



CITY OF CUPERTINO

AGENDA

CITY COUNCIL

10350 Torre Avenue, Council Chamber and via Teleconference
Tuesday, May 9, 2023
6:00 PM

Televised Special Meeting (6:00)

IN-PERSON AND TELECONFERENCE / PUBLIC PARTICIPATION INFORMATION

Members of the public wishing to observe the meeting may do so in one of the following ways:

- 1) Attend in person at Cupertino Community Hall, 10350 Torre Avenue.
- 2) Tune to Comcast Channel 26 and AT&T U-Verse Channel 99 on your TV.
- 3) The meeting will also be streamed live on and online at www.Cupertino.org/youtube and www.Cupertino.org/webcast

Members of the public wishing to comment on an item on the agenda may do so in the following ways:

- 1) Appear in person at Cupertino Community Hall.
- 2) E-mail comments by 4:00 p.m. on Tuesday, May 9 to the Council at citycouncil@cupertino.org. These e-mail comments will also be forwarded to Councilmembers by the City Clerk's office before the meeting and posted to the City's website after the meeting.

Members of the public may provide oral public comments during the Special Meeting as follows:

Oral public comments will be accepted during the meeting. Comments may be made during the public comment period for each agenda item.

Members of the audience who address the City Council must come to the lectern/microphone, and are requested to complete a Speaker Card and identify themselves. Completion of Speaker Cards and identifying yourself is voluntary and not required to attend the meeting or provide comments.

Teleconferencing Instructions

To address the City Council, click on the link below to register in advance and access the meeting:

Online

Register in advance for this webinar:

https://cityofcupertino.zoom.us/webinar/register/WN_mbMKuppzQ7-E7m8403CkkQ

Phone

Dial: 669-900-6833 and enter Webinar ID: 921 6883 7662 (Type *9 to raise hand to speak, *6 to unmute yourself). Unregistered participants will be called on by the last four digits of their phone number.

Or an H.323/SIP room system:

H.323:

162.255.37.11 (US West)

162.255.36.11 (US East)

Meeting ID: 921 6883 7662

SIP: 92168837662@zoomcrc.com

After registering, you will receive a confirmation email containing information about joining the webinar.

Please read the following instructions carefully:

1. You can directly download the teleconference software or connect to the meeting in your internet browser. If you are using your browser, make sure you are using a current and up-to-date browser: Chrome 30+, Firefox 27+, Microsoft Edge 12+, Safari 7+. Certain functionality may be disabled in older browsers, including Internet Explorer.
 2. You will be asked to enter an email address and a name, followed by an email with instructions on how to connect to the meeting. Your email address will not be disclosed to the public. If you wish to make an oral public comment but do not wish to provide your name, you may enter "Cupertino Resident" or similar designation.
 3. When the Mayor calls for the item on which you wish to speak, click on "raise hand," or, if you are calling in, press *9. Speakers will be notified shortly before they are called to speak.
 4. When called, please limit your remarks to the time allotted and the specific agenda topic.
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5. Members of the public that wish to share a document must email cityclerk@cupertino.org prior to speaking. These documents will be posted to the City's website after the meeting.

NOTICE AND CALL FOR A SPECIAL MEETING OF THE CUPERTINO CITY COUNCIL

NOTICE IS HEREBY GIVEN that a special meeting of the Cupertino City Council is hereby called for Tuesday, May 09, 2023, commencing at 6:00 p.m. in Community Hall Council Chamber, 10350 Torre Avenue, Cupertino, California 95014 and via teleconference. Said special meeting shall be for the purpose of conducting business on the subject matters listed below under the heading, "Special Meeting."

SPECIAL MEETING

CALL TO ORDER

PLEDGE OF ALLEGIANCE

ROLL CALL

ACTION CALENDAR

1. **Subject:** Consider a report regarding the review of potential violations of the City of Cupertino Municipal Code and City policies regarding Council- and commissioner-staff relations ("Report").

Recommended Action: Consider the recommendations in the Report.

[Staff Report](#)

[A – Grand Jury Report – "A House Divided: Cupertino City Council and City Staff"](#)

[B – City of Cupertino Response to Grand Jury Report](#)

[C – Fact Finding Report](#)

ADJOURNMENT

Lobbyist Registration and Reporting Requirements: Individuals who influence or attempt to influence legislative or administrative action may be required by the City of Cupertino's lobbying ordinance (Cupertino Municipal Code Chapter 2.100) to register and report lobbying activity. Persons whose communications regarding any legislative or administrative are solely limited to appearing at or submitting testimony for any public meeting held by the City are not required to register as lobbyists. For more information about the lobbying ordinance, please contact the City Clerk's Office at 10300 Torre Avenue, Cupertino, CA 94107; telephone (408) 777-3223; email cityclerk@cupertino.org; and website: www.cupertino.org/lobbyist.

The City of Cupertino has adopted the provisions of Code of Civil Procedure §1094.6; litigation challenging a final decision of the City Council must be brought within 90 days after a decision is announced unless a shorter time is required by State or Federal law.

Prior to seeking judicial review of any adjudicatory (quasi-judicial) decision, interested persons must file a petition for reconsideration within ten calendar days of the date the City Clerk mails notice of the City's decision. Reconsideration petitions must comply with the requirements of Cupertino Municipal Code §2.08.096. Contact the City Clerk's office for more information or go to <http://www.cupertino.org/cityclerk> for a reconsideration petition form.

In compliance with the Americans with Disabilities Act (ADA), anyone who is planning to attend this meeting who is visually or hearing impaired or has any disability that needs special assistance should call the City Clerk's Office at 408-777-3223, at least 48 hours in advance of the meeting to arrange for assistance. In addition, upon request, in advance, by a person with a disability, meeting agendas and writings distributed for the meeting that are public records will be made available in the appropriate alternative format.

Any writings or documents provided to a majority of the Cupertino City Council after publication of the packet will be made available for public inspection in the City Clerk's Office located at City Hall, 10300 Torre Avenue, Cupertino, California 95014, during normal business hours; and in Council packet archives linked from the agenda/minutes page on the Cupertino web site.

IMPORTANT NOTICE: Please be advised that pursuant to Cupertino Municipal Code section 2.08.100 written communications sent to the Cupertino City Council, Commissioners or City staff concerning a matter on the agenda are included as supplemental material to the agenda item. These written communications are accessible to the public through the City's website and kept in packet archives. Do not include any personal or private information in written communications to the City that you do not wish to make public, as written communications are considered public records and will be made publicly available on the City website.



CITY OF CUPERTINO

Agenda Item

23-12298

Agenda Date: 5/9/2023
Agenda #: 1.

Subject: Consider a report regarding the review of potential violations of the City of Cupertino Municipal Code and City policies regarding Council- and commissioner-staff relations ("Report").

Consider the recommendations in the Report.



CITY ATTORNEY'S OFFICE

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CITY COUNCIL STAFF REPORT

Meeting: May 9, 2023

Subject

Consider a report regarding the review of potential violations of the City of Cupertino Municipal Code and City policies regarding Council- and commissioner-staff relations ("Report").

Recommended Action

Consider the recommendations in the Report.

Reasons for Recommendation

On December 19, 2022, the Santa Clara County Civil Grand Jury issued a report entitled, "A House Divided: Cupertino City Council and City Staff" ([Attachment A](#)). The Grand Jury report resulted from multiple complaints concerning the conduct of the City Councilmembers toward City management and staff. According to the Grand Jury report, the Civil Grand Jury reviewed allegations that (1) Councilmembers interfered in the day-to-day operations of the City; (2) Councilmembers routinely berated and belittled presentations made by the City staff during the City Council meetings; and (3) certain Councilmembers gave direct work assignments to City employees, contrary to the requirements of the Council-Manager form of government as set forth under the Cupertino Municipal Code.

Following its deliberations, the Grand Jury released a report that included four findings, three of which are relevant to the item pending before Council.

Finding 1: The City has a culture of distrust between the Councilmembers and City staff that is creating dysfunction.

Finding 2: The dysfunction prevalent between the City Council and City staff has negatively impacted City operations, including the continuing loss of skilled and experienced personnel. The City has a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult.

Finding 4: A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, if includes sanctions and consequences for deviations from the stand. The

City's Ethics Policy is generic and lacks enforcement provisions and therefore fails to provide a framework to address ramifications for policy violations.

On February 21, 2023, the City Council considered the Grand Jury report and approved the City's response to the report pursuant to Penal Code section 933 (Attachment B). As part of the City's response, the City Council directed the City Attorney's Office to investigate and report back on violations of the Municipal Code with respect to Council-staff and commissioner-staff relations. The City Attorney's Office retained Linda Daube, Esq. to conduct an independent investigation of potential violations of the Municipal Code and related violations of City policies.

The City Council was initially provided a confidential, attorney-client privileged Report regarding the investigation. On May 2, 2023, the City Council voted to waive privilege and release the report to the public, and to continue further discussion of the Report until the public has had the opportunity to review it.

The Report (Attachment C) includes seven recommendations directed at facilitating more effective Council-staff relations and enhancing the City Council's ability to accomplish its goals, which are summarized below and discussed in more detail in the Report.

1. Councilmembers should avoid "governance by email" and should rely on their 1:1 meetings with the City Manager to avoid adverse impacts to City operations and to facilitate communication and trust between the Councilmembers and the City Manager and City staff.
2. Councilmembers should attempt to improve the contentious relationship that certain members have had with City staff and should communicate any concerns about staff to the City Manager, who is accountable to the City Council for her staff's performance.
3. Councilmembers should rely on the advice of and give weight to the recommendations of executive management staff and other professionals in considering items that come before the City Council.
4. The City Council should continue to use the City Work Program as a way to implement Council's goals, and the City should rely on the Work Program to focus resources and determine staffing needs.
5. The 2018 Ethics Code should be used as a basis for developing revisions to a new Ethics Policy.
6. The City Attorney and City Clerk should consider providing Councilmember training on Rosenberg's Rules of Order.
7. The City Manager should explore ways to resolve Councilmember needs for information, given limited staff resources (*e.g.*, 1:1 meetings).

If the City Council determines that the recommendations above and/or similar measures it may consider do not address the Councilmember conduct at issue, including violations of Municipal Code Chapter 2.17, Council may consider other remedies, including procedural changes to avoid future violations of the Municipal Code, censure, and/or referral to the District Attorney.

Sustainability Impact

Not applicable.

Fiscal Impact

No fiscal impact.

California Environmental Quality Act

Not applicable.

Prepared by: Christopher D. Jensen, City Attorney

Approved for Submission by: Pamela Wu, City Manager

Attachments:

A – Grand Jury Report – "A House Divided: Cupertino City Council and City Staff"

B – City of Cupertino Response to Grand Jury Report

C – Fact Finding Report

A HOUSE DIVIDED: CUPERTINO CITY COUNCIL AND CITY STAFF



2022 Santa Clara County
Civil Grand Jury

December 19, 2022

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GLOSSARY AND ABBREVIATIONS

General Law City

A city whose government structure and powers are defined by the general law of the state. This is in contrast with a charter city whose government structure and powers are defined by a city charter.

California Public Records Act

The California Public Records Act (Government Code section 6250 et seq.) allows the public to request access to government records, unless such records are exempt by law from disclosure.

Councilmanic Interference

Councilmanic Interference refers to a councilmember's attempts to thwart the principles of the council-manager form of government management.

SUMMARY

The 2022 Santa Clara County Civil Grand Jury (Civil Grand Jury) received multiple complaints concerning the behavior of the City of Cupertino (City) councilmembers toward City staff. The essence of these complaints focused on an adversarial relationship existing between the Cupertino City Council (City Council) on the one hand and City management and staff on the other. Complainants alleged: (1) councilmembers interfered in the day-to-day operations of the City; (2) councilmembers routinely berated and belittled presentations made by City staff during City Council meetings; and (3) certain councilmembers gave direct work assignments to City employees, thwarting the requirements of the Council-Manager form of government.

Throughout its investigation, the Civil Grand Jury learned of the existence of distrust and fear among City staff of councilmembers. Generally, each side took issue with the other, laying blame back and forth over multiple complaints. The Civil Grand Jury was provided with repeated examples of councilmembers behaving inappropriately toward the City Manager and staff including, but not limited to, routine disrespect and the inclination to doubt the accuracy of the City staff's work. The Civil Grand Jury found that the behavior by certain councilmembers towards City staff directly violated the City's ordinances relating to the council-manager form of government under which the City operates.

Furthermore, high turnover in key management and leadership positions within City government has caused the City to lose employees with significant capabilities and experience and, in some cases, leave key positions unfilled. These issues adversely impact the City's ability to best serve the community and effectively operate the City. Additionally, the City's designated Internal Auditor, Moss Adams LLP, identified numerous areas where the City had critical deficiencies, including that the City has weak or nonexistent internal financial controls and inadequacies in existing operating policies and procedures. Many of these deficiencies have existed for several years and pose potentially serious future operating and financial risks to the City as it pursues significant growth projects. The City Council's Audit Committee has implemented a work plan designed to address identified areas of fiscal risk and weak or absent internal controls, but there is no evidence in City Council meeting minutes that the plan has been vetted by the City Council.

BACKGROUND

Governance

The City is a general law city whose form of government is governed by California Government Code sections 36501 to 36525. General law cities, while complying with state mandates, may adopt ordinances that provide specific requirements related to the operation of the city. To this end, the City of Cupertino Municipal Code (“Cupertino Municipal Code”) includes the following provisions:

- (1) Chapter 2.48 – Departmental Organization
- (2) Chapter 2.17 – City Council/City Staff Relationships

The City has chosen to operate under the Council-Manager form of government, which separates the operational responsibilities assigned to the City Manager from the governance and oversight responsibilities assigned to the Mayor and Councilmembers. Cupertino Municipal Code chapters 2.17 and 2.48 explicitly establish the roles of the City Manager, certain key staff, and the councilmembers.

Pursuant to Cupertino Municipal Code section 2.17.010, councilmembers (including the mayor) are prohibited from attempting to influence City staff’s administrative responsibilities. :

Under the Council/Manager form of government neither the City Council, nor individual Council members, can give orders to any subordinates of the City Manager. The City Manager takes his or her orders and instructions from the City Council only when given at a duly held meeting of the City Council. *No individual council member can give any orders or instructions to the City Manager.* [Emphasis added]

Cupertino Municipal Code section 2.17.032 expressly states that “Individual Council members shall not attempt to influence staff decisions, recommendations, workloads, and schedules, and department priorities without prior knowledge and approval of the City Council.” As Cupertino Municipal Code section 2.17.020 provides, the intent and purpose of this requirement are to ensure that control and direction of the City are maintained by the City Council as a whole as opposed to individual councilmembers; and to protect City staff from “undue influence” from individual councilmembers so that City staff can execute priorities given by management and the City Council as opposed to individual councilmembers. Further, the City Council – as opposed to individual City councilmembers – retains “the full power to accept, reject, amend, or otherwise guide and direct staff actions, decisions, recommendations, workloads and schedules, department priorities, and the conduct of city business” through the City Manager. (Section 2.17.031)

Councilmanic Interference

Councilmembers engaging in the type of conduct outlined above are committing “councilmanic interference.” Councilmanic interference is a violation of the Council-Manager form of government, as established by Cupertino Municipal Code section 2.28.50:

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The City Council and its members shall deal with the administrative services of the City only through the City Manager, except for the purpose of inquiry, and neither the City Council nor any member thereof shall give orders to any subordinates of the City Manager. The City Manager shall take his or her instructions from the City Council only when given at a duly held meeting of the City Council, and no individual councilperson shall give any instructions to the City Manager.

While councilmembers are prohibited from giving orders to subordinates of the City Manager, Cupertino Municipal Code section 2.17.034 expressly allows councilmembers to get information from City staff, which does not qualify as councilmanic interference:

Individual Council members as well as the City Council as a whole, have complete freedom of access to any information requested of staff (except information which is otherwise protected by law from disclosure) and will receive the full cooperation and candor of City staff in being provided with any requested information. Information sought by an individual council member may, at the discretion of the City Manager, be automatically provided to the City Council as a whole. In exercising this discretion, the City Manager will consider whether the information is significant or new or otherwise not available to the Council or is of interest to the Council.

Further, Cupertino Municipal Code section 1.12.010 makes it unlawful for any person to violate a mandatory provision of the code, which can be a misdemeanor. Section 1.12.010 states:

It is unlawful for any person to perform any act that is prohibited, made or declared to be unlawful or an offense by the code, or to violate any provision or fail to comply with any of the requirements of this code. A violation of any provision or failing to comply with any of the mandatory requirements of the code shall constitute a misdemeanor, except where the violation is specifically declared to be an infraction.

METHODOLOGY

The investigation process undertaken by the Civil Grand Jury included interviews with councilmembers, past and present City officials, and the Audit Committee of the City Council. Additionally, the Civil Grand Jury watched recordings of several City Council meetings; researched and reviewed the state statutes governing the structure and operation of general law cities; researched and reviewed relevant provisions of the Cupertino Municipal Codes that describe City operations and City Council structure and responsibilities; and engaged in research that produced numerous documents supporting the findings and recommendations in this report.

The investigation focused on four critically important areas: (1) councilmanic interference by councilmembers with City management and staff; (2) operational and fiscal risk management concerns; (3) behavior dysfunction leading to failures in governance; and (4) the lack of an Ethics and Code of Conduct Policy with enforcement provisions. As a result of this investigation, the Civil Grand Jury developed several findings and recommendations to address the identified areas of dysfunction.

INVESTIGATION

Councilmanic Interference and Mutual Distrust

The Civil Grand Jury learned that City staff are routinely criticized, ridiculed, and embarrassed during public meetings, leading City staff not to trust councilmembers. A careful review of several recorded City Council meetings confirmed the existence of adversarial and dysfunctional behavior toward City staff exhibited by some City councilmembers. At the same time, it was also noted that some councilmembers have been concerned about the difficulty in obtaining accurate and timely information on City operations considered important in performing City Council governance and oversight responsibilities. The dysfunctional relationship between City management and some councilmembers has created an environment of distrust.

