

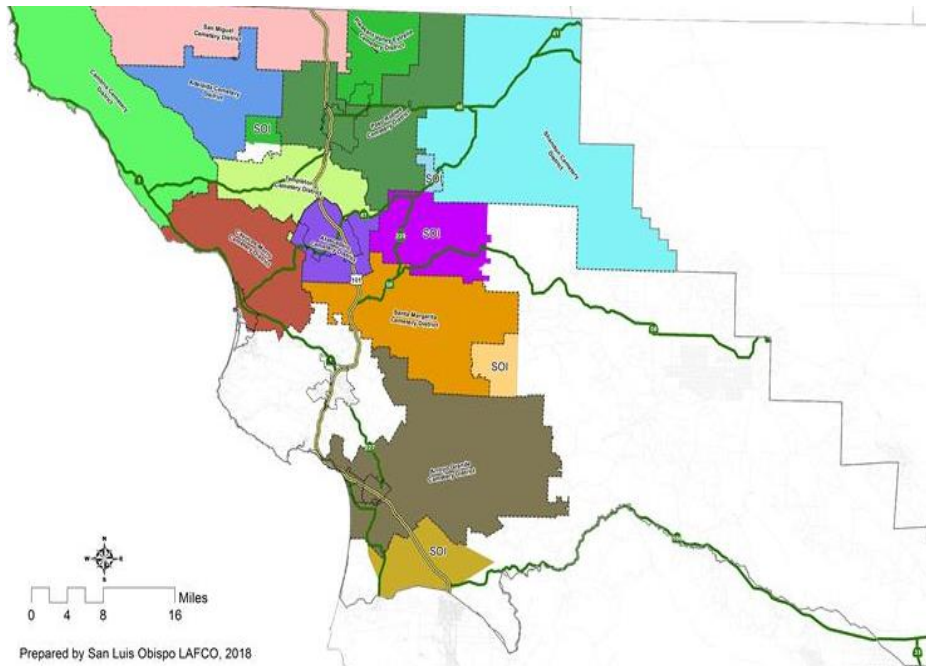
# CEMETERIES - THE PLACE OF FINAL REPOSE

## SUMMARY

The Grand Jury investigated 11 Cemetery Districts. Each district was unique in its physical layout with the operations of each one differing in multiple ways. Items such as property taxes, allocated income, endowment fees, maintenance, equipment, volunteers, number of Trustees, payment of stipends, expenditures, facilities and use of grants all differed to some degree. San Luis Obispo, Los Osos, Creston, Pozo, Avila Beach, Nipomo, California Valley and a small area near Adelaida do not have Public Cemetery Districts but are serviced by private cemeteries.

## BACKGROUND

The County of San Luis Obispo operates 11 separate Cemetery Districts. These final resting places, as shown below, are scattered throughout the county from San Miguel in the north to Arroyo Grande in the south, from Cambria along the coast to Shandon in the east.



These districts are like other Community Service Districts (CSD) which operate independently with a Board of Trustees. The exception, unlike other CSD, is that each Cemetery Board is appointed by the County Board of Supervisors and not elected by the voters. These Cemetery Districts are required to operate in compliance with the State of California Health and Safety Code.

Nine of the districts operate and maintain one cemetery within their service area. The Pleasant Valley-Estrella District operates one cemetery and maintains a historic church with a cemetery in Paso Robles near the airport. Arroyo Grande has one active cemetery and another property for future development.

Each Cemetery District is required to perform these minimum duties based on Section 9000 to Section 9667 of the Health and Safety Code of the State of California:

- Have a Board of Trustees with three to five members.
- Conduct board meetings at least every three months in compliance with the Brown Act.
- Maintain accurate and current records of all remains interred.
- Adopt an annual budget by August 30 of each year.
- Provide a regular audit.
- Establish operating conditions and fees.
- Provide and operate an endowment care fund. The fund must have a legally defined minimum payment for each interment. The endowment principle cannot be spent. The fund must be invested in a limited number of investments. The income from the fund can only be spent on care of the cemetery.

The purpose of this report is to review the operation and endowment of the districts. We provide this as a check for the County to be aware of the status of each Cemetery District.

## **METHOD**

The Grand Jury visited 12 sites: 11 Cemetery Districts and the Estrella Church. Meetings were held at the sites with the operators or in some cases the Board of Trustees or both starting in July 2021 through September 2021. Detailed notes were taken at all visits. The County Treasurer's Office, members of the County Counsel's Office and private companies who provide staff at some of the districts were also consulted.

