



Think Inside the Triangle™

SUPPLEMENTAL AGENDA
Attachment added to Agenda Item 5.A

NOTICE OF SPECIAL MEETING

Pursuant to Section 54956 of the Government Code of the State of California, a Special meeting of the **Tracy City Council** is hereby called for:

Date/Time: **Tuesday, August 20, 2024, 5:00 p.m.**
(or as soon thereafter as possible)

Location: **Tracy City Hall, Council Chambers**
333 Civic Center Plaza, Tracy, CA. 95376

Government Code Section 54954.3 states that every public meeting shall provide an opportunity for the public to address the Tracy City Council on any item, before or during consideration of the item, however no action shall be taken on any item not on the agenda.

This meeting will be open to the public for in-person and remote participation pursuant to Government Code Section 54953(e)

For Remote Public Comment:

During the Items from the Audience, public comment will be accepted via the options listed below. If you would like to comment remotely, please follow the protocols below:

- *Comments via:*
 - **Online by visiting** <https://cityoftracyevents.webex.com> and using the following **Event Number: 2556 912 6787** and **Event Password: TracyCC**
 - ***If you would like to participate in the public comment anonymously***, you may submit your comment via phone or in WebEx by typing “Anonymous” when prompted to provide a First and Last Name and inserting Anonymous@example.com when prompted to provide an email address.
 - Join by phone by dialing +1-408-418-9388, enter 25569126787#8722922# Press *3 to raise the hand icon to speak on an item.

- *Protocols for commenting via WebEx:*
 - *If you wish to comment under “Items from the Audience/Public Comment” portion of the agenda:*
 - *Listen for the Mayor to open “Items from the Audience/Public Comment”, then raise your hand to speak by clicking on the Hand icon on the Participants panel to the right of your screen.*
 - *If you no longer wish to comment, you may lower your hand by clicking on the Hand icon again.*
 - *Comments for the “Items from the Audience/Public Comment” will be accepted until the public comment period is closed.*

1. Call to Order
2. Actions, by Motion, of City Council pursuant to AB 2449, if any
3. Roll Call and Declaration of Conflicts
4. Items from the audience - *In accordance with Council Meeting Protocols and Rules of Procedure, adopted by Resolution No. 2019-240, and last amended by Resolution No. 2021-049, a five-minute maximum time limit per speaker will apply to all individuals speaking during "Items from the Audience/Public Comment". For non-agendized items, Council Members may briefly respond to statements made or questions posed by individuals during public comment; ask questions for clarification; direct the individual to the appropriate staff member; or request that the matter be placed on a future agenda or that staff provide additional information to Council.*
5. DISCUSSION ITEMS
 - 5.A. The City Council 1) discuss responses to the 2023-2024 San Joaquin County Civil Grand Jury's Report titled: "City of Tracy: Public Trust Still Not Restored" Case No. 0323 and, upon conclusion, and 2) adopt a Resolution approving the final form of response letter and authorizing the City Manager and City Attorney to jointly execute and transmit the response letter to the presiding judge.

Supplemental Attachment
6. Council Items and Comments
7. Adjournment

Posting Date: August 19, 2024

The City of Tracy is in compliance with the Americans with Disabilities Act and will make all reasonable accommodations for the disabled to participate in employment, programs and facilities. Persons requiring assistance or auxiliary aids in order to participate, should contact the City Manager's Office at (209) 831-6000 at least 24 hours prior to the meeting.



Patrick T. Donegan
(310) 220-2172
Patrick.Donegan@bbklaw.com

Public Legal Memorandum

VIA E-MAIL

To: City of Tracy, City Attorney's Office
From: Patrick T. Donegan (PD)
Date: August 19, 2024
Re: Grand Jury Response

INTRODUCTION

The purpose of the below memorandum is to opine on the assertions of law and legal authority (*i.e.*, State law, City of Tracy Municipal Code, case law, *etc.*) contained in the City of Tracy's response to the Grand Jury Report titled, "City of Tracy: Public Trust Still Not Restored 2023-2024 Case No. 0232" ("2023-2024 Grand Jury Report"). This office was engaged by the City Attorney of the City of Tracy ("City") for this role. This office conducted no independent investigation into any of the factual allegations or conclusions found in the 2023-2024 Grand Jury Report. Thus, each and every "Discussion," "Finding," and "Recommendation" found in the 2023-2024 Grand Jury Report is not addressed.