As described above, there is a difference between ordering or directing City staff – which qualifies as councilmanic behavior – and requesting information, which is expressly permitted by the Cupertino Municipal Code. The Civil Grand Jury heard multiple complaints and various examples of conduct that councilmembers viewed as permissible information requests, but City staff believed were councilmanic interference. Councilmembers do communicate directly with City staff seeking information. This is permissible; however, individual councilmembers cannot, in this context, influence staff decisions, workloads, schedules, or department priorities without prior knowledge and approval of the City Council because that kind of conduct qualifies as councilmanic interference. It is easy to see how a direct request for information from a councilmember might have the impact of influencing workloads, requiring staff to work overtime, or readjusting staff priorities, which is the concern of City staff. It is also possible that the councilmember might not know or appreciate the impact of the information request.

Thus, there is a lot of gray area between information requests and information requests that have a more councilmanic spirit. As the Civil Grand Jury learned, some of the councilmembers' requests have been voluminous or come on the heels of the councilmembers' specific dissatisfaction with a staff report on a certain subject and, thus, appear punitive as opposed to a genuine information request. Some councilmembers, not getting the information they need, have resorted to submitting Public Records Act requests to the City Clerk to obtain specific information from City staff. This is unusual because Public Records Act requests are commonly made by the public, not by councilmembers. It is easy to see how City staff view this practice as an aggressive tactic by the councilmembers. On the other hand, some City staff have resisted individual councilmembers' direct requests for detailed information or reports that they believe should have come through the City Manager and represent councilmanic interference. This is also frustrating for the councilmember who is charged with governing and must be informed to make important decisions about the direction of the City. Parsing out who is right or wrong in this landscape does not solve the core problem of distrust and resulting dysfunction.

The Civil Grand Jury learned of a few instances of more blatant councilmanic conduct. Councilmember Kitty Moore questioned a subordinate of the City Manager about charges the staff member incurred on a City credit card. The staff member presented an explanation of the charges. Councilmember Moore did not accept the explanation and requested copies of the documentation to pursue her own investigation. Any irregularities or policy violations related to City credit use are squarely within the purview of the City Manager. Direct councilmember involvement violates the City Municipal Code prohibiting councilmembers from involving themselves in the day-to-day operations that are clearly the responsibility of the City Manager.

The Civil Grand Jury also learned through different sources that Mayor Darcy Paul directed a City staff member to assist with an event. The Mayor asserted that the City staff member had “volunteered” to help during a ribbon-cutting ceremony and therefore, such assistance did not amount to a directive as prohibited by City ordinance. The Mayor failed to recognize the powers at play--the inherent difference in stature--when a councilmember asks staff to attend functions outside their normal work responsibilities. On two separate occasions, Mayor Paul asked other City staff to work at events that were not part of official City business and occurred after working hours. For one such event, the Mayor made the request by personally calling the staff members. Such requests by councilmembers should be made through the City Manager.

Another source of distrust between the City Council and City staff involves renovations to City Hall. Further, City staff voiced concern that their workplace, City Hall, had not been renovated and seismically improved. Although the 2015 City Council allocated funds for the renovation, the monies were subsequently redirected to expand the City Library. Certain staff regard the present City Council’s unwillingness to fund the renovation as confirmation that their health and safety concerns are not a priority.

Trust between the City Council and the City Manager and staff is essential to the effective operation of the City. The Civil Grand Jury investigation and interviews revealed that little trust exists between the City’s staff and councilmembers. In many instances the distrust is mutual. The combination of poor relationships and strained communication between these two groups has created several critical problem areas in the functioning of City government and the ability of the City Council to provide the leadership and meaningful oversight that is the core of good governance.

Failure to Produce Treasurer’s Report

Earlier this year, the Civil Grand Jury investigated the lack of financial reporting as mandated by state law. In a separate report entitled “Show Me the Money: Financial Transparency Needed,” the Civil Grand Jury responded to a complaint that the City was in breach of its ordinance to produce monthly treasurer’s reports. During the investigation of the missing treasurer’s reports, the City Manager resigned unexpectedly in June of 2022.

Cupertino Municipal Code section 2.24.030 (“Monthly Reports”) states:

The Treasurer shall make monthly reports which conform to the requirements of [California] Government Code Section 41004. Said reports shall be delivered to the City Council, the City Manager and made available for review by such other persons who may so request.

Despite the legal requirement to comply with Government Code section 41004, no City staff member was preparing and delivering a monthly treasurer’s report. When this issue was raised during an Audit Committee meeting, the rationale provided by City staff was that many of the surrounding cities do not comply with this requirement. Absence of the monthly treasurer’s report impaired the councilmembers’ ability to fully exercise fiscal oversight.

It took a few months for City staff to comply with the law. The Civil Grand Jury investigation into this issue revealed that the City finance department is now producing the treasurer’s report required under California Government Code section 41004 and Cupertino Municipal Code section 2.24.030. Nonetheless, the City staff’s disregard of this City ordinance in the past added to the perception of City Council that staff was not competently fulfilling their job responsibilities.

Fiscal and Risk Management Issues

Fiscal and financial risk management oversight is a key area of responsibility of every city council. Good governance requires that city councils routinely review the financial operations of the city, identify areas of weakness and/or risk, and oversee effective policies and procedures for implementation by city managers. Addressing financial issues in a timely manner is an essential component of a city council’s exercise of its oversight responsibilities.

Operationally, the scheduled and repetitive use of internal audits is an effective tool for the discovery of financial management and internal control issues. Audits provide the best means of measuring consistent progress in mitigating weaknesses and identifying gaps through implementation of council-directed and -approved policies and procedures designed to address any identified issues.

The Civil Grand Jury learned of the existence of a 14-year embezzlement scheme by a former City staff member of almost \$800,000 that purportedly occurred between 2000 and 2014. Further investigation revealed that after the discovery of the embezzlement scheme in 2014, no financial policy or procedural changes were developed and implemented by the City.

The City contracts with Moss Adams LLP (Auditor) to serve as the City’s Internal Auditor. Leading up to December of 2020, the Auditor undertook a comprehensive risk assessment evaluation of all departments and their respective functions across the entirety of the City’s organization. Although their audit report identified several areas of concern, including internal financial controls, the Civil Grand Jury learned that the City did not take any appreciable steps to

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remedy these concerns. The City Council did, however, call for a more detailed audit of financial operations and risk. That led to another audit in Spring 2022, which resulted in a report entitled “City of Cupertino: Fiscal Policy Inventory and Gap Analysis,” dated May 5, 2022. That report was presented by the City staff to the Council on July 19, 2022. The audit report included in its findings a policy and procedure work plan covering areas of identified financial risk. Also included in the Auditor’s findings was a detailed “Summary of Recommendations” referencing high-risk areas that require immediate City Council attention and remediation. The following chart, prepared by the Auditor, sums up the deficiencies by area, including eight areas that the Auditor described as high risk:

| Policy Area | Type of Gap | Associated Risk | Recommended Priority Level |
|-------------------------------------|-------------|-----------------|----------------------------|
| Accounting and Financial Reporting | Major Gaps | High | 1 |
| Accounts Payable | Full Gap | High | 1 |
| Budgeting | Major Gaps | High | 1 |
| Capital Assets | Major Gaps | High | 1 |
| Cash Management | Major Gaps | High | 1 |
| Payroll and Timekeeping | Full Gap | High | 1 |
| Procurement | Major Gaps | High | 1 |
| Revenue and Accounts Receivable | Full Gap | High | 1 |
| Debt Management/Tax Bond Compliance | Major Gaps | Medium | 2 |
| Gifts and Donations | Major Gaps | Medium | 2 |
| Grant Management | Full Gap | Medium | 2 |
| Investment Management | Minor Gaps | Medium | 2 |
| Credit Cards | Minor Gaps | Low | 3 |
| Inventory | Full Gap | Low | 3 |
| Travel and Expense Reimbursement | Minor Gaps | Low | 3 |

Figure 1. Prioritized Policies and Procedures Work Plan

The full report is attached as [Appendix A](#).

In sum, two separate audit reports dated December 2020 and May 2022, both commissioned by the City, included sets of recommendations to strengthen operating policies, procedures, and

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internal controls. The Civil Grand Jury learned that few, if any, of those recommendations have been implemented for reasons that remain unclear. Past and present key staff offered no clarity on how the City addressed or intends to address the well-developed Moss Adams internal audit recommendations.

The Civil Grand Jury learned that the City Council's Audit Committee has been meeting and discussing the audit reports. The Civil Grand Jury investigated the functions and responsibilities assigned to the Audit Committee, which exists as a subcommittee of the City Council. These functions and responsibilities are identified on the City of Cupertino website as follows (also refer to Cupertino Municipal Code section 2.88.100):

- To review the annual audit report and management letter
- To recommend appointment of internal/external auditors
- To review the monthly Treasurer's Report
- To recommend a budget format
- To review City investment policies and internal controls of such policies
- To review internal audit reports
- To review quarterly Fraud, Waste, and Abuse Program reports

Audit committee operating procedures require members, among other responsibilities, to assess the internal audit findings and recommendations and submit their analysis and recommendations to the City Council for discussion and action. The Auditors attend and participate in the City Council Audit Committee meeting, and their reports, findings, and recommendations are provided directly to the Audit Committee for discussion and development of recommended actions.

However, it remains unclear to the Civil Grand Jury whether the City is addressing the fiscal risks identified in the May 5, 2022, Auditor report. The Audit Committee meets regularly and the minutes reflect that there is a workplan. In May 2022, the status of the Audit Committee's work was on the City Council agenda, but that meeting was later canceled. The Civil Grand Jury could find no evidence in the City Council minutes that the City Council had discussed the risk reduction work plan or had authorized the City Manager to proceed with its implementation. This is concerning because the financial control issues have long been known to the City and yet questions directed to councilmembers, Audit Committee members, and relevant City staff failed to provide assurance that the City Council has prioritized the efforts of the Audit Committee or evaluated and approved a work plan to address the audit deficiencies.

City Staff Turnover

The Civil Grand Jury learned of an abnormally high turnover rate among City staff, including key top staff positions. For example, half of the Planning Division and 60 percent of senior management staff have left the City since January 2022. The City has had four city managers from

June 2019 to the present. The most recent City Manager appointment took place on August 29, 2022. The high turnover in key management positions increases the risk of operational errors and oversights. It also reduces the level of institutional memory and process knowledge that facilitates the efficient and timely flow of work throughout the City's several departments.

High turnover also brings in new employees, some of whom are unlikely to be familiar with the City's specific operational policies and procedures and therefore require higher levels of training and closer supervision to become proficient in their work assignments. Several of the interviews undertaken by the Civil Grand Jury confirmed that high staff and management turnover reduced the operating efficiency of City government. Further, the Civil Grand Jury learned that this high turnover rate has negatively impacted the City's reputation and in turn, has led to its inability to attract qualified people for some key staff and management positions. Interviewees cited turnover as a continuing operational problem.

Some councilmembers indicated that the high turnover was more a function of individual retirements and people seeking better, higher-paying positions. Documents researched and reviewed by the Civil Grand Jury provided information that did not fully support these conclusions. For example, the City of Cupertino salary structure for staff and management is competitive with equivalent positions in other nearby cities. And witnesses confirmed that much of the turnover was due to some councilmembers' contentious behavior and direct interference in City operations and staff assignments.

Interviews with current and former City managers confirmed that some City councilmembers inserted themselves in the process of recruiting and hiring for open positions within the City. The belief by City staff that their work is unappreciated and devalued by councilmembers perpetuates the open and public conflict between the City Council and City staff. Such behavior makes it highly likely that management turnover will continue.

Effective local government depends upon hiring and retaining qualified staff and management and electing councilmembers dedicated to functioning in a manner that best serves their constituents. The City, according to several interview statements, has developed a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult.

Ethics Policy

In a City Council vote on January 15, 2019, the City Council rescinded its Code of Ethics and Conduct that had just been voted on and passed the prior November. A year later, in January 2020, the City Council adopted a new Ethics Policy. The Civil Grand Jury has many concerns about the new Ethics Policy.

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First, unlike the rescinded version, the current Ethics Policy is less comprehensive and ignores the subject of councilmanic interference found in the rescinded version. Thus, there are significantly fewer ethical requirements and standards for councilmembers.

Second, the current version of the Ethics Policy contains no enforcement provisions that would allow action(s) to be taken against councilmembers or City officials who violate behavioral or performance requirements. The Civil Grand Jury reviewed the City's current Ethics Policy against those of comparable cities. Noticeably missing were enforcement provisions that enabled the public, councilmembers, and staff to report policy violations or other misconduct.

Enforcement provisions are needed to:

- Provide guidelines to address misconduct and inappropriate behavior
- Implement appropriate disciplinary action when necessary, including warnings, sanctions, censure, and termination
- Define steps to take depending upon the nature of the violation, prior violations by the same individual, and other factors that could bear upon the seriousness of the violation

In the absence of enforcement provisions, the City's barebones Ethics Policy is ineffective in remediating problematic staff and councilmember actions and behaviors. Adopting a more comprehensive ethics policy is important to enable the City Council to execute its assigned responsibilities for effective governance, operational oversight, and risk mitigation.

Third, the Ethics Policy is not available to the public online. This lack of transparency is unusual for City government. Further, the lack of a publicly available Ethics Policy reduces the likelihood that councilmembers will be held accountable by the public for violations of the policy. The 2018 and 2020 versions of the City's Ethics Policy are attached as [Appendix B](#) and [Appendix C](#), respectively.

Fourth, the year-long gap during which the City had no ethics policy is a concern.

Last, it seems that the rationale for creating a policy with generic ethics goals and no enforcement provisions was to avoid accountability. One councilmember interviewed expressed the opinion that the old policy did not provide enough flexibility. Another councilmember suggested that the old Ethics Policy was too restrictive. No City councilmembers could explain why the replacement Ethics Policy does not contain any enforcement provisions. The City Council's decision to rescind a detailed Code of Ethics and Conduct with meaningful enforcement provisions, and to replace it with a barebones unenforceable policy that is not publicly available, and, in the meantime, to operate without any policy at all for 12 months, is very concerning to the Civil Grand Jury and evidences a lack of willingness on the part of the current City Council to hold itself accountable.

CONCLUSION

Voters of the City of Cupertino elect five councilmembers. Councilmembers in turn hire the City Manager and the City Attorney. The public has the right to hold the governing body responsible for its leadership and guidance and to pursue policies that lead to sound governance. City voters do not elect City staff. If the environment created by the governing board is toxic, the City will not be able to hire and retain competent talent to serve the residents of Cupertino. The governing council must create a respectful environment for staff. The behavior of councilmembers may need to be reviewed and good government practices implemented to remediate the dysfunction that currently exists.

The absence of a comprehensive Ethics and Code of Conduct policy with enforcement provisions is a significant concern for the Civil Grand Jury. Ethics and Code of Conduct policies set baseline parameters of acceptable organizational operating practices and required behavior of staff, management and councilmembers. The absence of enforcement provisions in the new Ethics Policy provides the City and its residents no remedy for unacceptable actions or behavior.

The Civil Grand Jury is aware that this report will be published after the November 2022 elections and hopes that any newly elected councilmembers will take the opportunity to develop better working relationships with the City staff.

FINDINGS AND RECOMMENDATIONS

Finding 1

The City has a culture of distrust between the councilmembers and City staff that is creating dysfunction.

Recommendation 1

The City should develop or acquire a good governance training and development program for both existing and newly elected councilmembers and existing and new staff members to address: (i) their role, responsibilities, and the relevant laws that specify and/or limit their function; (ii) the division of responsibilities between councilmembers and staff as directed by the Cupertino Municipal Code; and (iii) the necessity of morale building to create a stronger, more effective, and respectful relationship between City staff and councilmembers. Recommendation 1 should be implemented by March 31, 2023.

Finding 2

The dysfunction prevalent between the City Council and City staff has negatively impacted City operations, including the continuing loss of skilled and experienced personnel. The City has a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult.

Recommendation 2

The City should hire a consultant to study staff morale and make recommendations to improve retention of employees and quality of the working environment. To the extent legally permissible, the study and recommendations should be published for public review. Recommendation 2 should be implemented by July 31, 2023.

Finding 3

The City has not taken sufficient steps to improve the City's financial risk profile as recommended by its retained Internal Auditor.

Recommendation 3a

The City should implement the work plan identified in the May 2022 Fiscal Policy Inventory and Gap Analysis Report developed by the City's internal audit firm, Moss Adams LLP, to address policy and procedural gaps and weaknesses. Recommendation 3a should be implemented by July 31, 2023.

Recommendation 3b

The City should employ the use of continuing annual internal audits to assess progress in the development and implementation of new or modified policies and procedures to comply with

internal audit risk reduction and mitigation recommendations. Recommendation 3b should be implemented by July 31, 2023.

Finding 4

A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, it includes sanctions and consequences for deviations from the standard. The City's Ethics Policy is generic and lacks enforcement provisions and therefore fails to provide a framework to address ramifications for policy violations.

Recommendation 4a

The City should establish an independent Public Ethics Commission with guidance from experts in applied ethics, such as the Markkula Center for Applied Ethics at Santa Clara University, to: (i) develop and implement a robust government ethics training program for all councilmembers; and (ii) evaluate a best practices enforceable Code of Ethics and Conduct Policy that governs all councilmembers and appointed officials for consideration by the City Council. This recommendation should be implemented by March 31, 2023.

Recommendation 4b

The City should reinstate enforcement procedures to enable the City Council and the public to file complaints and testify at public hearings to help remediate ethics violations. This revision should include a procedure for public admonishment, revocation of special privileges, or censure. This recommendation should be implemented by March 31, 2023.

Recommendation 4c

The City Council should engage a conflict resolution professional to help enhance mutual understanding and respect amongst all stakeholders. This recommendation should be implemented by January 31, 2023, and should be repeated at least once per year.

Recommendation 4d

The City should publish its current Ethics Policy on the City website by January 31, 2023.