The County Local Agency Formation Commission (LAFCO) was consulted as they are tasked to perform a Municipal Service Review and a Sphere of Influence Assessment for all districts every five years. The latest assessment of Cemetery Districts was in 2018. Some of their information was incorporated in this report.

Finally, we reviewed the relevant sections of the California Health and Safety Code for background on the duties and responsibilities of Cemetery Districts. What we highlight here is based on the operation of the Cemetery Districts. Private cemeteries are governed differently.

## NARRATIVE

We started this investigation because it had been 13 years since the Grand Jury had reviewed the operation of all the Cemetery Districts. The Grand Jury is required to review at least one CSD or agency and the detention facilities in the County every term. The Cemetery Districts are diverse in their operation with several having volunteer boards and some having boards that receive a stipend. Some have major endowments while others are nominal with limited or no endowments. Some have limited interments every year while others have numerous interments monthly.

The State of California has had regulations and allowed establishment of Cemetery Districts since 1909. Several districts have been in existence since the days of the Spanish colonial era. Some were church or fraternal order affiliated prior to the establishment of Cemetery Districts. The following charts list the features of each Cemetery District as a comparison.

Common requirements of Cemetery Districts	Adelaida	Arroyo Grande	Atascadero	Cambria	Cayucos-Morro Bay	Pleasant Valley-Estrella	Paso Robles	San Miguel	Santa Margarita	Shandon	Templeton
Interments per year	0-2	200	90	100	48	3	140	10	20	6	25
Endowment fund	yes	yes	yes	yes	yes	no	yes	yes	yes	yes	yes
Audit date M/Y	None-Not feasible based on district's revenues	6/20	6/20	6/20	6/21	None-Not feasible based on district's revenues	6/20	6/21	6/18	6/17	6/20
Number of Board members	3	3	3	3	3	5	5	5	3	5	3

The facilities at the Cemetery Districts vary appreciably. Some have chapels, storage buildings, restroom facilities and special places for spreading cremated remains. Some have well maintained grounds. Others rely on volunteers to trim the grass and weeds. See the table below.

Physical attributes of San Luis Obispo Cemetery Districts	Adelaida	Arroyo Grande	Atascadero	Cambria	Cayucos-Morro Bay	Pleasant Valley-Estrella	Paso Robles	San Miguel	Santa Margarita	Shandon	Templeton
Acreage	7	21 + 20	60	14.2	7	2.5 + 1.5	45	7	4.25	3	10
Operating Personnel	0	3	3	3	4	0	4	2	2	2	1 + contract
On site Office	no	yes	yes	yes	yes	no	yes	yes	no	no	yes
Storage Facility	no	yes	yes	yes	yes	no	yes	yes	no	no	yes
Restroom	no	yes	yes	yes	yes	no	yes	yes	PP	no	yes
Water	no	yes	yes	yes	yes	no	yes	yes	yes	no	yes
Electricity	no	yes	yes	no	yes	no	yes	yes	yes	no	yes
Fences	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
Security / Lighting	no	yes	yes	no	no	no	yes	yes	no	no	yes
Chapel	no	no	no	no	yes	no	yes	no	no	no	no
Maintenance Equipment storage	no	yes	yes	yes	yes	no	yes	yes	no	no	yes
Spreading area for cremated remains	no	no	yes	yes	no	no	yes	no	no	no	no
Columbarium	no	no	yes	yes	yes	no	yes	yes	no	no	yes
Website	no	yes	yes	yes	yes	no	yes	yes	no	no	yes
Allow above ground monuments	yes	no	no	no	no	yes	yes	yes	no	no	yes

Those districts with no employees rely on the Trustees or volunteers to maintain the cemetery property. Those who take an interest in the cemetery will likely have relatives interred and wish to maintain the cemetery as a result of their interest. Even those who have maintenance personnel will rely on volunteers for some of the required maintenance at different times of the year. This practice has been provided for many years. In most cases the Trustees and volunteers have personal

reasons for getting involved. This practice saves considerable funds for the districts and builds strong bonds with the communities they serve. One San Luis Obispo County Supervisor lists how to contact the Cemetery Districts on the Supervisor’s website. The others do not. In all cases during our investigation, we found dedicated and motivated people who provide leadership and timely assistance to those who need this service.

