



Council Meeting: August 31, 2010

**SUBJECT: Response to Santa Clara County Civil Grand Jury Report,
*Sunnyvale City Council Actions Lack Transparency***

BACKGROUND

On June 18, 2010, the Santa Clara County Civil Grand Jury ("Grand Jury") released a report, *Sunnyvale City Council Actions Lack Transparency*, detailing the findings and recommendations from its investigation related to filling a Council vacancy resulting from a Council member being recalled to active military duty. California Penal Code §933(c) requires that the governing body of the public agency that has been the subject of the Grand Jury report respond to the Presiding Judge of the Superior Court on the findings and recommendations. This response, which is included as Attachment A to this report, is due no later than Tuesday, September 21, 2010.

EXISTING POLICY

California Penal Code §933(c): No later than 90 days after the grand jury submits a final report on the operations of any public agency subject to its reviewing authority, the governing body of the public agency shall comment to the presiding judge of the superior court on the findings and recommendations pertaining to the matters under the control of the governing body.

DISCUSSION

The Grand Jury's report, *Sunnyvale City Council Actions Lack Transparency*, presents the findings and recommendations from the Grand Jury's investigation related to filling a Council vacancy resulting from a Council member being recalled to active military duty. Based on the results of their investigation, the Grand Jury concluded that the Sunnyvale City Council lacked a written and transparent process for appointing an interim council member, that the December 16, 2008 agenda did not inform the public that an interim councilmember would be appointed, that the fiscal impact report was incomplete, and that the Council provided a benefit option to the council member on active military duty not available to other city employees. In addition to the findings made, the Grand Jury report also provided recommendations for informing the public of topics to be discussed at future Council meetings, for providing complete financial impact information, and that the City adopt a written process to appoint future interim Council replacements.

The California Penal Code requires that the governing body of the public agency that has been subject of the report respond to the Presiding Judge of the Superior Court on the findings and recommendations. City staff has prepared a draft response for the Council's review and approval or modification.

Staff agrees with some of the Grand Jury's findings. It is correct that on December 16, 2008, there was no permanent written process in place for making an interim appointment. It is also correct that the January 6, 2009 Report to Council on fiscal impacts did not include the PERS impacts of appointing a candidate who was vested in PERS, or would vest in PERS during the interim appointment.

Staff disagrees with some of the Grand Jury findings. The December 16, 2008 agenda complied with the Brown Act legal notice requirements, and provided written options for appointment of an interim council member. The Council did not give a benefit option to a council member that is not available to other City employees.

The City has already implemented the recommendation on a written policy for appointing interim council members, and will implement expanded fiscal impact reporting when applicable.

Detailed responses to the Grand Jury report's recommendations are included in Attachment A. For reference, the Grand Jury report has been included as Attachment B. There is no further action required of Council beyond approving the City's response for submission to the Presiding Judge of the Santa Clara County Superior Court.

FISCAL IMPACT

There is no fiscal impact from the City's response to the Grand Jury report.

PUBLIC CONTACT

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

ALTERNATIVES

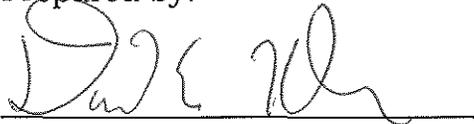
1. Approve the City's response to the Santa Clara County Civil Grand Jury report as presented in Attachment A.

2. Approve the City's response to the Santa Clara County Civil Grand Jury report as presented in Attachment A with modifications.

RECOMMENDATION

Staff recommends Alternative 1, approve the City's response to the Santa Clara County Civil Grand Jury report as presented in Attachment A.

Prepared by:



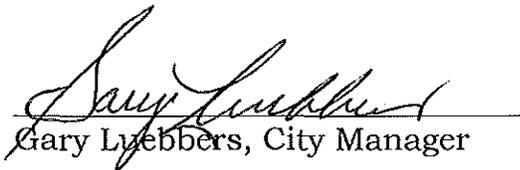
David E. Kahn, City Attorney
City Attorney's Office

Reviewed by:



Teri Silva, Human Resources Director

Approved by:



Attachments

- A. Response to Civil Grand Jury Report, *Sunnyvale City Council Actions Lack Transparency*
- B. Grand Jury Report

City of Sunnyvale Response to Grand Jury Report: Sunnyvale City Council
Actions Lack Transparency

Finding 1

The City of Sunnyvale lacks a written process that is open and transparent for appointing an interim councilmember.

