program Management and Construction Management contracts to Del Terra without using an RFP/RFQ process.
- Nov. 10, 2016 — The Board approves Measure I and Measure J Program Management and Construction Management contracts for Del Terra.
- November 2016 — The County Superintendent of Schools receives both the CBO and consultant Ryland reports from an anonymous source.

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<sup>1</sup> Bond Measure J preceded Measure I.

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- December 2016 — As per the FCMAT report, the Board instructs District staff to reissue an RFP allowing an architect working with Del Terra to bid on a contract, though the District had received qualified bids for the original RFP.
- Dec. 8, 2016 — Trustees elect Tran as Board President.
- June 9, 2017 — FCMAT releases its 142-page report.<sup>2</sup> It found “sufficient evidence to demonstrate that fraud, misappropriation of funds and/or assets, or other illegal activities may have occurred in the specific areas reviewed.”
- June 9, 2017 — FCMAT report details FPPC<sup>3</sup> Form 460s indicated that more than \$30,000 was contributed to the Measure I bond campaign by Del Terra, and \$55,000 by architectural firms that have done work for Del Terra.
- June 2017 — Multiple media sources report the DA Major Fraud Unit is investigating the District and Del Terra.<sup>4</sup>
- June 28, 2017 — State Department of Education revokes the District’s fiscal independence, effective July 1, 2017.
- Aug. 30, 2017 — Trustees elect Herrera as Board President.
- Sept. 29, 2017 — S&P Global Ratings lowers the District’s bond rating four levels from AA- to BBB+.
- October 2017 (or earlier) — Security and Exchange Commission opens an investigation.
- Nov. 8, 2017 — District legal consultant Rogelio Ruiz opines “that Del Terra had a financial interest in the 2016 Measure J CM agreement and the 2016 Measure I Program and Construction Management Agreement prohibited by section 1090.” Ruiz “strongly” recommends the Board promptly consider terminating Del Terra Measures J and I Construction Manager contracts, but the Board takes no action. On Nov. 9, 2017, the Board votes to waive the attorney-client privilege and releases the Ruiz memorandum.
- Nov. 9, 2017 — The Board votes 3-2, with the bloc in the majority, to move forward with two multi-purpose buildings, even though the District Superintendent and staff recommend against proceeding because of lack of funding and ongoing investigations. Trustee Tran states that the District should go forward even if deficit spending is required.
- Nov. 16, 2017 — Trustees elect Andres Quintero as Board President.
- Jan. 11, 2018 — The Board votes 3-2, with the bloc in the majority, to hire a new District general counsel without vetting the six RFQ proposals. The firm chosen, which was one of those that responded to the RFQ, had not submitted any letters of recommendation.

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<sup>2</sup> <http://fcmat.org/wp-content/uploads/sites/4/2017/06/Alum-Rock-UESD-final-report.pdf>

<sup>3</sup> California Fair Political Practices Commission

<sup>4</sup> <https://www.mercurynews.com/2017/06/09/alum-rock-audit-fear-of-fraud-mismanagement-involving-school-district/>

