

Correspondence – Audit Subcommittee – August 23, 2011
Received as of Friday, August 19th – 3:00 PM

To: PHUUD Audit Committee.
Re: August 23-Audit Committee Meeting

7-29-2011

Dear Mayor Barbieri, Vice Mayor Chiang & Judge Kawaichi,

It appears that the audit committee is forging-ahead to craft a final document on the PHUUD debacle before the "key cause" is resolved. I believe, the 1-1/2 year long-unresolved legal dispute with Harris & Assc supports my conclusion. That Administrator Geoffery Grote had the primary responsibility and decision to identify any irregular bidders and properly award the PHUUD construction contract to the "lowest responsible bidder".

As a result of your inquiry of the two million dollar taxpayer bailout of the Piedmont Hills Underground Utility District (PHUUD), the critical issue remains unresolved. Either City Administrator Geoff Grote or City Engineer/Harris & Assc failed to abide by the Cal-Trans bidding guidelines, California Public Bidding Laws and section 25.0 (Rejection of Bids) of the PHUUD bidding documents. Valley Utility's irregular line 38 bid unit price of \$ 2190.00 per cubic yard for the removal of rock went unnoticed and unaddressed by both Administrator Geoff Grote and Harris Assc. This blatant collapse of basic (boilerplate/Cal Trans) public bid analysis resulted in the mis-award of the PHUUD construction contract to Valley Utility by Administrator Grote. This significant executive error is in violation of the Piedmont City Charter section 4.11, California Business & Professional code section 20415 and California Public Contract code sections (20161 & 20162), etc. There are over 100 more competitive bidding statues in California. All these statues are laws that are intended to protect the public and bidders by eliminating favoritism, fraud and corruption in the awarding of public construction contracts.

Both judicial case law and existing statues mandate that all public work projects must be awarded to the "lowest responsible bidder". Valley Utility's unit bid (line 38 rock) was glaringly irregular, thus their bid was non-responsive, based on State public bidding laws. Valley Utility's lower base bid amount was irrelevant and subordinate in relationship, to a "lower responsible bidder". Tennyson Electric was the "lowest responsible bidder" at the \$425.00 per cubic yard unit (line 38) for the rock removal and \$ 1,830,000.00 on their base bid element.

At the July 8th Audit Committee meeting Administrator Grote agreed. He stated that nobody on his senior staff, including himself had knowledge of any irregular unit numbers.

Mr. Grote's statement makes no sense! A blind person could see the irregular numbers.

We are told that it was Harris Assc, that failed to recognize the irregular bid submitted by Valley Utility and it was Harris Assc contractual analysis that cloaked Mr. Grote's judgment.

I believe, based on Mr. Grote's 22 year pattern of awarding public contracts and Harris Assc March 3 email to Larry Rosenberg, that it was "clearly" Administrator Geoffery Grote's sole administrative duty to screen-out/disqualify any bidders proposals with irregular or unbalanced unit numbers and to validate the contract award to the legitimate bidder. The seven analyzed items specified (spelled out) in Harris Assc Mar. 3rd email, do not include screening for irregular unit bid items.

The City of Piedmont and Harris & Assc are currently in litigation to resolve the violations that occurred. If Mr. Grote's claims are correct, then Harris Assc will be found culpable for failing to identify the irregular/non-responsive bid unit rock prices of Valley Utility and Piedmonters will be made-whole, with a financial settlement from Harris & Assc in the amount of 1.3 million dollars.

If not?

The PHUUD Audit Committee and Piedmont City Council Members fiduciary duty is to all the Citizenry of Piedmont to hold those responsible, accountable for their actions.