REQUIRED RESPONSES

Pursuant to California Penal Code § 933(b) et seq. and California Penal Code § 933.05, the County of Santa Clara 2022 Civil Grand Jury requests responses from the following governing body:

| Responding Agency | Findings | Recommendations |
|--------------------------|-----------------|------------------------------|
| The City of Cupertino | 1, 2, 3, 4 | 1, 2, 3a, 3b, 4a, 4b, 4c, 4d |

APPENDIX A

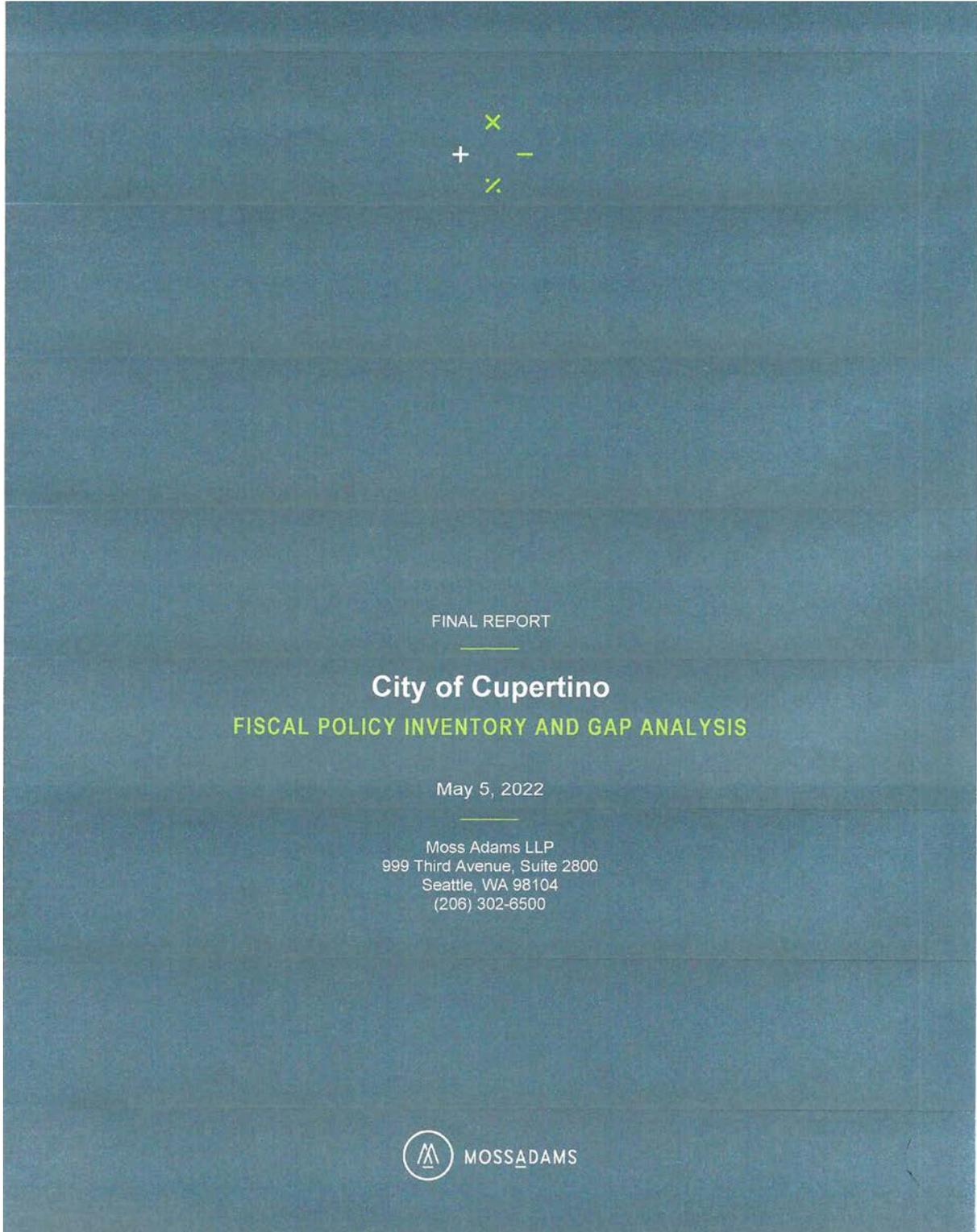


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Fiscal Policy Inventory and Gap Analysis
FOR INTERNAL USE OF CITY OF CUPERTINO ONLY



I. BACKGROUND, SCOPE, AND METHODOLOGY

A. BACKGROUND

The City of Cupertino (the City) requested that Moss Adams LLP (Moss Adams), as the City's internal auditor, perform an inventory of all City fiscal policies and procedures (P&Ps) and a gap analysis to determine what gaps in coverage exist, and develop a prioritized P&P work plan to support the City in addressing identified gaps. The objectives of this project were to:

- Determine which fiscal areas are adequately covered by comprehensive current P&Ps.
- Identify policy gaps, including areas where no policies to support fiscal functions are documented, existing policies are outdated or in need of minor updates or additions, and current internal control or gap coverage are missing key components.
- Prioritize policy gaps based on overall risk, and develop an implementation plan to provide the City with recommendations for prioritizing and addressing the identified policy gaps.

This engagement was performed in accordance with Standards for Consulting Services established by the American Institute of Certified Public Accountants. Accordingly, we provide no opinion, attestation, or other form of assurance with respect to our work or the information upon which our work is based. This report was developed based on our assessment of the City's fiscal P&Ps as of October 2021. The procedures we performed do not constitute an examination in accordance with generally accepted auditing standards or attestation standards.

B. SCOPE AND METHODOLOGY

This project was limited in scope to the City's finance and accounting (fiscal) functional areas. All fiscal P&Ps available as of October 2021 were provided to Moss Adams to assess as part of this project. Other P&P documents, informal process documentation, or guideline documents that are not approved formal P&Ps at the City level may exist; however, they were not included in this analysis and are therefore not included in the results presented in this report.

The procedures performed included:

- **Fiscal P&P Inventory** – We worked with City management to develop a full listing of finance and accounting policy areas that were applicable to the City and that would be included in the scope of this project. For each area, we performed the following:
 - Obtained all supporting/related P&P documents available
 - Documented a full inventory of the current existing P&P documents, including a summary of the coverage areas of each.
 - Discussed the full inventory of results with management to ensure that all P&P documents were provided and included in the inventory.
- **P&P Gap Analysis** – We assessed the inventory results and performed a full gap analysis, including:
 - Assessed the current content of each area to identify potential gaps in coverage.

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- Assessed existing P&P documents for opportunities to improve the overall content and flow/structure, incorporate best practices, and improve internal controls, where possible, to provide for effective resources for employees.
- Summarized the gaps identified for each P&P area.
- Categorized the significance and extent of the identified gaps as follows: full gaps, major gaps, or minor gaps. We also noted areas only in need of an update.
- **Prioritized P&P Work Plan Development** – Based on the results of the P&P inventory and gap analysis performed, we developed detailed recommendations, by area, for the City to use as a road map for developing, amending, or updating P&Ps. We assigned a risk level (high, medium, or low), as described in the table below, and a recommended priority order by phase based on the risk level. We discussed the prioritized P&P work plan with management, gathered input on the work plan, and made updates, as appropriate.

Gaps identified during the analysis were categorized as follows:

- **Full Gap** – Documented policies and procedures do not exist for the area.
- **Major Gap** – Some P&P documentation exists; however, there are major gaps in overall coverage.
- **Minor Gap** – P&Ps cover most of the key areas but require some updating or additional coverage.
- **Update Needed** – The P&P needs to be reviewed for potential updates.

The assessed risk level, category descriptions, and recommended phases/timing for addressing the gaps and related recommendations are described in the table below. The risk levels were assigned based on our understanding of the City, insights gained from management, the inherent risk in each area, and the level and significance of gaps identified.

| Assessed Risk Level | Category Description | Recommended Phase/Timing |
|---------------------|---|-----------------------------------|
| High Risk | <ul style="list-style-type: none"> ○ Area is inherently high risk ○ Gaps identified were either full gaps (i.e., no P&P coverage) or major gaps ○ Area is a high priority for the City's operations and structure | Phase One (within 12 months) |
| Medium Risk | <ul style="list-style-type: none"> ○ Area is inherently high or medium risk; however, a lack of documented P&Ps may only represent a medium risk to the City ○ Gaps identified were either full gaps or major gaps ○ Area is a high priority for the City's operations and structure | Phase Two (within 18 months) |
| Low Risk | <ul style="list-style-type: none"> ○ Area is inherently low risk ○ Gaps identified were either minor in significance or magnitude, or the area only needed review or updating ○ Area is a low priority for the City's operations and structure | Phase Three (within 24 months) |



II. OVERALL RESULTS

Throughout the P&P inventory and gap analysis, we found that the City has a variety of P&P documents; however, they are not consistently utilized, structured, or based on standard templates. Although the City appears to have consistent practices established and has approvals/process flows setup within the enterprise resource planning (ERP) system, the City does not have a defined P&P framework and as a result, in many cases it was unclear what level of policy a document fell under.

Some of the City's documents identified as "policies" included administrative procedures. In some areas, the City uses the notes included in their financial statements as "policies", as well as Council Resolutions, memos, or email to communicate requirements. The City does not have a standard template/format and there does not appear to be a structure for ensuring all policies are supported by underlying procedures. Additionally, there is no consistent means of identifying when policies are approved and effective. The effective date on most policies is not complete.

Utilizing a defined P&P framework with standard templates will help streamline the City's P&P resources. This framework can be used to define responsibilities at both the City Council and management level.

The City can utilize the Prioritized P&P Work Plan presented on the following page to carry out their efforts to develop and update their fiscal P&Ps. In addition to following summary table, we have provided management with a detailed Prioritized P&P Work Plan, which includes all results from the inventory and gap analysis performed and detailed recommendations by area.



III. PRIORITIZED P&P WORK PLAN

| Policy Area | Type of Gap | Associated Risk | Recommended Priority Level |
|-------------------------------------|-------------|-----------------|----------------------------|
| Accounting and Financial Reporting | Major Gaps | High | 1 |
| Accounts Payable | Full Gap | High | 1 |
| Budgeting | Major Gaps | High | 1 |
| Capital Assets | Major Gaps | High | 1 |
| Cash Management | Major Gaps | High | 1 |
| Payroll and Timekeeping | Full Gap | High | 1 |
| Procurement | Major Gaps | High | 1 |
| Revenue and Accounts Receivable | Full Gap | High | 1 |
| Debt Management/Tax Bond Compliance | Major Gaps | Medium | 2 |
| Gifts and Donations | Major Gaps | Medium | 2 |
| Grant Management | Full Gap | Medium | 2 |
| Investment Management | Minor Gaps | Medium | 2 |
| Credit Cards | Minor Gaps | Low | 3 |
| Inventory | Full Gap | Low | 3 |
| Travel and Expense Reimbursement | Minor Gaps | Low | 3 |



IV. SUMMARY OF RECOMMENDATIONS

The following table summarizes the recommendations related to high-risk policy areas. A detailed listing of full recommendations was provided separately to management.

| Policy Area | Summary of Recommendations |
|------------------------------------|---|
| Accounting and Financial Reporting | <p>Expand and develop full Accounting and Financial Reporting P&Ps that address, at a minimum, the following key areas:</p> <ul style="list-style-type: none"> • Chart of account maintenance, setup, and structure. • Fund structures, including the definition and use of each City fund, and required fund reconciliations. Information on this topic that is currently presented in the Financial Policies can be used as a starting point and expanded upon. • Journal entry preparation, approval, and posting. • Month-end and year-end close procedures, including timing, responsibilities for performing each procedure, review/approval responsibilities, and monitoring. • Financial Reporting: which reports will be prepared and on what basis (monthly, quarterly, etc.), who will be responsible for their review and approval, which reports will be presented to the City Council and/or Committees, and how frequently. • Audit requirements and auditor selection. • Significant Accounting Policies and Procedures: The City can utilize notes to audited financial statements as a starting point to accumulate significant accounting policies, then expand to address detailed procedures that will be applied to ensure compliance. • Account Reconciliations: Which balance sheet accounts are reviewed monthly; responsibility for preparation, review and approval; and procedures on performing reconciliations and addressing variances. • Monitoring controls including financial trend analysis (year to year, budget to actual, monthly fluctuations) and key performance indicators. • Unclaimed property handling, including any rules on forfeiture of property to the State Controller's Office. |
| Accounts Payable | <p>Develop full, comprehensive AP P&Ps that include all significant areas within the AP function including, but not limited to, the following:</p> <ul style="list-style-type: none"> • Vendor Management: New vendor setup and vendor changes, including required supporting documentation, approvals, and segregation of duties, vendor master list controls and annual reviews, and dormant vendors. In general, vendor management should be controlled by individuals independent of the AP process. • Invoice receipt, approval, and routing (manual or electronically) to AP for payment processing. • Reconciliation between invoice and purchase requisition (PR)/purchase order (PO), receiving documentation, etc. and documentation required to support this three-way match process. • Invoice coding and system entry. • A/P processing including required reviews/approvals, invoice tie-out, and pre- and post-check register reviews/approvals. • Check printing, signature, and check stock maintenance controls. • ACH payment processing and related controls. • Check mailing and support filing. |

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| Policy Area | Summary of Recommendations |
|------------------------------|---|
| | <ul style="list-style-type: none"> • Monitoring controls over the disbursement function, such as vendor file changes/addition reviews and trend analysis (i.e., total payments by vendor). • Record retention requirements to support the AP process/function. • Other key controls and internal procedures over the disbursement function. |
| <p>Budgeting</p> | <p>Expand and develop full, comprehensive Budget Management P&Ps that include all significant areas within the budget function including, but not limited to, the following key areas:</p> <ul style="list-style-type: none"> • Budget Preparation Process: How individual departments/programs should prepare their budgets, what data/historical and upcoming information should be used, and resources available to employees responsible for aspects of the budget process • Budget Calendar: Including a snapshot of all key dates in the process (initial budget notifications from Finance, department/program due dates, original draft budget submission, internal reviews/approvals, Council presentation and budget adoption/approval, budget finalization, system entry, etc.) • How to address budgeting for new funding identified during the year (resources greater than budget estimates, new appropriations or new grants/donations, etc.), including timeline requirements, reviews/approvals, and system entry • Budget monitoring, including budget-to-actual reporting, use and responsibilities, required reviews, justification for budget overages, and anticipating changes throughout the year • City-mandated budget requirements and how each will be considered and applied to ensure compliance • Budget amendment and transfer processing, including the documentation and approvals required and responsibilities for each • Overall roles and responsibilities within the budget function, including budget establishment, monitoring, etc. • Required budget-to-actual reporting to leadership and/or City Council, including what information is to be reported and at what frequency |
| <p>Capital Assets</p> | <p>Expand and develop a full, comprehensive Capital Asset P&P that includes all significant areas within the Capital Asset function including, but not limited to, the following:</p> <ul style="list-style-type: none"> • Capital budgeting (incorporate the existing Capital Improvement Policy located within Financial Policies) • Depreciation: Methods used, determination of useful lives, entering during asset setup, depreciation expense entry preparation, review, approval and posting, etc. • Capital asset receiving process, including physical receipt and documentation of receipt • Reporting new fixed assets to Accounting and issuing asset tags (including who issues tags, tracking tags, placement on assets, and recording tag numbers in ERP system) • New asset setup in the City ERP system (including required information, supporting documentation submitted/maintained, etc.) • Reconciliation between G/L and capital asset data in the ERP system, and reviews to ensure all capital assets are captured • Policies regarding capital asset reviews, their purpose, who is responsible for performing reconciliations, identifying variances, repairs/maintenance expense review and documentation, etc. • Capital Asset Custodians: Assignment and accountability of those responsible for capital assets in each department/division/site |

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| Policy Area | Summary of Recommendations |
|---------------------------------------|---|
| | <ul style="list-style-type: none"> ◦ Capital Asset Transfer and Disposal Procedures: Reporting disposals/transfers to Accounting, updating in the ERP system, changes in accountability, methods of disposal including documentation requirements and approvals, lost/stolen asset handling/reporting, etc. ◦ Annual Inventory Count: Procedures, condition assessment, and segregation of duties (including having an independent person perform count, identify assets damaged or not tagged, add assets, verify asset details, reconcile information, and make updates in the ERP). ◦ Record retention for capital assets |
| <p>Cash Management</p> | <p>Incorporate the existing Cash Receipts/Handling Policy into a full Cash Management P&P. A comprehensive set of Cash Management P&Ps should be developed and should cover, at a minimum, the following:</p> <ul style="list-style-type: none"> ◦ Bank account setup, cancelling, access monitoring, etc. ◦ Bank reconciliations, including responsibility for preparation, supporting documentation required, outstanding items monitoring, variance handling, review, and approvals ◦ Bank account signature authority ◦ Change fund policy (for sites that handle cash payments) ◦ Payment acceptance, including types of payments accepted (cash, checks, credit cards, ACH, etc.) and requirements for processing/accepting each type ◦ Cash reconciliations, deposits, and variance reporting (reporting overages/shortages) ◦ Counterfeit detection requirements ◦ Required frequency for remitting cash to Cashiering for deposit ◦ Segregation of duties ◦ Monitoring of locations' deposit frequency ◦ Consequences for non-compliance ◦ Minimum security requirements for transporting deposits ◦ Petty cash handling <p>The City should also consider developing site/location-specific P&Ps that apply to all City locations that accept or handle monies. Each site that handles payments should be required to develop internal Cash Handling P&Ps to show how they will ensure compliance with City-wide policies. Detailed Cash Handling P&Ps, by site, would include areas such as the following:</p> <ul style="list-style-type: none"> ◦ How receipts are issued and reconciled ◦ Where payments are recorded (manual log, system, etc.) upon receipt ◦ Responsibilities for cash handling and daily reconciliations ◦ Daily reconciliation procedures (i.e., base funds, system/log totals for receipts, payments being deposited, etc.) ◦ Detailed procedures for storing payments, closing credit card machines, etc. |
| <p>Payroll and Timekeeping</p> | <p>Develop comprehensive Payroll & Timekeeping P&Ps to help ensure that time worked is properly accounted for, reviewed, and approved; that pay rates are properly controlled and applied; and that employees are ultimately paid appropriately and accurately. Payroll and Timekeeping P&Ps should cover, at a minimum, the following:</p> <ul style="list-style-type: none"> ◦ New employee setup and pay rate adjustments (in general, this duty should be performed by someone independent of the payroll processing function to ensure that duties are adequately segregated) |