## TIME TO PUT 'TRUST' BACK IN TRUSTEE

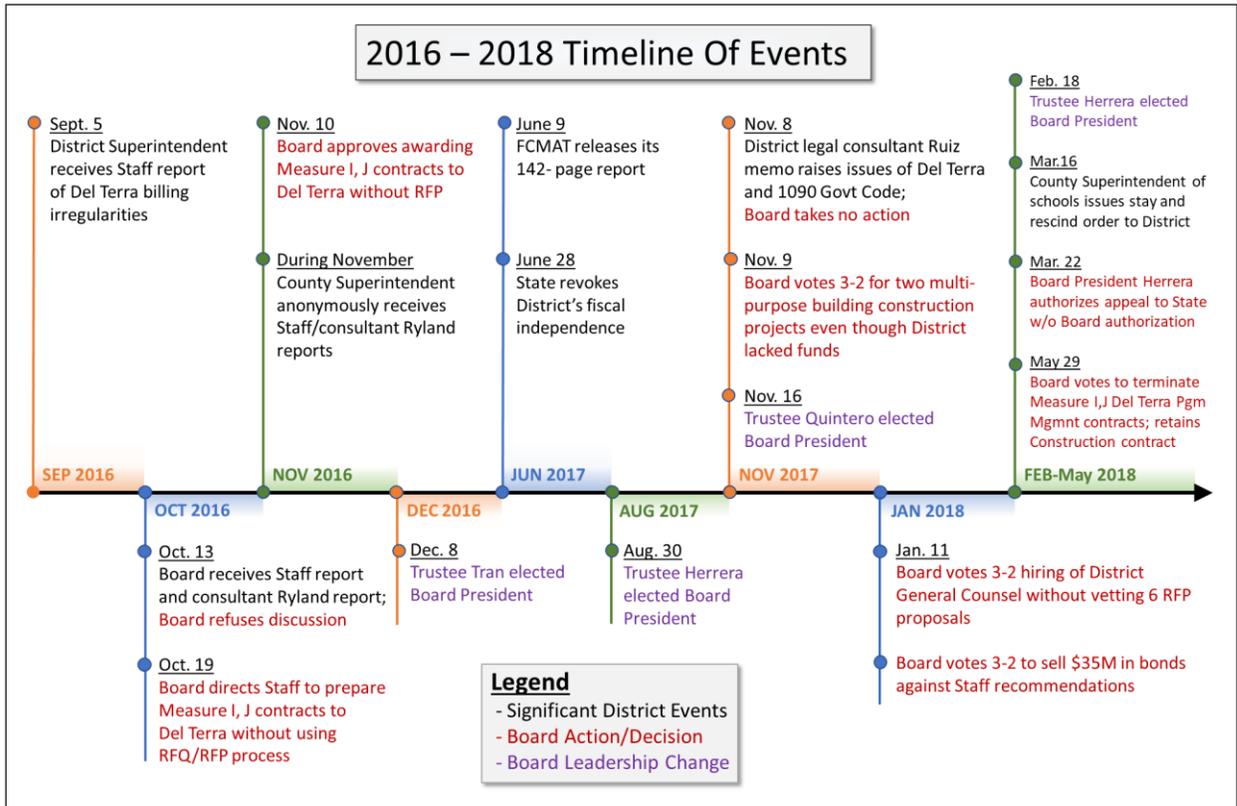
- Jan. 11, 2018 — Board votes 3-2, with the bloc in the majority, to sell \$35 million in bonds, counter to staff's advice and despite the lower bond rating.
- Feb. 8, 2018 — Trustees elect Herrera as Board President.
- Feb. 8, 2018 — District Superintendent requests job performance evaluation be conducted in public session.<sup>5</sup>
- Feb. 27, 2018 — At a special Board meeting, 33 residents speak in support of the District Superintendent, many pointing out that the Superintendent has requested a public performance evaluation. Trustees choose to conduct the evaluation in closed session.
- March 16, 2018 — County Superintendent of Schools issues a stay and rescind order that transfers financial control from the District to the SCCOE. The order cites governance and fiscal management issues.
- March 22, 2018 — Board President Herrera authorizes an appeal of the stay and rescind order to the State Department of Education (DOE) without authorization of the Board.
- April 5, 2018 — The DOE denies the appeal as unauthorized and untimely.
- April 13, 2018 — The SCCOE's fiscal advisor reports that the Board committed a closed-session Brown Act violation the previous day by failing to give advance notice of charges against an employee, presumably the Superintendent.
- May 29, 2018 — Board votes to terminate the Measure I and J Program Management contracts held by Del Terra but retains the Construction Management contracts.
- October 2017-May 2018 — At every Board meeting, the agenda includes a closed-session item labeled "Employee Discipline, Dismissal or Release." The Board has authority only over one employee, the Superintendent.
- 2017-2018 — Trustees violate Board By-Laws by electing a Board President multiple times in one year.

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<sup>5</sup> <https://www.arusd.org/cms/lib/CA01001158/Centricity/Domain/11/February.8.%202018.Reg.Bd.Mtg.FINAL.pdf>

# TIME TO PUT 'TRUST' BACK IN TRUSTEE

Figure 1: 2016 – 2018 Timeline of Events



## METHODOLOGY

Grand Jury members attended a dozen Alum Rock School Board meetings covering nearly 75 hours, with many ending after midnight. The Grand Jury attended every meeting from October 2017 until June 2018. Jurors observed how trustees interacted with each other and the community. In addition, the Grand Jury visited all but one of the District's 25 schools.