The Grand Jury reviewed the latest financial reports available from the County Auditor. By law all districts are to provide information to the Auditor about their income, expenses and endowment. Income is received for services like burials, entombments and purchases of plots. Expenses include maintenance, repairs and capital expenditures. The endowment is a special fund designed for the perpetual care of the facility once the facility is full and/or closes. The information presented below is based on the latest reports from the County Tax Collector/Auditor. All figures are in dollars.

Monetary attributes of Cemetery Districts dollars	Adelaida	Arroyo Grande	Atascadero	Cambria	Cayucos-Morro Bay	Pleasant Valley-Estrella	Paso Robles	San Miguel	Santa Margarita	Shandon	Templeton
Endowment	7,041	1,602,233	974,530	283,137	573,065	0	1,827,945	59,243	17,413	32,630	83,310
Endowment fund return latest term	-147	76,999	28,307	23,396	36,580	0	69,427	5,015	1,010	362	3,909
Income	-71	512,668	567,057	197,830	642,618	7400	852,707	110,408	40,423	21,010	184,877
Expenses	-154	457,414	497,510	212,835	772,166	11,777	1,160,124	100,967	23,372	7,359	188,219
Profit/loss	-225	55,254	69,547	-15,005	-129,548	-4,377	-307,417	9,441	17,051		-3,342
Date of last Audit	n/a	6/20	6/20	6/20	6/21	n/a	6/20	6/21	6/18	6/17	6/20
Pay a stipend	no	no	yes	yes	yes	no	no	yes	no	no	yes
Accept credit cards	no	yes	coming	yes	yes	no	yes	no	no	no	no

Cemetery District incomes are varied. Some are taxpayer funded as part of the property taxes paid to the county each year. Some rely on interment fees alone. Similarly, expenses of the districts vary with volunteers providing maintenance and upkeep while others have paid staff to perform duties. The use of payment methods like credit cards is not universal. Many districts are not

equipped to accept payments other than cash or checks. The following table lists the incomes from the districts by source.

Cemetery Districts income types	Adelaida	Arroyo Grande	Atascadero	Cambria	Cayucos-Morro Bay	Pleasant Valley-Estrella	Paso Robles	San Miguel	Santa Margarita	Shandon	Templeton
Taxes		146,244	404,568	113,666	432,019		580,240	100,489	36,122	17,628	131,557
Interment or other sales	-221.25	312,091	82,643	80,155	103,922	2,400	237,680	6,075	3,150	1,345	48,625
Interest		49,481	34,976	4,009	84,096		36,522	3,269	914	1,023	3,939
Grants		2,833	2,608		22,631	5,000		575	237	114	756
Miscellaneous		2,019					-1,735			900	

The expenditures of the districts in some cases exceeded their annual income. In those cases, the districts relied on previous income kept in their general funds to balance their budgets. The table below lists the amounts of general funds in the County Treasury that the districts had at the end of the reporting periods. Those who receive property tax money typically have at least a year's worth of operating funds in their treasury account.

General fund balances as of reporting date	Adelaida	Arroyo Grande	Atascadero	Cambria	Cayucos – Morro Bay	Pleasant Valley-Estrella	Paso Robles	San Miguel	Santa Margarita	Shandon	Templeton
Cash in county treasury	1,021	1,241,866	1,310,750	52,838	3,497,781	4,000	817,559	186,886	113,907	148,586	227,915

The amount of funds available in the County Treasury for some of the districts and the scarcity of others is significant. The reasons for the differences are based on the source of the funds that the district receives as income. Those with no property tax money have small balances in their accounts. The reason for their not receiving tax money is rooted in the method used to balance the property tax funds allocation initiated by the State after Proposition 13. Property tax revenue sharing was determined by the State in 1978 and 1979. AB 8 and AB 1019 determined the distribution of property tax funds. These laws provided funds to local agencies based upon two years of 1977 and 1978 collections. If no taxes were allocated in those years, they received no

future tax funds. In order to now collect taxes, the districts must engage in a Proposition 218 approval process. This process calls for an across-the-board charge to each property owner in the district, voted by the property owners, attached to their property tax bill.

The Cemetery Districts in several cases only accept payment for services in cash or check. Some districts do allow for cashless payments. The Grand Jury questions why all Cemetery Districts do not allow cashless payments. As CSDs whose boards are appointed by the Board of Supervisors and all operating funds held and disbursed by the County, they should avail themselves of the County's ability to accept other forms of remuneration.

