OFFICE OF THE DISTRICT ATTORNEY

County of Ventura, State of California

MICHAEL D. BRADBURY
District Attorney

GREGORY D. TOTTEN
Chief Assistant District Attorney

RONALD C. JANES, Chief Deputy
Major Offenses Division

LELA HENKE-DOBROTH, Chief Deputy
General Criminal Division

JEFFREY G. BENNETT, Chief Deputy
Admin/Child Support Operations

MICHAEL K. FRAWLEY, Chief Deputy
Special Operations

GARY G. AUER, Chief Deputy
Bureau of Investigation

June 21, 2000

The Honorable Charles W. Campbell, Jr.
Presiding Judge
Superior Court of California
County of Ventura
800 S. Victoria Avenue
Ventura, CA 93009

Re: **Comments on 1999-2000 Ventura County Grand Jury Report Regarding Ventura County Ordinance No. 4088 (The Sheriff Larry Carpenter Public Safety Ordinance)**

Dear Judge Campbell:

This letter is submitted pursuant to Penal Code §933 to provide comment on the Grand Jury's recent report regarding Ventura County Ordinance No. 4088 (The Sheriff Larry Carpenter Public Safety Ordinance). The Grand Jury has requested that I respond to recommendations 1, 3 & 4 of their report. Unfortunately, each of these recommendations is partially or wholly based upon the false premise that Ordinance No. 4088 is not legally valid.

The Grand Jury's report was issued without benefit of legal analysis by any office other than the Ventura County Counsel. While both Chief Assistant District Attorney Greg Totten and I were called upon to discuss public safety funding with the Grand Jury, we were not invited to submit any legal analysis concerning the validity of this ordinance. Therefore, my response must be prefaced by the observation that Ventura County's local public safety ordinance was validly enacted, is legally binding and enforceable, and cannot be changed without the approval of the voters of Ventura County.

The recommendations of the Grand Jury and my comments follow:

1. **Grand Jury Recommendation No. 1:** That "budgets of the public safety departments and the allocation and proposed use of Proposition 172 moneys should be reviewed annually by the Board

of Supervisors as part of the overall budget process and in accordance with The California Budget Act."

Comment: I concur, with the express reservation that this does not mean that any of the provisions of Ventura County Ordinance No. 4088 may be violated or disregarded. The annual review process must, as explained in the legal analysis which follows, adhere to all requirements of Ordinance No. 4088.

2. **Grand Jury Recommendation No. 4:** That "the public safety departments should work together with the CAO and Board of Supervisors to ensure availability of funding for staffing of the Juvenile Justice Complex when it is completed."

Comment: I concur. My department will cooperate fully with the Chief Administrative Officer and Board of Supervisors to ensure availability of funding consistent with the requirements of all applicable laws, including Ventura County Ordinance No.4088.

3. **Grand Jury Recommendation No. 3** That "the Board of Supervisors should rescind the constraints of Ordinance No. 4088 and reconsider the allocation of Proposition 172 funds to public safety agencies during their *annual* budgeting process." (Emphasis in original.)

Comment: I disagree. The Board of Supervisors has no legal authority to disregard the requirements of the state and local initiative measures known as Proposition 172 and Ordinance No. 4088, respectively, as explained in the legal analysis which follows:

HISTORY AND LEGAL ANALYSIS OF ORDINANCE NO. 4088

The 1999-2000 Grand Jury Report contains–and relies upon–a 1 ½ page opinion letter written by the Ventura County Counsel in June, 1996, regarding Ventura County Ordinance No. 4088. That 1996 letter concluded, without citation to any case authority, that the Board of Supervisors could choose to ignore the provisions of the ordinance. A comprehensive review of applicable law and legislative history convincingly demonstrates County Counsel erred in reaching this conclusion. In fact, it is clear that Ordinance No. 4088 was properly enacted, is legally binding, and cannot now be altered or amended without express approval of the voters of Ventura County.