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| Policy Area | Summary of Recommendations |
|---|--|
| | <ul style="list-style-type: none"> • Time recording for exempt and non-exempt employees • Time reviews and approvals • Timecard edits or corrections before/after payroll processing • Transfer of time detail to process payroll • Payroll processing (including required reviews/approvals pre and post processing, reconciliations, general ledger posting, reporting, etc.) • Direct deposit setup and processing • Check printing, signature, and distribution • Payroll tax reporting and tracking and accrual account reconciliations • PTO accruals, use and recording, monitoring of PTO balances, etc. • Payroll monitoring and oversight (including pay rate change report reviews; timecard edit reviews; systems access monitoring; payroll trend analysis by employee, position, department, etc.; and other reviews/reporting performed to ensure the payroll function is well-controlled) |
| <p>Procurement</p> | <p>Expand and develop a full comprehensive set of Procurement P&Ps and include, at minimum, the following key areas:</p> <ul style="list-style-type: none"> • Due diligence thresholds, including online/verbal quotes, format written quotes, Requests for Proposal (RFPs), and a dollar threshold for each level of due diligence. The existing chart defines thresholds but does not provide details on how a user should complete the various methods. The attachments to the current policy, address some specific procedures (e.g., Formal Bid Procedures) but they need to be updated and organized. • Approval thresholds and a clear definition of the workflow process for obtaining all required approvals. In addition, definition of approvals that may be required for certain types of purchases, based on G/L code (i.e., IT, fixed assets, and/or grant-related). • Sole-source and emergency purchase procedures (justifications and documentation requirements, approvals, etc.) that define their appropriate use(criteria, etc.). • Initiating Purchase Requisitions (PRs), and a clear definition of the process for PRs and POs. • Receiving procedures and related documentation requirements (on packing slips/receiving reports and in the system, if applicable). • Segregation of duties between Purchasing and Receiving. • Documentation requirements and methods of storing information. • Suspension and Debarment Checks: The threshold for when to perform checks and responsibility for performing them, when they must occur in the procurement process, documentation required to support they were performed, how/where documentation will be maintained to support new vendor setup, and the reverification process to confirm that vendors used for longer than a specified period (e.g., one year) are reconfirmed and the results of the review are documented. • Specific requirements for certain high-risk purchases. • Specific restrictions and unallowable purchases (alcohol or other). |
| <p>Revenue and Accounts Receivable</p> | <p>Develop a comprehensive set of Revenue and A/R P&Ps at a City-wide level to address, at a minimum, the following:</p> <ul style="list-style-type: none"> • Defining the specific types of revenue throughout the City, referencing Department and Division-specific P&Ps where appropriate • Revenue recognition and accounting for revenue |

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| Policy Area | Summary of Recommendations |
|-------------|---|
| | <ul style="list-style-type: none"> • Customer account setup and requirements • Overall monitoring of revenue activity • Defining the City's requirements for billing and collection activities (including defining roles and responsibilities, documentation requirements, frequency, etc.) • Accounts receivable management, including tracking and reporting A/R, requiring aging analysis, reporting on delinquent accounts, etc. • Systems access related to A/R management systems, to ensure proper segregation of duties • Allowance for doubtful accounts establishment, recording of bad debt expense, criteria for estimate development, etc. • Handling refunds and account credits, including required documentation, approvals, etc. • Guidance to Departments/Divisions for developing their specific billing policies/procedures, and for ensuring consistency and enhancing revenue capture • Establishing criteria to determine when past due/delinquent accounts are sent to collection agencies and how revenue collection service providers are engaged and monitored • Defining when account write-offs can occur, what approvals are required, and how write-offs/account adjustments must be documented and controlled • Unclaimed Refunds: Procedures to follow when customers don't cash refund checks or checks are returned to the City Utility Bills, when to waive late fees, when to credit overcharged customers, when to invoice undercharged customers • General Bills and Taxes: When to waive late fees and allow for payment plans <p>Given the various types of revenue across the City, it may be appropriate for individual revenue-generating Departments/Divisions to develop their own specific P&Ps. These should cover how the Departments/Divisions will implement specific P&Ps and monitor for compliance with City-wide P&Ps, including the use of account management systems, reconciliations to the City's ERP system, specific billing/collection activities, etc.</p> |



Appendix A – Management Responses to Fiscal Policy Inventory and Gap Analysis:

1. Accounting and Financial Reporting

Management Response:

Management agrees that formalized policy and procedures are needed in Accounting and Financial Reporting. Currently, staff utilizes non-formalized procedures for the processes listed above. Staff created policies in these areas the review process and expected to be approved by the Director of Administrative Services and the City Manager.

2. Accounts Payable

Management Response:

Management agrees that formalized policy and procedures are needed in Accounts Payables. Currently, staff utilizes system set up and security and non-formalized procedures for the processes listed above. Staff created policies in these areas the review process and expected to be approved by the Director of Administrative Services and the City Manager.

3. Budgeting

Management Response:

Management agrees that formalized policy and procedures are needed in Budgeting. Currently, staff utilizes system security and non-formalized procedures for the processes listed above. Staff created policies in these areas are in the review process and expected to be approved by the Director of Administrative Services and the City Manager.

4. Capital Assets

Management Response:

Management agrees that formalized policy and procedures are needed in Capital Assets. Currently, staff utilizes non-formalized procedures for the processes listed above. Staff created policies in these areas are in the review process and expected to be approved by the Director of Administrative Services and the City Manager.

5. Cash Management

Management Response:

Management agrees that formalized policy and procedures are needed in Cash Management. Currently, staff utilizes non-formalized procedures for the processes listed above. Staff created policies in these areas are in the review process and expected to be approved by the Director of Administrative Services and the City Manager.

6. Payroll and Timekeeping

Management Response:

Management agrees that formalized policy and procedures are needed in Payroll and Timekeeping. Currently, staff utilizes system security and non-formalized procedures for the processes listed above. Staff created policies in these areas are in the review process and expected to be approved by the Director of Administrative Services and the City Manager.

7. Procurement



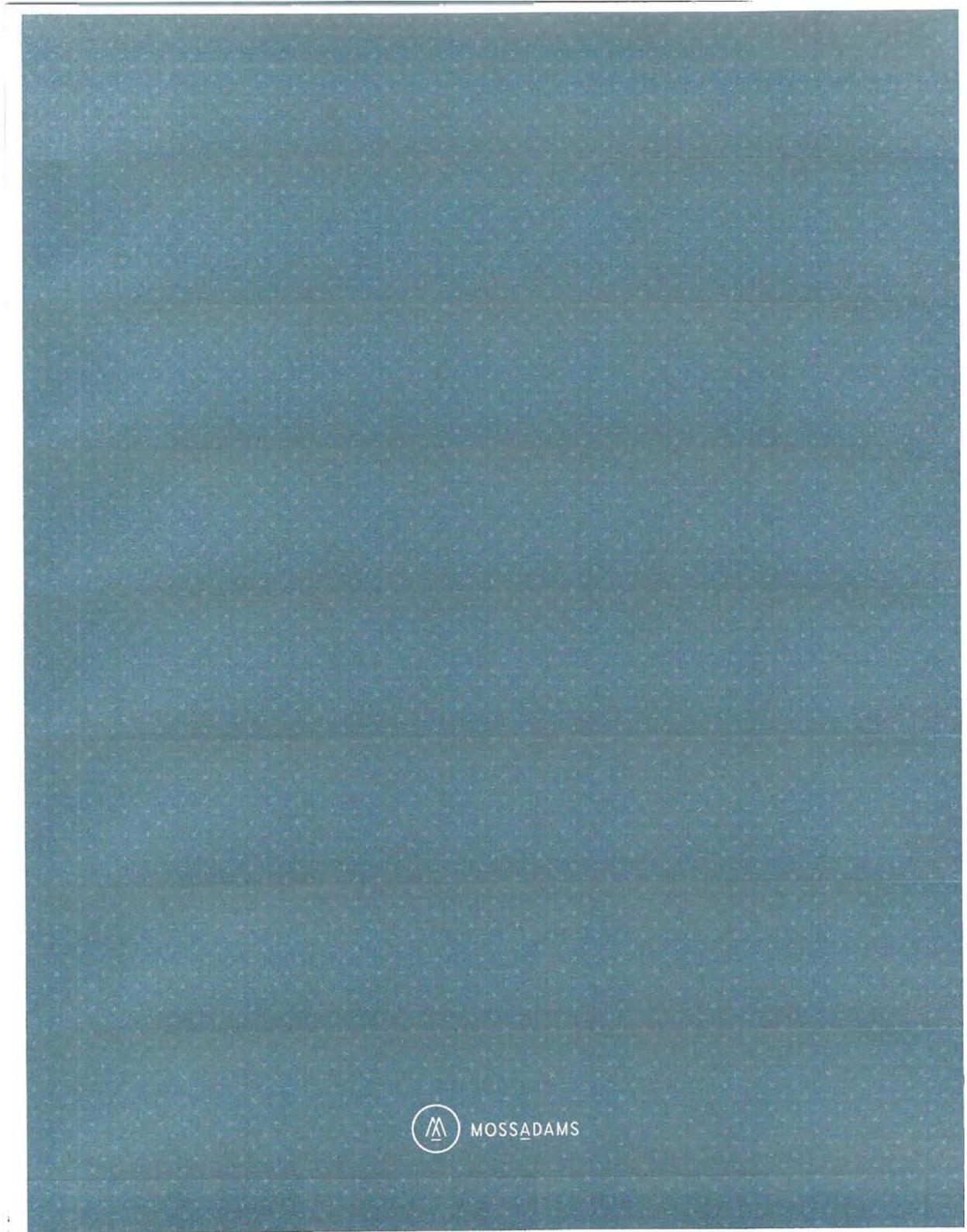
Management Response:

Management agrees that formalized policy and procedures are needed in Procurement. Currently, staff utilizes system security and non-formalized procedures for the processes listed above. Staff created policies in these areas are in the review process and expected to be approved by the Director of Administrative Services and the City Manager. These changes will be delayed as the City prioritizes findings from the procurement audit and has requested a Purchasing Manager as part of the Proposed Budget. To minimize changes and potential confusion all changes to procurement will occur at one time and after the review of the new Purchasing Manager should the position be approved.

8. Revenue and Accounts Receivable

Management Response:

Management agrees that formalized policy and procedures are needed in Revenue and Account Receivable. Currently, staff utilizes system security and non-formalized procedures for the processes listed above. Staff created policies in these areas are in the review process and expected to be approved by the Director of Administrative Services and the City Manager.



APPENDIX B

ATTACHMENT D

RESOLUTION NO. 18-

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CUPERTINO
ADOPTING THE CITY OF CUPERTINO CODE OF ETHICS AND CONDUCT
FOR ELECTED AND APPOINTED OFFICIALS

WHEREAS, the City Council of the City of Cupertino has determined that a Code of Ethics and Conduct benefits the public by increasing public confidence in the integrity of local government and its effective and fair operations; and

WHEREAS, the Cupertino Code of Ethics and Conduct will guide the conduct of Elected and Public Officials and support their independent, impartial, and fair decision-making and execution of policy; and

WHEREAS, City Council wishes to maintain an atmosphere of respect and civility in the performance of City affairs and public business.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Cupertino hereby adopts the attached "City of Cupertino Code of Ethics and Conduct for Elected and Appointed Officials"

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this ___ day of _____, ____, by the following vote:

Vote Members of the City Council

AYES:
NOES:
ABSENT:
ABSTAIN:

ATTEST:

APPROVED:

Grace Schmidt, City Clerk

Darcy Paul, Mayor
City of Cupertino

ATTACHMENT D



City of Cupertino

**DRAFT Code of Ethics and Conduct
For
Elected and Appointed Officials**

Adopted _____ by Resolution No. 18-____

PURPOSE

The Cupertino City Council adopts this Code of Ethics and Conduct as guidelines for elected and appointed officials to exercise their office and conduct themselves in a manner that instills public confidence and trust in the fair operation and integrity of Cupertino's city government.¹

In accordance with State law and Title 2 of the Cupertino Municipal Code, Cupertino's elected and appointed officials include the members of the City Council, the Mayor, appointed officers of City boards and commissions, the City Manager, the City Attorney, the City Clerk and the City Treasurer.

ETHICS

The citizens and businesses of Cupertino and the general public are entitled to have fair, ethical, and accountable local government. To this end, the public should have full confidence that their elected and appointed officials:

- Comply with both the letter and spirit of the law and policies affecting the operations of government and their respective roles and responsibilities; and
- Are independent, impartial, and fair in their judgment and actions; and
- Use their public office for the public good and not for personal gain; and
- Conduct their deliberations and make their decisions in an atmosphere of respect and civility, and during public meetings in accordance with Open Meeting laws, except for confidential proceedings allowed by law.

Therefore, members of the City Council, City Boards and Commissions, the City Clerk, the City Treasurer, the City Manager and the City Attorney (hereinafter, "City Officials") should conduct themselves in accordance with the following ethical standards:

1. **Act in the Public Interest.** Recognizing that stewardship of the public interest must be their primary concern, City Officials will work for the common good of the people of Cupertino and not for any private or personal interest, and they will assure fair and equal treatment of all persons, claims, and transactions coming before them.

¹ These guidelines are intended to codify the values of the City of Cupertino relative to the conduct of its elected and appointed officials and in no way distract from or supersede the many other rules and laws that govern city officials. By their very nature, some guidelines apply only to legislative bodies and decision-makers as noted in the Code.

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2. **Comply with both the spirit and the letter of the Law and City Policy.** City Officials must comply with applicable federal, state and local laws in the performance of their public duties. These include the United States and California constitutions; the Cupertino Municipal code; laws concerning financial disclosures; sources of income and gifts; conflicts of interest laws; elections; campaign contributions; incompatible offices; employer responsibilities; and open government rules.
3. **Conduct of City Officials.** The professional and personal conduct of City Officials while exercising their office must be above reproach and avoid situations that create the appearance of impropriety. Officials must refrain from abusive conduct, personal charges or verbal attacks upon the character or motives of other City Officials, city staff, or the public.
4. **Respect for Process.** City Officials will perform their duties in accordance with the processes and rules of order established by the City Council.
5. **Conduct at Public Meetings.** City Officials will come prepared to address items and issues at public meetings; will listen courteously and attentively to all public discussions before the body; and will focus on the business at hand.
6. **Decisions Based on Merit.** City Officials will base their decisions on the merits and substance of the matter at hand, rather than on unrelated considerations. When making adjudicative decisions that require determination of the facts of a particular case and application of the law and rules, decision-makers will maintain an open mind until the conclusion of the hearing on the matter and will base their decisions on the facts presented at the hearing and the law.
7. **Communication.** For adjudicative matters pending before the body, City Officials will rely on the agenda materials and information received at the public meeting to support their decision. To the extent substantive or material information is received outside of a public meeting, decision-makers must, at a minimum, publicly disclose the circumstances and the outside source of information. Consultation with the City Attorney is strongly advised to ensure the integrity and legality of decisions made on adjudicative matters.
8. **Conflict of Interest.** To maintain independence and impartiality for the common good and comply with the extensive set of conflict of interest

laws, City Officials will use caution and their best efforts to avoid the appearance of impropriety in their actions and decisions. Consistent with the law, decision-makers will not use their official positions to influence government decisions in which they have (a) a material financial interest, (b) an organizational responsibility to or personal commitment to others that creates a conflict of interest or the appearance of one, or (c) a strong personal bias as to one party or position.

Potential conflicts of interest should be discussed with the City Attorney at the earliest opportunity prior to a public meeting or hearing in order to ensure time to research and analyze the facts. Decision-makers are referred to the Cupertino Municipal Code, Section 2.18.030, which provides, among other things, that the City Attorney may render informal advice to individual Councilmembers regarding potential conflicts of interest, as appropriate. However, it is understood that Councilmembers are protected from potential liability for a conflict of interest only upon taking action that complies with a written opinion issued by the California Fair Political Practices Commission (FPPC).

If informed to seek formal advice from the FPPC or other State agency, a member will not participate in a decision until the FPPC has issued a written opinion that concludes there is no conflict. The member will provide the City Attorney a copy of the written request to the FPPC and the opinion, and will conform his or her participation to the advice given.

If a conflict of interest exists regarding a particular matter or decision, the member will not participate in the decision or discuss the matter with other decision-makers or other persons, unless otherwise permitted by law.

9. **Gifts and Favors.** Public Officials will not take advantage of services or opportunities for personal gain, by virtue of their public office, which is not available to the general public. They should refrain from accepting gifts, favors or promises of future benefits, which might compromise their independence of judgment or action or give the appearance of impropriety.
10. **Confidential/Privileged Information.** Public Officials have a duty to maintain the confidentiality of privileged documents and communications and the legal advice provided to or by them, in accordance with the law. This includes information gathered during a closed session and advice rendered by the City Attorney. Members will not disclose confidential or

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privileged information without proper legal authorization, nor use such information to advance their personal, financial, or other private interests.

11. **Use of Public Resources.** Public Officials should not use public resources which are not available to the public in general (e.g., City staff time, equipment, supplies, or facilities) for private gain or for personal purposes not otherwise authorized by law.
12. **Representation of Private Interests.** In keeping with their role as independent representatives of the City and stewards of the public interest, Councilmembers should not appear on behalf of the private interests of third parties before the Council or any Commission or proceeding of the City, nor should members of Commissions appear before their own bodies or before the Council on behalf of the private interests of third parties on matters related to the areas of service of their bodies.
13. **Advocacy.** Members should represent the official policies and positions of the City Council and Commission to the best of their ability when designated as delegates for this purpose. When presenting their individual opinions and positions, members should explicitly state they are speaking in their personal capacity and not in their official capacity as members of their respective bodies. When speaking in their personal capacities, members should state their views do not represent their bodies' official positions. Councilmembers and Commissioners have the right to endorse candidates for Council seats and other elected offices; however, it is inappropriate to mention or display endorsements during Council meetings, Commission meetings, or other official City meetings, unless otherwise allowed by law.
14. **Policy Role of Members.** Members should respect and adhere to the Council-Manager structure of Cupertino City government as outlined in the Cupertino Municipal Code. In this structure, the City Council determines the budget priorities and policies of the City with input provided by City staff and Commissions and the general public. Members should not interfere with the administrative functions of the City or the professional duties of City staff; nor should they impair the ability of staff to implement Council policy decisions.
15. **Independence of Commissions.** Because of the value of the independent advice of Commissions to the public decision-making process, members of

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the City Council should refrain from using their position to unduly influence the deliberations or outcomes of Commission proceedings.