Instead, only the portions germane to the legal role and authority of the various parties discussed in the 2023-2024 Grand Jury Report are addressed. Failure to substantively discuss any of the other portions of the 2023-20024 Grand Jury Report and City response(s) does not indicate agreement or endorsement of any of these portions. Further, in-depth opinions on management style, relationships between Council members, and relationships between various City staff are beyond the scope of this memorandum. With the caveat that all applicable codes of conduct, professional rules of conduct, state and local law, contractual provisions, any pertinent employee handbooks and/or memorandums of understanding, and any other applicable standards of conduct should be adhered to. If the City Council so desires a formal change, amending one of the aforementioned sources is the correct course of action to effectuate such a change.

ANALYSIS

Finding F1.7, Recommendation R1.7, and Response

F1.7: Members of the City Council attempted to undermine the ordinance requiring a supermajority vote to remove the City Manager to a simple majority vote

R.1.7: By October 1, 2024, City Council should approve an ordinance requiring a supermajority vote to modify any ordinance requiring a 4/1 vote. Additionally, a 90-day public notice to change this vote requirement should be mandatory.

City Response: As a general law city, the authority for the City's powers are granted by State law, including the ability to adopt ordinances. More research is required to verify if this recommendation is suitable for the City of Tracy.

The California Constitution grants a city broad discretionary power to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const., article XI, section 7. State law does the same. Govt. Code section 37100 (“The legislative body [of a city] may pass ordinances not in conflict with the Constitution and laws of the State or United States.”) As a general law city, the City has only those powers expressly conferred upon it by the California Constitution and California statutes, and those powers incidental to the object and purposes of the City’s powers. *See Irwin v. City of Manhattan Beach* (1966) 65 Cal 2d 13, 20. The City Council’s power to conduct government business by a vote, at a minimum, of the majority of the City Council sitting in quorum (e.g., to hire/fire a City Manager) derives from state law. *See e.g.* Gov. Code § 36810.

Government Code section 36936 states:

“Resolutions, orders for the payment of money, and **all ordinances require a recorded majority** vote of the total membership of the city council.” [emphasis added]

However, Government Code section 36813 states that a city council “may establish rules for the conduct of its proceedings.”

What a city cannot do is divest itself or future councils of the very power to legislate. As explained by the California Supreme Court, “[i]t is a familiar principle of law that no legislative board, by normal legislative enactment, may divest itself or future boards of the power to enact legislation within its competence.” *City and County of San Francisco v. Cooper* (1975) 13 Cal. 3d 898, 929; see also *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal. App. 3d 316, 328; *Thompson v. Board of Trustees* (1904) 144 Cal. 281, 283. In these precedents, the legislative body ran afoul of this principle by attempting to restrict itself from exercising the power to legislate. *Cooper*, 13 Cal. 3d at 929 (school board could not preclude itself from revising or altering salary resolution without approval of the certificated employee council); *People's Advocate*, 181 Cal. App. 3d at 328-29 (California state legislature could not limit content of future budget legislation). However, this office is not aware of any directly on-point legal authority ruling on the validity of what is being recommended: an ordinance that via its own adopted language that can only be amended by a supermajority vote.

Read together, all of the aforementioned authority supports the idea that a City Council can, via ordinance, subject certain actions or provisions to a supermajority vote (*i.e.*, terminating a City Manager requires a 4/5 vote). However, whether or not that very ordinance can only be changed or modified by a supermajority vote is unclear and thus may be subject to challenge. The plain text of Government Code section 36963 states that an ordinance requires a recorded majority vote of the total membership of the City Council (not a supermajority). Government Code section 36813 states that a city council has discretion to establish rules for the conduct of meetings which, while broadly read could lend some support for this idea of requiring 4/5 votes to change an ordinance. However, because section 36963 is more specific to the adoption of ordinances, it is likely the more conservative approach to rely upon this language than the more generalized language found in section 36813. In essence, trying to limit this Council's or future City Council's ability to legislate based on the simple majority found in State law, absent any authority¹ directly on-point, may be subject to challenge.

Practically, this approach does avoid the possible incongruous result where multiple ordinances are passed (possibly conflicting) via the simple recorded majority vote of the total membership because some ordinances cannot be changed unless by supermajority. This could result in the City being forced to deal with and implement conflicting ordinances. While an ordinance dealing with the firing of a City Manager is relatively straightforward, other topics are much more nuanced and interact with other provisions of the municipal code. Thus the supermajority vote requirements for just select provisions could result in inconsistent or ridiculous results.

Finding F1.9, Recommendation R1.9, and Response

F1.9: Serving as Parliamentarian for Council meetings puts the City Attorney in a conflicting situation. Each decision by the Parliamentarian can be seen as partial to one side or the other.

R1.9: By October 1, 2024, if a Parliamentarian is deemed necessary at City Council meetings, the position should be held by an independent third party.

