

**June 5, 2007**

**SUBJECT: Sunnyvale City Council Response to Santa Clara County Civil Grand Jury Report Titled: "Sunnyvale Violated State Election Law"**

**REPORT IN BRIEF**

The Santa Clara County Civil Grand Jury issued a May 14, 2007 Civil Grand Jury Report Titled: "Sunnyvale Violated State Election Law." As the governing body of the agency that is the subject of the Final Report, the Sunnyvale City Council is required to submit a response to the Presiding Judge of the Superior Court of Santa Clara County within 90 days. The City Council's response must state if it agrees or disagrees with the findings and recommendations from the Civil Grand Jury.

The Civil Grand Jury's finding of a violation of state election law is based on the Sunnyvale City Council's certification of the election results from the November 2005 election on November 29, 2005. Although the City had been provided with the official final results of the election on November 29, 2005, the County Registrar of Voters did not formally certify the vote canvass until December 6, 2005. The Civil Grand Jury concluded that the City of Sunnyvale should have waited until December 6, 2005, and receipt of the formal vote canvass before certifying the election results.

As a Charter city, the City of Sunnyvale can establish procedures for local elections. The City's certification of the election results was consistent with its Charter authority and based on receiving the official vote count on November 29th from the County Registrar of Voters, which did not change between November 29th and December 6th. This information was provided to the Civil Grand Jury, but omitted from the Final Report. Additionally, the issue had previously been investigated based on a similar complaint to the District Attorney's Office and satisfactorily resolved, so no Civil Grand Jury investigation was necessary.

The proposed City Council response provides the facts and legal analysis that are missing from the Final Report and explains why the City Council disagrees with the finding of violation of state election law. It further responds that the City has implemented the recommendation in the Grand Jury Final Report to avoid the possibility of future disputes with the County over election certification.

## **BACKGROUND**

The Santa Clara Civil Grand Jury is authorized by California law to perform a "watchdog" function for local governmental agencies. Issues investigated by a Civil Grand Jury can be based on citizen complaints or grand jury member interest. The Grand Jury performs its watchdog function by issuing final reports with findings and recommendations. Its legal authority related to the "watchdog" function is limited to issuing final reports. After a Civil Grand Jury Final Report is issued, the governing body of the agency that is the subject of the report has 90 days to respond to the findings and recommendations in the final report. The governing body is required to agree or disagree with the findings, and state whether the recommendations will or will not be implemented.

The Santa Clara County Civil Grand Jury released its Final Report Titled, "Sunnyvale Violated State Election Law" on May 14, 2007. The Final Report states the investigation arose from a citizen's complaint that Sunnyvale swore in its three new councilmembers on November 29, 2005, before the County Registrar of Voters formally certified the election canvass. The identity of the citizen is not released, and is considered confidential by the Grand Jury. The Civil Grand Jury conducted interviews and reviewed documents. During the course of those interviews, the Civil Grand Jury was provided with both documents and information that a similar complaint had previously been made to the District Attorney's Office. After the District Attorney issued a letter on July 10, 2006, alleging a violation of state election law, the City responded on July 24th disagreeing with that finding and explaining that it based the November 29<sup>th</sup> swearing-in of councilmembers on final vote tallies provided by the Registrar of Voters. The City and District Attorney's office engaged in further discussion in which a satisfactory resolution was reached that allowed both the City and District Attorney to continue to assert their respective legal positions about the 2005 election certification, with the City agreeing to future certifications after the official canvass to prevent any dispute about its Charter authority to certify the election using the official results prior to formal certification of the canvass. The City informed the Grand Jury that in the future it would schedule the City's certification of election results after the Registrar of Voter's certification of the official canvass, but the Grand Jury omitted this important information from its Final Report.

The City provided the Grand Jury with additional relevant facts, City of Sunnyvale Charter provisions, and a California State Constitution provision in support of its legal authority to certify the election results based on the final official results of the November 2005 election as provided by the Registrar of Voters. The Final Report failed to include these facts and legal authority.

## **EXISTING POLICY**

Council Policy 7.3B.5: Conduct elections in accordance with the Charter and state laws.

## **DISCUSSION**

On May 14, 2007, the City of Sunnyvale received the Grand Jury's Final Report alleging that Sunnyvale violated state election law. California Penal Code Section 933(c) provides the guidelines for the City's response to the Grand Jury's Final Report. The City is required to either "agree" or "disagree" with each applicable finding and provide an explanation if it disagrees. The City is also required to provide a response to the recommendation and state whether or not it has been or will be implemented.