16. **Positive Work Place Environment.** Public Officials should support a positive and constructive work place environment for City employees and for citizens and businesses dealing with the City. Members should recognize their special role with City employees and in no way create the perception of inappropriate direction to staff.

CONDUCT GUIDELINES

The Conduct Guidelines are designed to describe the manner in which City Officials should treat one another, City staff, constituents, and others they come into contact with while representing the City of Cupertino.

1. **City Officials' Conduct with Each Other in Public Meetings and Private Encounters**

Elected and appointed officials are individuals with different backgrounds, personalities, values, opinions and goals, who have chosen to serve in public office to protect the City's interests and the wellbeing of the community they serve. In all cases, this common goal should guide officials' conduct with each other and with the public, particularly when individuals may not agree on every issue.

- (a) *Respect and facilitate the role of the Chair in maintaining order*
It is the responsibility of the Chair to keep comments of City Officials on track during public meetings. City Officials should recognize and assist the Chair to focus discussion on noticed agenda items. If there is disagreement about the agenda or the Chair's actions, those objections should be voiced politely and with reason, following procedures outlined in parliamentary procedure.
- (b) *Practice civility and decorum in discussions and debate*
Difficult questions, challenges and disagreements with a particular point of view, and criticism of ideas and information are legitimate elements of debate and public discourse of a free democracy in action. Robust discussion and free debate, however, do not justify making belligerent, personal, impertinent, slanderous, threatening, abusive or disparaging comments.

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- (c) *Work through the Chair to address offensive personal comments*
If a member is personally offended by the remarks of another member, the offended member should make notes of the actual words used and call for a "point of personal privilege" that challenges the other member to justify or apologize for the language used. The Chair will maintain control of this discussion.
- (d) *Demonstrate effective problem-solving approaches*
City Officials have a public stage and have the responsibility to show how individuals with different points of view can find common ground and seek a compromise that benefits the community as a whole.
- (e) *Continue respectful behavior in private*
The same level of respect and consideration of differing points of view that is appropriate for public discussions should be maintained in private conversations.

2. City Officials' Conduct with the Public in Public Meetings

Making the public feel welcome is an important part of the democratic process. No signs of partiality, prejudice, or disrespect should be evident on the part of individual City Officials toward an individual participating in a public forum. Every effort should be made to be fair and impartial in listening to public testimony.

- (a) *Be welcoming to speakers and treat them with respect*
Members' primary responsibility during public testimony is to listen. Welcome all public speakers and encourage their active participation in public meetings by listening to their comments. Avoid engaging public speakers in debate, and call on the Chair whenever a point of order or clarification is required.
- (b) *Be fair and equitable in allocating public hearing time to individual speakers*
Consistent with legal requirements, the Chair will determine and announce limits on speakers at the start of a public meeting or hearing process.
- (c) *Practice active listening*
It is disconcerting to some speakers to have members not look at them when they are speaking. It is fine to look down at documents or

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to make notes, but reading for a long period of time or gazing around the room may give the appearance of disinterest. Members should try to be conscious of facial expressions, and avoid those that could be interpreted as "smirking," disbelief, anger or boredom.

- (d) *Maintain an open mind*
Members of the public deserve an opportunity to influence the thinking of elected and appointed officials.
- (e) *Ask for clarification, but avoid debate and argument with the public*
Only the Chair – not individual members – can interrupt a speaker during a presentation. However, a member can ask the Chair for a point of order if the speaker is off topic, exceeds the time allotted for public comment, or engages in behavior or discussion/language that is disruptive or violates the law.
- (f) *Avoid personal comments that could offend members of the public*
Whether addressing an individual member of the public or the public at large, it is never appropriate to make belligerent, personal, impertinent, slanderous, threatening, abusive, or disparaging comments.

3. **City Officials' Conduct with the Public in Unofficial Settings**

- (a) *Make no promises on behalf of the Council, Commission or City*
Members will frequently be asked to explain a Council or Commission action or to give their opinion about an issue as they meet and talk with constituents in the community. It is appropriate to give a brief overview of City policy and to refer to City staff for further information. It is not appropriate to overtly or implicitly promise Council or Commission action, or to promise that City staff will do something specific for the constituent.
- (b) *Make no personal comments about other City Officials*
It is acceptable to publicly disagree about an issue, but it is not acceptable to make derogatory comments about other City Officials, their opinions, or actions.

4. City Officials' Conduct with City Staff

Governance of a city relies on the cooperative efforts of elected officials who set policy, appointed officials who advise the elected, and City staff who implement and administer the Council's policies. Therefore, every effort should be made to be cooperative and show mutual respect for the roles and contributions made by each individual for the good of the community.

The City of Cupertino operates under a Council/Manager form of government as established in Cupertino Municipal Code Chapter 2.28 whereby the City Council controls the administrative services of the City only through the City Manager. The Council/Manager form of government is intended to provide the best of unencumbered professional/technical staff input balanced with the collective oversight of elected officials. Under the Council/Manager form of government neither the City Council, nor individual Council members, can give orders to any subordinate of the City Manager. The City Manager takes his or her orders and instructions from the City Council only when given at a duly held meeting of the City Council. No individual Councilmember can give any orders or instructions to the City Manager.

- (a) *Treat all staff as professionals*
Clear, honest communication that respects the abilities, experience, and dignity of each individual is expected. Poor behavior towards staff is not acceptable.
- (b) *Do not disrupt City staff from their jobs*
City Officials should not disrupt City staff while they are in meetings, on the phone, or engrossed in performing their job functions in order to have their individual needs met. Do not attend City staff meetings unless requested by staff – even if the elected or appointed official does not say anything, his or her presence implies support of a position, shows partiality, may intimidate staff, and may hampers staff's ability to do their job objectively.
- (c) *Never publicly criticize an individual employee*
City Officials should not criticize the performance of City employees in public, to the employee directly, or to the employee's manager. Comments about staff performance should only be made to the City Manager through private correspondence or conversation. Appointed

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officials should make their comments regarding staff to the City Manager.

- (d) *Do not get involved in administrative functions*
City Officials acting in their individual capacity must not attempt to influence City staff on the making of appointments, awarding of contracts, selecting of consultants, processing of development applications, or granting of City licenses and permits.
- (e) *Do not solicit political support from staff*
City Officials should not solicit any type of political support (financial contributions, display of posters or lawn signs, name on support list, etc.) from City staff. City staff may, as private citizens with constitutional rights, support political candidates, but all such activities must be done away from the workplace.
- (f) *Attorney-Client Relationship*
The City Attorney provides advice to City staff, to Public Officials, and to Councilmembers individually and collectively. In accordance with law and Rules of Professional Conduct, the City Attorney represents the full City Council and the City as a municipal organization, and any attorney-client relationship established belongs to the City, acting by and through the full City Council. To the extent permitted by law, only the City Council as a body and not individual councilmembers can waive the attorney-client privilege.

5. Council Conduct with Commissions

The City has established several Commissions as a means of gathering more community input. Citizens who serve on Commissions become more involved in government and serve as advisors to the City Council. They are a valuable resource to the City's leadership and should be treated with appreciation and respect.

- (a) *If attending a Commission meeting, be careful to only express personal opinions*
Councilmembers may attend any Commission meeting, which are always open to any member of the public. However, they should be sensitive to the way their participation could be viewed as unfairly affecting the process. Any public comments by a Councilmember at a Commission meeting should be clearly made as individual

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opinion and not a representation of the feelings of the entire City Council.

(b) *Limit contact with Commission members to questions of clarification*

It is inappropriate for a Councilmember to contact a Commission member to lobby on behalf of an individual, business, or developer, and vice versa. It is acceptable for Councilmembers to contact Commission members in order to clarify a position taken by the Commission.

(c) *Respect that Commissions serve the community, not individual Councilmembers*

The City Council appoints individuals to serve on Commissions, and it is the responsibility of Commissions to follow policy established by the Council. But Commission members do not report to individual Councilmembers, nor should Councilmembers feel they have the power or right to threaten Commission members with removal if they disagree about an issue. Appointment and re-appointment to a Commission should be based on such criteria as expertise, ability to work with staff and the public, and commitment to fulfilling official duties. A Commission appointment should not be used as a political "reward."

(d) *Be respectful of diverse opinions*

A primary role of Commissions is to represent many points of view in the community and to provide the Council with advice based on a full spectrum of concerns and perspectives. Councilmembers may have a closer working relationship with some individuals serving on Commissions, but must be fair and respectful of all citizens serving on Commissions.

(e) *Keep political support away from public forums*

Commission members may offer political support to a Councilmember, but not in a public forum while conducting official duties. Conversely, Councilmembers may support Commission members who are running for office, but not in an official forum in their capacity as a Councilmember.

6. **Conduct with the Media**

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Commission members are not authorized to represent the City to media outlets (including broadcast, print, and social media sites) outside of official Commission meetings unless specifically authorized to do so.

- (a) *The Mayor is the official spokesperson for the City Council on City positions*
The Mayor is the designated representative of the City Council to present and speak on the official City position. If an individual Councilmember is contacted by the media, the Councilmember should be clear about whether their comments represent the official City position or a personal viewpoint.
- (b) *Choose words carefully and cautiously*
Comments taken out of context can cause problems. Be especially cautious about humor, sardonic asides, sarcasm, or word play. It is never appropriate to use personal slurs or swear words when talking with the media.

COMPLIANCE

1. *Acknowledgement of Code of Ethics and Conduct*
City Officials should sign an acknowledgement that they have read and understand the guidelines contained in the Code of Ethics and Conduct.
2. *Ethics Training for Local Officials*
City Officials must comply with State or City mandated requirements for ethics training. Ethics training must be completed prior to representing the City on intergovernmental assignments or Council subcommittees.
3. *Behavior and Conduct*
The Cupertino Code of Ethics and Conduct sets forth guidelines and standards of ethical conduct desired and expected for members of the Cupertino City Council and Commissions and other City Officials. Members themselves have the primary responsibility to assure that ethical standards are understood and met, and that the public can continue to have full confidence in the integrity of city government. The Chairs of Commissions and the Mayor and Council have the additional responsibility to intervene when actions of members that appear to be in violation of the Code of Ethics and Conduct are brought to their attention.
 - (a) City Council:
Individual Councilmembers should point out to the offending

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Councilmember perceived infractions of the Code of Ethics and Conduct. If the offenses continue, then the matter should be referred to the Mayor in private. If the Mayor is the individual whose actions are being questioned, then the matter should be referred to the Vice Mayor. It is the responsibility of the Mayor (or Vice Mayor) to initiate action if a Councilmember's behavior is not in compliance with the Code of Ethics and Conduct. If no action is taken by the Mayor (or Vice Mayor), then the alleged violation(s) can be brought up with the full Council.

(b) Commission Members:

Counseling, verbal reprimands, and written warnings may be administered by the Mayor to Commission members failing to comply with City policy. These lower levels of sanctions should be kept private to the degree allowed by law. Copies of all written reprimands administered by the Mayor should be distributed in memo format to the Chair of the respective Commission, the Commission Staff Liaison, the City Clerk, the City Attorney, the City Manager, and the City Council.

In accordance with law, the City Council may impose sanctions on Commission members whose conduct does not comply with the City's policies, up to and including removal from office. Any form of discipline imposed by Council should be determined by a majority vote of at least a quorum of the Council at a noticed public meeting, and such action should be preceded by a Report to Council with supporting documentation.

When deemed warranted, the Mayor or majority of Council may call for an investigation of Commission member conduct. Also, should the City Manager or City Attorney believe an investigation into a member's conduct is warranted, they may refer the matter to the Mayor or Council. The Mayor or Council should ask the City Manager or the City Attorney to investigate the allegation and report the findings.

These sanctions are alternatives to any other remedy allowed by law to remedy conduct that violates this code or State or Federal law. In order to protect and preserve good government, all members of the City organization should be cognizant of their responsibilities and duties to meet the requirements of the law and uphold the guidelines

contained in this Code.

IMPLEMENTATION

The Code of Ethics and Conduct is intended to be self-enforcing and is an expression of the standards of conduct for City Officials expected by the City. It therefore becomes most effective when City Officials are thoroughly familiar with it and embrace its provisions.

For this reason, this document should be included in the regular orientations for candidates for City Council, City Manager, City Attorney, applicants to Commissions, and newly elected and appointed City Officials. Members entering office should sign a statement (example below) acknowledging they have read and understand the Code of Ethics and Conduct. In addition, the Code of Ethics and Conduct should be periodically reviewed by the City Council and updated it as necessary.

I affirm that I have read and understand the City of Cupertino Code of Ethics and Conduct for Elected and Appointed Officials.

Signature

Date

APPENDIX C

RESOLUTION NO. 20-011

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF CUPERTINO
ADOPTING THE CITY OF CUPERTINO ETHICS POLICY

WHEREAS, the City Council of the City of Cupertino has determined that an Ethics Policy benefits the public by increasing public confidence in the integrity of local government and its effective and fair operations; and

WHEREAS, the Cupertino Ethics Policy will guide the conduct of the City Council, officials appointed by the Council, and City staff (collectively "public officials") and support their independent, impartial, and fair decision-making and execution of policy; and

WHEREAS, City Council wishes to maintain an atmosphere of respect and civility in the performance of City affairs and public business.

NOW, THEREFORE, BE IT RESOLVED that the City Council does hereby adopt the attached "City of Cupertino Ethics Policy"

PASSED AND ADOPTED at a regular meeting of the City Council of the City of Cupertino this 21st day of January, 2020, by the following vote:

Vote Members of the City Council

AYES: Scharf, Paul, Chao, Sinks
NOES: None
ABSENT: Willey
ABSTAIN: None

| | |
|--|----------------------------------|
| <p>SIGNED:</p>  <p>_____ Steven Scharf, Mayor City of Cupertino</p> | <p>2/5/20 _____ Date</p> |
| <p>ATTEST:</p>  <p>_____ Kirsten Squarcia, City Clerk</p> | <p>2/5/20 _____ Date</p> |

CITY OF CUPERTINO ETHICS POLICY

The citizens, businesses, and organizations of the City are entitled fair, ethical, and accountable local government that has earned the public's full confidence for integrity.

To this end, the City Council has adopted this Ethics Policy for City Council, appointed officials, and staff of the City of Cupertino to promote public confidence in the integrity of local government and its effective and fair operation.

A. Comply with Law

City elected/appointed officials and staff comply with the laws of the nation, the State of California and the City in the performance of their public duties. These laws include, but are not limited to: the United States and California constitutions, the Cupertino Municipal Code, City ordinances and policies, and laws pertaining to conflicts of interest, election campaigns, financial disclosures, employer responsibilities and open processes of governments. The City ensures its elected/appointed officials and staff receive regular training on ethics as required by state law.

B. Conduct of Members

The professional and personal conduct of City elected/appointed officials and staff should be respectful of others, recognizing that individuals can respectfully disagree with each other. City elected/appointed officials and staff should refrain from abusive conduct, personal charges, or verbal attacks upon the character or motives of others, including members of the Council, boards and commissions, the staff, or the public.

C. Respect for Process

City elected/appointed officials and staff perform their duties in accordance with various processes and rules of order established from time to time by the City Council governing the deliberation of public policy issues, conduct of quasi-judicial proceedings, meaningful involvement of the public, and implementation of policy decisions of the City Council by City staff.

D. Decisions Based on Merit

City elected/appointed officials and staff make their decisions in the best interest of the City, which might include relevant policy considerations, rather than on unrelated considerations.

E. Conflict of Interest

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The City's ethics policy regarding conflicts of interest is to comply with all applicable ethics rules in the State of California. This Policy is not intended to go beyond or expand upon those rules. In general, in order to assure their independence and impartiality on behalf of the common good, City elected/appointed officials and staff do not use their official positions to participate in or influence decisions in which they have a material financial interest, an organizational responsibility, or a close familial or embroiled personal relationship.

F. Gifts and Favors

City elected/appointed officials and staff limit and report gifts as required by state law, and follow advice provided by the City Attorney.

G. Confidential Information

City elected/appointed officials and staff respect the confidentiality of information concerning the property, personnel, and affairs of the City. They neither disclose confidential information without proper legal authorization, nor use such information to advance their personal, financial or other private interests.

H. Use of Public Resources

City elected/appointed officials and staff do not use public resources, such as City staff time, equipment, supplies or facilities, for private gain or personal/political purposes (except to the extent those resources are available to the public generally).

I. Representing the City & Advocacy

When formally authorized to represent and/or advocate for the official policies or positions of the City, elected/appointed officials and staff must do so accurately and in a limited fashion that does not go beyond the scope of their authority. By contrast, when City elected/appointed officials and staff are presenting their individual opinions and positions on issues potentially relevant to the City, they must explicitly state they do not represent their body or the City and must not allow any inference that they do.

J. Positive Work Place Environment

City elected/appointed officials and staff support the maintenance of a positive and constructive work place environment for City employees and for citizens and businesses dealing with the City. City elected/appointed officials recognize their special role in dealings with City staff, taking care not to create any perception of inappropriate direction to staff.

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This report was **ADOPTED** by the County of Santa Clara 2022 Civil Grand Jury on this 19th day of December, 2022.

A handwritten signature in blue ink, appearing to read "Karen A. Enzensperger", is written over a horizontal line.

Ms. Karen Enzensperger
Foreperson



CITY MANAGER'S OFFICE

CITY HALL
10300 TORRE AVENUE • CUPERTINO, CA 95014-3255
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February 22, 2023

Honorable Beth McGowen
Presiding Judge (2023)
Superior Court of California
County of Santa Clara
191 North First Street
San José, CA 95113

RE: Civil Grand Jury Report

Dear Judge McGowen:

Pursuant to California Penal Code section 933 *et seq.*, please find enclosed the City of Cupertino's response to the 2022 Santa Clara County Civil Grand Jury Report, "A House Divided: Cupertino City Council and City Staff." The City Council approved the City's response to the Grand Jury Report on February 21, 2023. The approved City response is enclosed for your review. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to be "P. Wu".

Pamela Wu
City Manager

Enclosure

**CITY OF CUPERTINO RESPONSE TO THE FINDINGS AND RECOMMENDATIONS OF THE
2022 SANTA CLARA COUNTY CIVIL GRAND JURY REPORT, “A HOUSE DIVIDED: CUPERTINO
CITY COUNCIL AND CITY STAFF”**

Finding 1

The City has a culture of distrust between the councilmembers and City staff that is creating dysfunction.