As a result of state provisions enacted during the 1993-94 legislative session, $2.6 billion dollars of local property tax revenues was shifted from counties, cities, special districts and redevelopment agencies to California's schools. To address the impact of the loss of these property tax revenues on public safety services, the Legislature took two actions. First, it extended the ½ cent statewide sales tax which had been enacted in 1991 as a result of the Loma Prieta earthquake, and required that the revenues therefrom be dedicated to public safety services. (Chap. 73, Stat. 1993, sec. 12, Govt. Code §§30051 to 30054). Second, the Legislature placed a constitutional amendment (Proposition

172) on the November 2, 1993 General Election Ballot continuing the ½ cent statewide sales tax and dedicating it for public safety purposes.

Proposition 172 was adopted by the voters at the November 2, 1993 General Election. It added §35 to Article 13 of the California Constitution. Section 35 imposes a ½ cent sales tax to be used exclusively for public safety services. Counties could elect to receive their share of these sales tax revenues in two ways: (1) by a resolution passed by a majority vote of the Board of Supervisors prior to August 1, 1993; or (2) absent such a vote, by a majority of the county voters voting on Proposition 172 at the November 3, General Election. (See Govt. Code §30052(b)(2)(B).) On August 17, 1993, the Board of Supervisors of Ventura County voted by resolution to receive Proposition 172 revenues, and at the November 1993, General Election, 58.2 percent of the voters of Ventura County voted in favor of it.

Later in 1994, to prevent supplanting of public safety funds, the Legislature enacted Chapter 886 which added §30056 to the Government Code. This section provides that for counties funding combined public safety services from local financial resources, the budget for public safety services shall remain thereafter at the level a county sets for its 1994-95 budget. In any year in which that level falls, the county's share of the ½ cent sales tax revenues generated by Proposition 172 will be decreased by that amount.

In late 1994, the Citizens for a Safe Ventura County circulated an initiative measure designed to ensure that Proposition 172 tax revenue would be used to supplement, not supplant, the funding that safety organizations in Ventura County had previously received. The measure easily qualified for the June, 1995 Primary Election. However, rather than place the measure on the ballot, the Board of Supervisors exercised its option to adopt the measure itself under Elections Code §3719 (now §9125) and enacted the measure as Ordinance No. 4088 on May 16, 1995.

In substance, Ordinance No. 4088 (since designated as "The Sheriff Larry Carpenter Public Safety Ordinance") requires the county to fund the designated public safety agencies at least at the level contained in the county's recommended 1994-95 budget, with annual adjustments to be made for "associated inflationary costs."

The issues belatedly raised by the 1996 County Counsel letter--which is, unfortunately, the only authority relied upon by the 1999-2000 Grand Jury in making its current recommendations--are 1) whether the subject matter of Ordinance No. 4088 is the proper subject of the initiative power; and 2) whether the Board of Supervisors can unilaterally ignore or administratively amend the ordinance under the guise of "interpretation" without first submitting the matter to the voters or the courts. As explained below, the subject matter of Ordinance No. 4088 is clearly the proper subject of the initiative power and Ordinance No. 4088 cannot be unilaterally amended, altered or ignored by the Board of Supervisors.

I. Ordinance No. 4088 is the Proper Subject of the Initiative Power.

A. The Power of Initiative and Referendum

Under the power of initiative, the People reserve to themselves the ability to propose statutes and constitutional amendments. (Cal. Const. Article 2, §8.) Under the power of referendum, the people reserve to themselves the ability to stay the operation of a law until it is submitted to the voters for their adoption or rejection. (Cal. Const. Article 2, §9.) Unlike the power of initiative, the power of referendum cannot, among other limitations, be used to stay the operation of a tax levy or an appropriation for the current expenses of the state. It is important to note that the two powers are separate and distinct and the prohibitions or authority under one power do not control the exercise of the other power. ***Rossi v. Brown*** (1995) 9 Cal.4th 688.