The proposed City of Sunnyvale's response to the May 14, 2007 Final Report is Attachment "A" to this report, and fully complies with the City of Sunnyvale's obligations pursuant to California Penal Code Section 933(c). In short, the City disagrees with the Final Report's finding of a violation of state election law because:

- The Final Report is factually incomplete and fails to acknowledge or include the City's July 24<sup>th</sup> response to the District Attorney's Office disagreeing with the allegation that there was a violation of state election law and explaining the basis for its November 29<sup>th</sup> certification.
- The Final Report fails to acknowledge that the official final results that the City obtained from the Registrar of Voters on November 29<sup>th</sup>, 2005, accurately represented the final vote tallies from the November 2005 election.
- The Final Report cites the wrong section of the City Charter and does not include the correct City Charter Section provided to the Grand Jury authorizing the Council to judge election returns.
- The Final Report fails to include the relevant provision from the California State Constitution relating to Charter city authority, which was provided to the Grand Jury.

The Final Report recommendation to establish a formal procedure to provide that Council election results will be certified only after the receipt of the official canvass from the Registrar of Voters was initiated through the Charter review process prior to the release of the Final Report on May 14, 2007. The City intends to place on the November 2007 ballot, a Charter amendment that will establish in the Charter the election certification date of the first meeting in January after each council election. Even if this Charter measure were to not be approved by a majority of the voters, the City has determined that to avoid any unnecessary dispute in the future its election certification will be based on the Registrar of Voters official canvass, even if complete final vote tallies are available earlier.

## **FISCAL IMPACT**

There is no fiscal impact from this response to the Grand Jury Final Report.

## **CONCLUSION**

The City of Sunnyvale fully supports and appreciates the “watchdog” function of the Santa Clara County Civil Grand Jury for local government in the County. Final reports issued by the Grand Jury after an investigation should be complete and impartial. The May 14, 2007 Civil Grand Jury Report Titled: "Sunnyvale Violated State Election Law" leaves out important facts and legal authority that consequently makes its finding questionable. The City of Sunnyvale is authorized, and in fact required, by state law to submit a response to the Final Report agreeing or disagreeing with its finding. The City of Sunnyvale is providing its response well in advance of the 90-day deadline and is taking the opportunity to point out to the Grand Jury and the Presiding Judge the relevant facts and legal authority omitted from the May 14, 2007, Final Report. The City of Sunnyvale’s response also provides information on its initiative prior to receipt of the Final Report to place a Charter amendment on the ballot that would prevent future disputes about election certification and implements the Grand Jury recommendation.

## **PUBLIC CONTACT**

Public contact was made through posting of the Council agenda on the City’s official notice bulletin board, posting of the agenda and report on the City’s Web page, and the availability of the report in the library and the City Clerk’s Office.

## **ALTERNATIVES**

1. Approve the Sunnyvale City Council Response to May 14, 2007 Civil Grand Jury Report Titled: "Sunnyvale Violated State Election Law," disagreeing with the finding and providing an explanation of the basis for the disagreement, and reporting implementation of the Final Report recommendation; authorize Mayor to sign the response letter and transmit to the Presiding Judge.
2. Approve, as modified, the Sunnyvale City Council Response to May 14, 2007 Civil Grand Jury Report Titled: "Sunnyvale Violated State Election Law," disagreeing with the finding and providing an explanation of the basis for the disagreement, and reporting implementation of the Final Report recommendation; authorize Mayor to sign the response letter and transmit to the Presiding Judge.

3. Do not approve the Sunnyvale City Council Response to May 14, 2007 Civil Grand Jury Report Titled: "Sunnyvale Violated State Election Law," disagreeing with the finding and providing an explanation of the basis for the disagreement, and reporting implementation of the Final Report recommendation; do not authorize Mayor to sign the response letter and transmit to the Presiding Judge.

### **RECOMMENDATION**

Staff recommends Alternative 1: Move to Approve the Sunnyvale City Council Response to May 14, 2007, Civil Grand Jury Report titled, "Sunnyvale Violated State Election Law," disagreeing with the finding and providing an explanation of the basis for the disagreement, and reporting implementation of the Final Report recommendation; authorize Mayor to sign the response letter and transmit to the Presiding Judge.

Prepared by:

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David E. Kahn, City Attorney  
City Attorney's Office

### **Attachment(s)**

Attachment A: Sunnyvale Governing Body Response to May 14, 2007 Civil Grand Jury Report Titled: "Sunnyvale Violated State Election Law"

**ATTACHMENT "A"**

June 5, 2007

Honorable Catherine A. Gallagher  
Presiding Judge  
Santa Clara County Superior Court  
191 North First Street  
San Jose, CA 95113

Re: **Sunnyvale City Council Response to May 14, 2007 Civil Grand Jury Report Titled:  
Sunnyvale Violated State Election Law**

Dear Judge Gallagher:

As required by Penal Code Section 933(c), the Sunnyvale City Council submits its timely response to the May 14, 2007 Civil Grand Jury Report Titled: Sunnyvale Violated State Election Law. The Sunnyvale City Council approved this response on \_\_\_\_\_, 2007.

