

Thousand Oaks City Council

Summary

The Ventura County 2005-2006 Grand Jury (Grand Jury) investigated alleged violations of the Brown Act and Municipal Code Violations by certain members of the Thousand Oaks City Council with regard to the termination of City Manager Philip Gatch. The issue was whether an appropriate process of review and separation was followed. The Grand Jury also investigated several ancillary issues relative to the recruitment of a new City Manager and the replacement of a City Councilmember.

The possible Brown Act violations were investigated by the District Attorney's office and found to be unsupported by evidence for a criminal filing. With respect to possible Thousand Oaks Municipal Code (TOMC) violations, although the Grand Jury found an abundance of mutual distrust, suspicion, and accusations between council members and members of the public, the Grand Jury found no evidence to justify an accusation procedure that could remove anyone from office.

Background

California Penal Code §919(c) requires that the Grand Jury inquire into the willful or corrupt misconduct in office of public officers of every description within the county. Charges of misconduct are easily made and may be unwarranted. Investigation based upon rumor, suspicion or conjecture may interfere with the normal functioning of public offices and unjustifiably undermine public confidence in government. The Courts have never clearly defined what type of conduct allows removal from office. The Courts have clearly said that the conduct does not need to be criminal, only willful. Any act of malfeasance or nonfeasance in office is sufficient to support removal from office. Examples of non-criminal acts, sufficient to support removal from office, include exercise of official power in a malicious, arbitrary or oppressive manner; unauthorized use of public property; failure to keep required records; destruction or withholding of records; and/or neglect of duty for a period of time.

The Grand Jury has the jurisdiction to initiate a civil proceeding to remove a public officer by authority of California Government Code §3060. Although seldom used, a written accusation may be presented against any officer of a district, county or city for willful or corrupt conduct in office. If misconduct is found, an accusation may lead to a trial. The official, if convicted, is removed from office. The procedure for an accusation is similar to that of an indictment. The main difference is that the public official is not charged with a crime but rather with willful or corrupt misconduct in office.

In the course of this investigation, the Grand Jury encountered several ancillary issues regarding the processes for hiring and termination of a city manager, both interim and permanent, as well as the replacement of a Councilmember. The Grand Jury considered ethical issues relative to the lack of transparency of operations of the Thousand Oaks City Council, as well as the apparent lack of fair and open conduct of some city business.

Methodology

The Grand Jury interviewed all members of the City Council (except Edward Masry because he was very ill), a variety of key city employees, interested citizens, and complainants. City Council meetings were observed via commercial service television and newspaper articles; documents, video, and audio tapes of City Council meetings were also reviewed.

Findings

- F-01.** At the request of the Thousand Oaks City Council, the District Attorney's office investigated possible Brown Act violations with respect to the termination of City Manager Gatch.
- F-02.** The District Attorney's investigation of the Brown Act (Government Code §54950 et seq) revealed an "abundance of mutual distrust," many "nonspecific suspicions and accusations," however, "no evidence to support" any violations. (Attachment I. Letter dated June 30, 2005 from R. Thomas Harris, Special Assistant District Attorney.)
- F-03.** The District Attorney did not conduct an investigation of the alleged violations.
- F-04.** The Grand Jury investigated the alleged violations of TOMC §2-1.208.
- F-05.** Mr. Gatch was hired as City Manager of Thousand Oaks on July 13, 2004, and resigned his position effective June 30, 2005, after 38 years of service to the City of Thousand Oaks.
- F-06.** The City Manager is appointed by majority vote of the Council and holds office at the pleasure of the Council. The City Manager is selected solely on the basis of executive and administrative qualifications as well as actual experience in the accepted practices and duties of the office.
- F-07.** TOMC §2-1.24 provides for the removal of the City Manager by the City Council without cause with three affirmative votes and written notice of a termination date. The right of the City Manager to severance pay and any other arrangements incident to termination is in accordance with any contractual arrangement entered into with the City Council.
- F-08.** City Manager Gatch's contract provided for a formal annual performance review at the end of each fiscal year (i.e., by June 30).
- F-09.** On May 25, 2005, Councilmen Masry and Dennis Gillette were requested by Mayor Bob Wilson to serve as a Personnel Committee to review Mr. Gatch's performance, salary, and benefits and to report to the Council with recommendations. Mr. Gatch provided a summary of his recent achievements and goals to the committee for consideration.
- F-10.** The Council's Personnel Committee review of City Manager Gatch's performance on November 8, 2005, consisted only of 'acceptable' or 'not acceptable' ratings. This review focused primarily on compensation issues, not on his performance.