Although some elected officials and public officers view the initiative power as a threat to their governance, the People's initiative power has historically been accorded great deference by the courts:

> The exercise of initiative and referendum is one of the most precious rights of our democratic process. Since under our theory of government all the power of government resides in the people, the power of initiative is commonly referred to as a "reserve" power and it has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, our courts will preserve it. (***Mervynne v. Acker*** (1961) 189 Cal. App. 2d 558, 563-564, partially quoted in ***Associated Home Builders, etc, Inc. v. City of Livermore*** (1976) 18 Cal.3d 582, 591.)
>
> It is generally accepted that most forms of legislation may be proposed, repealed or amended by the proper exercise of the initiative. (***Blotter v. Farrell*** (1954) 42 Cal.2d 804, 812.)

There can be little argument that inherent in the initiative power is the power to direct how public moneys should be spent. Under the initiative power, the People have on numerous occasions both appropriated and directed how public moneys should be spent. Proposition 98, a constitutional and statutory initiative (November, 1988), created no new revenues but specified what level education should be funded and what programs should receive funding. Both Propositions 99 (November 1988) and 10 (November 1998) imposed tobacco taxes, appropriated the proceeds and directed how the proceeds should be expended. Proposition 9, (June 1974) created the Fair Political Practices Commission and appropriated $1,000,000 annually for the support of the Commission. Proposition 20 (November 1972) created the Coastal Commission and appropriated $5,000,000 is support thereof.

B. Exercise of the Initiative Power at the Local Level.

California Constitution Article 2, §11 states in part:

> Initiative and referendum powers may be exercised by electors of each city or county under procedures that the Legislature shall provide.

Although the Legislature has prescribed various procedural rules for how the initiative is to be exercised at the local level, it has not by statute attempted to limit the purposes for which the initiative power may be exercised. (See Election Code §§ 9100 et seq. (county), 9200 et seq. (municipal) and 9300 et seq. (district).) The general rule is that in situations where the local legislative body may enact an ordinance, the People may also do so. ***Gibbs v. City of Napa*** (1976) 59 Cal. App. 3d 148, 157.

The courts, however, have placed two restrictions on the exercise of the initiative power at the local level. First, they have held that "administrative" acts of a legislative body, state or local, are not subject to the initiative power. In furtherance of this principle, an entire body of law has developed articulating what are "administrative" versus "legislative" acts. ***Hopping v. Council of City of Richmond*** (1915) 170 Cal. 605; ***Yost v. Thomas*** (1984) 36 Cal.3d 561, 569-570. The initiative measure embodied in Ordinance No. 4088 constitutes a legislative, not administrative, act. Appropriating and allocating appropriations are unquestionably legislative acts. Were they administrative acts, there would be no need in the Constitution for the prohibition against referending appropriations for current expenses.

Second, the courts have held that if the subject matter of the initiative is one which a local legislative body has no authority to adopt, then it cannot be adopted through the exercise of the initiative power. Under this restriction, two tests have evolved. With respect to non-charter cities and all counties, the test is whether the initiative is inconsistent with state law. (See ***Voters for Responsible Retirement v. Board of Supervisors*** (1994) 8 Cal.4th 765.) With respect to charter cities, which have authority to adopt laws concerning "municipal affairs" that may be inconsistent with state law, the test is not only whether the initiative is inconsistent with state law, but whether it also involves a matter of "statewide concern" over which a charter city has no authority to legislate. (See ***Bishop v. City of San Jose*** (1969) 1 Cal.3d 56, 61-63.)

In 1988, a third test emerged: If the subject matter of the initiative is a matter of statewide importance, has the Legislature evidenced an intent to delegate to the local legislative body exclusive jurisdiction to legislate on the matter? (See ***Committee of Seven Thousand v. Superior Court*** (1988) 45 Cal.3d 491; ***DeVita v. County of Napa*** (1995) 9 Cal.4th 763.)

C. The General Power Accorded the Board of Supervisors to Enact a Budget does not Accord it Exclusive Power to Appropriate Money.