The Grand Jury interviewed more than 25 local, county and state school officials and former officials.

The Grand Jury also reviewed hundreds of pages of published documents. These included the 142-page report by the Fiscal Crisis Management Assistance Team (FCMAT).

Additionally, the Jury reviewed a half-dozen legal opinions that various watchdog agencies had provided regarding District and Board actions and inactions. The Grand Jury kept up to date on SCCOE directives and numerous newspaper articles that have been written about the District and Board.

## DISCUSSION

### Del Terra Contracts

Public entities are generally obligated to follow a competitive bidding process for contracts.

The Board awarded Program Management and Construction Management contracts to Del Terra without using a competitive process (RFP/RFQ) despite recommendations against such awards from at least two District CBOs, consultant Ryland, FCMAT and District legal consultant Rogelio Ruiz. For public works, in general, the RFP process involves public advertisement for the submission of sealed bids, the public opening of bids, and the award of contracts to the lowest responsible bidder.

There are permitted exceptions to this general rule. Trustees said they believed Del Terra was doing a good job and that they saw no need to seek a competitive RFP/RFQ. The Grand Jury offers no opinion on whether the Board was obligated to follow the RFP/RFQ process. Public bidding encourages governmental entities to open the contracts process to public bidding to eliminate favoritism, fraud and corruption; avoid misuse of public funds; and stimulate advantageous market place competition.<sup>6</sup>

The Board did not use a competitive RFP/RFQ process in awarding Del Terra the Construction Manager contract for Measure J, on May 8, 2014, according to Ruiz and FCMAT. This occurred despite the District counsel's warning at the time that such an action is contrary to terms of the Program Manager agreement, puts the District at a pricing disadvantage, and leaves the District open to serious criticism from the public, potentially auditors and other stakeholders for questionable contracting practices.

Two years later, on Nov. 10, 2016, the Board approved Construction and Program Management agreements with Del Terra for Measure I and a retroactive extension for Measure J, also without seeking RFP/RFQs. Board minutes show the Measure J Construction Management contract had expired on Sept. 30, 2015.

On May 29, 2018, the Board voted to terminate the Measures I and J Program Management contracts, even though the advice from Ruiz six months earlier had been to terminate the Construction Management agreements.

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<sup>6</sup> See e.g., Public Contracting Code Section 1100 et seq.

### Chief Business Officer's Report

The District hired a new Chief Business Officer (CBO) in August 2016. Information was brought to the CBO's attention about issues with invoices submitted by Del Terra. These invoices lacked the necessary documentation. Del Terra had submitted construction management bills for the construction of a multipurpose building where construction had not begun.

The CBO investigated these concerns and on Sept. 5, 2016, drafted a report to the District Superintendent. The CBO's report concluded that the cost structure of the Construction Management and Program Management agreements favored Del Terra to the disadvantage of the District.

The CBO report concluded that a single Del Terra employee was performing both the Program Management and Construction Management roles. The CBO report also said that none of the five 2016 projects at Hubbard School, managed by Del Terra, was completed on time.

The CBO also advised that Program Management and Construction Management contracts should be put out for competitive bid via RFP or RFQ.

The Superintendent gave Board President Marquez a copy of the CBO Report in October 2016. Marquez, however, refused to read the report and refused to put a review of the report on the Board agenda.<sup>7</sup>

The Superintendent independently put review of the CBO's report on the Board's agenda as a closed-session item, and emailed copies of the report to all Board Trustees. The CBO presented his report at closed session<sup>8</sup> on Oct. 13, 2016. The closed session became contentious, according to persons interviewed by the Grand Jury. Trustee Herrera, upset with the report, told the CBO "by the time I am done with you, you won't recognize your name." The Grand Jury could not find any action ever taken by the Board on the CBO report.

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<sup>7</sup> The Board President and Superintendent jointly establish agendas.