- F-11.** Mr. Gatch's contract (#6184-2004B) was modified on July 13, 2004, to eliminate the original contract expiration date of August 1, 2005.
- F-12.** On November 8, 2004, the Personnel Committee recommended that, based on his performance, the City Manager receive a merit salary increase of 3%. He would also receive a nominal increase of 2% to the total retirement salary per year, plus tax benefits of nearly one-half of his retirement account not being tax deferred. In addition, based on the City's contractual agreement pertaining to a 10% supervisory differential, an amended contract provided a salary increase adjustment of 5%, for a total compensation increase of 8%.
- F-13.** The performance evaluation and compensation item for the City Manager was removed from the agenda of the November 16, 2004, City Council meeting. It was agreed by the Personnel Committee and City Manager that the continuance of the performance review for a period of 3-6 months would have no detrimental effect on the merit and differential compensation adjustments. The adjustments would be made retroactive to July 1, 2004, when the original contract review was due.
- F-14.** A review of City Manager Gatch's performance was never conducted by the City Council. Compensation and benefits issues were addressed by the Personnel Committee on November 8, 2004.
- F-15.** On Wednesday, March 23, 2005, Councilman Andy Fox requested a meeting for that afternoon with City Manager Gatch. The purpose was to advise Mr. Gatch that Councilman Fox and other Council members wanted him to retire by May 1, 2005. Councilman Fox requested Mr. Gatch's letter of resignation by the next Council meeting scheduled for April 5, 2005. Councilman Fox indicated that the termination could be friendly with appropriate acknowledgment and ceremony due a prominent employee who had worked for the city for 38 years.
- F-16.** A second meeting between Councilman Fox and City Manager Gatch was scheduled for Monday, April 4, 2005, at 9:00 am.
- F-17.** City Manager Gatch called Mayor Claudia Bill-de la Peña to advise her of Councilman Fox's demand for his resignation, stating that Councilman Fox implied he had enough votes to have him fired.
- F-18.** Since there had been no Council meeting discussion (the City Manager's termination was not an agenda item), numerous citizens alleged that Councilman Fox had talked with other Council members, in violation of the Brown Act, in order to determine that he had enough votes to terminate the City Manager.
- F-19.** The Brown Act (Government Code §54952.2) prohibits a majority of the members of a city council from communicating with each other – directly or through intermediaries – in a manner that creates a consensus for taking any action unless that communication occurs during an official, agenda meeting of the city council.