The County Counsel asserted in his 1996 opinion letter that Ordinance No. 4088 somehow conflicts with state law, specifically those provisions of state law governing the adoption of county budgets (Government Code §§ 29000 through 29093). As the County Counsel's opinion letter offers no analysis or citation to any authority for this conclusion, we can only speculate what he had in mind. Certainly, he could not contend that enactment of a budget and appropriations in support thereof is an "administrative act" not subject to the initiative power. Presumably, County Counsel was contending that because certain Government Code budgetary sections make reference to the "Board of Supervisors " they reflect an intent by the Legislature to make any issue relevant to the county budget the sole prerogative of the Board of Supervisors. If this was County Counsel's position, we are left to speculate that he was relying on the California Supreme Court's 1988 decision in ***Committee of Seven Thousand v. Superior Court*** (supra) 45 Cal.3d 491 ("***COST***" hereinafter). However, any such reliance would be misplaced.

In ***COST***, the Supreme Court articulated several factors to consider in determining whether a legislative measure confers exclusive jurisdiction on a legislative body, thus barring the exercise of the local initiative power over the subject of the legislation. In ***COST***, the subject of the legislation was Government Code § 66484.3 which authorized Orange County and city councils within Orange County to impose development fees to fund construction of major thoroughfares. An initiative was qualified in the City of Irvine that would have prohibited the imposition of such fees. Litigation ensued and ultimately the Court of Appeal held that the initiative was invalid because §66484.3 expressly delegated to "city councils" the power to impose the fee. The court drew from this fact the following:

> Over the years this court has struggled with the question whether a statutory reference to action by a local legislative body indicates a legislative intent to preclude action on the same subject by the electorate. A review of these decisions supports the conclusion that while such references are generally not conclusive as to legislative intent, they do support an inference that the intent was to preclude action by initiative or referendum. Review of the case law further suggests that the strength of the inference varies according to the precise language used in the statute, a reference using generic language such as "governing body" or "legislative body" supporting a weaker inference than a specific reference to boards of supervisors and city councils. A third conclusion to be drawn is that an intent to exclude ballot measures is more readily inferred if the statute addresses a matter of statewide concern rather than a purely municipal affair. (***COST***, *supra*, at 501.)

In addition to concluding that the use of the term "city councils" in §66484.3 raised a strong inference to prohibit the electorate from exercising the initiative power over these fees, the court also concluded that these fees were a matter of "statewide importance" to "fund major thoroughfares whose primary purpose is to carry through traffic and provide a network connecting to or which is part of the state highway system." (***COST***, *supra*, at 506.)

As yet another indicator of legislative intent, the court compared §66848.3 with the earlier §66484 after which it was modeled and noted that § 66484 had made no reference to city councils but had merely referred to a "local ordinance."

In 1995, the Supreme Court had its first opportunity to revisit the ***COST*** decision. In ***DeVita v. County of Napa*** (1995) 9 Cal.4th 763, the court cited the factors enumerated in ***COST*** and held that an initiative to preserve agricultural land and make general plan amendments was valid. In characterizing the ***COST*** decision, the opinion made quite clear that the initiative power was not to be abrogated by the application of "mechanical rules." The opinion states (at page 777):

> COST did not represent a sea change in our referendum and initiative jurisprudence, but rather brought to light certain interpretive principles implicit in case law. We did not intend to prescribe a set of fixed rules for mechanically construing legislative intent. Nor did COST alter the constitutionally based presumption that the local electorate could legislate by initiative on any subject on which the local governing body could also legislate. Thus it is still the case that "'[i]f doubts can [be] reasonably resolved in favor of the use of [the] reserve initiative power, courts will preserve it.'" (***VFRR***, supra, 8 Cal.4th at pp. 776-77, quoting ***Associated Home Builders***, supra. 18 Cal.3d at p. 591.)