The City of Sunnyvale appreciates and fully supports the role of the Santa Clara County Civil Grand Jury in providing a “watchdog” function for local governmental agencies. The Civil Grand Jury releases reports with its findings and recommendations after completing its investigations. Such reports, however, should be complete and impartial to foster confidence in the Grand Jury process and findings. Unfortunately, the May 14, 2007 Civil Grand Jury Report Titled: Sunnyvale Violated State Election Law (“Final Report”) omits important facts and excludes important legal analysis provided to the Civil Grand Jury by the City of Sunnyvale, as described in the City of Sunnyvale’s Response below:

**Grand Jury Finding 1:**

**The City of Sunnyvale violated California State Elections Code Sections 10262 and 10263.**

**Sunnyvale City Council Response:**

**Disagree with finding that there was a violation of California State Elections Code Sections 10262 and 10263.**

Honorable Catherine A. Gallagher, Presiding Judge  
Santa Clara County Superior Court

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**Explanation:**

The facts which the Grand Jury provides in its Final Report are incomplete. The Final Report states that in the course of its inquiry, the Grand Jury discovered that there was a May 13, 2006, citizen complaint similar to the complaint received by the Grand Jury on August 25, 2006. The complaint was that the City violated Elections Code Section 10263<sup>1</sup> by installing new council members before election results were certified by the Registrar of Voters. The Final Report states that the District Attorney's Office concluded its investigation with a July 10, 2006, letter notifying the Sunnyvale Mayor at that time that "...the Council's action appears to be a knowing violation of the Election Code."

But on July 24, 2006, the City responded to the District Attorney's allegation that it had violated Elections Code Section 10263, and in its response, the City pointed out that the July 10 letter took a portion of the City staff report out of context. The July 10<sup>th</sup> letter quoted the portion of the City's staff report stating that the official canvass was not yet received, but omitted the rest of the paragraph which stated:

However, we have been informed we will receive the official final results of the vote, as well as the precinct by precinct breakdown, sometime on Tuesday November 29<sup>th</sup>. At that time this report and certifying resolution will be updated with the data contained in the official final results, and distributed to council at the November 29, 2005 Council meeting.

The City's response to the District Attorney's July 10<sup>th</sup> letter also stated that the City had multiple conversations with the County Registrar's Office and had determined that although the formal certification of the canvass would not be complete until December 6, 2007, the final election results that were available on November 29, 2007, represented the complete count of the votes, and the results would not change between November 29 and December 6, 2006.

The City stated in its July 24<sup>th</sup> response to the District Attorney's Office:

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<sup>1</sup> Elections Code Section 10263 provides:

Upon the completion of the canvass and before installing the new officers, the governing body shall adopt a resolution reciting the fact of the election and the other matters that are enumerated in Section 10264. The governing body shall declare elected the persons for whom the highest number of votes were cast for each office.

(a) Except as provided in subdivision (b), the governing body shall meet at its usual place of meeting no later than the fourth Friday after the election to declare the results and to install the newly elected officers.

(b) For a consolidated election, the governing body shall meet at its usual place of meeting no later than the next regularly scheduled city council meeting following presentation of the 28-day canvass of the returns, or at a special meeting called for this purpose, to declare the results and to install the newly elected officers.

Honorable Catherine A. Gallagher, Presiding Judge  
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There is no factual basis for your allegations that the Council's action on November 29<sup>th</sup> "appears to be a knowing violation of the Elections Code."...There is a reasonable interpretation that the Registrar's statement that the canvass was complete coupled with the provision of the Official Elections Results on November 29<sup>th</sup> fully complied with Election Code Section 10263.

Furthermore, the City's July 24<sup>th</sup> letter to the District Attorney's Office stated:

**...[T]he Sunnyvale City Council takes its obligations under the City Charter and Elections Code seriously and will make every effort in the future to schedule the meeting date for its resolution certifying the election results on or after the date that the Registrar of Voters issues the certified canvass of election results to avoid any ambiguity or debate regarding Elections Code Section 10263.** [Emphasis in original]

A subsequent telephone conversation between the District Attorney's Office and the Sunnyvale City Attorney's Office resulted in a final and satisfactory conclusion for both parties. Although the City of Sunnyvale and District Attorney's Office did not reach agreement on the issue of the City's Charter authority, the City agreed to schedule future election certifications after the receipt of the certified canvass from the County Registrar of Voters. The District Attorney's Office confirmed the statement in its July 10, 2006, letter that "no further action will be taken." Accordingly, the Civil Grand jury had no need to investigate a matter that had already been satisfactorily resolved. When it decided to do so, it had an obligation to include the information that the matter had been satisfactorily resolved between the City and District Attorney's Office after the City's response on July 24<sup>th</sup> and prior to any Civil Grand Jury investigation.