Each Cemetery District pays liability insurance for their CSD. As a County entity whose property is owned by the County, the Grand jury questions why the CSDs are not covered by the County Liability Insurance policy. The Trustees are appointed by the Board of Supervisors, not by district voters. The district voters have no opportunity to impact the operation of the district as the county directs the operation by appointing the Trustees. In this respect, the County is in effect operating the district as if it were controlled by their employees.

### **CEMETERY DISTRICT ISSUES**

The districts expressed desires to have their facilities upgraded or to have equipment or infrastructure improved during our meetings. Only one expressed some success in achieving improvements using the County Community Project Grant system. Pleasant Valley-Estrella has successfully petitioned the Board of Supervisors to fund topographic assessment of the cemetery using the grant program. They also successfully received a subsequent grant to install a solar gate system. This type of grant system is a unique way for the Board of Supervisors to enhance the community in a meaningful way with a considerable improvement for the recipient. The paragraphs below indicate ways that the cemeteries wish to have their needs addressed and some general comments from our site visits.

## **ADELAIDA**

Adelaida requested three benches for visitors and repair of the fence where a tree branch had fallen. During our visit the cemetery was not maintained because of COVID. Meetings of the trustees had not been done for over a year. Even Zoom meetings had not been conducted.

## **ARROYO GRANDE**

Arroyo Grande is a well-maintained cemetery, however, they have a need for better equipment. Their tractor was purchased in 1940. Their dump truck dates back to 2001. They need a new backhoe as well. They have no gates. As a result, they have experienced vandalism and trespassers from homeless individuals. They have a secondary site for future expansion which currently has a residence that is rented.

## **ATASCADERO**

Atascadero lost the use of their website and, at the time of our interview, they were looking for technical support. They experienced some problems during COVID restrictions as their workers were not deemed “essential” during the early part of the pandemic. Open areas at the site are used by community members and the school district track team. The site is well maintained with their only concern being inconsistencies caused by the pandemic.

## **CAMBRIA**

Cambria needs a way to clear the property of tree limbs falling within the cemetery and debris that fall on their property from adjacent properties.

## **CAYUCOS-MORRO BAY**

Cayucos-Morro Bay has had some vandalism in recent times. Bicyclists ride their bikes along the frontage road of the cemetery to access a pedestrian tunnel to the beach. Security is an issue. Their current need is for a utility vehicle to help with maintaining the facility.

## **PLEASANT VALLEY-ESTRELLA**

Pleasant Valley-Estrella would like to upgrade the Pleasant Valley facility with a gazebo, a creek bridge to access the gazebo from the main part of the cemetery, and an entry kiosk.

They currently operate and pay insurance on the Estrella Adobe which is open infrequently. The Estrella Adobe has a long history and the title to the property is currently with the Methodist Church. The site was the first Protestant church in the County and is a State Historical site. The County wants to have the title transferred from the Church to rectify the ownership confusion. This process has been proceeding slowly. It would be beneficial if it could be expedited.

### **SANTA MARGARITA**

Santa Margarita Cemetery would like to build a columbarium to house cremated remains. They need more space and are negotiating with Santa Margarita Ranch to expand. Site curbing and development for future interments are needed.

### **SHANDON**

Shandon Cemetery is expanding. The existing two-acre site is expanding to three acres. They need the new site surveyed and fenced.

They would like to install a water system consisting of a water tank, a solar powered pump, and a windmill. A revision to the curbing is needed.

### **TEMPLETON**

Templeton is installing two electric gates to allow visits seven days per week. The only maintenance item unplanned is a painting of the office doors. They would like an angel to identify the children's section.

### **PASO ROBLES**

There appears to be some confusion about the ability of all Cemetery Districts to pay Trustees a stipend for meeting attendance. At one time, Paso Robles paid a \$100.00 stipend per meeting, but it was discontinued due to advice provided by the State Social Security Administrator. Other districts pay \$50.00 or the statute maximum of \$100.00. Some pay nothing. Health and Safety Code Section 9031 indicates that the stipend can be paid for a maximum of four meetings per month at a maximum of \$100.00 or such other amount that is established by the Board of Trustees. In November of 2020 the Paso Robles Cemetery was advised by the Office of the State Social Security Administrator that their Trustees are employees. Their position was that Trustees are not

covered by a California state retirement system and, therefore, they are subject to Social Security and Medicare taxes on payments received. The Board of Trustees opted to stop offering stipends so as to avoid paying Trustees as employees.