<sup>8</sup> Notably, the Grand Jury did not inquire about communications made during closed-session discussions. Pursuant to Government Code section 54963(e), however, it is not a violation of the confidentiality that applies to closed session for a person to complain to the Grand Jury regarding a perceived violation of law for actions taken in closed session; express an opinion concerning the propriety or legality of actions taken by a legislative body during closed session; or disclose information that is not confidential information.

Rather, less than a month later, the Board in an open session on Nov. 10, 2016, awarded new multimillion-dollar contracts with Del Terra for both Program Management and Construction Management services for Measure I projects without using an RFP process.

### **Ryland School Business Consulting Report**

The District Superintendent responded to the CBO Report by hiring a third-party consultant, Ryland School Business Consulting (Ryland)<sup>9</sup>, to independently review the Del Terra contracts and invoices. Ryland issued a report on Oct. 16, 2016, confirming the CBO's findings and making additional findings that were more critical of the Del Terra contracts than the CBO's report. Ryland found:

- Del Terra's invoices lacked detail.
- Del Terra's 6% (Construction Management) and 4% (Program Management) combined were "extremely high."
- Del Terra was both Construction Manager and Program Manager, which is not considered a best practice for proper oversight.
- The Del Terra contracts were not drafted in the District's best interest.

### **County Superintendent of Schools**

Jon Gundry, then the County Superintendent of Schools, in November 2016, received copies of the CBO Report and the Ryland Report from an anonymous person. Based on this information, Gundry asked the State Superintendent of Instruction to engage a FCMAT team to audit Alum Rock.

The information regarding potential fraud present in the CBO and Ryland reports prompted County Superintendent Gundry to refer the matter to the DA.

### **Fiscal Crisis Management Assistance Team**

The State Superintendent of Instruction can call on the Fiscal Crisis Management Assistance Team (FCMAT) to investigate local school districts. The independent FCMAT advises school districts on fiscal and management practices, business policies and procedures, and organizational structure. After seven months of investigation ending in June 2017, FCMAT submitted 61 recommendations to then County Superintendent Gundry.

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<sup>9</sup> Ryland, in business since 2004, assists school districts with financial analysis and fiscal adviser services. It has done work for the Alum Rock District previously.

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Key FCMAT recommendations included:

- Follow industry best practices by using a competitive RFQ/RFP process for procuring Program Management and Construction Management
- Renegotiate all Del Terra contracts
- Require all project files and documents to be immediately turned over in an organized fashion
- Enforce all aspects of the contract scope of work
- Enforce the contract language requiring Del Terra to develop and maintain with district staff to establish an overall bond program financial management system in the area of accounting

Among its findings, FCMAT also found “sufficient evidence to demonstrate that fraud, misappropriation of funds and/or assets, or other illegal activities may have occurred in the specific areas reviewed.” The areas reviewed included:

- Del Terra billing
- internal control deficiencies
- conflicts of interest
- debt repayment
- fiscal independence

The FCMAT report described the many obstacles the team encountered in its investigation, including a finance department in disarray because:

- The District had employed five CBOs in the past five years
- Its financial software was outdated
- Many staff members had resigned in recent years, resulting in a lack of institutional knowledge

FCMAT found records were missing that related to District construction projects and use of bond proceeds. FCMAT reported that “Requests for documents from Del Terra Group have gone unanswered. Del Terra’s lack of cooperation regarding requests for interviews and lack of documents violate the program services agreement ... .”

FCMAT reported that Del Terra donated \$30,000 to the Measure I bond campaign. The Board subsequently, at its Oct. 19, 2016, meeting awarded Del Terra the Measure I Program Management and Construction Management contracts without use of the RFP process. This

went against the advice of the District Superintendent and staff, who recommended the District issue an RFP.

FCMAT also reported that several architectural firms that had previously done work with the earlier Del Terra-managed Measure J bond projects had donated \$55,000 to the Measure I campaign. Del Terra later awarded some of these architectural firms Measure I bond fund contracts.

The FCMAT report explains that these donations raise questions of potential conflicts of interest between the Board and Del Terra.

On another matter, FCMAT expressed concern about how the Board regularly disregards District staff recommendations.