The Civil Grand Jury received a copy of the City of Sunnyvale's July 24<sup>th</sup> response at the same time it received the District Attorney's July 10<sup>th</sup> letter. But there is no mention of the City's July 24<sup>th</sup> response in the Final Report. The bibliography to the Civil Grand Jury's Final Report provides a reference to the July 10 letter from the District Attorney's Office, but fails to reference the July 24<sup>th</sup> letter from the City of Sunnyvale, despite it having been provided to the Civil Grand Jury. Consequently, the Final Report is factually incomplete and provides only one side of the discussion.

In addition, the Civil Grand Jury relied on an incorrect Sunnyvale City Charter section in reaching its finding that the City's Charter did not authorize the Council's action on November 29, 2006. The Final Report cites Charter Section 1403, which refers to the process for holding elections in accord with the State Elections Code. During its investigation, the Civil Grand Jury was informed that the applicable Charter provision is Section 612, which provides:

The City Council shall judge the qualifications of its members as required by the Charter and shall judge all election returns. [Emphasis added]

Honorable Catherine A. Gallagher, Presiding Judge  
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Not only was Charter Section 612 omitted in the Final Report, so was the reference to the California Constitution provided by the City and set forth below:

California Constitution, Art. XI, Sec. 3. (a) For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments. [Emphasis added]

The Final Report finding a violation failed to include either the correct Charter Section 612 or the relevant provision of the California Constitution. It follows that its conclusion of a violation of Elections Code Sections 10262 and 10263 is based on incomplete and erroneous legal analysis.

During the course of the Civil Grand Jury's investigation, the City of Sunnyvale informed the Civil Grand Jury, in writing, that:

...[T]he City has indicated that it wishes to avoid any dispute in the future about whether or not it can certify results prior to the certification of the official canvass, even if the official final results are available. **Accordingly, the City will not in the future certify results until it has received formal certification from the Registrar of Voters.** [Emphasis added]

But this information provided by the City of Sunnyvale, and the resolution of the issue, was also excluded by the Civil Grand Jury from its Final Report.

### **Civil Grand Jury Recommendation 1:**

**Establish a formal procedure that conforms with California State Elections Code Section 10263 commencing with the November 6, 2007, election.**

### **Sunnyvale City Council Response:**

**The recommendation has been implemented.**

**[Although the City disagrees with the finding that there was a violation of the Elections Code, it nonetheless is implementing the recommendation to avoid the possibility of any future dispute about the election certification date.]**

Honorable Catherine A. Gallagher, Presiding Judge  
Santa Clara County Superior Court

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**Explanation:**

The City is placing a formal Charter amendment on the November 2007, general election ballot that will set the City certification of election results on the first regular meeting in January to provide for the 28-day official canvass certification for consolidated elections. Provided that this Charter ballot proposal receives a majority vote of the electorate, the Council meeting date allowing for Registrar of voters certification of the official canvass will become the law of the City as part of the Charter.

Furthermore, prior to the issuance of the Civil Grand Jury's May 14, 2007 Final Report, the City of Sunnyvale informed both the District Attorney's Office and the Civil Grand Jury that for future elections it will schedule its certification and installation of new councilmembers after the receipt of the Registrar of Voters official certification of the canvass.

**Conclusion**

As stated above, the City of Sunnyvale values and respects the Santa Clara Civil Grand Jury and its "watchdog" role for city and county government. Civil Grand Jury final reports on investigations should not exclude factual or legal information when that information is necessary to demonstrate that the Civil Grand Jury is evaluating a complaint or allegation fairly and objectively. The May 14, 2007 Civil Grand Jury Report Titled: Sunnyvale Violated State Election Law, omits both factual and legal information provided to the Civil Grand Jury during the course of its investigation and consequently does not appear to meet the usual Civil Grand Jury standard of fair and objective reporting. As a consequence, the City of Sunnyvale City Council, in its response under Penal Code Section 933(c), must respectfully disagree with the Finding. The City has nonetheless implemented the Recommendation in the interest of avoiding any future dispute about its election certification date.

Respectfully submitted,

Mayor Otto Lee  
for Sunnyvale City Council  
Pursuant to California Penal Code Section 933(c)

cc: Amy Chan, City Manager  
David Kahn, City Attorney  
Katherine Chappellear, City Clerk