City Response:

Partially agree and partially disagree with the finding.

At the time the Sunnyvale City Council considered on December 16, 2009, whether to appoint an interim Council member while one of its members was on active duty in Iraq, the City agrees that there was no permanent written process in place for making the appointment. That being so, there was no legal requirement to have a permanent written policy for the appointment of interim Council members in place.

However, the Report to Council on December 16, 2009, included as an attachment from the City Attorney a December 9, 2009 memo providing three procedural options, in writing, for appointing an interim Council member, and stated that the Council could also develop and approve other procedural options at its discretion.

In January, 2009, prior to the Grand Jury's release of the report that the City is now responding to, the City Council selected as a 2010 Study Issue the "Process For Appointing Interim Councilmembers". On July 20, 2010, the Council reviewed and discussed the study issue report of the selection of interim Council members, including selection options and pros and cons of each option.

After public comment, discussion and debate, the City Council adopted the following process by a 7-0 vote for future interim Council appointments:

- Council will publicly announce the interim seat.
- The City will receive applications from any interested applicants during an open application period.
- Council will interview all candidates subject to the Brown Act.
- Council will make an appointment at a public meeting with opportunity for public comment prior to any appointment.

It follows that as of July 20, 2010, the City of Sunnyvale has a written process that is open and transparent for appointing an interim Council member.

Recommendation 1

The Council should establish a clear written process to appoint future interim Council replacements.

City Response:

The recommendation has been implemented, as summarized in the Response to Finding 1, above.

Finding 2

Council's Dec. 16, 2008 agenda item #9, RTC 08-377, failed to reasonably inform interested members of the public that a predetermined interim councilmember would be appointed at the meeting.

City Response

Disagree with the finding.

As the Grand Jury acknowledges, the Brown Act requires that 72 hours prior to a legislative meeting, an agenda must be posted with a brief general description of items to be discussed. The posted agenda description for the December 16 meeting included as a topic of discussion "Options for Appointment of Interim Councilmember". Accordingly, a citizen reading the agenda was advised that the Council would be considering how an interim Councilmember would be appointed. The December 16 Report to Council stated that several procedural options for selecting a Councilmember were attached to the Report, and that the Council had the option of selecting one of the proposed options or "another procedure or method suggested by the Council".

At the December 16, 2008, Council meeting there was extensive discussion of Councilmember Lee's military deployment, whether an interim Council member should be appointed, and discussion of the procedure for appointing the interim Councilmember. The Council decided to not adopt one of the three options listed in the attachment to the Report to Council and instead selected a process where the highest vote getter in the last election would be appointed at the January 6, 2009 Council meeting. This procedure was within the "another procedure or method suggested by the Council" language in the agenda posting.

The Grand Jury's finding that a predetermined interim Councilmember was appointed at the December 16, 2008 meeting is factually incorrect. Although supplied with the minutes of the meeting showing that the City Manager was directed to provide the official election results to the mayor and to bring a subsequent Report to Council on January 6, 2010 for any actual appointment,

the Grand Jury erroneously concluded that an appointment was made on December 16.

Finding 2 also fails to acknowledge that the agenda posting for January 6, 2009, stated that the Council would consider the "Appointment of Interim Councilmember". Members of the public were advised that the appointment would be discussed and voted on at the January 6, 2009 meeting and a number of citizens did appear and speak about the interim appointment. While many speakers disagreed with the Council's method of selecting an interim Councilmember based on prior election results, the minutes demonstrates that the speakers had the opportunity to address the Council on the issue of the appointment of the interim Councilmember. The Council elected to proceed with the appointment of the Council candidate receiving the most votes but not elected at the prior election, which was within the legislative authority of the Council.

Recommendation 2

The Council needs to properly notice the public, by ensuring that the published agenda clearly describes the items to be considered.

City Response

The recommendation has been implemented, and was implemented prior to the release of the Grand Jury Report. The City's published agenda complies with Brown Act requirements for "a brief general description of each item to be discussed."