More significantly, the opinion also concludes that **absent a statute evidencing statewide import**, the local initiative power will not be restricted:

> Only in matters that transcend local concerns can the Legislature have intended to convert the city and county governing bodies into its exclusive agents for achievement of a "legislative purpose of statewide import." (9 Cal.4th at 780.)

Exercise by a Board of Supervisors of the budget powers conferred on it by Government Code §§29000 to 29093 does **not** raise an issue of statewide import. Indeed, the county's budget process is **purely a local matter**. This principle is evident from the Supreme Court's decision in ***Rossi v. Brown*** (1995) 9 Cal.4th 688. In ***Rossi,*** the court held that the initiative power extended to tax levies and upheld an initiative that repealed a local utilities tax. In so holding, the court reaffirmed the importance of the initiative power, reciting the general principles articulated by the courts over the previous years. By way of example, the court stated (at page 695):

> The initiative and referendum are not rights "granted the people, but . . . power[s] reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]. '[I]t has long been our judicial policy to apply a liberal construction to [the initiative] power wherever it is challenged in order that the right be not improperly annulled.

> If doubts can reasonably be resolved in favor of the use of the reserve power, courts will preserve it. [citation]' (Quoting ***Associated Home Builders,*** supra, 18 Cal. 3d at p. 591.)

Rossi represents a significant change in the judicial view of the initiative power. Prior to ***Rossi***, the power of the initiative was deemed circumscribed by the restrictions in the referendum power. Thus, it was not unusual for the courts to cite principles applicable to the referendum power as equally applicable to the initiative power. (See ***Community Health Assn. v. Board of Supervisors*** (1983) 146 Cal. App.3d 390.) In ***Rossi***, the court recognized that restrictions in the referendum power were intended to prevent disruption of the budgetary process of the county, but concluded that the power of the initiative "rarely affect[s] the **current** budgetary process of a local government" and "local officials have ample notice of the potential impact of an initiative long before the measure can become effective." (***Rossi, supra***, at 703-704; emphasis added.) This is certainly true with respect to Ordinance No. 4088. Not only did the county have adequate notice of the impacts of this measure, but the Board of Supervisors voluntarily implemented it without placing it on the ballot.

D. The Board of Supervisors has not been Accorded Exclusive Jurisdiction Over the Provision of Public Safety Services Supported by Proposition 172 Revenues.

The County Counsel's 1996 opinion letter is wrong for another reason. Proposition 172 did more than create a ½ cent sales tax dedicated exclusively for public safety. It linked the sales tax to a broader objective. Pursuant to Proposition 172, §35(a)(2) of Article 13 of the California Constitution states:

> The protection of the public safety is the **first responsibility** of local government and local officials have an **obligation to give priority** to the provision of adequate public safety services. (Emphasis added.)

There can be little doubt that this statement was a significant factor in securing voter approval of Proposition 172. The Argument in Favor of Proposition 172 contained in the official state ballot pamphlet for the November 1993 election states in part:

> If Proposition 172 is defeated, budgets for sheriffs, police, district attorneys, jails and firefighters will suffer huge cuts.
>
> There will be fewer police and sheriff patrols in your neighborhood. Fire stations will be closed and personnel reduced. Jails will be closed and criminals released. Criminal cases will go unprosecuted. Response times for police and firefighters will increase dramatically.

If a county Board of Supervisors was not interested in according public safety priority as the county's first responsibility, it could refuse the Proposition 172 revenues but the Board's refusal could, pursuant to the express language in §35(d)(1)(B) of Article 13 and Government Code § 30052(b)(2)(B), be overridden by the voters. This power conferred on the voters reflects a clear determination that voter participation in how the revenues should be expended is appropriate and that such issue is not within the exclusive jurisdiction of the Board. (See ***Blotter v. Farrell*** (1954) 42 Cal.2d 804.)

In ***Blotter,*** the Government Code required that ordinances creating councilmanic districts be submitted to the voters for approval. The court held that this requirement was sufficient to permit the voters, by initiative, to revise councilmanic districts. Similarly, Proposition 172 permits the voters to accept the Proposition 172 revenue. Inherent in the voters' right to accept such revenues is the right to determine how the constitutional policy set forth in §35(b)(2) of Article 13 shall be implemented to ensure that public safety services are the first responsibility of the county and shall receive priority over other county programs.