- F-20.** It was suggested by numerous citizens and newspaper accounts that the termination of the City Manager had been “coerced” by Councilman Fox in service of a political agenda.
- F-21.** In a letter to the Editor of the *Thousand Oaks Acorn* on April 7, 2005, Councilman Fox called for Mr. Gatch to resign stating that “management of the city needed to go in a different direction, possibly with someone who is younger and has more energy.”
- F-22.** Based on public statements of other Council members, it was likely that Councilman Fox believed that he knew their positions on the issue of the City Manager’s performance.
- F-23.** On the evening of Wednesday, March 30, 2005, Councilman Fox cancelled the meeting with Mr. Gatch scheduled for April 4, 2005, and requested Mr. Gatch’s letter of resignation as of April 1, 2005. Mr. Gatch believed that if he failed to comply, he would be fired after the Council meeting on Tuesday, April 5, 2005. Councilman Fox requested that Mr. Gatch deliver his resignation letter by noon the following day, Thursday, March 31, 2005.
- F-24.** TOMC §2-1.208 provides that the “City Manager shall take orders and instructions from the Council, as a body, only when sitting in a duly held meeting of the Council, and no individual Council member shall give any orders or instructions to the City Manager. This shall not be construed to prevent any Council member from discussing matters of the City with the City Manager and staff.”
- F-25.** On Thursday, March 31, 2005, Mr. Gatch drafted his letter of resignation and faxed it to Councilman Fox’s Los Angeles Fire Department office by noon. Councilman Fox called Mr. Gatch to indicate specific changes to the letter and requested it be typed on city stationery and sent to each Council member.
- F-26.** Because Mr. Gatch felt threatened and pressured and believed that Councilman Fox was speaking on behalf of the majority of the Council, he complied instead of insisting on adherence to the TOMC procedure.
- F-27.** City Manager Gatch resigned effective June 30, 2005, under the threat of being fired, took a leave of absence, and vacated the City Manager’s office effective May 6, 2005. It was understood and agreed that this retirement would not nullify or void the terms of compensation and benefits of his Employment Agreement dated July 13, 2004.
- F-28.** Many citizens spoke in protest at the April 19, 2005, Council meeting expressing concern about the timing and the threatening and coercive manner of the City Council’s handling of the City Manager’s resignation.
- F-29.** During the City Council meeting of April 19, 2005, Mayor Bill-de la Peña made a motion to investigate potential violations of municipal and state laws relative to the process of the resignation of the City Manager.
- F-30.** The City Attorney indicated that the District Attorney’s Office or the Attorney General would be the appropriate agencies to investigate possible Brown Act violations and offered to write a letter on behalf of the Council to request same.

- F-31.** The City Attorney offered to recommend a law firm out of the county that specializes in municipal work to investigate possible municipal code violations.
- F-32.** The Council did not approve the expenditure of any funds for an outside law firm to conduct an investigation.
- F-33.** The Council voted to support an investigation by the District Attorney or Attorney General of possible Brown Act violations by members of the City Council. The investigation would include the Council and related staff and cover a period of two years from July, 2003, through July, 2005.
- F-34.** Scott Mitnick, Interim City Manager, was selected as the new City Manager at the Council's November 15, 2005, meeting. Some Council members wanted to avoid a costly and time-consuming search process for a replacement. The Council was split on the issue of candidate selection. One Council member stated that a candidate search would have been a more fair process.
- F-35.** The City has no stated policy relative to the recruitment and hiring process for the City Manager.
- F-36.** Numerous citizen complaints were voiced regarding Mr. Mitnick's compensation because it almost doubled his salary as Interim City Manager.
- F-37.** Councilman Masry resigned from the City Council on November 30, 2005. He had been ill and absent from most meetings since March, 2005. He was elected in November, 2000, and re-elected in 2004 to a term to expire in 2008.
- F-38.** When Councilman Masry resigned and subsequently died, his family and others expressed a strong preference for a special election to fill his seat, especially since three years remained of his four-year term. The Council stated their concern about the cost of a special election, based on their own estimate of \$250,000, and elected to exercise their option to appoint someone to the vacant seat.
- F-39.** Although there is no stated policy with respect to the replacement of a Council member, the City has the authority to either appoint or hold a special election.
- F-40.** Many citizens expressed their concern at the lack of a democratic process (special election) to replace a City Council member. Thus, many citizens were disturbed when the City Council decided to appoint Tom Glancey to fill the seat vacated by Councilman Masry.
- F-41.** After Mr. Glancey was appointed to the City Council, an estimate was received from the Registrar of Voters of \$50,000 to hold a special election, instead of the City Council's estimate of \$250,000.
- F-42.** At a Council workshop in July, 2005, the behavior and ethics of Council members, as well as the need for clear rules and enforcement, were discussed. The Council agreed to a code of conduct designed to make their behavior more civil toward one another. The norms, passed unanimously, are also intended to reduce personal attacks, eliminate public reprimands of city staff, and mitigate smears during election campaigns.
- F-43.** The City Council's agreed-upon norms of conduct are: treat one another and staff respectfully; follow the rules; speak for yourself, not others; do not

mention other Council members to the media; do not criticize staff in public; keep comments from wandering into areas indirectly critical of other Council members; do not encourage supporters to come to City Hall to criticize other Council members; do not make assumptions; and do not question motives.