Response: *Partially agree/partially disagree.* The Grand Jury Report identifies examples of conflict and distrust that the City should strive to overcome. The City agrees that the Grand Jury has identified a genuine problem in the City, although descriptions of specific instances may be inaccurate or incomplete. The Report may also overstate the level of “dysfunction” that is present in the City. The City continues to deliver a high level of services to its residents. In addition, the City continues to make policy progress in many areas—for example, the City Council recently approved two much-needed major housing projects and several smaller developments, and the City continues to innovate in policy areas such as its response to climate change and the reduction of single-use plastics.

Despite some areas of disagreement with the Grand Jury’s conclusions, the City agrees that distrust between staff and councilmembers has been pervasive and mutual. The Grand Jury Report correctly calls attention to the need for trust and civility in interactions between Council and staff.

Recommendation 1

The City should develop or acquire a good governance training and development program for both existing and newly elected councilmembers and existing and new staff members to address: (i) their role, responsibilities, and the relevant laws that specify and/or limit their function; (ii) the division of responsibilities between councilmembers and staff as directed by the Cupertino Municipal Code; and (iii) the necessity of morale building to create a stronger, more effective, and respectful relationship between City staff and councilmembers. Recommendation 1 will be implemented by March 31, 2023.

Response: The City has begun implementing Recommendation 1 and will complete implementation of the recommendation by the end of Fiscal Year 2022-2023. The City executive leadership team and City Council will continue to strive for a more respectful relationship between staff members and councilmembers. Councilmembers and staff are consistently advised on their roles and responsibilities under the Council-Manager form of government, including responsibilities that are codified in the Cupertino Municipal Code. The City management team has provided Council training on these issues during recent Council orientation and retreat sessions and will continue to reinforce the message delivered at those training sessions. In addition, on September 6, 2022, the City Council

approved the Fiscal Year 2022-2023 Internal Audit Workplan. That workplan included an Enterprise Leadership Study that will assess the effectiveness of the City's management and governance collaboration framework and provide recommendations to strengthen and streamline procedures to align with best practices for municipal leadership. The study began in January and is expected to be completed by June 2023. In addition, the City continues to make policy progress in many areas—for example, the City Council recently approved two significant large development projects and a number of smaller developments in a timely fashion, and the City continues to innovate in policy areas such as its response to climate change and the reduction of single-use plastics.

The City also acknowledges the need for improved staff training on the role of City staff within the Council-Manager form of government and will seek to develop recommendations for improving staff training and morale in connection with the implementation of Recommendation 2, below.

Finding 2

The dysfunction prevalent between the City Council and City staff has negatively impacted City operations, including the continuing loss of skilled and experienced personnel. The City has a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult.

Response: *Partially agree/partially disagree.* While it is difficult to disentangle Cupertino-specific factors from larger economic trends that have made recruitment and retention challenging for government agencies throughout the region, the City is aware of instances where poor Council-staff relations have contributed to the decisions of staff to leave the City. At the same time, the City has recently had successful recruitments to fill key positions with qualified external and internal candidates. Despite these successes, the City acknowledges that reputational issues have created challenges for the recruitment and retention of key personnel that the City must strive to overcome.

Recommendation 2

The City should hire a consultant to study staff morale and make recommendations to improve retention of employees and quality of the working environment. To the extent legally permissible, the study and recommendations should be published for public review. Recommendation 2 should be implemented by July 31, 2023.

Response: The City agrees with Recommendation 2 and will implement the recommendation through an update to the citywide risk assessment first conducted in December 2020 by the City's internal auditor. The City anticipates including the update in the Fiscal Year 2023-2024 Internal Audit Workplan.

Finding 3

The City has not taken sufficient steps to improve the City's financial risk profile as recommended by its retained internal auditor.

Response: *Disagree.* While the City agrees that the internal auditor's recommendations should be implemented, the Grand Jury Report provides an inaccurate view of the City's "financial risk profile." The City has implemented financial controls to protect against fraud, waste and abuse, including the following:

- In December 2014, the City implemented a new enterprise resources planning ("ERP") software, New World. The transition to New World improved internal controls on procurement by establishing multi-layered approvals to prevent fraud, waste, and abuse.
- In conjunction with the upgrade of the City's ERP software in 2014, the City incorporated a decentralized accounting structure to enhance segregation of purchasing and financial duties.
- Since 2014, the City has hired 4.5 additional full-time equivalent staff to improve segregation of duties and internal controls.
- The City implemented a Council-approved Fraud, Waste and Abuse Program in Fall 2022.
- The City submitted eight of the nine financial policies listed in the high-risk category for review by the internal auditor as reported to the Audit Committee on November 28, 2022. The City presented the ninth policy to the internal auditor for review by January 2023. The City expects all nine policies will be finalized for approval by June 30, 2023.

In addition, the December 14, 2022 Grand Jury Report, "Show Me the Money", confirmed that the City is in compliance with its financial reporting requirements.

The City disagrees with the Grand Jury Report's characterization of these measures as not "sufficient." Nevertheless, the City agrees that implementation of City's Internal Audit Workplan should be prioritized, as reflected in the above response and the City's responses to the recommendations below.

Recommendation 3a

The City should implement the work plan identified in the May 2022 Fiscal Policy Inventory and Gap Analysis Report developed by the City's internal audit firm, Moss Adams LLP, to address policy and procedural gaps and weaknesses. Recommendation 3a

should be implemented by July 31, 2023.

Response: The City agrees with this recommendation and intends to implement the work plan identified in the May 2022 Fiscal Policy Inventory and Gap Analysis Report by June 30, 2023.

Recommendation 3b

The City should employ the use of continuing annual internal audits to assess progress in the development and implementation of new or modified policies and procedures to comply with internal audit risk reduction and mitigation recommendations. Recommendation 3b should be implemented by July 31, 2023.

Response: This City has implemented Recommendation 3b.

Finding 4

A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, it includes sanctions and consequences for deviations from the standard. The City's Ethics Policy is generic and lacks enforcement provisions and therefore fails to provide a framework to address ramifications for policy violations.

Response: *Partially agree/partially disagree.* The Grand Jury Report correctly emphasizes the importance of baseline standards for ethical behavior, including sanctions for noncompliance. As in most cities, the responsibility for holding elected officials and staff accountable for any ethics code violations falls on the City Council and City Manager, respectively. With respect to the level of detail in the Ethics Policy, ethics policies vary widely among jurisdictions in level of detail and prescriptiveness. Regardless of the form of the ethics policy, the policy should serve the purposes of increasing public confidence in the integrity of local government and its effective and fair operations, and support independent, impartial, and fair decision-making and execution of policy by City officials, as reflected in City of Cupertino Resolution 20-011, adopting the current Ethics Policy.

Recommendation 4a

The City should establish an independent Public Ethics Commission with guidance from experts in applied ethics, such as the Markkula Center for Applied Ethics at Santa Clara University, to: (i) develop and implement a robust government ethics training program for all councilmembers; and (ii) evaluate a best practices enforceable Code of Ethics and Conduct Policy that governs all councilmembers and appointed officials for consideration by the City Council. This recommendation should be implemented by March 31, 2023.

Response: The City provides required ethics training for elected officials and supplements that required training with opportunities for additional ethics education at League of Cities conferences and Council retreats. The City will review its current ethics training for

opportunities to improve training for councilmembers and other City officials.

The City Council will also consider revisions to the current Ethics Policy using the Ethics Policy adopted by the City Council in 2018 as a starting point. However, based on the City's understanding of ethics policies in peer jurisdictions, the City Council is typically responsible for considering ethics violation and enforcing sanctions against councilmembers, commissioners, and committee members where appropriate; few, if any, peer jurisdictions delegate this authority to an independent ethics commission. The Grand Jury's recommendation fails to take into account the administrative burden and expense of establishing an independent ethics commission in smaller jurisdictions such as Cupertino.

In addition, on February 7, 2023, the City Council adopted a Procedures Manual that establishes policies for the conduct of Council meetings and other Council business. The Procedures Manual includes standards for conduct and decorum that are consistent with the Grand Jury's recommendations. Similarly, on February 21, 2023, the City Council directed staff to review the Commissioners Handbook to bring policies and procedures governing City commissions into alignment with the Council Procedures Manual and to address other concerns raised in the Grand Jury Report.

Recommendation 4b

The City should reinstate enforcement procedures to enable the City Council and the public to file complaints and testify at public hearings to help remediate ethics violations. This revision should include a procedure for public admonishment, revocation of special privileges, or censure. This recommendation should be implemented by March 31, 2023.

Response: It is unclear what prior enforcement provisions the Grand Jury report references in this recommendation. The City's 2018 Ethics Policy, like its current Ethics Policy, is explicitly self-enforcing. (Grand Jury Report, Appendix B at p. 46.) Consistent with the practice in an overwhelming majority of Cupertino's peer jurisdictions, the City Council is, and at all recent times has been, responsible for enforcing standards for the behavior and conduct of its own members. To that end, the City Council has directed the City Attorney to investigate and report back to Council regarding other potential violations of the Municipal Code arising out of Council-staff or commissioner-staff relations. The intent of the Report is to allow Council opportunities to correct past Municipal Code violations and prevent future violations.

Recommendation 4c

The City Council should engage a conflict resolution professional to help enhance mutual understanding and respect amongst all stakeholders. This recommendation should be implemented by January 31, 2023, and should be repeated at least once per year.

Response: It is unclear how Recommendation 4c relates to Finding 4. However, the City will identify opportunities for implementing this recommendation where appropriate.

Recommendation 4d

The City should publish its current Ethics Policy on the City website by January 31, 2023.

Response: The current Ethics Policy continues to be available on the City's website and has now been posted on the City Council page. The response to this recommendation has been completed.

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Confidential Fact Finding Report

Review of Outstanding Issues and Concerns Raised by the Findings and Recommendations of the 2022 Santa Clara Civil Grand Jury Report, A House Divided: Cupertino City Council and City Staff, Published on December 19, 2022

*Prepared by: Linda L. Daube, Esq.
Submitted: May 1, 2023*

**THIS REPORT SHALL ONLY BE PUBLICLY DISCLOSED ON CONDITION
THAT THE CITY COUNCIL OF THE CITY OF CUPERTINO WAIVES THE
ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT**

I. Procedural History and Overview of the Allegations: Basis for Additional Review

The Undersigned was retained on February 14, 2023 to independently review some of the findings set forth in the 2022 Santa Clara County Civil Grand Jury Report, "A House Divided: Cupertino City Council and City Staff", dated December 19, 2022 (hereinafter referred to as "Report"). Specifically, the scope of my review included reviewing past and on-going communications among City of Cupertino ("City") staff, City Councilmembers, and City Commission members. The scope of the assignment was the result of City Council direction to staff during its February 7, 2023 City Council meeting regarding the City's proposed response to the Report's Finding No. 4, Recommendation 4b, that provided:

"The City should reinstate enforcement procedures to enable the City Council and the public to file complaints and testify at public hearings to help remediate ethics violations. This revision should include a procedure for public admonishment, revocation of special privileges, or censure. This recommendation should be implemented by March 31, 2023." [Report, @ p. 16].

In a subsequent City Council meeting on February 21, 2023, Councilmember Fruen moved that the following language be added to the City's response to Recommendation 4(b) of the Report: ". . .the City Council has directed the City Attorney to investigate and report back to Council

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regarding other potential violations of the Municipal Code arising out of Council-staff or commission-staff relations. The intent of the Report is to allow Council opportunities to correct past Municipal code violations and prevent future violations." [emphasis added]. Councilmember Fruen's motion was approved by the City Council. This Investigator initiated the review at the direction of the City Attorney.

What was relevant to determining the scope of the review as well as determining the appropriate individuals to be contacted was the discussion among Councilmembers during the February 7 and the February 21, 2023 City Council meetings. During these meetings both Councilmember Moore and Councilmember Chao raised concerns about the investigative review process of the Santa Clara County Civil Grand Jury, and Councilmember Moore pointed to a significant inaccuracy in the December 19, 2022 report regarding the description of her (Moore's) purported contact with a subordinate staff member regarding a City employee's charges incurred on a City issued credit card.¹ [Refer to p. 8 of the Report].

Councilmember Chao raised issues that the Civil Grand Jury process was flawed and there was no opportunity to cross-examine complainants. Chao stated that she had been contacted and had been interviewed by the Civil Grand Jury and had offered emails and documents to them, but the Civil Grand Jury ignored her (Chao's) explanations and offer to provide additional documentation. Chao also contended that she was not admonished to tell the truth as is done in any court proceeding and could only conclude that other interviewees had likewise not been admonished. During the February 21st meeting, Chao expressed concerns that there was no accountability for statements made by those interviewed by the Civil Grand Jury. Accordingly, both Moore and Chao were contacted during this investigation to provide an opportunity to more fully respond to the Findings or Recommendations set forth in the Report.

As will be more fully discussed under Section II, *Investigative Methodology*, individuals to be interviewed were initially selected based upon whether that individual had been specifically or by reference involved in the incidents discussed in the Report.

Overview of the Civil Grand Jury Findings and Recommendations

On December 19, 2022, the Santa Clara County Civil Grand Jury issued its findings in a report entitled, "A House Divided: Cupertino City Council and City Staff". The report was the result of the Civil Grand Jury

¹ During the February 7, 2023 meeting, City Attorney Jensen publicly reported that in responding to the Civil Grand Jury Report, the response would not include a response to all purported inaccurate factual statements; however, Jensen stated that the description of Councilmember Moore's requests for information regarding staff credit card usage was incorrect.

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receiving multiple complaints concerning the conduct of City Councilmembers toward City management and staff. According to the Report, the Civil Grand Jury reviewed the following allegations that: 1) Councilmembers interfered in the day-to-day operations of the City; 2) Councilmembers routinely berated and belittled presentations made by City staff during City Council meetings; and, 3) certain Councilmembers gave direct work assignments to City employees, thwarting the requirements of the Council-Manager form of government set forth under the City's Municipal Code.

The Report resulted in four (4) Findings, three (3) of which directly related to the scope of this review:

- **Finding 1** – The City has a culture of distrust between the Councilmembers and City staff that is creating dysfunction;
- **Finding 2** – The dysfunction prevalent between the City Council and City staff has negatively impacted City operations, including the continuing loss of skilled and experienced personnel. The City has a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult; and,
- **Finding 4** – A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, it includes sanctions and consequences for deviations from the stand. The City's Ethics Policy is generic and lacks enforcement provisions and therefore fails to provide a framework to address ramifications for policy violations. [Civil Grand Jury Report @ pp. 15-16.]

Moreover, the Report included references to complaints that had been brought forth during the course of its investigation including, without limitation, the following:

1. Existence of Councilmember distrust of City staff and staff fear of retaliation from Councilmembers [Report @ p. 3];
2. City Councilmembers behaving inappropriately toward the City Manager and staff, including routine disrespect and the inclination to doubt the accuracy of the City's staff work [Report @ p. 3];
3. Evidence of high turnover in key management and leadership positions within City government resulting in the loss of employees with significant capabilities and experience [Report @ p. 3];
4. Some Councilmembers' requests have been voluminous or "come on the heels of the Councilmember's specific dissatisfaction with a staff report on a certain subject and, thus, appears punitive as opposed to a genuine information request" [Report @ p. 7];
5. High staff and management turnover has reduced the operating efficiency of the City's government [Report @ p. 3];

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6. High staff turnover was not supported by the contention that the turnover was the result of retirements and staff seeking better, higher paying positions [Report @ p. 12];
7. The “abnormally” high turnover rate among City staff, including key staff positions, is the result of the belief of City staff that their work is unappreciated and devalued by Councilmembers [Report @ p. 12];
8. The abnormally high turnover rate of management and executive management staff has negatively impacted the City’s reputation and, in turn, has led to its inability to attract qualified people for some key staff and managements positions [Report @ p. 12];
9. Councilmember requests for information is often perceived by City staff as “councilmanic interference” and the time to respond to requests could be interpreted as inappropriately interfering with department workloads, staff decisions, schedules, and/or department priorities [Report @ p. 7];
10. In some instances, when City Councilmembers believed they did not receive requested information, the individual Councilmember filed a Public Records Request (“PRA”) pursuant to California Government Code § 6250 *et seq.*, which generally is an option available to members of the public and is not typically used by City Councilmembers [Report @ p. 7];
11. It may be frustrating to Councilmembers who request additional staff information to not receive such information as Councilmembers are charged with governing and must be informed to make important decisions about the direction of the City [Report @ p. 7].

As will be more fully discussed in Section IV, *Allegations and Factual Findings*, of this Fact-Finding Report, based upon the consistent and unequivocal statements provided by current and former City executive and management staff interviewed and the numerous email communications between Councilmembers, Commissioners, and staff, there was substantial evidence to support and sustain all of these factual findings.

While many of the Civil Grand Jury’s findings were described in somewhat “conclusory” terms, e.g., “existence of distrust and fear”, “berated”, “councilmanic”,² the Report clearly highlighted several government operational issues that warranted further review given the direction of the City Council at its February 21, 2023 meeting. Accordingly, the focus of my review was to ascertain facts that either supported in full or in part and/or did not support the ultimate findings/recommendations of the Report.

² As will be more fully discussed below, interviewees were asked what these “conclusions” referenced in the Report meant to them and what factual examples reflected, supported, and/or did not support these conclusions. Specific examples of interviewee responses will be more fully discussed below.

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My evaluation takes into account the undisputed fact that the City's turnover rate in key executive management positions is significant with the employment of four City Managers since 2019. Moreover, as cited in the Report, over 50% of Planning Division staff and 60% of the City's senior management staff have left the City since January 2022.

It is also significant that after the publication of the Report, on February 3, 2023, the City Council engaged in a comprehensive City Council Governance Workshop with the purpose of: 1) strengthening the effectiveness of the City Council as a governing body; 2) clarifying roles within the governance and administrative structure of the City; and 3) establishing agreement on norms for working together with each other and with staff on behalf of the Cupertino community.