## **FINDINGS**

- F1. Adelaida and Pleasant Valley-Estrella did not supply audits due to low revenue per County Auditor. Of the remaining Cemetery Districts, seven are current providing financial statement audits and two are delinquent.
- F2. Some Cemetery Districts give stipends to their Trustees. Other Cemetery Districts do not. Paso Robles stopped because of advice received from the State Social Security Administrator defining them as employees.
- F3. Some Cemetery Districts accept credit cards for fee payments. Others do not.
- F4. All Cemetery Districts are required by California Health & Safety Code Section 9065 to have an endowment care fund. The size of the funds varies appreciably. With the exception of Pleasant Valley-Estrella, all Cemetery Districts have an endowment care fund recorded within the County's financial system.
- F5. Some of the Cemetery Districts have restroom facilities, some do not. Some Cemetery Districts have electricity, water and lighting, some do not.
- F6. Nine Cemetery Districts have a property tax base. Two do not receive tax revenue.
- F7. Some Cemetery Districts have equipment and maintenance facilities to provide upkeep. Some smaller districts contract these services.
- F8. Most Cemetery Districts include offices and provide easy contact information. Some have websites and some do not.
- F9. Some Cemetery Districts allow above ground monuments and headstones. Most have stopped.
- F10. Locations where cremated remains of the departed can be spread or placed in a niche are available at some of the Cemetery Districts.
- F11. Security at the Cemetery Districts was not a serious problem for most. Lack of security has caused problems for some.
- F12. The Pleasant Valley-Estrella Cemetery currently pays for liability insurance for the Estrella Cemetery, which is located on land owned by the Methodist Church.

## **RECOMMENDATIONS**

- R1. All Cemetery Districts should provide ways to accept current forms of payments. The County has established ways to pay property taxes and other fees using alternate methods of payment for their charges. The Cemetery Districts should investigate how they could link to that payment method.
- R2. All Cemetery Districts should have a website with full contact information or link to the Supervisors' home page or another CSD link on the County website.
- R3. All Cemetery District Boards should have meetings, even if they are virtual, as required by law.
- R4. Those Cemetery Districts that rely on volunteers should assure that the sites are safe by removing dangerous conditions as required.
- R5. Clear title to the Estrella Cemetery property should be acquired by the County.
- R6. All Cemetery Districts should have liability insurance paid for by the County.
- R7. The Board of Trustees should review their Cemetery District's policy on stipends in regard to the State of California Social Security Administrator letter on taxing of payments to Trustees (See Attachment #1).
- R8. Those Cemetery Districts that have needs and wants should investigate the County Grant system.
- R9. With the increase in cremations, Cemetery Districts should review the need for columbaria and/or scatter areas.

## **REQUIRED RESPONSES**

The following entities are required to respond to the findings and recommendations:

Adelaida Cemetery District shall respond to recommendations R1, R2, R3, R4, R6, R7, R8, R9.

Arroyo Grande Cemetery District shall respond to recommendations R1, R2, R6, R7, R8, R9.

Atascadero Cemetery District shall respond to recommendations R1, R2, R6, R7, R8, R9.

Cambria Cemetery District shall respond to recommendations R1, R6, R7, R8.

Cayucos-Morro Bay shall respond to recommendations R1, R6, R7, R8, R9.

Pleasant Valley-Estrella shall respond to recommendations R1, R2, R5, R6, R7, R8, R9.

Paso Robles Cemetery District shall respond to recommendations R1, R6, R7.

Santa Margarita Cemetery District shall respond to recommendations R1, R2, R6, R7, R8, R9.

San Miguel Cemetery District shall respond to recommendations R1, R6, R7, R9.

Shandon Cemetery District shall respond to recommendations R1, R2, R6, R7, R8, R9.

Templeton Cemetery District shall respond to recommendations R1, R6, R7, R8, R9.

The County Auditor shall respond to recommendations R1, R7.

The County Counsel shall respond to recommendations R5, R7.

The County Board of Supervisors shall respond to recommendations R1, R2, R6, R7.