One example occurred at the Board's Nov. 9, 2017, meeting, where Trustees discussed at length the construction of two multi-purpose buildings using bond proceeds. The District Superintendent recommended that bond proceeds not be used until the completion of a detailed assessment of the needs of each school because of limited funds.

By 3-2 vote, with the bloc in the majority, the Board approved the projects, rejecting the Superintendent's recommendation. Trustee Tran stated in the open meeting that he was willing to go into deficit spending to fund the projects.

In another example, the Board at its Jan. 11, 2018, meeting voted to proceed with a bond sale against the advice of the District Superintendent, who wanted to wait until the midyear budget report on the District's fiscal condition.

FCMAT also noted a number of financial irregularities. The District implemented new financial strategies to correct some of these financial irregularities. The District also responded that it would complete or implement other new procedures by Oct. 31, 2017, but as of this report had failed to do many of these items.

On July 28, 2017, the Board responded to the FCMAT report. The Board wrote that the District has consistently audited the Bond program and the District's outside auditor found no problems. The Board wrote that there was no evidence of fraud.

### **Government Code Section 1090**

California Government Code Section 1090 regulates financial self-dealing among government officials and contractors and provides for criminal prosecution and/or civil

liability and/or penalties. Section 1090 prohibits public officials from being financially interested “in any contract made by them in their official capacity, or by any body or board of which they are members.” Section 1090 can apply to independent contractors and consultants who have influence and authority over the contracting decisions of a public agency.

In an Oct. 27, 2017, special meeting, the Board voted to renegotiate the contracts between the District and Del Terra in response to FCMAT’s recommendations. This decision likely prompted District legal consultant Ruiz to evaluate whether there was a legal obstacle to renegotiating the contract under Section 1090.

On Nov. 8, 2017, Ruiz rendered a legal opinion that there was a “material risk that a finder of fact could reasonably conclude that the 2016 Measure J Construction Management agreement and the 2016 Measure I Program and Construction Management agreement between the District and Del Terra violate the prohibitions of Government Code Section 1090, and that any Board-approved re-negotiated agreements would also violate Section 1090.” The Board, at its Nov. 9, 2017, meeting, made public Ruiz’s legal opinion of the previous day.

Trustees had mixed reactions to this opinion. Trustees Martinez and Quintero were concerned about this legal opinion, but the three-Trustee bloc of Marquez, Tran and Herrera were not concerned.

Ruiz also opined that Del Terra was making or participating in the making of the contract; that Del Terra had a financial interest in the contract; and that no legal exceptions applied. He advised the District that courts have voided contracts in violation of Section 1090. Ruiz also noted that some courts have found that the contractor could not recover from the public agency any compensation for goods or services, and, further, that some offending parties have been required to return the profits.

Ruiz “strongly” recommended that the Board consider terminating the Measure J and I Construction Management agreements with Del Terra and consider possible action and possible remedies and/or correction measures regarding the existing Construction Management services agreements.

As stated above, on May 29, 2018, the Board voted to terminate Del Terra’s Measures I and J Program Management contracts. The District has not publicly indicated that it will pursue legal remedies against Del Terra.

### Santa Clara County Superintendent of Schools

In a letter to the District on Sept. 15, 2017, the SCCOE conditionally approved<sup>10</sup> the District's 2017-18 budget, which requires closer oversight by the SCCOE. It also requested additional financial information from the District in order to determine whether the budget should be approved.

On Nov. 8, 2017, the SCCOE sent a letter granting approval of the District budget, but pointed to long-term issues demonstrating financial distress, as defined by the Educational Code. As a result, the SCCOE said it would assign a fiscal expert to oversee District finances. In January 2018, a three-member "fiscal expert team" began advising the District. It continues in this role.

On March 16, 2018, the County Superintendent, in a letter to the Board President, described additional steps the SCCOE would take to address ongoing financial, governance and operational problems in the District. The Superintendent wrote that she "shall exercise the authority to stay and rescind any action by the District that is determined to be inconsistent with the District's ability to meet its obligations ... ."