Further, at a regular Council meeting on February 7, 2023, by majority vote, the City Council adopted Resolution No. 23-021, *Cupertino City Council Procedures Manual* (hereinafter referred to as "Manual"). The Manual included guidelines for communication with City staff, Councilmember access to information and requests for information, decorum and civility in interacting with City staff and with other Councilmembers, and the conduct of deliberations/debates during City Council meetings. The Manual also incorporates applicable sections of the Municipal Code and, in essence, provides administrative guidelines to comply with and implement certain provisions of the Municipal Code. Moreover, and consistent with the issues raised by the Civil Grand Jury regarding the lack of enforcement procedures of the City's Code of Ethics policy, the Manual provides that "[t]he City Council may enforce repeated or serious violations of the rules set forth in the Manual through a censure action placed on a Council agenda."

As part of the scope of this review, interviewees were asked whether they felt that the February 3rd workshop as well as the adoption of the Manual has had any significant impact on improving the alleged improper conduct of Councilmembers. The overall consensus of the staff interviewed was that while there had been a short "grace" period following the workshop and the adoption of the Manual where Councilmembers appeared to act professionally; however, starting at the end of February 2023, at least two Councilmembers, Councilmember Moore and Chao, have re-engaged in extensive email requests for information that have significantly interfered with the overall operations and productivity of management staff and the respective City departments. Moreover, some of the more recent emails from Councilmembers Moore and Chao following the February 7, 2023 adoption of the Manual have been perceived by City staff members as accusatory, disrespectful, and condescending.

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Scope of Review

Based upon the above, the scope of this review was to:

1. Determine whether there is additional factual evidence to further support the Civil Grand Jury Findings regarding possible violations of the City of Cupertino's Municipal Code and/or whether there are any additional factual findings that may support violations of one or more of the Municipal Code provisions following the December 2022 issuance of the Report;
2. Determine whether there are facts and documentary evidence that may support possible violations of the Manual, adopted on February 7, 2023;
3. Develop policy recommendations to potentially mitigate any further violations of the Municipal Code and/or the Manual; and,
4. Develop policy considerations in updating the City's Code of Ethics using the 2018 Policy as a starting point.

While the purpose of this review is to evaluate the past and current conduct of Councilmembers, the findings may also serve as guidelines to improve City Council/City Staff relationships moving forward.

II. Investigative Methodology

To begin my review, I received approximately 1,500 email documents that had been lodged. The emails and documents covered approximately a two year period, from 2021 to the present. Primarily, the documents consisted of emails between Councilmembers and staff, in particular, the former and current City Managers and department heads.

On or about March 9, 2023, I received from the City Attorney a list of past and current executive and management City staff who might be possible witnesses to various incidents involving current and former Councilmembers/Mayors and City Commission members. Prior to receiving the list of possible witnesses, I reviewed and summarized the most relevant email documents and also viewed various video segments of four previous City Council meetings. Further, I reviewed the Report, the Manual, applicable sections of the City's Municipal Code, City Resolution 18-115, *Adopting the City of Cupertino Code of Ethics and Conduct for Elected and Appointed Officials*, and, City Resolution No. 20-011, *Adopting the City of Cupertino Ethics Policy*, that had been referred to in the Report.³

³ As part of its commitment and response to the Report, the City Council will be considering revisions to the current *Ethics Policy*, using the prior policy adopted by the Council in 2018. Such review will be incorporated in the City's FY 2023-2025 Work Plan. [City's Response to The Civil Grand Jury's Recommendation No. 4a].

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The above-referenced three “Findings” and the eleven factual complaints set forth by the Civil Grand Jury in its Report (pp.3-4 above) served as the foundational allegations that, if proven to be supported by substantial evidence, may support violations of one or more applicable provisions of the City’s Municipal Code as well as the newly adopted Council Procedures Manual⁴. In summary, the findings and the factual complaints set forth in the Report formed the basis for developing questions for interviews and the further review of videos of selected City Council meetings and Logikcull email communications.

Legal Framework for Review

The gravamen of the issues reviewed by the Civil Grand Jury and by this Investigator emanate from the basic structure of the City of Cupertino’s government, which, is clearly defined under the City’s Municipal Code as a Council/City Manager form of government.⁵ The preamble to Chapter 2.17 *City Council/City Staff Relationships* of the Municipal Code provides the blueprint for establishing the City of Cupertino’s Council/City Manager form of government and sets forth in pertinent part:

“After the City of Cupertino’s incorporation, the City Council enacted Ordinance No. 1-06 creating and establishing the Council/City Manager form of government whereby the City Council controls the administrative services of the City *only* through the City Manager. *The Council/Manager form of government is intended to provide the best of unencumbered support of professional/technical staff’s input balanced with the collective oversight of elected officials.* . . .Neither the City Council, nor individual Council members, can give orders to any subordinates of the City Manager. . . .The City Manager takes his or her orders and instructions from the City Council *only* when given at a duly held meeting of the City Council. No individual council member can give any orders or *instructions* to the City Manager.” [*emphasis added.*]

⁴ The guidelines provided in the newly adopted Manual were used only to review actions occurring *after* its adoption by the City Council on February 21, 2023.

⁵ The City Council/City Manager form of government, while common throughout California, is not the only model as there are several California cities that are “charter” cities. Moreover, even those municipalities having a Council/City Manager form of government also have municipal code ordinances, council procedures, and Code of Ethics policies that are unique to that particular agency. The procedures of how City business is, and has been, conducted in the City of Cupertino is strictly dependent on Cupertino’s laws and administrative rules set forth under its Municipal Code and therefore, comparisons to other municipalities having different underlying governance structures, municipal code provisions, and/or administrative policies may be irrelevant. The conduct of Councilmembers and City staff is strictly governed by the applicable duly enacted municipal code provisions and administrative rules and procedures.

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As cited by the Civil Grand Jury in its Report, §§ 2.17.020, 2.17.032, and § 2.17.034 of the Municipal Code provide specific laws regarding the conduct of City business and interactions with the City Manager. The two (2) areas that are pertinent to this investigation include the following:

1) The City Council (as an entire body) retains full power to accept, reject, amend, or otherwise guide and direct staff actions, decisions, recommendations, workloads and schedules, department priorities, and the conduct of city business through the City Manager; *this power cannot be delegated to individual Council members*, nor to committees composed of council members consisting of less than a quorum. [§ 2.17.031]. While nothing in the City's Municipal Code precludes *individual Council members requesting information*, in accordance with § 2.17.034, the City Manager retains discretion in how, and whether, the requested information will be provided to all Council members, if at all. Further, individual Councilmember requests to the City Manager for information are further limited by the criteria and authority provided to the city Manager provided under § 2.17.043 (cited below). Consistent with this Municipal Code section, the City Manager retains the sole authority to determine whether the individual request for information and assistance would adversely impact City staff's work priorities and available resources.

2) § 2.17.032 and § 2.17.042 specifically preclude individual Councilmembers from attempting to influence staff decisions, recommendations, workloads, and schedules and department priorities without prior knowledge and approval by the *entire* City Council. Likewise, City staff may only be guided by City management and/or the City Council as a whole. Under § 2.12.042, City staff may be disciplined for violating this Municipal Code provision and may report attempts by individual Councilmembers to unduly influence or pressure staff into making, changing or otherwise suppressing staff decisions or recommendations, or changing departmental work schedules and priorities.

As referenced above, one of the provisions of the City's Municipal Code that had not been referenced by the Report was § 2.17.043, *Timely Responses*, which provides in pertinent part that the City Manager has sole discretion to determine whether a Councilmember's request for information would require such significant allocation of staff time as to alter other work priorities and, if so, such an individual request should be directed to staff through a collective direction of the entire City Council. § 2.17.043 further provides guideline by which the City Manager can exercise this discretion: 1) Is the request specific and limited in scope so that staff can respond without altering other priorities and with only minimal delay to other assignments; 2) Is the request a "one time" work requirement, as opposed to an on-going

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work requirement?; and 3) Does the response to a request require a significant allocation of staff resources (generally defined as consisting of more than one staff person, or a single staff person working on the request in excess of two hours? Based upon the scope of this review, § 2.17.043 was also incorporated in reviewing the Councilmember/staff relations and communication.

In the event that a Councilmember's conduct is determined to have possibly violated applicable provisions of the City's Municipal Code as referenced above, such violation(s) may be a misdemeanor subject to criminal prosecution. [§1.12.010 of the Cupertino Municipal Code].

City Council Procedures Manual, Resolution 23-021

In reviewing Councilmember-staff relationships *following* the adoption of Resolution 23-021 *Cupertino City Council Procedures Manual*, provisions of the Manual were incorporated as guidelines. While the Manual essentially incorporates several of the above-mentioned Municipal Code sections, Section 6.5 *Decorum*, highlights civility requirements that all Councilmembers and City staff *shall* treat each other with dignity, courtesy, and respect. Further, § 6.5 provides that Councilmembers should avoid personal attacks on City staff and shall refrain from publicly criticizing the general abilities, character, or motivations of any staff members and should share any such concerns privately with the City Manager or City Attorney.

§ 6.6 of the Manual *Councilmember Access to Information* provides that "no Councilmember shall circumvent the City's Manager's direction regarding a request for information by seeking information through a Public Records Act request."

Finally, the Manual is consistent with the Civil Grand Jury's concerns that the City's *Ethics Policy* [Recommendation 4a, p.16 of the Report] provided no enforcement provisions, the Manual sets forth enforcement rules in Section 10: "The City Council may enforce repeated or serious violations of the rules set forth in this Manual through a censure action placed on the Council agenda."⁶ [Manual @ p. 14].

⁶ Censure is a disciplinary procedure naming a particular member of the legislative body as an offender. It does not "diminish" a Councilmember's rights but may limit or preclude certain conduct that has been determined, by a majority of the legislative body, to constitute violations of applicable rules and policies. Censure has been protected as an appropriate remedy under the First Amendment and under California Anti-SLAPP statutes.

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Evaluation of the Outstanding Issues

In evaluating the allegations, the following criteria will be incorporated as part of the final report:

1. **Not Sustained:** The investigation failed to disclose sufficient evidence to support the alleged conduct beyond a preponderance of evidence.
2. **Inconclusive:** The investigation uncovered conflicting evidence of relatively equal weight as to whether the alleged conduct did or did not occur.
3. **Sustained:** The investigation disclosed that there is substantial evidence that the act or omission occurred as alleged beyond a preponderance of evidence.

Sixteen (16) current and former executive and management staff members have been interviewed. Following the initial staff interviews, Mayor Wei, Councilmember Moore, and Councilmember Chao were also interviewed. Former Mayor Darcy Paul was invited to participate in an interview, but due to his scheduling conflicts, was unable to do so prior to the completion of this Fact-Finding Report. A copy of Paul's email response that had been sent to the City Attorney, City Manager, and all Councilmembers has been included as part of this Fact-Finding Report.

To maintain the integrity of the fact finding, I asked each of the sixteen (16) interviewees to identify other possible witnesses/complainants, if any. Further, I asked each staff member interviewed to provide to me any emails/documents that they believed would support their statements and/or were relevant to the scope of my review. I did receive numerous documents from the interviewees, some of which had been provided by the City Attorney's Office and some of which had not been included.

Some of the witnesses suggested names of individuals, both current and former City employees, who should be interviewed. Finally, each staff member interviewed was admonished to: 1) answer my questions truthfully; 2) provide any and all information that he/she believed would be relevant to the scope of my review; 3) refrain from talking to anyone about my questions to them and their answers to me; and, 4) if they answered the questions, I would assume that they understood the question and, if they did not, they had my permission to let me know. I also informed them that if they felt that they were treated adversely or retaliated against because someone suspected that they had participated in this review, they should contact the City Attorney as the City had an absolute prohibition against retaliation for participating in an investigation. Following the interviews of the current and former City staff members, I reviewed email documentation provided to me and viewed the

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videos of specific City Council meetings concerning agenda items that had been referenced by the staff members during their interviews.

Finally, during the course of my interviews, I discovered that there had been at least five (5) “informal” complaints and one (1) formal complaint filed with the Human Resources Department (“HR”) in accordance with the City’s Administrative Rules and Regulations of the Personnel Code, Section 3 *Prohibition Against Harassment, Discrimination & Retaliation*. Most of these complaints had been lodged prior to January 2023; however, several of the other interviewees stated that they had *not* notified HR about their complaints regarding interactions with current and former Councilmembers and Commissioners for fear of retaliation.

With respect to the five (5) “informal” complaints that had been lodged with HR, the individuals interviewed told me that they had initially been reluctant to file a formal complaint as they were fearful of retaliation as the alleged misconduct involved former and current Councilmembers and Commissioners. The five (5) complainants told this Investigator that they were concerned that if the Councilmember or Commissioner became aware of their complaint, these individuals would have created such a hostile and intolerable work environment that the employees would feel forced to leave City employment. Even though these staff members had decided to file an informal complaint, they did not want any formal investigation but merely wanted to let HR know what had happened in case there were further incidents. All of the complaints were based upon bullying and harassment where the staff member felt that the “subjects” of their complaint were interfering with the scope of their work duties and that of their respective City departments. It did not appear that the allegations were based upon a “protected classification”; however, the alleged conduct, if supported by substantial evidence, may violate applicable provisions of the Municipal Code and Section 3 of the City’s Administrative Regulations, particularly with respect to § 3.3 *No Retaliation*⁷.

The City has a strict “confidentiality” provision under its Administrative Regulations regarding anti-harassment and retaliation which provides in pertinent part that: “The City recognizes that confidentiality is important to all parties involved in an investigation and it will not disclose a completed investigation report, except as it deems necessary to support a disciplinary action, to take remedial action, to defend itself in adversarial proceedings, or to comply with the law or a court action.” A separate review of the complaints lodged only with HR Department and those disclosed to this Investigator

⁷ § 3.3 provides in pertinent part that a retaliatory “adverse conduct” includes: taking sides because an individual has reported harassment or discrimination; spreading rumors about a complaint; shunning or avoiding an individual who reports harassment or discrimination; or real or implied threats of intimidation to prevent an individual from reporting harassment or discrimination.

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during the course of the staff interviews has yet to be fully concluded, and the names of the current and former City staff interviewed shall remain confidential.

III. Witness Credibility

Credibility of the interviewees was based on the following: 1) factual consistency of the individual's statement with that of statements of other witnesses and/or documents produced; 2) ability of the person interviewed to specifically articulate examples of his/her generic comments; 3) whether the interviewee had personally observed certain incidents that they relayed to the Investigator; and 4) whether there were potential biases based upon his/her employment history with the City, i.e., whether the staff member was concerned about the stability of his/her employment or the damage to their professional reputation should they be totally candid with this Investigator. In reviewing the credibility of the interviewees' statements, all current and former staff interviewees were admonished by this Investigator at the beginning of each interview to answer all questions truthfully and provide all relevant information, to which all interviewees responded that they would do so.

This Investigator found the staff interviewees forthcoming and candid. More importantly, there was consistency in the statements that each had made regarding his/her experience in working with former and current Councilmembers and Commissioners. With respect to Mayor Wei, Councilmember Moore, and Councilmember Chao, this Investigator found all three forthcoming in expressing concerns and goals for enabling the City Council to more effectively work together and to improve working relationships between the City Council and the City Manager and staff. Councilmember Moore did state that in making decisions, she often requires more information than perhaps other Councilmembers may need and that she is frequently frustrated with getting the information needed.⁸ Likewise, Councilmember Chao told this Investigator that she needs sufficient information to make sure that staff has reviewed all alternatives/options before making a recommendation to the City Council. Further, Chao told this Investigator that she also needs information verifying that City staff has made sure that any agenda item brought before the City Council has *procedurally* complied with any required approvals, i.e., any required approvals by the appropriate City Commissions. Finally, Chao told this Investigator that she needs information to assure that the proposed action complies with applicable City codes and regulations.

⁸ Moore's comment is consistent with the Civil Grand Jury's observation that "it may be frustrating to Councilmembers who request additional staff information as Councilmembers are charged with governing and must be informed to make important decisions about the directions of the City"; however, voluminous requests for information may appear "punitive" by City staff and the time to respond to such requests diverts staff resources from priority project work. [Report @ p. 7].

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During her interview, Chao also questioned the validity of the current and former City staff statements regarding the reasons for the City's significantly high staff turnover that included the dysfunctional work environment due to conduct of former Councilmembers and Commissioners. Chao continued to insist that the turnover was due to retirements and that the departing staff was leaving for better positions and higher paying positions. Further, Chao stated from her perspective, some of City staff who had left had had performance problems and personally realized that they couldn't be successful.

IV. Discussion of Allegations and Factual Findings

One of the witnesses best expressed the general consensus of the current staff (and some former staff members) by stating, "The Civil Grand Jury Report is the tip of the iceberg and only reflects half of what has happened." Overall, following the February 3rd workshop and the adoption of the Manual, some of the interviewees felt that "things" would get better; however, all current staff interviewed agreed that since February, there has been a gradual decline in civility and growing distrust of staff's professional capabilities, especially demonstrated by Councilmembers Moore and Chao.

The factual evidence collected as a result of this review has been divided among the three (3) Findings that served as the basis for the further fact finding. As stated above, the factual support for these findings as referenced in Section I, *Procedural History and Overview of the Allegations: Basis for Additional Review*, were used as a basis for developing interview questions for the sixteen (16) current and former executive and management staff. Based upon the interviewees' statements and the numerous email communications reviewed, all of the eleven (11) factual complaints cited by the Civil Grand Jury in its December 19, 2022 Report are supported by substantial evidence and are **Sustained**.

The additional factual determinations obtained as a result of this review include the following and further **Sustain** the Civil Grand Jury findings:

Civil Grand Jury Finding 1: The City has a culture of distrust between the Councilmembers and City staff that is creating dysfunction.

1. Staff believes that there continues to be "distrust" from at least two Councilmembers, Councilmembers Moore and Chao, and such distrust has been reflected in the continuous challenges by these two Councilmembers through voluminous email requests for additional and duplicative information regarding the staff's recommendations for Council actions. Both Councilmembers Moore and Chao told this Investigator that

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they did have some “trust” issues with current City staff. As referred to above, Councilmember’s Moore distrust is primarily based upon the City’s embezzlement issue that had been discovered in 2017 and upon some of the financial and audit issues that had been raised by the Civil Grand Jury Report. Chao told this Investigator that her lack of trust was based upon the fact that she had uncovered several incidents where staff members had made “mistakes” and/or had relied upon incorrect information. According to Chao, when she has pointed out these mistakes to staff, the staff member does not admit that he/she was wrong. Chao stated that she cannot trust staff if they are not willing to admit that they have made a mistake. Chao even went so far as to suggest that the public has trust issues with staff. Both Moore and Chao told this Investigator that they frequently and independently research the projects that are matters subject to City Council agenda matters because they don’t trust staff’s recommendations as they don’t feel that they are provided adequate information to evaluate the recommendation.

