



## 2009-2010 SANTA CLARA COUNTY CIVIL GRAND JURY REPORT

# 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).<sup>1</sup>

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 Council<sup>2</sup>.

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;

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

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>3</sup> Jan. 6, 2009 Report to Mayor and Council, 09-004,

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

<sup>4</sup> 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 benefits ...consistent 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 27<sup>th</sup> day of May, 2010.

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Angie M. Cardoza  
Foreperson

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Judy B. Shaw  
Foreperson pro tem