Neil Teixeira

Garrett

I found the entire process of the so called "audit committee" so distasteful that I couldn't allow myself to participate. This was no real audit committee, but merely a committee to pacify the citizens of Piedmont, who were rightly upset by the activities of our staff and council. Just a couple of thoughts:

1. How can it take over 1.5 years from the events for a committee to issue a final report and then have that report qualified on so many levels and be totally non-definitive and wishy washy?
2. How can the City not hold its chief executive directly responsible for his staff and for overruns of this magnitude? I personally like Geoff, but if he worked for any business as CEO and the business incurred such overruns, he would have been terminated for cause on the spot. In discussions with John Chang, he admitted that actions such as this would have been grounds for termination at his bank, regardless of intent on the part of the employee.
3. The establishment of the "audit" committee was almost a joke. Mr. Barbieri was the signatory to the contracts in question and Mr. Chang was a member of Council during the process. How could they be the people involved in auditing themselves? The audit committee should have been formed from citizens, not bound by the Brown act, so that they could have interacted and actually accomplished something beneficial. This committee lacked any semblance of independence (except for Judge Kawaichi) either actual or perceived.
4. How could Geoff Grote have been the staff person to the committee when he was or should have been one of the individuals investigated for incompetence?

The entire process was flawed from start to finish, possibly because of the City's strong standing position that encourages undergrounding at virtually any cost. Even to date, the audit committee doesn't

acknowledge that the city's actual costs for PHUD were greater than the 2+ million for rock, etc.

Ie: The city costs should include the sewer repair work of over \$200,000 on Crest, which seems to have been swept under the table (or roadway of Crest).

This would never have been incurred or necessary but for the undergrounding project.

Incompetence at so many levels which is not being owned up to is indicative of the way our city is being run. In one of Mr. Wieler's recent Post articles he talked about how good the City was and how fiscally responsible and sound Piedmont is. In the same issue, the municipal tax review committee was saying that we are headed toward disaster if we don't reform our spending.

Best Regards
Joe Hurwich

Maybe I'm missing something, but it seems that the Committee has missed the forest for the trees. The only questions I'm interested in hearing an answer to is whether anyone on the council asked "What happens if there is a cost overrun?" and, if there is, "Who is going to pay for it?"

The Council should never have approved a project for private benefit if there was a risk of the public having to pay for it or pay for any significant part of it? Did no one ask? Where was our City Attorney? Wasn't it his job to warn the council of the potential consequences?

Sanford H. ("Sandy") Margolin

August 18, 2011

Audit Committee Report Comments

LITIGATION

That this matter is under litigation appears to have prevented the Committee from any meaningful examination of the role of Staff. I request that the City's litigation Complaint against Harris & Ass. and Robert Gray & Ass., and the defendant's respective Answers be published on the City website. Were these matters being litigated in Alameda county the Court website would give ready access to the documents. The matter is being litigated in Contra Costa and that Court site does not have on-line access. These documents are not shielded by attorney/client or work product privilege.

I request that once the litigation is concluded all depositions and court transcriptions be made available to the public.

IGNORING DOCUMENTATION

Geoff Grote has stated publicly no one on staff was involved in the bid process. An email from Russ Moore of Harris Ass. to Larry Rosenberg confirms

Larry is involved in discarding the MCH bid, a defective bid. What was Larry Rosenberg's involvement in discarding the MCH bid? (See my Oct 26, 2010 letter to this Committee.)

RUNNING ON EMPTY

By Sep.1 2009 the change work orders total \$970,593. This is \$423,066 *more* than the \$547,527 project contingency. By Oct. 12, 2009 the invoices from Valley Utility total \$2,206,089. This is \$144,047 *more* than the total \$2,062,822 available from the Valley bid of \$1,515,295 and the \$547,527 project contingency.

CREST ROAD TAXPAYER REPAIR

On Oct. 13-14 the Crest road utility trench washed out and collapsed. But for the special benefit undergrounding, there would have been no Crest road washout. The Audit Committee does not comment on public funds being used for private benefit in repairing the Crest road washout.

At the Muni Tax Comm Meeting Aug. 3, 2011 Geoff Grote defended staff's actions in using the sewer fund to repair the Crest Rd. washout. Mr. Grote's defense of the use of taxpayer funds for this special benefit two years after the incident is disturbing and indicative of a staff culture of shifting special benefit costs to general taxpayer expense.

Valley had 24 hours notice a major storm event was forecast. There is no comment from staff or this Committee about Valley's possible professional negligence in the Crest road washout.