Additionally, Government Code §§30051 et seq. determine how Proposition 172 revenues are to be allocated among the counties and cities within counties. At no time do these provisions direct how the monies should be allocated *within* a city or county among the public safety agencies. However, Government Code §30056 does contemplate that the "local legislative body" may enter into binding agreements with respect to how Proposition 172 revenues may be allocated among the local safety agencies. (Of course, under the principles articulated in ***COST***, the reference to "local legislative body"rather than to "Board of Supervisors" is, as we know, an indication that the Legislature had no intention of precluding the use of the initiative to make such allocation.)

II. The Board of Supervisors Has No Legal Ability to Ignore or "Rescind" Ordinance No. 4088.

The County Counsel's 1996 opinion letter acknowledges that Elections Code §9125 (previously §3719) requires that if the Board of Supervisors adopts by ordinance an initiative that has qualified for the ballot, rather than place it before the voters, the Board may not thereafter amend or repeal it without submitting the proposed amendments or repeal to the voters. The County Counsel then concludes, however, *without citation to any authority*, that a Board of Supervisors may, without judicial authorization, ignore this statutory mandate if it believes the ordinance was not the proper subject for an initiative.

There is absolutely no legal authority supporting such a conclusion. Elections Code §9125 is clear; a Board can either adopt an initiative verbatim or it must place it on the ballot. It cannot ignore the measure, thereby forcing the proponents to seek a judicial order placing it on the ballot (***Save Stanislaus Area Farm Economy v. Board of Supervisors*** (1993) 13 Cal.App.4th 141; 19 Opn. Cal. Atty. Gen. 94, 99 (1952)) and clearly cannot indirectly violate §9125 through the disingenuous approach of first adopting the initiative and thereafter ignoring it under the pretext that it is not the

proper subject for an initiative. If the Board had believed the measure it adopted as Ordinance No. 4088 was constitutionally flawed, its remedy was to place it on the ballot in 1995 in accordance with Elections Code §9125, and then file an action in Superior Court to remove it from the ballot.

Having adopted Ordinance No. 4088 and operated under it for four years, the Board has no authority to now challenge its validity. To permit a Board to keep an initiative measure off the ballot by first adopting it and then later ignoring it on the pretext of alleged illegality, would be to sanction a fraud on the voters and further the public's cynicism of their public institutions and elected representatives. If the Board now wishes to amend or repeal Ordinance No. 4088, it must present those options to the voters. Until such repeal or amendment is approved by the voters, the Board has a responsibility to not only comply with Ordinance No. 4088, but to defend it should it be challenged. (See ***Arnel Development Co. v. City of Costa Mesa*** (1980) 28 Cal.3d 511, 514 fn. 3.)

Conclusion.

The county is receiving revenues from Proposition 172 under a constitutional mandate that public safety services within the county are the first responsibility of the county and are to be given priority. In adopting Ordinance No. 4088 and not placing it before the voters, the Board of Supervisors agreed that the initiative measure now known as Ordinance No. 4088 is the appropriate means of meeting the county's responsibility under Proposition 172. Indeed, the purpose of Proposition 172 was to ensure that in fiscal hard times public safety services would continue as the first responsibility of county government. For the reasons set forth above, the Board of Supervisors has no authority to unilaterally abandon that position and purport to now rescind Ordinance No. 4088 without voter approval.

Very truly yours,

Mike Bradbury

MICHAEL D. BRADBURY
District Attorney

MDB/prw

pc: Assessor
Auditor-Controller
Members, Board of Supervisors
Chief Administrative Office
County Clerk
County Counsel
Foreperson, 1999-2000 Grand Jury
Pierre Durand, Health Care Agency
News Media
Sheriff
Treasurer Tax-Collector