City Response: Per League of California Cities: Understanding Your City's Departments, "The city attorney also may serve as the council's parliamentarian." Staff is not aware of a structure in which the City Attorney is not the parliamentarian of the council. More research is required to verify that this finding is applicable to the City of Tracy.

¹ Note that a recent decision examining a California city's municipal ordinance requiring a supermajority vote of a city council to overturn a planning commission decision was upheld. *Lateef v. City of Madera* (2020) 45 Cal. App. 5th 245. The ordinance stated: "A five-sevenths vote of the whole of the Council shall be required to grant, in whole or in part, any appealed application denied by the Commission." *Id.* at 252. The court was asked to interpret the statute, ultimately ruling that the "whole of the Council" meant the seven-member council, regardless of the actual number of voting councilmembers. *Id.* at 258. As part of its analysis, the court reviewed the ordinance's legislative history. The court noted that the ordinance had been modified by the city council to increase the supermajority requirement from four-fifths to five-sevenths following the expansion of the city council from five to seven members in 2012. *Id.* at 256. At no time, however, did the court question or even criticize the basic propriety of such a requirement in a municipal ordinance. However, the court did not address the issue here, of whether or not a provision of the ordinance also requiring a supermajority to amend it was valid.

The City follows Rosenberg's Rules of Order, which is the more simplified and straightforward Rules of Order compared to Robert's Rules of Order. Substantively, Rosenberg's Rules of Order consist of only six (6) pages and can be readily read and understood.

This office is not aware of any local municipality that hires an independent third party to solely serve as the governing board's parliamentarian. Often, this parliamentarian role is filled in part by more than just the City Attorney with the City Clerk and presiding officer also providing some parliamentarian type roles.² The position, however, is one of impartiality and advisement to the City Council. It should not be viewed as a role that favors one side or the other or necessitates the hiring of an independent third party.

Further, the City Attorney's role during a meeting extends past just this parliamentarian role as other legal authority must also be taken into account. For example, while Rosenberg's Rules of Order may provide a certain level of straightforward rules on making decisions as a body, there are numerous other local and State laws that must be adhered to. These include various local and State laws that require a different vote total than just a majority of a quorum or ensuring/advising the City Council that decision on land uses decisions are based on evidence in the record that comports with the required findings and other legal guardrails such as constitutional protections. Thus, a broad and holistic understanding of numerous different sources is required to advise the City Council to ensure its decisions are valid and not subject to legal challenge.

Introducing a new, independent third party to serve as the parliamentarian in order to increase efficiency and remove any allegations of partiality may have the unintended consequence of actually increasing both. That is, scenarios could be envisioned where this independent parliamentarian is advising the City Council on just Rosenberg's Rules of Order where the City Attorney and/or other City staff are providing other advice possibly in conflict or in tension with the advice given by this third party parliamentarian based on other statutory or constitutional authority. This would result in the City Council having to weigh and address (increased inefficiency) competing advice and then seemingly decided which advice to follow (increasing the sense of partiality).

In sum, this office does not believe that the solution to the issue of partiality in decisions or advice given regarding the City's Rule of Order is the introduction of another third party. Instead, training and understanding of the relatively straight forward Rosenberg's Rules of Order and the City's Code of Conduct will provide the City Council as a whole with a more substantive knowledge set pertaining to the procedure at its meetings. Further, such rules and any advice or guidance given should be just that – neutral, consistent advice to the City Council irrespective of who is asking or what policy topic is being discussed.

Rules of Order are meant to establish order at the meetings and enforce the will of the majority while protecting the rights of the minority. They should not be viewed nor used in a partisan way to effectuate a desired policy or outcome. It is incumbent on existing City staff and the City Council to ensure that these ideals are both understood and implemented appropriately.

² For example, often times the presiding officer would ask the City Clerk who seconded a motion or how many motions are on the floor. Other times the presiding officer will deny a motion being made if there are already three motions on the floor (the maximum allowed under Rosenberg's Rules of Order).

Finding F2.1, Recommendation R2.1 and Response

F2.1 Employees reported the work backlog created by updating past practices has negatively impacted the public because of delays in residential and/or commercial agreements with the City.

R2.1 By October 1, 2024, an outside legal firm should be engaged to help expedite the current work backlog in the City Attorney's office.

(City's Response to Finding F2.1) The City Attorney has an ethical and professional duty to the City of Tracy to follow and promote the rule of law. The City Attorney consistently has implemented this duty by providing representation that encourages a culture of compliance with legal requirements. For the past year, the City Attorney's Office has closely collaborated with multiple departments, especially the City Manager's Office, to improve various forms as well as internal and external review and approval processes. The underlying desire, Citywide, has been to incorporate best practices while providing quality customer service to City applicants. As with all change management, there was a temporary transition period that created some difficulties, and City staff worked with relevant stakeholders throughout the process. Overall, these improvements positively serve the public (and the City) as they create clarity in expectations between the City and applicants, more enforceable documents, and greater certainty in deadlines for implementing public infrastructure.