Finding 3

The city's fiscal impact report was incomplete, in that it did not provide the Council or the public with the complete cost of the interim appointment to the Council.

City Response:

The City partially disagrees with Finding 3 and partially agrees with Finding 3.

The fiscal impact discussed in the January 6, 2009 Report to Council was the cost to the City of an interim Councilmember during the period of time that Councilmember Lee was on military deployment. The fiscal analysis was not specific to an individual and provided the maximum fiscal impact for anyone appointed as an interim Councilmember during the period of Councilmember Lee's military deployment. The January 6 Report to Council accurately stated that there would be no fiscal impact to the City from an interim Councilmember's salary because Councilmember Lee would not be receiving his City salary while

deployed. The January 6 Report To Council also accurately stated the additional fiscal impact to the City for payment of premiums for medical, dental and vision benefits for an interim Councilmember.

Because the person appointed on January 6, 2009, as an interim Councilmember had previously served a full 4-year term as a City of Sunnyvale Councilmember, there was an additional fiscal impact based on PERS vesting rules after 5 years of service. After 5 years of service, any City employee or Councilmember is vested under PERS and is entitled to retirement medical benefits and pay based on length of service and compensation. The fiscal impact from the retirement medical and pay benefits in the event a former Councilmember served a total of 5 years or more was not included in the January 6, 2009 Report to Council.

Recommendation 3

The Council should direct city staff to provide comprehensive information in their report, so the public has complete information about the cost of an interim appointment.

City Response

The recommendation has not yet been implemented, but will be implemented in the future.

Recommendation 3 is applicable only at the time the City is making an interim appointment for a Council seat. There is no interim appointment pending at this time, so the recommendation cannot be implemented until that occurs. Although the City fully disclosed the fiscal impacts for a Councilmember for an interim appointment during the time of the appointment, in the event that the City is considering appointing a former Councilmember or former City employee and the interim appointment will have a fiscal impact because of PERS vesting rules, the Report will include fiscal impact information if the person becomes vested in PERS as a result of the interim appointment.

Finding 4

The Council gave a benefit option to a council member that is not available to other city employees.

City Response

Disagree with the finding.

Unfortunately, the Grand Jury finding demonstrates a misunderstanding of how the continuation of benefits was provided to Councilmember Lee during his active military service.

As the Grand Jury acknowledges, the City of Sunnyvale provides for a continuation of City salary and benefits for City employees who are called to active military duty in recognition of their sacrifices on behalf of the City and country. In almost all cases of employees called to active duty, the City salary exceeds the salary the employee will receive from the military. The City provides continuation of the full City salary, but requires the employee to reimburse the City for the amount of military pay and housing allowance so that the City is responsible for only the difference between the military salary and regular City salary. Because the City is paying more than the military salary, it requires the employee to sign an agreement that it will reimburse the City with the amount of military pay, which is less than the City salary. There is no requirement to reimburse for medical and dental benefits, but there is an obligation to continue to pay the employee's portion, if any, of the premiums.

Because Councilmember Lee's military active duty pay exceeded his Council salary, he did not request a continuation of his Council salary while on active duty. Therefore, the City did not need to require a reimbursement agreement from Councilmember Lee for his military salary, as he was not receiving any City salary during his active military duty. Council member Lee did request and receive a continuation of medical benefits for his family while he was on active leave, consistent with the continuation of medical benefits available to all other City employees. Council member Lee was responsible, as all other employees, for the portion of the medical and dental premium that exceeds the City's maximum contribution and Council member Lee is reimbursing the City for the portion of the medical premium that exceeded the maximum contribution. Council member Lee continued on the health benefits plan, as at the premium rate for family coverage there was no difference in premium amount.

It follows that the benefits package that Council member Lee had while on active military service was exactly the same as other City employees on military service. Furthermore, while the City pays a salary supplement for City employees on active military duty to continue their City salary while on active duty, it did not do so for Council member Lee.

It is regrettable that the Grand Jury erroneously made a finding that a Council member serving the City and country through active military duty received a benefit option not available to other City employees, when in fact the benefits received did not include a City salary supplement and were less than the benefits received by other City employees on active military duty.

Recommendation 4

The recommendation has been implemented through the City's current resolution and practice.