2. Staff uniformly stated that the purported “distrust” is reflected in the continuing blaming staff for Council decisions that have been criticized by members of the public. As an example, some of the email exchanges reflected that when a Council decision, made collectively at a regular or special meeting, has been challenged by a constituent, the Councilmember’s excuse for supporting (or not supporting) that decision was that “staff did not provide sufficient information” to properly evaluate the proposed recommendation. In such cases, the Councilmember then emailed the City Manager for additional information on the matter that had already been considered and voted on by the entire Council.
3. Four of the interviewees told me that the tone of the email communications from two of the Councilmembers was threatening, accusatory, and somewhat coercive in that they believe that if they don’t appropriately respond, they will continue to be “badgered”. One interviewee told me that she had reviewed some of the emails between Councilmembers and City staff and that, “literally, she has cried over the tone/texture of such emails.” This interviewee “loved” working for the City and was disheartened that Councilmembers would “attack” City management staff.
4. In addition to the distrust, there was substantial evidence, both in emails and videos of Council meetings, that Councilmember

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Moore has responded to City staff in a discourteous and disrespectful manner. Both Moore and Chao have made public comments that have been perceived by staff members as criticizing their work product to the extent that some staff members are fearful of even making a recommendation for Council action.

5. The abusive and controlling behavior of former Mayor, Darcy Paul, and former Planning Commissioner Wang, is substantiated in email communications between these two individuals and City staff. For example, as reported by four of the interviewees, at a public event, Mayor Paul publicly stated something to the effect that, "I guess I should say thank you to staff but they always want to make it all about them." Further, the email communications reflect that Paul would berate staff, dictate procedures, direct hiring and firing decisions, and intermittently make comments in front of staff, "remember who you work for." Uniformly, the interviewees stated that Paul's conduct and staff relationships were a significant factor in creating a dysfunctional work environment. In fact, two interviewees told this Investigator that they only stayed with the City because they knew that Paul's term was ending. These statements and conduct are pending further review.
6. The majority of the current and former staff interviewed told this Investigator that the dysfunction was the result of Councilmembers Moore and Chao not understanding their roles in carrying out their council duties. In accordance with applicable provisions of the Municipal Code, Councilmembers make decisions collectively during a scheduled meeting and must seek information solely through the City Manager. The email exchanges reviewed by this Investigator reveal that Councilmember Moore has repeatedly failed to appear for 1:1 meetings with the City Manager but instead has engaged in sending voluminous emails to the City Manager with copies of the emails to other staff members and, in some cases, has sent emails directly to staff members, thereby bypassing the City Manager.⁹ Councilmember Moore told this Investigator that she perceived her Councilmember role to double check staff's work by actually conducting her own independent research and staff work, particularly with respect to performing audits and producing financial reports. This perception may be fueled in

⁹ It appears, however, that since January 2023, both Councilmember Moore and Chao are now directing their information requests to the City Manager rather than directly to the subordinate staff. This observation was based on a review of email communications from 2022 through the present.

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Moore's stated distrust of the City's financial reports is based primarily on the 2017 discovery of the embezzlement. In a recent exchange regarding Councilmember Moore's research regarding lawsuits and City contracts, Councilmember Moore described her role as a Councilmember as *not* being a "silent observer" and that it was necessary to her job to "analyze and critique." Councilmember Chao told this Investigator that she believes her job as a Councilmember is not to "rubber stamp" staff's recommendations. Like Councilmember Moore, Councilmember Chao independently investigates matters and projects that will be placed on City Council agendas and, many times, she believes that, based upon her independent research, staff has made errors in their analysis and has relied upon incorrect information. However, Councilmembers Moore and Chao's duties as councilpersons are, in accordance with the Municipal Code, separate and distinct from the performing of independent work as a City auditor, planner, housing specialist, or financial consultant, especially without approval by the entire City Council.

Both Councilmembers Moore and Chao told this Investigator that they often contact other agencies, both cities and counties, to find out what that agency is doing or how that agency is handling the particular project. How other agencies are addressing certain issues or projects *may or may not be relevant* to how the City of Cupertino is addressing its project goals and objectives as the City of Cupertino is unique from other agencies. Moreover, both Councilmembers Moore and Chao appear to assume that City staff is *not* to be trusted and it is their job to double-check staff work product. While Councilmembers Moore and Chao want to assure that the staff recommendations presented to the entire City Council are based upon credible staff review, independently researching staff agenda items is perhaps not the more effective way to accomplish their need for information and assurances that the staff reports and recommendations have included a review of alternative options and are based upon valid information. If there are questions about staff reports and recommendations, those questions should, in accordance with the Municipal Code, be directed to the City Manager. The City Manager, in turn can either address those issues and/or, if additional information is needed, direct the question/concern to the staff member so that when the staff report is published as part of the City Council agenda, Councilmembers Moore and Chao can be assured that their concerns have been reviewed and considered as part of any staff recommendation. As will be discussed more fully

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discussed below, the voluminous email requests based upon Councilmembers Moore and Chao's independent research of particular agenda items require significant staff time and resources to respond.

Civil Grand Jury Finding 2: The dysfunction prevalent between the City Council and City staff has negatively impacted City operations, including the continuing loss of skilled and experienced personnel. The City has a reputation of having a difficult work environment, making recruiting of highly qualified applicants difficult.

7. Collectively, the current and former management staff interviewed told me that they felt devalued, demeaned, and significantly frustrated by two of the Councilmembers in that there appeared to be no way that they could ever produce satisfactory work. Two of the interviewees told me they were actively looking for other employment. Many interviewees told this Investigator that staff members who had left City employment told them that they were leaving primarily because of how badly they had been treated and bullied by City Councilmembers.¹⁰ Both former and current staff concurred that the City's work environment was "toxic" and stressful.
8. One interviewee told me that it is almost impossible to get project work accomplished because of the number of staff hours required to respond to Councilmember information requests in addition to preparing staff reports and back-up materials for all of the regular and continued meetings. Another interviewee shared that most recently, once staff provides an answer to a Councilmember's request, it seems like, "any answer is never good enough for them." According to the interviewees, the additional work is "exhausting" and significantly diverts staff resources from work priorities and "undermines the ability of City staff to effectively serve the citizens of Cupertino." The significant staff turnover has exacerbated the problem of insufficient staff to handle increasing Councilmember demands.
9. There is substantial evidence to support the Civil Grand Jury's conclusion that the high turnover rate was *not based* on staff retirements and/or staff seeking better, higher paying positions. All interviewees told me that they really like their jobs and tried to do their best, but nothing they did appeared to be satisfactory to former Mayor Paul and Councilmembers Moore

¹⁰ While the interviewee statement could be considered "hearsay", the observations were consistent with the personal statements of current and former City staff members.

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and Chao. More importantly, the workload due to the inordinate number of Councilmembers' information requests is overwhelming and almost impossible to accommodate given the current staff resources. Both current and former staff members felt that the additional workload in responding to the emails as well as that additional work due to staffing shortages was overwhelming. As to the compensation package for City employees, based upon a comparison to several other agencies, Cupertino's compensation package is competitive, and it is unlikely that the management staff exodus is the result of the City's compensation package. It is significant that the last two (2) City Managers voluntarily resigned with no severance package. Further, at least one management employee left for a lower position with another agency because of the treatment by former Mayor Paul and Councilmembers.

***Email Communication Issues Contributing to the Overall
Ineffectiveness of and Interference With
Effective City Operations***

Collectively, current and former staff members told this Investigator that the excessive number of emails from Councilmembers Moore and Chao was indeed intimidating and adversely impacted department operations and workloads. In reviewing the email exchanges, a continuing pattern of emails of Councilmembers Moore and Chao are the on-going requests for information that is considered "old business" of what previous City Councils had reviewed and decided. Further, there were misstatements of facts based upon both Councilmembers "independent research" of certain Council agenda items. To some extent, it appeared that Councilmembers Moore and Chao have determined that their roles and functions as Councilmembers are best performed by "governance through email exchange". Specific examples are included below.

- 10.** In reviewing the number of emails from City Council members to the City Manager in recent months (since January 2023), the average number of emails per week is 50-70 initial emails, not counting any follow-up emails which sometimes was five additional emails per initial email. Over fifty percent (50%) of these weekly emails were initiated by Councilmembers Moore and Chao and this average did not include the follow-up emails sent in response to the initial email. Depending upon the topic, up to 20-30 pages of email exchanges were generated as a result of an initial email. Three (3) interviewees told me that they didn't think that Councilmember Moore and Chao really

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understood how long it takes staff to read through significantly long emails and then respond.

11. The two Councilmembers' email requests for staff "information" were, and have been, perceived by the majority of staff interviewed as "subtle attempts" to influence staff priorities and recommendations. At issue is whether the Councilmembers' continued requests for information is for information only or is intended to interfere with departmental and City operations or for some other reason. In some cases, these requests for staff assistance with independent research or other questions appear motivated by individual policy preferences not adopted by the full Council. For example, there is evidence that Councilmember requests for information have been repeated and, in one case, a staff member provided the same information to the same Councilmember on at least three occasions. Moreover, there is evidence that the informational requests frequently revert to "old news" such as the employee embezzlement issue that was discovered in 2017 and/or former decisions regarding a funding agreement with the Chamber of Commerce. When current staff attempts to "fix" and address some issues, Councilmembers Moore and Chao appear, through voluminous emails, to focus on, from their perspective, the purported egregious staff screw-up as opposed to focusing on how to effectively correct the situation. [Note: From all of the information collected as part of this review, the "embezzlement" issue was effectively addressed through the installation of a new financial management system and that a significant portion of the embezzled funds have been repaid to the City.] As discussed in the Civil Grand Jury's Report, attempts by an individual Councilmember to direct staff work or influence staff priorities outside of a noticed meeting is a violation of Municipal Code Chapter 2.17. In the herein matter, instances where Councilmembers have attempted to direct staff work in service of a personal policy agenda not adopted by the full City Council is likewise concerning.

Civil Grand Jury Finding 4: A comprehensive Code of Ethics not only provides guidance and baseline standards for ethical behavior, it includes sanctions and consequences for deviations from the stand. The City's Ethics Policy is generic and lacks enforcement provisions for policy violations.

To date, one of the most significant City Council responses to the Report's Recommendation, Finding 4, has been the recent adoption of the Manual that addresses many of the deficiencies identified by the Civil Grand

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Jury regarding the current *Ethics Policy*. While acknowledging that the City Council has committed to revising the *Ethics Policy* using the 2018 Policy as a starting point, the recently adopted Manual addresses civility, Councilmember debate, and respect standards and, consistent with the Civil Grand Jury's Recommendation No. 4, provides remedies, i.e., censorship, where there are violations. In my professional opinion, based upon over thirty years as a public lawyer, both serving as in-house attorney in the City of Long Beach, City Attorney's office, and, thereafter, as a contract City Attorney and special counsel to numerous public agencies throughout California, the Manual more than adequately addresses the Report's concerns regarding the City's Ethics Policy and serves as an effective oversight tool until such time as a final policy for both Councilmembers and appointed Commissioners can be developed and approved. That being said, a revision of the current ethics policy using the *Code of Ethics and Conduct for Elected and Appointed Officials Policy*, Resolution No. 18-115 is the recommended starting point, especially for appointed officials.

Undue Influence on Hiring Decisions

On page 12 of the Report, the Civil Grand Jury mentions that, "Interviews with current and former City managers confirmed that some City Councilmembers inserted themselves in the process of recruiting and hiring for open positions with the City." If this factual finding is supported by substantial evidence, there may be violations of the above mentioned Municipal Code provisions regarding attempts to pressure staff and engage in conduct reflecting undue influence on staff decisions, as well as Municipal Code § 2.28.040(D) that authorizes the City Manager to "appoint, discipline and dismiss any and all officers and employees of the City except those elected by the electors of the City . . ." (See also Municipal Code CMC § 2.52.100(A) [City Manager has responsibility "[t]o appoint persons to and remove persons from positions subject to the provisions of [the Personnel Code].")

Based upon the information gathered during the course of this investigation, there was substantial evidence to **Sustain** the Civil Grand Jury's finding that there had been attempts by former Mayor Paul, City Councilmembers and Commissioners to direct the hiring and firing of City staff. However, after January 1, 2023, there are insufficient facts to support a finding that current Councilmembers have attempted to direct and/or pressure City staff hiring and/or firing decisions.

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V. Conclusions & Recommendations

For the foregoing reasons, this Investigator finds that based upon the interviews and the documents reviewed as part of this Fact-Finding Report, the Civil Grand Jury Findings No. 1 and No. 2 were supported by substantial factual evidence and that the distrust of City staff by Councilmembers Moore and Chao has continued since the publication of the Report in December 2022 resulting in: 1) excessive and duplicative email requests for information; 2) independent “investigations” of agenda matters without City Manager and/or Council knowledge or authority; 3) communication with staff in emails and/or public meetings in an accusatory, discourteous and disrespectful manner; 4) an adverse impact to staffing workloads, work schedules and priorities; and, 5) the overall low morale of key management staff that may result in increased staff turnover adversely impacting the City’s ability to accomplish its goals and priorities for the benefit of City of Cupertino residents and businesses. Based upon these findings, there may be violations of the applicable and above referenced Municipal Code provisions and the standards set forth in Resolution No. 23-021 *Cupertino City Council Procedures Manual*.¹¹ What is most significant from this review is the consistency of the statements of the sixteen former and current executive and management staff employees regarding current and former Mayors, City Councilmembers, and Commissioners. The statements provided to this Investigator were unequivocal about their descriptions of and experience with the City of Cupertino’s work environment.

Recommendations

Based upon the above review, the Undersigned recommends the following alternatives in order to facilitate more effective City Council/City staff relationships and enhance the City Council’s ability to accomplish its goals in order to best serve City residents and businesses:

- 1) Current City staff needs to be supported (and trusted) in carrying out their respective duties and, more importantly, current staff needs to feel that they are valued in providing professional services to the City. Councilmembers do have an obligation to make informed decisions; however, voluminous email exchanges regarding requests for information may be less efficient than bringing those concerns to the City Manager through the scheduled 1:1 meetings. In the 1:1 meetings, the City Manager may be able to address the question directly and, if not, refer the question to the appropriate staff member. In a nutshell, while it is true that

¹¹ As to the remedy for violations of the Municipal Code and/or the Manual, the City Council has the ultimate authority based upon the factual findings to determine appropriate action that may include 1) censure; 2) referral to the District Attorney; 3) referral to the Grand Jury; and/or 4) remove the Councilmember from certain committees and/or serving as chairperson to certain committees.

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in accordance with the Municipal Code, all Councilmember's requests for information are to be directed to the City Manager, voluminous emails are rarely the most efficient way to address both Councilmembers' Moore and Chao's requests for information, and the sheer volume of email has adversely impacted departmental operations. The 1:1 meetings between the City Manager and individual Councilmembers is, and traditionally has been in California public agencies, the most efficient way to respond to a Councilmember's inquiries and such meetings should facilitate communication and trust between the Councilmember and the City Manager.

2) The adverse and contentious relationships between and among former and current Councilmembers and former and current City staff members have contributed to staff turnover in the City of Cupertino. The impact of these contentious working relationships has been a significant staff turnover adversely impacting the overall effectiveness and efficiency of City operations. Generally, it will take a new City Manager and/or senior level staff member at least 6 – 12 months to become fully versed in the past history of council decisions on specific projects and to become fully acclimated with the capabilities and accomplishments of subordinate staff. Turnover in executive and management staff in any organization is costly in loss of staff productivity, training costs, and loss of institutional knowledge. If Councilmembers, including Councilmembers Moore and Chao, distrust or question current City staff members' abilities to carry out the responsibilities of their position, then those concerns and the reasons therefore must be communicated to the City Manager so that these concerns may be addressed. The City Council as a whole is responsible for evaluating the City Manager's performance if it feels that such concerns are not being addressed.

3) The City Council should rely on the advice of and give weight to the recommendations of executive management staff and other professionals in considering items that come before the City Council, particularly when those items require technical expertise or specialized knowledge or experience.. Otherwise, the City of Cupertino will be burdened in making timely decisions essential to providing the infrastructure and services necessary to best serve Cupertino residents and businesses. This is not to say that Councilmembers should simply "rubber-stamp" all staff recommendations; however, the voluminous email requests for information and independent investigations appear to be a counterproductive and time consuming process. Councilmember Chao did inform this Investigator that City Manager Wu should inform her if she had received comments from staff regarding her (Chao's) requests and/or if staff felt that Chao had engaged in conduct that the staff member perceived as accusatory or condescending manner.

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4) The City Council's approval of the City's "Work Plan" is an excellent way to implement Council's goals and work projects and allows Department Heads to focus resources and to determine appropriate staffing needs and/or whether outside consultant resources are needed to meet Council goals/objectives.

5) The 2018 Ethics Code should be used as a basis for developing revisions to a new City Code of Ethics policy, especially in developing a Code of Ethics for City appointed positions. As referenced above, the newly adopted Manual addresses many of the Code of Ethics issues cited by the Civil Grand Jury in its Report; however, a new Ethics Code using the 2018 Ethics Code provides an effective starting point for Commissioners Handbook.

6) If not already conducted, the City Attorney and City Clerk should consider providing Councilmember training on Rosenberg's Rules of Order.

7) The City Manager should explore ways to resolve Councilmember Moore and Chao's need for information given limited staff and departmental resources. In accordance with applicable Municipal Code provisions, 1:1 meetings between the City Manager and Councilmember Moore and Chao could be used to address the need for information without appearing to direct or influence staff priorities.

Finally and most importantly, effective city governance is recognizing that there will be problems beyond anyone's control and when those situations appear, the priority should be addressing the solution, not focusing on or blaming staff for what happened. Trust in City management staff is an essential component of effective municipal governance.

Respectfully Submitted:



Linda L. Daube, Attorney
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