- F-44.** TOMC, Chapter 10, §1-10.01 “... The Code of Ethics for Officials and Employees” (Code of Ethics) requires that “public officials and employees be independent, impartial and responsible to the people; that government decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government.”
- F-45.** Section 1-10.02 of the Code of Ethics provides for public officials “... to observe, in their official acts, the highest standards of performance ... Recognizing that the public interests must be their primary concern, their conduct in both their official and private affairs should be above reproach.”
- F-46.** Section §1-10.03 of the Code of Ethics states that “All officials and employees owe a duty of loyalty to the political objectives expressed by the electorate.” Further, that “Appointive officials and employees should adhere to the rules of work and performance established as the standards for their positions by the appropriate authority.” And finally, that “Officials and employees should not exceed their authority or breach the law, or ask others to do so ... ”

Conclusions

- C-01.** The circumstances leading to the resignation of City Manager Gatch included assertions by Councilmember Fox that a vote to terminate the City Manager was a certainty. Councilmember Fox made those assertions even though no review of the City Manager’s continued employment status was included on any City Council meeting agenda immediately prior to that event. This situation can lead easily to an assumption that Councilmember Fox communicated with at least two other City Council members in violation of Brown Act (Government Code §54952.2). However, the evidence of such a violation of the Brown Act is insufficiently clear to justify the initiation of a formal accusation procedure by the Grand Jury against any member of the Thousand Oaks City Council. (F-01, F-02)
- C-02.** Violations of TOMC §2-1.208 are difficult to prove because it is usual, in the conduct of city business, for Council members to interact individually with the City Manager and city staff. (F-02, F-04)
- C-03.** The actions of Councilman Fox giving specific directives and communications to City Manager Gatch outside of a duly-held City Council meeting, pressuring him to resign, may give the appearance of being in violation of TOMC §2-1.208. (F-01, F-02, F-04)
- C-04.** While TOMC §2-1.208 should not be construed to prevent any Council member from discussing city business with the City Manager or staff, it does constrain individual Council members from giving direct orders or instructions to the City Manager outside of regular Council meetings. (F-15 through F-28)

- C-05.** The city government of Thousand Oaks often gives the appearance that it fails to operate transparently and professionally. There is a perception that many decisions are decided in advance of City Council meetings and that the meetings are essentially a public formality. Three specific examples are: 1) the forced resignation of City Manager Gatch; 2) the recruitment process of a new City Manager; and 3) the decision not to hold an election to replace Councilman Masry, even though three years remained on his term of office. (F-01, F-02, F-04, F-10, F-13 through F-21, F-28, F-31 through F-36, F-38 through F-44)
- C-06.** A public perception of underhandedness, poor judgment, and lack of professionalism exists with respect to the resignation of City Manager Gatch that resulted in a rush to judgment when other options were readily available. (F-14 through F-22, F-24 through F-28, F-31, F-33)
- C-07.** The City Council could have easily reviewed the City Manager’s performance in closed session and given him the opportunity to resign or be fired. (F-08 through F-14)
- C-08.** The City Council’s history of adversarial relationships, lack of cooperation, internal strife and acrimony, insulting citizenry, and extreme and disrespectful rhetoric has been well-documented for over a decade. (F-15, F-17 through F-22, F-27, F-28, F-33 through F-38)

Recommendations

- R-01.** At a minimum, the City Council should adhere to the existing Code of Ethics and the recently adopted Code of Professional Conduct. (C-01 through C-06, C-08)
- R-02.** The City Council should revise the Code of Ethics to avoid the appearance of Brown Act violations, to ensure the transparent conduct of city business, to address the public perception of favoritism, to deal with the appearance that decisions are often made in advance of City Council meetings, and to address a perceived lack of objective decision-making. (C-01 through C-06, C-08)
- R-03.** Personnel performance and reviews must be handled in strict adherence to the TOMC pursuant to individual contracts. (C-07)
- R-04.** The City Council should conduct city business in such a way as to inspire confidence, respect, and trust from constituents. (C-01 through C-06, C-08)

Responses Required From:

Thousand Oaks City Council (R-01 through R-04)

Attachments

Attachment I. Letter dated June 30, 2005 from R. Thomas Harris, Special Assistant District Attorney.)