The County Superintendent further outlined what she considered to be deficiencies:

- Instability in leadership.
- A lack of accountability with statutory guidelines.
- Credible allegations of conflict of interest.
- Allegations of intimidation and retaliation by Trustees involving employees
- The three-Trustee bloc voted to sell \$35 million in bonds against the advice of the District's Bond Counsel.
- The District's credit rating had been significantly lowered.
- Inadequate internal controls.
- The District completion of their 2016-17 internal audit was delayed three times.

The letter also points out that the Board has done little to address the FCMAT recommendations.

In April 2018, the SCCOE appointed a fiscal advisor to, among other things, implement the stay and rescind order<sup>11</sup> as well as lead the fiscal expert team.

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<sup>10</sup> California Educational Code 42127.4.

<sup>11</sup> California Education Code 42127.6.

### **Appeal to State Superintendent of Instruction**

Board President Herrera, on his own, directed the District Counsel to file an appeal of the County Superintendent's stay and rescind order with the State Superintendent of Instruction. The District Counsel submitted the appeal in a letter dated March 22, 2018.

In a letter dated April 5, the State Superintendent denied the appeal. The State noted that the appeal was the action of a single member. The State said the letter from the District Counsel "does not indicate that this appeal was authorized by the District's Board in compliance with the Brown Act."

In addition, the State said the appeal was filed nearly two months after the deadline for such appeals.

### **Brown Act Meetings**

The Ralph M. Brown Act<sup>12</sup> open-meetings law governs the actions of governmental bodies as well as elected officials in how and when they notice and conduct meetings.

Trustees have violated the law in at least two instances and, the Grand Jury believes, have misused the law at other times with both their actions and their inactions.

The SCCOE fiscal advisor wrote to Board President Herrera on April 13 stating that the Board violated the Brown Act during an April 12, 2018, closed-session meeting. The violation occurred when Trustees attempted to discipline the District Superintendent without giving her proper notification.

In the second violation of the Brown Act, the Board's Facilities/Bonds Projects Committee, which is subject to this law, has failed to consistently provide proper notices and minutes for its meetings, the Grand Jury found. Marquez chairs this committee.

Among other instances that have attracted the attention of agencies, the California Department of Education pointed out that the Board President should have obtained Board

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<sup>12</sup> The District is governed by the Brown Act, which has the express purpose of assuring that local government agencies conduct the public's business openly and publicly. Courts and the California Attorney General usually broadly construe the Brown Act in favor of greater public access and narrowly construe exemptions to its general rules. Under the Brown Act, the District is required to prepare an agenda, must state the meeting time and place, and must contain "a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session." California Government Code Section 54951

approval through an appropriately noticed meeting for the appeal against the stay and rescind order from the SCCOE.

In another questionable action, the Board continuously lists on its closed-session agenda<sup>13</sup> an item identified as "Employee Discipline/Dismissal/Release." The Grand Jury attended every Board meeting from October 2017 through May 2018, and this item was on every agenda. The only public employee the Board can discipline, dismiss or release is the Superintendent.

This tactic enables the Board to terminate the District Superintendent's contract at every meeting. The Superintendent was repeatedly told by Trustee Tran that Trustees Herrera and Marquez wanted his vote to terminate the Superintendent's contract. The Grand Jury offers no opinion on whether the District was appropriately using this closed-session exception to the Brown Act. The Grand Jury, however, is concerned that this exception was used as a standing item on the District's agenda because it created the constant threat to the Superintendent that she could be evaluated and possibly terminated at any meeting. While the Superintendent is an at-will employee, the Grand Jury considers this Board tactic to be abusive.

### **Board By-Laws**

On a 3-2 vote, the three-Trustee bloc awarded Measure I Program Management and Construction Management contracts to Del Terra without an RFP/RFQ process. The Grand Jury believes the Trustees failed to adhere to Board By-Law, Section 9005, which in part states "to maximize Board effectiveness and public confidence in district governance, board members are expected to govern responsibly and hold themselves to the highest standards of ethical conduct."

The Grand Jury found another possible example of failing to adhere to Section 9005 was the process of selecting a new District General Counsel. On Jan. 11, 2018, the three-Trustee bloc voted to hire a new General Counsel using Requests for Qualifications but did not vet the proposals or even interview the candidates. The firm chosen had not submitted any required letters of recommendation.