With respect to any perceived backlog, as noted below, there is no significant backlog in the City Attorney's Office at this moment. The current City Attorney commenced her employment with the City of Tracy on April 25, 2022. Since that date, the City Attorney's Office has reviewed and executed more than 900 documents, which is double the number of documents that had been executed in the City the two years preceding her arrival. The City Attorney's Office is committed to providing timely and quality legal services to all City teams.

(City's Response to Recommendation F2.2) As noted above, the City Attorney engages outside counsel, as needed, to assist with various litigation matters and special counsel assignments, to ensure that timely and expert legal services are being rendered to all City teams. The City Attorney's Office expects to issue a statewide Request for Proposals (RFP) for on-call legal services by the end of August 2024, as the prior RFP was done several years ago. This RFP will allow the City Attorney's Office to have access to more law firms practicing in the State, across various practice areas relevant to the needs of the City. The RFP will also request proposals from law firms seeking to serve as an outside Assistant City Attorney, in the event that a suitable in-house attorney is not found to fill the vacant position through the normal recruitment process.

As noted above, this office did not conduct any independent investigation into the inner workings of the City. Outside counsel are often utilized by city attorneys across the state to help manage the ebbs and flows of workflow. In addition to the above mentioned recommendations, developing internal deadlines for submittal to the City Attorney's office with an expected turnaround time could create more consistency and reliability when conducting standard City business. Now what

these deadlines and turnaround times are depend on policy and judgment calls on behalf of the City Attorney and various City staff. But having a known and set deadline (*e.g.*, staff reports and resolutions to be submitted to the City Attorney’s office X days before agenda posting, City Attorney shall provide edits/comments X days after submittal, *etc.*) could possibly avoid the scenario where certain departments receive a plethora of documents to review in a small period of time which leads to a “fire drill” type mentality.

Recommendation R2.2 and Response

R2.2 By October 1, 2024, the office of the City Attorney should develop and utilize standardized agreements to streamline the review and approval processes.

As noted above, as of the date of this Response, the City Attorney’s Office has no significant backlog with respect to documents/ agreements that have been submitted by City staff for legal review, as the prior backlog has been diligently cleared. In addition to these document reviews, the City Attorney also ensures that the numerous deadlines for court filings and agenda publications (the City Attorney’s Office reviews every item being published on agendas of the City Council, standing committees, and Planning Commission) are met. The City Attorney’s Office has also resolved dozens of outstanding code enforcement citations, many of which predated the arrival of the current City Attorney. The City Attorney strives to utilize available resources to timely meet the City’s legal needs, in the most cost-efficient manner possible.

(City’s Response to Recommendations R2.2) The City Attorney strongly believes in the efficiencies that stem from having standardized agreements. To this end, the City Attorney has created templates for various agreements that are routinely used by the City, such as professional service agreements, airport leases, and improvement agreements. These forms are now in the process of being converted to fillable PDF documents, to further streamline the review and approval processes. The City Attorney’s Office will continue to develop additional templates, as appropriate. In addition to creating templates, the City Attorney has implemented a new procedure in which templated agreements (as long as no changes are being proposed to such forms) no longer have to come to the City Attorney’s Office for initial “document review”. This new procedure will greatly streamline internal approval processes.

The creation and implementation of standardized or template agreements is a key tool to ensuring timely review of City business. Further, this avoids the process of creating documents from scratch for each and every project, contract, *etc.* The only additional comment would be to possibly create a standard process for when these template agreements are requested to be changed. Different vendors, property owners, or others that interact with the City could have disparate reasons for requesting a change from the City’s template agreements. It may be beneficial to have the pertinent City staff member try and compile the requested reasons/justifications for any proposed change and then establish a typical timeframe for the City Attorney’s office to review requested changes.

Finding F2.4, Recommendation R2.4 and Response

F2.4 The current Code of Conduct limits the hiring of outside legal counsel to only the City Attorney. This ties the hands of City of Tracy with the City Attorney is not available to meet the duties of her office.

R2.4 By October 1, 2024, the Code of Conduct regarding the hiring of outside counsel should be amended to allow other city officials to hire outside counsel if the City Attorney is unable to perform their duties, or if the legal issue being addressed give the appearance of a potential conflict of interest.