## **AGENCY RESPONSE REQUIREMENTS**

The Penal Code Section 933.05 that specifies the format and methodology for agency responses is listed below. All agency respondents are required to respond to all findings and recommendations in the following manner:

- If the respondent disagrees wholly or partially with an item, the respondent must elaborate on the portion of the item that they disagree with and provide an explanation.
- If a respondent notes that an item will be implemented in the future, the response must include a timeframe for implementation.
- If a respondent notes that an item requires further analysis, the agency must include in the response an explanation of and the scope of what will be studied, and the timeframe needed for the study. The timeframe for follow-up from the agency cannot exceed six months.
- If the item will not be implemented or is not reasonable, the respondent is required to provide a detailed explanation.

### **933.05. Findings and Recommendations**

- (a) For purposes of subdivision (b) of Section 933, as to each grand jury finding, the responding person or entity shall indicate one of the following:
- (1) The respondent agrees with the finding.
  - (2) The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons, therefore.
- (b) For purposes of subdivision (b) of Section 933, as to each grand jury recommendation, the responding person or entity shall report one of the following actions:
- (1) The recommendation has been implemented, with a summary regarding the implemented action.

- (2) The recommendation has not yet been implemented, but will be implemented in the future, with a timeframe for implementation.
- (3) The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a timeframe for the matter to be prepared for discussion by the officer or head of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This timeframe shall not exceed six months from the date of publication of the grand jury report.
- (4) The recommendation will not be implemented because it is not warranted or is not reasonable, with an explanation, therefore.

Presiding Judge	Grand Jury
Presiding Judge Craig van Rooyen Superior Court of California 1035 Palm Street Room 355 San Luis Obispo, CA 93408	San Luis Obispo County Grand Jury P.O. Box 4910 San Luis Obispo, CA 93403

# ATTACHMENT 1



Official State Social Security Administrator  
California Public Employees' Retirement System

P.O. Box 720720, Sacramento, CA 94229-0720 | Phone: (916) 795-0810 | Fax: (916) 795-3005  
888 CalPERS (or 888-225-7377) | TTY: (877) 249-7442 | [www.calpers.ca.gov/ssa](http://www.calpers.ca.gov/ssa)

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November 18, 2020

CalPERS ID:

Paso Robles District Cemetery  
Tom Flynn  
Cemetery Manager  
P.O. BOX 1706  
Paso Robles, CA 93447

**Subject: Annual Information Request**

Dear Tom Flynn,

Thank you for providing your completed Annual Information Request (AIR) to the California State Social Security Administrator (SSSA). The SSSA is the federally designated official who is the liaison between you, a governmental employer, the Internal Revenue Service (IRS), and the Social Security Administration (SSA).

You are receiving this letter because the SSSA has determined a potential compliance issue with the rules, laws, and/or procedures governing the reporting and withholding standards of the Social Security and Medicare program.

**Section 218 Agreement Status**

Paso Robles District Cemetery (District) is covered under Section 218 Modification number 36 (Agreement) effective July 1, 1954.

The Agreement is an Absolute Coverage Group Agreement which extends Social Security coverage to employees. The Agreement does not contain any optional exclusions.

**Information provided**

Per responses on AIR questionnaire, the District indicated there are no employees, but has a governing body.

Per email and phone communication received by our office from the District, it was stated that the District's board members do not have Social Security or Medicare taxes withheld from their stipends and that the board members are being treated as independent contractors. The stipends are not being treated as wages and board members stipends are reported on a Form 1099.

**Laws Referenced**

The SSSA conducted a comprehensive review of the federal and state laws that pertain to your question:

Social Security Administration, State & Local (SL) Coverage Handbook

- SL §60001.601 Employee Defined
- SL §70001.701 Wages Defined
- SL §50001.550 Mandatory Social Security and Medicare Coverage

#### Internal Revenue Code

- IRC §31.3401(c)-1 Employee Defined
- IRC §1402(c)(1) Self-Employment Tax

#### Analysis

SL §60001.601 indicates that by common law the board members are considered employees, and not independent contractors:

“Whether an individual is an “employee” under the common law rules or Federal statutory definition is determined in accordance with the provisions of the Social Security Act and the applicable regulations. Under the Social Security Act, the term “employee” includes:

- An officer of a State or political subdivision. (Section 218(b)(3))
- Any individual who, under the common law rules applicable in determining an employer-employee relationship, has the status of an employee. (Section 210(j)(2)).”