Another By-Law violation, as noted in the Brown Act section above, occurred when Board President Herrera, without approval of the Board, filed an appeal of the action of the County

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<sup>13</sup> The District is permitted to meet in private in what is called a "closed session meeting," as authorized by the Brown Act. If the District convenes a closed session, it must include the section of the Brown Act authorizing the closed session in advance on the agenda and it must make a public announcement prior to the closed-session discussion.

Superintendent to the State Superintendent of Education. This unilateral action violated Board By-Law, Section 9200. It states, in part: "The Board of Trustees recognizes that the Board is the unit of authority over the district and that a Board member has no individual authority. Board members shall hold the education of students above any partisan principle, group interest, or personal interest."

The Grand Jury also believes Trustees violated Board By-Laws Section 9005 by voting to reissue RFPs for a Clean Energy consultant and for Measure I architectural services to allow Del Terra or a firm that previously worked with Del Terra to bid, even though contractors had bid on the RFPs by the deadline. While Trustees are entitled to vote to reissue an RFP, taking that action to benefit a single group risks an agreement disadvantageous to the District.

### **Securities and Exchange Commission Investigation**

Due to allegations that Bond money might have been used improperly, the U.S. Securities and Exchange Commission (SEC) launched an investigation by October 2017. The SEC informed the District that it should not destroy any records.

One type of violation the SEC investigates is the misrepresentation or omission of important information about securities. Individuals or entities found to violate SEC laws can face serious monetary and civil penalties.

At their Dec. 14, 2017, meeting, Trustees discussed the SEC investigation. They said they had done nothing wrong and that they would not hire legal counsel to represent them in the matter. Trustee Herrera stated that any member of District staff could prepare and provide the information that the SEC might request.

The SCCOE fiscal advisor pointed out another inappropriate action by the Board. In a May 8, 2018, letter, the advisor states that "the actions of the governing board to restrict the Superintendent's involvement with the review and audit of the Del Terra contracts, and ongoing investigation by the SEC and the district attorney are also destabilizing for the District's fiscal health, in that it improperly interferes with the District's business operations and ongoing investigations regarding critical financial matters."

## S&P Global Ratings

S&P Global Ratings (S&P) makes recommendations on the financial viability of an organization.

S&P significantly downgraded the District's credit rating<sup>14</sup> to BBB+ from AA-, a drop of four levels, on Sept. 29, 2017. S&P said it took this action in reaction to the FCMAT report, "confirmation" of the DA's ongoing investigation and concerns addressed by the SCCOE.

This lower credit rating will increase interest rate charges on future bond sales, which will result in higher taxes for District property owners. At the Jan. 11, 2018, Board meeting, the District's bond advisors estimated the impact of such a downgrade for a \$35 million, 30-year bond, at more than \$850,000, based on market rates as of that date.

## CONCLUSIONS

The Grand Jury through research and interviews concluded that the three-Trustee bloc of Herrera, Marquez and Tran has failed to adequately fulfill their fiduciary duties and governance responsibilities to the Alum Rock Union Elementary School District.

The District's many challenges have been made worse by the actions and inactions of these Trustees. Since the Grand Jury started attending Board meetings, more than 100 parents and residents appear at almost every meeting to demand improvements. Residents who attend the meetings seek the resignations of the bloc of three trustees, the termination of the Del Terra contracts and the retention of the current District Superintendent.

The Board has been presented with credible evidence that its relationship with Del Terra is not serving the best interests of the District. Persons or agencies investigating or critical of the Board include:

- District Chief Business Officer
- Ryland School Business Consulting
- Santa Clara County Office of Education
- State Fiscal Crisis Management Assistance Team
- District legal consultant
- Securities and Exchange Commission

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<sup>14</sup> <https://www.arusd.org/cms/lib/CA01001158/Centricity/Domain/23/SandP.ARUSD.841329.pdf>

## TIME TO PUT 'TRUST' BACK IN TRUSTEE

- S&P Global Ratings
- Various elected officials

All of the issues discussed in this report demonstrate the mismanagement by the Board, controlled by the three-Trustee bloc, and show that significant changes are needed to put trust back into the Trustees.