2009-2010 SANTA CLARA COUNTY
CIVIL GRAND JURY REPORT

ATTACHMENT B

FILED

JUN 18 2010

DAVID H. YAMASAKI
Chief Executive Officer/Clerk,
Superior Court of CA County of Santa Clara
BY D. ALDYCKI DEPUTY

SUNNYVALE CITY COUNCIL ACTIONS LACK TRANSPARENCY

Summary

The 2009-2010 Civil Grand Jury (Grand Jury) received a complaint of violations of the Ralph M. Brown Act (Brown Act) and failures of process committed by the Sunnyvale City Council (Council).

A member of the Council was recalled to active military duty, resulting in a vacancy on the Council. There is no city policy that addresses filling such vacancies. The Council, therefore, chose a process that selected a pre-determined individual rather than open the position to more than one candidate. This process was not properly noticed, lacked transparency, and limited public input.

The Council provided the deployed council member a benefit structure greater than that available to city employees.

In addition, the Council voted to fund the position for an interim councilmember based on insufficient information regarding the cost to the city to provide lifetime pension and medical benefits for the interim councilmember.

Methodology

The Grand Jury interviewed members of the Council and city staff. The Grand Jury reviewed agendas, minutes, and recordings of the relevant Council meetings, related City Charter sections, regulations and documents, as well as media reports.

Background

The Council is composed of seven members. Elections take place every two years to elect three or four members to a four-year term. Candidates must run for a seat (one through seven) and compete city-wide for that seat. Council members receive a salary of approximately \$22,000 per year, and medical benefits for themselves and their families of approximately \$18,000 per year.

Councilmember Otto Lee's Recall to Active Duty

Councilmember Otto Lee, who won his seat in 2007, was notified of his recall to active military duty. He informed the Council of his recall at the Council's regular meeting on Dec. 2, 2008.

On Dec. 8, 2008, Lee submitted a memo to the Council and the City Manager requesting that his council seat be filled by an interim appointment during his military leave and stating that he intended to return to the Council at the conclusion of his service. In addition, he requested that during his military leave he should not receive his council salary; however, he asked that the City continue to pay for medical and dental benefits for his family.

Council Agenda Items and Staff Reports Relating to the Lee Vacancy

At the Dec. 9, 2008, council meeting, a motion was made to add an agenda item to the Dec. 16, 2008, council meeting "...to discuss Councilmember Lee's status and whether a successor or interim Councilmember should be appointed.

The agenda item for the Dec. 16 meeting read:

"RTC [Report To Council] 08-377 Consideration of Active Military Duty for Councilmember Lee – Legal Issues, Status of Council Seat, Continuation of Salary and Benefits, Options for Appointment of Interim Councilmember" (Report).¹

The Report prepared by the City Attorney advised the Council that under Section 395.8 of the California Military and Veterans Code, when a councilmember is absent due to military service, the councilmember's seat will not be considered vacant. The Council could choose to leave the seat unoccupied or appoint someone on an interim basis. Neither the City Charter nor existing city policies state a selection method for filling an interim vacancy on the Council².

Attachment B of the Report stated:

"If the Council elects to move forward on appointing an interim replacement for Councilmember Lee, Council may consider the following procedural options as well as any other procedural options that the council may develop and approve:

1. Council could appoint a Council subcommittee to search, and make recommendations in a public session;

¹ Dec. 16, 2008 Report to Mayor and Council, 08-366, (<http://sunnyvale.ca.gov/NR/rdonlyres/B9806E31-EFC0-4C15-819F-976FEA769CF4/0/1216H20ResourcesSubelementUpdateRTC.pdf>)

² City Charter of the City of Sunnyvale, Section 604

2. Council could appoint a blue ribbon panel of Council members and community members to search, and make recommendations in a public session; or
3. Council could receive applications during an open application period, interview all candidates subject to the Brown Act, and make a selection in a public session."

All Councilmembers except Whittum and Moylan argued that this was a critical time for the city and it was necessary to have an odd number of Council members to break possible tie votes. The Council then voted at the Dec. 16 meeting to fill Lee's seat on an interim basis.