SL §70001.701 indicates the definition of the wages as a stipend is not considered in the determination that these are wages:

“The term “wages” means remuneration paid in cash or some other form for services performed by an employee. The label given the payment (salary, fee, commission, etc.) and the basis for the payment is immaterial in determining whether the remuneration constitutes wages.”

SL §50001.550 defines Mandatory Social Security and Medicare coverage:

“Beginning July 2, 1991, Social Security and Medicare coverage is mandatory for State and local government employees who are not members of a public retirement system and who are not covered under a Section 218 Agreement, unless specifically excluded by law. The mandatory Social Security provisions also apply to those State and political subdivision employees who have the option to become members of the retirement system but have chosen not to do so (optionals) as well as those employees who are personally ineligible for membership in the retirement system (ineligibles).

Mandatory Social Security coverage ceases when a State or local government employee becomes a member of a public retirement system.

- If an employee was hired after April 1, 1986, and is not a member of public retirement system, the employee is covered for Social Security and Medicare. If the employee subsequently becomes a member of a retirement system, the employee ceases to be covered for Social Security (but not Medicare because the employee was hired after April 1, 1986). Employees hired or rehired after March 31, 1986, remain covered for Medicare regardless of their membership in a retirement system.
- If an employee was hired prior to April 1, 1986, and was not a member of public retirement system, the employee is covered for Social Security and Medicare. If the employee subsequently becomes a member of a retirement system, the employee ceases to be covered for Social Security and Medicare.

NOTE: If mandatory Social Security coverage applies, an employer can provide an alternative plan to Social Security if it meets the minimum benefit requirements in the IRC Section 3121(b)(7)(F)."

IRC §31.3401(c)-1 defines the relationship of employee and employer using the behavior control model of the common law rule:

"Generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so."

IRC §1402(c)(1) explains that holders of "public office" are not subject to self-employment tax.

"The term "trade or business", when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to trade or business expenses), except that such term shall not include—

- (1) the performance of the functions of a public office, other than the functions of a public office of a State or a political subdivision thereof with respect to fees received in any period in which the functions are performed in a position compensated solely on a fee basis and in which such functions are not covered under an agreement entered into by such State and the Commissioner of Social Security pursuant to section 218 of the Social Security Act;"

Regulations for section 1402, addressing the applicability of self-employment tax, indicate that the performance of the functions of a public office DOES NOT constitute a trade or business. Therefore, holders of "public office" are not subject to self-employment tax. Generally, all holders of public office that receive payment for their services are excepted from self-employment tax and are presumed to be employees receiving wages.

### **Guidance**

Based on the facts and circumstances provided, the board members are considered employees of the District and not independent contractors. These elected positions are covered under the Section 218 Agreement. It is our guidance that the District withholds Social Security and Medicare contributions for the positions not covered by the Agreement unless a required exclusion applies (SL 50001.560).

### **Next Steps**

IRS regulations require that employers make corrections at a minimum for all opened tax years. However, by entering into a "Closing Agreement" with the IRS, the employer may make corrections beyond the statute of limitations. The employee's earnings records with SSA should be corrected for the entire employment period subject to Social Security coverage so that employees Social Security benefits are calculated correctly. The SSA will accept corrections dating back to 1978. For additional information on how to make corrections, please see attachment titled "Correcting Social Security and Medicare Withholding."

Our office will be able to facilitate a conference call with IRS and SSA to assist with the next steps for correcting employees' records.

If you disagree with our determination or guidance, the SSSA can submit your case to the SSA or the IRS for review. Please contact the SSSA at 916-795-0810 or [sssa@calpers.ca.gov](mailto:sssa@calpers.ca.gov). We will act as the liaison between your agency, the SSA, the IRS and can request that the SSA or IRS review your agency's status.

If you would like to have a private letter ruling on this matter from the IRS Office of General Counsel in Washington DC, you'll need to follow the steps as outlined in Revenue Procedure 2020-1 (Section 7. See Appendix A, for a schedule of current user fees). The Revenue Procedure is located on the Service's website at [www.irs.gov](http://www.irs.gov).

The SSSA Office is committed to assisting California's government employers and employees in matters related to its responsibilities for administering the provisions of the California Section 218 Agreement and the proper application of Social Security and Medicare. Should you have any questions please do not hesitate to contact Veronica Silva-Gil directly, manager of the State Social Security Administrator's Office, at (916) 795-2229.

Sincerely,



Christina Rollins  
Section Manager  
State Social Security Administrator

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