STAFF CANDOR

The report states (p21) Geoff Grote informed Mayor Friedman "in October 2009." Why is the exact date omitted? If informed after the trench collapse, the disturbing implication is that even at this late date when all funds are exhausted only the collapse of the trench forced staff to reveal the debacle.

GEORGE PEYTON

City Attorney Peyton reviewed the contracts for "form and content" that transferred unlimited liability to Piedmont taxpayers. I asked both this Committee and City Council why City Attorney Peyton's role in this has not been examined, and why the city has not attempted to collect from Mr. Peyton's insurance. There has been silence concerning George Peyton's responsibility.

UNBALANCED VALLEY BID

The Valley Utility bid for the open ended line 38 bedrock item exceeded other bidders by minimally 219%. Compared to the Tennyson Electric, the next lowest overall bid, Valley's line 38 was 1,460%. higher. The Valley bid is unbalanced.

REPORT CONCLUSION

The cost over-runs are not \$2M as the report indicates (page 1); the actual sum is about \$3M. The taxpayer funded Crest Rd repair was \$296K. Massive amounts of staff time were spent on this. The counter suits brought by the City against the Kurtins proved to be frivolous at best and cost taxpayers minimally \$450k.

INDEPENDENT AUDIT

The Report is not substantive to the basic issues of staff involvement and other related issues. Two City Council members that voted for the public funds giveaway have now examined themselves. An independent audit is needed.

Rick Schiller

Memo

To: Geoffrey L. Grote, City Administrator
John Tulloch, Interim City Clerk

From: Larry Rosenberg, Director of Public Works (retired) 

Date: August 17, 2011

Re: Clarification to Draft Audit Subcommittee Report
dated July 14, 2011

In anticipation of the August 23, 2011 meeting of the Audit Subcommittee, please include the following clarification in the record.

Reference to Page 18, Item 2.b. Timeline of expenditures including the development of "rock issue" paragraph 1 which reads (underlining added):

"As previously discussed, a completed timeline and analysis of the expenditures and payments through change order #025, by reviewing the billings and description of the work done (see attached Exhibit A). As noted earlier, rock was first discovered during the last half of July 2009 with the installation of splice boxes. Valley brought this to the attention of the Public Works Director and both parties agreed to use the In-Force Account provision of the construction contract, rather than the \$2,190 per cubic yard pricing provided in the accepted bid, which would have been far more expensive, plus offering a credit as an offset for the work that otherwise would have been done under the base bid (for non-rock trenching)."

The underlined sentence is inaccurate as it indicates that the Public Works Director and Valley Utility unilaterally agreed to use the in-force account provision of the construction contract. Rather, the decision to use the in-force account provision was a decision of the Steering Committee. The Steering Committee consisted of Ann Swift, City Clerk; Larry Rosenberg, Director of Public Works; John Wanger, City Engineer (Coastland Engineers); Russ Harlan, Project Manager (Coastland Engineers); Larry Fisher, Field Inspector (Robert Gray Associates); and Patrick Benedict (Valley Utility).

Correspondence – Audit Subcommittee – August 23, 2011
Received as of Tuesday, August 23rd at 3:00 PM

Gentlemen:

Concerning your summary report dated July 14, 2011, herewith my views and observations concerning the above subject:

I agree, for the most part, with the findings of the League of Women Voters summary of February 22, 2011.

There are a few items that I feel need supplemental discussion and/or additions to the Sub-Committee's report. They are:

- Under the heading of "Background: Utility Underground Assessment Districts" ("Background"), page 3, there is a statement that PG&E's share of funding is "very minor". This is far from reality. Under both PG&E's Electric Rule 20A and 20B, and the AT&T Co. telecommunications company ("Telco") Rule 32A.1 & 32A.2, the utilities must bear substantial costs.
- Also under Background, page 4, indicates that Rule 20A provides funds to each community through ratepayers to underground electric and telco facilities by allocations. This is quite misleading. Under Rule 20A, the electric utility sets aside funding in their books annually for undergrounding in communities throughout its service territory; but under the telco's Rule 32A.1, the company is obligated to match geographically the agreed upon district boundaries that the electric company agrees to fund. There is no specific "allocation" for the Telco.
- Further, under Background, page 4, there is use of the term "Underground Utility Assessment District" when Rule 20A does not apply. This too is misleading. Underground Utility Districts and Assessment Districts are actually two separate sets of statutes.
- The same paragraph indicates that Rule 20B projects are "not funded by the utility companies". This is blatantly wrong. The electric company must bear a portion of the costs. The Telco, under Rule 32A.2, must fund the entire cost of cable placement, splicing, cutover, pole work and removals; a substantial amount of each project; the applicants pay the cost of the underground supporting structure (trench, conduits, backfill, repaving etc., U.S.S.). The applicants pay for the U.S.S. on their private properties.
- It is imperative that the Council understand the employment of electric Rule 20B (Telco Rule 32A.2) requires that the area to be undergrounded include **"both sides of a street for at least one block or 600 feet, whichever is the lesser, and all existing overhead communications and electric distribution facilities within the area will be removed"**.
- On page 6, there is Background discussion regarding the City acting in the capacity of the contracting party with the construction company. This

- need not be the case. The "applicant", whether that is a developer, a "group of applicants", or the City can act as the contracting party.
- On page 7, item 1a, there is discussion regarding several neighbors belief that safety of the residents necessitated that utilities be placed underground. This is a frequent belief that is often over-stated. The undergrounding program in California had at its core aesthetic improvement.
 - In the same item 1a, there is a statement that "the committee did raise additional funds to help defray additional expenses". In my view, the \$100,000 collected towards this is absolutely insulting to the remainder of the community that is forced to bear over \$2,000,000 to shore up this private benefit project.
 - On page 9, there is discussion regarding assumption of bidding and construction tasks by the City Clerk in the absence of the Director of Public Works. I want to know how and why she was selected to assume these responsibilities; and more importantly, why there was not more management oversight of her work. This was clearly uncharted ground for her.
 - Page 10-11 includes discussion about the rock excavation line item on the bid specifications that led to the unbalanced bids. There is little doubt in my mind that in reviewing the bids submitted, the City Engineer failed terribly by not recognizing the extreme difference between the contractor awarded the contract and all other bidders. This bid should have been discarded or returned as being "non-responsive".
 - Beginning on page 13 and carrying on to page 19 is discussion about discovery of serious quantities of rock in the utility trenches, who did what about the discovery and what was not done about it. In hindsight, I have to ask whether or not there was ever consideration of a redesign of trench cross-sections to provide: 1) Reduced "cover" requirements, 2) Reduced "separation" between the conduits requirements, by 3) Back-filling with a lean mix concrete slurry? This would clearly have reduced the cubic yards of material excavated.
 - Also on page 13 there is brief discussion about the \$300,000 in costs associated with the trench wash-out on Crest Road (due to major storm during construction period) with funds from the City's Sewer Fund. In my view, this was a mis-appropriation of taxpayers funds. This was absolutely a failure by the contractor to adequately protect his trench during construction. The contractor should have borne the cost of restoring the failed trenches.
 - On page 14 there is discussion about the understated lineal footage of trench on the bid specification (off by more than 15%). It seems to me that the field foreman should have recognized this much earlier in the construction than occurred. Steps might have been taken to mitigate these errors.

Now, moving forward:

- When considering future underground districts, a uniform percentage number needs to be established when considering a "show of interest" vote in undergrounding any neighborhood and the actual percentage needed to proceed with adoption of a resolution/ordinance declaring establishment of district boundaries. Too often there has been confusion among the property owners within a proposed district.
- As to the application of the electric and telco tariffs:
- First: There is little likelihood that there will be sufficient accumulation of Rule 20A allocations for the foreseeable future to allow for fully utility funded projects.
- Second: It's much more likely that future undergrounding projects in Piedmont will be in accordance with electric Rule 20B (Telco Rule 32A.2). To protect the City, and its taxpayers, from liability in projects of this type, it is most important to let the requesting neighborhood groups, ie: "Group of Applicants", deal directly with the utilities by contracts. The City would only need to be involved to the extent of conducting public hearings to establish the underground district boundaries, schedule etc. To qualify, the district must include "both sides of a street for at least one block or 600 feet, whichever is the lesser, and all existing overhead communications and electric distribution facilities within the area will be removed".
- Third: Rule 20C (Telco 32A.3) doesn't involve the same qualifications as above. Individuals or small groups of applicants can contract directly with the utilities to underground small areas; with cooperation of neighbors.