The city offers a program to employees that gives them the option to sign a contract allowing them to receive city pay and benefits in exchange for reimbursing the city with their military pay plus allowances. Lee's request was to retain his military pay in lieu of his city councilmember stipend, but to have the city continue to pay for him and his family's city medical and dental benefits. The Council approved Lee's request. The option given to Lee is not available to other military employees.

Interim Councilmember Appointment

At the Dec. 16 council meeting, Lee suggested that the Council accept applications for an interim replacement and that an appointment be made at the Council's Jan. 6, 2009, meeting. Citing concerns about adopting a transparent process, he stated, "I just have some concerns that if the public does not really have the ability to at least give some input on the actual appointment, I think it could be somewhat of an issue."

The Council declined to adopt any of the three selection options suggested by the City Attorney. They decided instead, at the Dec. 16 meeting, to appoint, as interim councilmember, the unsuccessful candidate who had received the highest number of votes in the previous election of Nov. 6, 2007.

Some Councilmembers stressed the importance of finding a candidate who could hit the ground running. Councilmember Moylan stated that candidate was Dean Chu, who had previously served on the Council. Mr. Moylan asked if anyone knew whether Mr. Chu would accept the appointment. No one responded. Moylan also advised the Council that this would look like a back room deal.

The Grand Jury learned that Councilmembers had spoken with Chu, prior to this meeting, about filling an interim seat, and he had responded favorably to the suggestion.

At the Jan. 6 council meeting, the City Manager provided a council report regarding the fiscal impact of Chu's appointment.³ This report was limited to salary and health benefits, and did not state any future retirement costs. Chu, having already served four years on the Council from 2004 to 2008, would, as a result of the interim appointment, become vested in the California Public Employees Retirement Plan (PERS) during his additional year of service. A member of the public asked about the cost of Chu's retirement benefits at this meeting. An answer was not provided at that time.

During the public hearing session, sixteen individuals commented on the selection process. Thirteen spoke out against the process. Also, some individuals expressed concerns that the Council may have violated the Brown Act.

Council members argued that Chu had served on the Council from 2004 through 2008 and was familiar with matters currently before the Council. He had lost the Nov. 2007 election by a very small number of votes and his finance background and knowledge of the city's troubled downtown mall project were pertinent factors in considering his appointment.

The Council voted to approve Chu as an interim councilmember to Seat 5 during Lee's military leave. The Council also approved dropping a capital expenditure budget item in order to fund medical benefits for Chu and his family.

Councilmember Whittum proposed, and Councilmember Swegles seconded, a 2010 study issue to develop a policy to address the process for appointing interim councilmembers. However, on May 11, 2010 at the regular council meeting, the Council voted to defer this issue.

Discussion

Misleading and Inadequate Public Notice

Council meetings and agenda setting must be conducted in accordance with the Brown Act. The Act requires that at least 72 hours prior to a regular meeting, a legislative body must post an agenda containing a brief general description of each item to be discussed or transacted at the meeting. (Government Code § 54954.2(a).) The act makes it clear that discussion items must be placed on the agenda, as well as items which may be the subject of action by the body. The purpose of the brief general description of an item is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body.⁴

³ Jan. 6, 2009 Report to Mayor and Council, 09-004,

(<http://sunnyvale.ca.gov/NR/rdonlyres/66E15E0E-D3E1-4144-98E6-751163575135/0/09004.pdf>)

⁴ Where there has been a violation of the Brown Act, the body itself or interested parties can act to remedy the violation; however this must be done within specified time that, in this case, has now lapsed.

The agenda for Dec. 16, 2008 specified options for the appointment of an interim councilmember, not the selection of an individual. The process chosen by the Council selected a particular individual. Based on the notice provided, the public could not reasonably conclude that the Council was planning to select a process that would identify one individual, Dean Chu. However, at the meeting, the Council debated the selection of Chu by name. And prior to the meeting, Councilmembers had discussed with Chu his desire to serve. This suggests that some Councilmembers were choosing an individual, and not a method for selection. Councilmember Lee expressed concerns with the transparency of the process, but he voted to select Dean Chu.

The Council did not honor the public's right to be closely involved in the selection of a public official who would have a strong voice in setting future policy for the city.