(City's Response to Finding F2.4) The City of Tracy is a general law city and its powers derive from those granted by the State legislature. Government Code 41801 expressly states: "The city attorney shall advise the city officials in all legal matters pertaining to city business." This basic legal requirement is codified in the Tracy Municipal Code under Section 2.10.010, which states:

"The City Attorney shall serve as legal counsel to the City government and all officers, departments, boards, commissions, and agencies thereof and shall have such other powers and duties as may be prescribed by state law and by ordinance or resolution of the City Council. In situations where the City Attorney determines there is a conflict in representation by that office, the City Council may authorize the retention or other legal counsel to represent one of the conflicting parties. The City Attorney shall appoint all other members of the City Attorney's Office."

To the extent that there is a conflict of interest, the City Council retains the power to engage other legal counsel. This limited power cannot practically nor legally be delegated to individual City departments.

(City's Response to Recommendation R2.4) As noted in Finding 2.4, the State has tasked the City Attorney of a general law city to provide all requisite legal services to all city officials and that requirement has been codified in the Tracy Municipal Code. To the extent that a conflict exists, the City Council, as a body, retains the power to engage separate legal counsel with respect to those specific matters in which a conflict exists. The City Council has exercised this power in the past.

Further, determination of whether the City Attorney is "able to perform their duties" is a contractual matter between the City Council and the City Attorney. The City Attorney has an employment contract with the City. This contract articulates the responsibilities of the City Attorney and the process by which the City Council, the other contracting party, may determine the City Attorney is failing to perform such responsibilities. Other City officials should not be involved in this contractual relationship.

Finally, granting other city officials the ability to hire outside counsel would create grave legal risks to the City. Precedence and consistency are critical in the implementation of legal practices. Multiple attorneys that are separately engaged and managed (outside of the City Attorney's Office) would result in inconsistent agreements and legal practices on

behalf of the City. The City Attorney's essential responsibility of selecting and managing outside counsel is also identified by the League of Cities in its Counsel and Council Guide.

The Tracy Municipal Code and Code of Conduct both provide some guidance on the retention of outside counsel and do not appear to provide individual staff members the ability to hire and retain their own legal counsel for City-related matters. This is consistent with practices by other jurisdictions to avoid multiple legal opinions solicited by various City staff. That is, a situation where a planning department (or individual planner) hires their own independent counsel who provides a legal opinion that may differ or be at odds with the legal opinion of the City Attorney is a scenario that must be avoided. As discussed above, outside legal counsel may have a role in providing the City necessary legal services. However, it is best practice for legal counsel to provide this in cooperation and conjunction with the City Attorney's office; not a scenario where two different attorneys (or sets of attorneys) are providing competing legal advice to the City and its decision makers that must then weigh each separate legal analysis.

The City Council serves as the ultimate City decision maker. As such, the City Council does retain the ultimate decision on who represents the City in its legal matters subject to relevant legal authority and any applicable contractual obligation. Should the City Council desire outside legal counsel on any particular matter, that is a discussion to be had by the City Council as a whole in a publicly noticed meeting. During this time it would be appropriate for the City Council to make its positions known (as a body) and then provide the pertinent direction to City staff to ensure the Council's position is effectuated provided it comports with existing authority. Delegating this authority to individual staff members, as the 2023-2024 Grand Jury Report states, would require amending, at the very least, the City's Code of Conduct and could lead to a culture of forum shopping for a legal opinion. However, this is within the City Council's authority if it so desired and if the City Council modified the relevant authority.

As has been somewhat of a theme of this memorandum, the City has the required roles filled as it pertains to legal services (sans possible understaffing for supporting attorneys in the City Attorney's office as stated in the 2023-2024 Grand Jury Report). To my understanding, this is not a function of a lack of funds or budgetary constraints so the City is in a relatively favorable position compared to another possibility where funds simply aren't there for the required legal services. There is a possibility that the introduction of a policy where individual staff members can hire outside counsel to provide their own independent legal advice on City related matters may further contribute to the dysfunction and inefficient City governance instead of helping to resolve the problem. The City's efforts may be better used in trying to train the already existing pertinent City staff members and rehabilitate the strained relationships between the City Attorney's office and other departments instead of creating an environment where individual departments or staff members have the authority to hire outside legal counsel at their discretion.

CONCLUSION

Ultimately, the 2023-2024 Grand Jury Report details and describes very important issues and challenges facing the City. The above analysis is not meant to replace or vitiate any of the issues and recommendations by the Grand Jury. Instead, it is meant to provide the City a more nuanced level of legal analysis pertaining to some of the issues and options posited by the Grand Jury so that the City Council and relevant City staff can be fully apprised of possible options.