NEVER CAN THE FIASCO OF THE PIEDMONT HILLS UNDERGROUND ASSESSMENT DISTRICT BE ALLOWED TO BE REPEATED!

George Childs

I am writing in reaction to the Undergrounding Audit Subcommittee draft report and its meeting of Aug 23, 2011. I request that this email be made a part of the public record for the meeting of August 23.

The subcommittee has labored mightily at producing an autopsy of the financially disastrous City involvement in undergrounding projects. But so far as I can determine from reading over the glut of words it has produced, it has not focused on what really matters to me as a City resident and taxpayer. I know the City completely screwed up on the past undergrounding projects. I think the City must stop taking risks for the benefit of a few private residents, but the subcommittee instead has focused on how the Council might continue to engage in its risky behavior more safely in the future. I am not interested in how to manage the risky behavior. I want the risky behavior to stop. I want to avoid more such autopsies in the future.

I want the Council to take action that assures that it will not put City tax dollars at risk by its voluntary action to approve a project that is for the benefit of only a few private property owners, such as the decision to approve construction of electrical undergrounding projects. My concern is why the City Manager, the City Attorney and the Council members, without a single one of

them publicly disclosing or objecting to the risks, allowed these undergrounding projects to be structured to expose every resident and taxpayer to significant loss of tax funds, and what institutional controls will be put in place to prevent this from happening again. I am not complaining about taking risks for public benefits. We need public streets, public parks and other public amenities, and they come with unavoidable risks. None of us, however, need to take any risks at our collective expense in order for a few private residents to enjoy underground electrical service. I am proud to pay my taxes for public projects. Unless and until I am reasonably satisfied that risks of exposing public assets for private benefit are reasonably eliminated, I will not vote for another City special tax, I will actively work against all such taxes and I will not vote for any Council candidate that does not include in the candidates platform a commitment to end this unnecessary, inappropriate and risky behavior. In fact, I will gladly contribute funds to oppose future tax measures and to support candidates who commit to stop exposing our public funds for the benefit of private parties, and any one of such candidates is welcome to contact me to see how I can provide support.

For more background on my concern, please read the following letter I wrote to the Editor of the Piedmont Post on April 15, 2010 (and was subsequently published):

I sadly read Bert Kurtin's opinion piece in the April 7 [,2010] edition about Alameda County Superior Court Judge True's rulings on the City's anti-SLAPP motion against the Kurtins. I have no opinion one way or the other about the merits or wisdom of the Kurtin's lawsuit against the City. But I have a strong opinion that the City has received very bad business and legal representation across the board on utility undergrounding matters. The waste of public funds continues to mount. First, we learned that the general city taxpayers and not the special district residents solely benefited by one project must deal with \$2 million plus cost overruns on one project. Now we learn that the City either allowed, or directed, its special litigation lawyers to engage in a frivolous and bad faith response to the Kurtins' lawsuit on a separate utility underground matter, which will cost the City hundreds of thousand of dollars in payments for both the City's and the Kurtin's legal costs. All exposure to the risks of these liabilities and costs should have been firmly fixed on the property owners who received the special benefits of the utility undergrounding projects and not assumed by the City taxpayers as a whole. .

I have supported every single special funding and tax increase measure on the City ballot since I bought my house in Piedmont in 1973, but I will never support another one, and I urge every other votes not to, until the City Council has taken credible steps to insure that it will receive competent legal advice to benefit the entire City, and not just a few property owners, and until credible and reliable steps are completed to avoid any further waste of millions in our public resources. Professions of surprise and "never again" from various City councilmembers and staff will not suffice. At a minimum, I think a Charter amendment is required that will prohibit councilmembers and other City leaders from actions, such as approvals that involve the City in utility undergrounding projects, which benefit a very few residents but expose us all to extremely costly and wasteful results.