Limited Information Provided on Chu's Lifetime Benefits

The Jan. 6, 2009, report to Mayor and Council did not explore the fiscal impact of the retirement expenses for Chu. The report was limited to the fiscal impact of salary and health benefits and did not state any future retirement benefits that would accrue to Chu once he became fully vested in PERS during his additional year of service.

In response to a public question at the Jan. 6 meeting, City Manager Luebbers stated at the February 10, 2009, council meeting that "the benefits Councilmember Chu receives are the minimum that PERS allows."

The Grand Jury found, more specifically, that this additional year's service qualifies Chu for PERS lifetime benefits. Chu will earn lifetime retirement benefits estimated to cost the City of Sunnyvale approximately \$2,823 per year if he retires at age 54. In addition, after retirement from the City of Sunnyvale, he will be eligible to receive the minimum of \$1,212 per year toward medical benefits.

Military Leave Benefits

The City of Sunnyvale is generous in providing continuation of city pay and benefits to employees recalled to active military duty.

City employees are asked to sign a contract. Pursuant to the contract, the city agrees to pay full salary and benefits (i.e., bi-weekly pay, benefits equal to the city's current contributions to retirement, health, dental, vision, and life insurance coverage provided the employee elects to continue coverage with these plans).

The employee agrees to reimburse the City with the employee's military pay plus allowances. "Employee also agrees to pay appropriate contribution towards applicable benefits." The employee is contractually obligated to reimburse the city up to and including the amount the city pays for both salary and benefits. The contract also requires that the employee return to city employment; otherwise, the city is permitted to seek reimbursement for supplemental salary and benefits plus interest.

The Council, on Dec. 16, 2008 adopted a resolution with the intent "to continue Councilmember Lee's benefitsconsistent with the extension of benefits provided to city employees during active military leave." Although the Council intended to provide consistency between Councilmember Lee and other city employees on leave, the resolution resulted in an inequity of treatment. The impact of the vote was that Councilmember Lee received his military pay and benefits plus city-paid benefits with no obligation to reimburse the city.

Councilmember Lee also did not sign the contract that is required of other city employees. This action was not consistent with the extension of benefits provided to city employees during active military leave as stated in the Council's resolution.

Conclusions

A councilmember is a key city leader, and matters regarding an appointment of this importance merit special care. The Council had a responsibility to the citizens to conduct the business of the city openly and above board, avoiding even the appearance of impropriety.

The Council, in its desire to help a deployed military officer keep his benefits package, elected to award a benefit package to a councilmember that was greater than that available to city employees.

Findings and Recommendations

Finding 1

The City of Sunnyvale lacks a written process that is open and transparent for appointing an interim councilmember.

Recommendation 1

The Council should establish a clear written process to appoint future interim Council replacements.

Finding 2

Council's Dec. 16, 2008, agenda item #9, RTC 08-377, failed to reasonably inform interested members of the public that a predetermined interim councilmember would be appointed at this meeting.

Recommendation 2

The Council needs to properly notice the public, by ensuring that the published agenda clearly describes the items to be considered.

Finding 3

The city's fiscal impact report was incomplete, in that, it did not provide the Council or the public with the complete cost of the interim appointment to the Council.

Recommendation 3

The Council should direct city staff to provide comprehensive information in their report, so the public has complete information about the cost of an interim appointment.

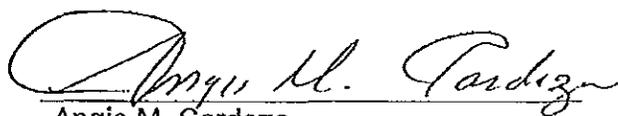
Finding 4

The Council gave a benefit option to a councilmember that is not available to other city employees.

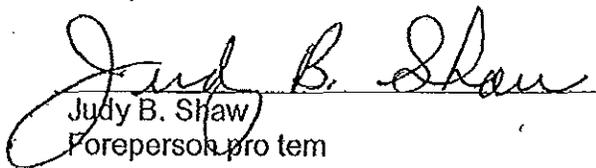
Recommendation 4

The Council must follow protocols to ensure that it provides no greater benefits to councilmembers than it provides to employees.

This report was **PASSED** and **ADOPTED** with a concurrence of at least 12 grand jurors on this 27th day of May, 2010.



Angie M. Cardoza
Foreperson



Judy B. Shaw
Foreperson pro tem