



CITY OF SUNNYVALE
OFFICE OF THE CITY ATTORNEY

David E. Kahn
City Attorney
Kathryn A. Berry
Sr. Assistant City Attorney
Rebecca L. Moon
Assistant City Attorney
Robert L. Boco
Assistant City Attorney
Barbara "Sam" Roberts
Paralegal
Jennifer Woodworth
Administrative Aide

September 20, 2010

FILED

SEP 21 2010

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

Hand Delivered

Honorable Jamie A. Jacobs-May
Presiding Judge
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

**Re: Sunnyvale City Council Response to June 18, 2010 Civil Grand Jury Report Titled:
Sunnyvale City Council Actions Lack Transparency**

Dear Judge Jacobs-May:

As required by Penal Code Section 933(c), the Sunnyvale City Council submits its timely response to the June 18, 2010, Civil Grand Jury Report titled: Sunnyvale City Council Actions Lack Transparency. The Sunnyvale City Council approved this response on September 14, 2010.

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, 2008, whether to appoint an interim councilmember 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 councilmembers in place.

However, the Report to Council on December 16, 2008, included as an attachment from the City Attorney, a December 9, 2008, memo providing three procedural options, in writing, for appointing an interim councilmember 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 on the selection of interim councilmembers, including selection options and the pros and cons of each option.

Honorable Jamie A. Jacobs-May, Presiding Judge

Santa Clara County Superior Court

Re: **Sunnyvale City Council Response to June 18, 2010 Civil Grand Jury Report Titled:
Sunnyvale City Council Actions Lack Transparency**

September 20, 2010

Page 2

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 councilmember.

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 December 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, 2008, 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, 2008, Report to Council stated that several procedural options for selecting a councilmember were attached to the Report, and 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 councilmember 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

Honorable Jamie A. Jacobs-May, Presiding Judge
Santa Clara County Superior Court

Re: **Sunnyvale City Council Response to June 18, 2010 Civil Grand Jury Report Titled:
Sunnyvale City Council Actions Lack Transparency**

September 20, 2010

Page 3

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, 2009, for any actual appointment, the Grand Jury erroneously concluded that an appointment was made on December 16, 2008.

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 demonstrate 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.

Notwithstanding the fact that the Council’s actions on December 16, 2008, complied with applicable legal standards, the turnout of citizens on January 6, 2009, expressing surprise at the procedure selected which resulted in one potential candidate for appointment indicates that a number of citizens did not understand that this procedure was a City option based on the December 16, 2008, agenda language. The Brown Act establishes a minimum legal standard for providing notice, and the City acknowledges that where an agenda item could result in an action not specifically described by the agenda language, it is desirable to provide a more complete description in the agenda or Report to Council to avoid surprise or unanticipated Council action. In addition, the City recognizes that when a councilmember intends to propose an alternative not described in the Report to Council, it is desirable to discuss the alternative prior to public comment, so members of the public who would like to provide input on the alternative have the opportunity to do so.

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.”

Honorable Jamie A. Jacobs-May, Presiding Judge
Santa Clara County Superior Court

Re: **Sunnyvale City Council Response to June 18, 2010 Civil Grand Jury Report Titled:
Sunnyvale City Council Actions Lack Transparency**

September 20, 2010

Page 4

Again, the City acknowledges that public notice of items to be considered is important to open and transparent government. The City will, in addition to insuring legal compliance with the Brown Act, strive to provide additional information in either the agenda or staff report to advance the City's goal of complete and accurate notice of agenda items and alternatives that the Council will be considering. In addition, the Council has discussed and has implemented an informal policy of disclosure of new alternatives not described in the staff report prior to public comment, to minimize any surprise to the public.

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 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 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 as an interim councilmember on January 6, 2009, had previously served a full 4-year term as a City of Sunnyvale Councilmember, an additional fiscal impact based on PERS vesting rules after 5 years of service was incurred. 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

Honorable Jamie A. Jacobs-May, Presiding Judge
Santa Clara County Superior Court

Re: **Sunnyvale City Council Response to June 18, 2010 Civil Grand Jury Report Titled:
Sunnyvale City Council Actions Lack Transparency**

September 20, 2010

Page 5

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 councilmember 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 the City is only responsible for 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. Councilmember 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. Councilmember Lee was responsible, as all other employees, for the portion of the medical and dental premium that exceeds the City's maximum contribution, and Councilmember Lee is reimbursing the City for the portion of the medical premium that exceeded the maximum contribution. Councilmember 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 Councilmember 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 Councilmember Lee.

Honorable Jamie A. Jacobs-May, Presiding Judge
Santa Clara County Superior Court

Re: **Sunnyvale City Council Response to June 18, 2010 Civil Grand Jury Report Titled:
Sunnyvale City Council Actions Lack Transparency**

September 20, 2010

Page 6

It is regrettable that the Grand Jury erroneously made a finding that a councilmember 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 Council must follow protocols to ensure it provides no greater benefits to councilmembers than it provides to employees.

City Response

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

Respectfully submitted,



Mayor Melinda Hamilton
for Sunnyvale City Council
Pursuant to California Penal Code Section 933(c)

MMH:sam

David\Council\Grand Jury\2010\Lacks Transparency-Response092010

cc: Gary Luebbers, City Manager
David Kahn, City Attorney
Kathleen Franco Simmons, City Clerk