Thomas D. Clark,
Piedmont

MEDIATION – ARBITRATION – PRIVATE JUDGING

Carl West Anderson
Presiding Justice (Ret.)
15 Sotelo Avenue
Piedmont, CA 94611

RECEIVED

AUG 23 2011

**CITY CLERK
CITY OF PIEDMONT**

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August 22, 2011

Hon. Mayor Dean E. Barbieri
Hon. Vice-Mayor John Chiang
Hon. Ken Kawaichi (Ret.)
City Hall
Piedmont CA, 94611

Re: July 14, 2011 Draft Audit Sub-Committee Report on the Piedmont Hills
Undergrounding Assessment District Project

Dear Gentlemen,

I write to address two questions (#16 and #18 appearing on p. 24) which reflect a misunderstanding of the role of the Steering Committee with regard to the PHUAD and which need clarification for the benefit of future such projects:

Q 16 asks whether the Steering Cte violated State bidding laws. It must be recognized that the Steering Cte had absolutely nothing to do with the bidding process. The Committee's role effectively ended when the City Council approved creation of the District in May of 2010. From that point forward all decisions and procedures employed were the exclusive responsibility of the City Council and City Staff. The bids were let by the City, reviewed by the City Engineer and approved by the City Council. The Steering Cte was not consulted, nor should it have been. [Likewise with the sale of the bonds.] The question inappropriately assumes the Cte used 'an unknown firm with an irregular low bid coupled with unbalanced unit numbers.' I urge you to correct this misconception by making it absolutely clear that the PHUAD Steering Cte played no part and made no recommendations and was not consulted with respect to any actions taken by the City to effect completion of the project except the following: (1) as completion neared we were consulted on the selection of the lamp standards, and we were asked to make that decision, which we did. (2) In early to mid-November of 2010 City Clerk Ann Swift called us to City Hall to explain for the first time the overruns due to rock and the

exhaustion of the contingency allocation, but the extent of the problem was then unknown. Following that meeting the Cte met and committed to raising contributions from our 144 homeowners to show our goodwill and to assist the City. In just a few short weeks we received commitments for over \$100,000.00 and notified the City of our success before year's end.

This Question, and to some extent the answer, misconstrue the purpose and role of the Steering Cte, which has everything to do with surveying neighbor interest initially, communicating that to City Staff, working with the Council and Staff to establish District boundaries, raising more than \$250,000.00 in at-risk funds to cover the preliminary engineering work necessary to prepare the bids. But its role has nothing to do with supervising employees in preparing engineering plans or actual construction of the project. I am willing to consult with our committee and prepare a detailed description of what we did over the 9 years it took to complete this project and to detail what we learned so that similar neighborhood projects in the future can benefit from our experience.

Q #18 implies that the Steering Cte had some responsibility to survey our neighbors concerning the geology of the District, to learn of the four reports listed on p. 22 of the Draft and to advise the City or the Engineers of this experience. Simply, this was not our responsibility. We do not possess the expertise, were not asked to do so, and we never assumed it was our responsibility. We are not geologists and engineers conversant with the various types of rock in our hills. We are not knowledgeable concerning what equipment works with what rock and its costs. We did know that the Dudley-Blair and Wildwood Districts did not encounter serious rock problems, and they are not that far away from us. Our motivation was to follow in their foot-steps to increase the safety of Piedmont citizens and beautify our neighborhoods.

I commend each of you for your extensive efforts expended thus far and am ready to assist you in compiling a comprehensive "How to underground in Piedmont" when the time is right. Please note that these are my personal comments and have not been subject to Steering Committee discussion.

Respectfully submitted,



Carl West Anderson

**City of Piedmont
California**



Date: August 23, 2011
To: City Council Audit Subcommittee
From: Geoffrey L. Grote, City Administrator
Subject: Correction to Draft Final Report

The final paragraph of page 6 of your Draft Final Report contains the following sentence:

“Yet the first documented report that the project was costing more than anticipated was not until October, 2009 and the City Council was given a report of significant cost overruns in December, 2009.”

In fact, as in the second paragraph under item 2.d on page 21 of the report, the first notification took place on November 2, 2009 during a closed session of the City Council.

I request that the reference on Page 6 be updated to reflect the proper date.