MEMORANDUM

To: Robin Stieler, Clerk of the Board

From: Todd Spitzer, Third District Supervisor
Orange County Board of Supervisors, Third District

Date: October 29, 2018

RE: District Attorney - Consider second reading and adoption of "An Ordinance of the County of Orange, California Adding Division 14, Article 1 to Title 4 of the Codified Ordinances of the County of Orange Regarding Registration of Alcohol, Narcotic, and Drug Abuse Programs" - All Districts (Continued from 10/16/18, Item S32C)

On October 25, the District Attorney filed a substantive amendment to the agenda item that now overlays the registration requirement to the entire county and makes the Health Care Agency (HCA) pay for it. This is a 180-degree change from the item when it had the first reading on October 16. The District Attorney’s first proposal only applied the ordinance to the unincorporated areas with the idea that each of the 34 cities adopt separate ordinances.

During open session on October 1, Health Care Agency Director Richard Sanchez stated that he was first approached about the registry a few weeks earlier. HCA, which has statutory authority over any registry, has not been able to describe how such a program would be implemented in the county’s unincorporated jurisdiction, let alone applied to the 34 cities county-wide. In addition, HCA has no financial source to pay for this registry. Directing Mr. Sanchez to study how to take the monies from other “buckets” simply deprives those existing programs from already designated funding sources.

As I stated in open session the approach used in the proposed ordinance was unnecessary since HCA already has jurisdiction over the entire county and is charged by the State to maintain a registry. Is the District Attorney now adopting my recommendation and analysis made during our discussion of the first reading? If so, then additional work needs to be done to determine a correct funding source. The
Board needs to resolve the issue of fee versus tax before HCA invests in an illegal fee program.

I made it clear that this idea was rushed for political and campaign purposes. Certainly the District Attorney initially came forward with an idea to apply this countywide, but CEO Frank Kim made it clear that he would not concur with the recommendation without a funding source.

On October 26, Supervisor Bartlett wrote in the Dana Point Times that this concept had been in the works for a year, “For the last year, I’ve worked with County Supervisor Michelle Steel, District Attorney Tony Rackauckas and the OC Health Care Agency to enhance our oversight of the addiction treatment industry and sober living homes.” Yet on October 10, the Chairman used Rule 21 to agendize this item as a supplemental only days before the meeting stating, “there is a critical need to protect victims...so moving quickly is crucial.”

If this concept has been researched and planned for a year I wonder why so many questions and different approaches are being presented at the last minute and why does HCA have so many objections to the program and its funding? This is not how the Board of Supervisors should make policy.

County Counsel issued an opinion to the Board under attorney client privilege on October 26. It is my personal belief that the County is open to significant litigation and that our arguments in the application of a new fee to cover the costs of the registry are weak. The Board should immediately make this document available to the public and we should have a full discussion of the new tax ramifications in open session.

The Legislature passed the registry statute in 2005 but it has now been superseded by Proposition 26 in 2010, which would require voter approval because this is a new tax. This is why no other California county is currently operating a registry.

One of the main reasons that I abstained on the first reading of this ordinance is that it was rushed by the District Attorney and many questions about the program and its implementation remain unanswered. Given that the recommended action from the District Attorney guts the initial approach in the ordinance and requires another first reading proves that this is a poorly researched proposal. The County Counsel has since revealed that a vote for this version and its funding mechanism would result in a tax increase, thereby requiring a vote of the People under Proposition 26.
Given that the registry does not meet the Proposition 26 test for a permissible fee in its cost recovery, no county wanted to submit the question to the voters to cover the cost of what is 1) essentially already monitored by the State with its on-line registry and 2) is obviously now a state unfunded mandate because its implementation requires a voter approved tax increase under Proposition 26 which it cannot force upon any county.

Therefore, I respectfully request the Board to consider the following actions:

1) The Board to waive the privilege on the County Counsel memo dated October 26, 2018 and to release its content to the public;

2) Direct County Counsel to advise on the issue that a vote to approve a registry ordinance is a vote to increase taxes without voter approval in violation of Proposition 26; and

3) Direct the District Attorney to properly research and prepare the ordinance to include a funding mechanism, before bringing to the Board for approval.