## FINDINGS AND RECOMMENDATIONS

### **Finding 1**

Alum Rock Union Elementary School District Board Trustees Herrera, Marquez and Tran, by action and/or inaction, have subjected the District to financial peril, public scorn and distrust.

### **Recommendation 1**

Trustees Herrera, Marquez and Tran should immediately resign their positions on the Board.

### **Finding 2**

District's legal counsel concluded that Measure I and Measure J Construction Management contracts between the District and Del Terra likely violate Government Code Section 1090.

### **Recommendation 2a**

The Board should terminate the Measure I and Measure J Construction Management contracts between the District and Del Terra by Oct. 1, 2018.

### **Recommendation 2b**

The District should retain an outside legal consultant by Oct. 1, 2018, to consider options to evaluate remedies against Del Terra.

### **Finding 3**

The District does not consistently use best practices in awarding contracts.

### **Recommendation 3**

The District should immediately begin using competitive bidding (e.g., RFP/RFQ) for all construction projects and professional services.

### **Finding 4**

Using the same contractor for both Construction Management and Program Management is not an accepted best practice and, according to the District's legal consultant, can put the District in financial and legal jeopardy.<sup>15</sup>

### **Recommendation 4a**

The District should enact a Board policy prohibiting the award of future Construction Management and Program Management contracts to the same company, by Dec. 1, 2018.

### **Recommendation 4b**

The District should award all future Construction Management and Program Management contracts to unrelated contractors.

### **Finding 5**

The Board has repeatedly not followed the Brown Act requirements.

### **Recommendation 5**

The Board should obtain comprehensive Brown Act training from a qualified third party, by Dec. 31, 2018, and within 30 days of the swearing in of new Trustees.

### **Finding 6**

The Board failed to follow their own Board By-Laws on numerous occasions.

### **Recommendation 6**

All current Board members should sign a declaration saying they have read, understood and will comply with the Board's By-Laws, and any subsequent revisions, by Sept. 30, 2018. Future Trustees should sign the same declaration within 30 days of their swearing in.

### **Finding 7**

The Board did not adequately vet all applicants in the selection of the current General Counsel.

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<sup>15</sup> Legal memorandum, Nov. 8, 2017, from Rogelio Ruiz to District Superintendent; <https://www.mercurynews.com/2017/11/16/del-terra-contracts-illegal-alum-rocks-own-attorney-tells-its-board/>

### **Recommendation 7**

The Board should terminate the contract with its General Counsel and use a competitive process (RFP/RFQ) that includes a proper vetting mechanism to hire new General Counsel, by Dec. 31, 2018.

### **Finding 8**

The Grand Jury commends District Superintendent Bauer for persevering during her four years while staying committed to improving student education and parental involvement.

### **Finding 9**

The Grand Jury commends Trustees Quintero and Martinez for their continuing efforts to steer the Board in a positive direction.

## REQUIRED RESPONSES

Pursuant to Penal Code sections 933 and 933.05, the Grand Jury requests responses as follows:

From the following governing bodies:

<b>Responding Agency</b>	<b>Finding</b>	<b>Recommendation</b>
Alum Rock Union Elementary School District	1, 2, 3, 4, 5, 6, 7	1a, 1b, 2, 3, 4, 5, 6, 7

From the following individuals:

<b>Responding Individual</b>	<b>Finding</b>	<b>Recommendation</b>
Alum Rock Union Elementary School District Trustee Esau Herrera	1, 2, 3, 4, 5, 6, 7	1a, 1b, 2, 3, 4, 5, 6, 7
Alum Rock Union Elementary School District Trustee Dolores Marquez	1, 2, 3, 4, 5, 6, 7	1a, 1b, 2, 3, 4, 5, 6, 7
Alum Rock Union Elementary School District Trustee Khanh Tran	1, 2, 3, 4, 5, 6, 7	1a, 1b, 2, 3, 4, 5, 6, 7

**TIME TO PUT 'TRUST' BACK IN TRUSTEE**

This report was **ADOPTED** by the 2017-2018 Santa Clara County Civil Grand Jury on this 18 day of June, 2018.



Peter L. Hertan

Foreperson