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OFFICE OF THE DISTRICT ATTORNEY

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June 30, 2005

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VIA FACSIMILE & U.S. MAIL

Amy Albano
City Attorney
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2100 Thousand Oaks Bl.
Thousand Oaks, CA 91362-2903

Re: **Your Request for Investigation of Possible Brown Act Violations**

Dear Ms. Albano:

In your April 22, 2005, letter to this office, you conveyed a formal request from the Thousand Oaks City Council that we investigate possible Brown Act violations in the Council's hiring and subsequent termination of employment of Thousand Oaks City Manager Philip Gatch. You attached to your letter a partial transcript of the City Council's discussion of this investigation request at its April 19, 2005, meeting, but did not set forth any evidence of possible Brown Act violations in your letter. When we contacted you upon receipt of your letter, you stated that you had no evidence of any such violations to provide.

Pursuant to our request, you subsequently sent us a copy of the videotape of the City Council meeting of April 19, 2005, plus a complete transcription of all comments made at that meeting regarding the Gatch termination under Agenda Items 6 (Public Comments) and 13.A (Council Issues-Request for Outside Counsel).

In addition to reviewing all of the materials you have provided plus numerous other documents, (including, e.g., the City Council/Gatch "Contract Termination Agreement" and some unsolicited letters from various individuals¹), we interviewed all five members of the City Council and a

¹ One of these correspondents questioned whether it would be appropriate for our office to conduct any investigation of the Thousand Oaks City Council in light of the facts that the City of Thousand Oaks had joined as a plaintiff in our recent public safety funding lawsuit against the County Board of Supervisors and that some members of the City Council had supported the incumbent District Attorney's bid for election three years ago. In response, we sought and received a written opinion on the conflict question from the California Attorney General's Office. The Attorney General opined that such prior relationships were no impediment to our office being able to "fairly handle the Brown Act investigation and determination of [any] violations," and did not create any disabling conflict of interest.

Hall of Justice, 800 South Victoria Ave., Ventura, CA 93009 www.ventura.org/vcda/ (805) 654-2500 Fax (805) 654-3850

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COMMUNICATIONS DEPT.

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Amy Albano
June 30, 2005
Page 2

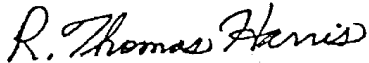
number of other community members. In summary, although our investigation and contacts with council members and council watchers revealed an abundance of mutual distrust plus many nonspecific suspicions and accusations, it provided no evidence to support any of them. More specifically, we found no evidence of any alleged Brown Act violations that would support a criminal filing.²

Although we have not found any evidence of a criminal violation of the Brown Act in the events culminating in the termination of employment of City Manager Gatch, two additional observations are warranted:

First, although some have questioned whether there may have been any violations of section 2-1.208 of the Thousand Oaks Municipal Code governing the methods by which Thousand Oaks council members and city managers are to interact, enforcement of that city code section is beyond our purview. Thus, we have neither investigated nor drawn any conclusions as to whether the provisions of this city ordinance are being followed.

Second, some of the persons we interviewed expressed suspicions that confidential information discussed in closed sessions of the City Council may have been improperly disclosed to persons not entitled to receive it, but none could offer any evidence to establish that any such disclosures were actually made and, if so, by whom and to whom. Although disclosure of confidential information that has been acquired by being present in a closed session can constitute a violation of Brown Act prohibitions (Government Code section 54963), it is not a criminal offense. Nor could a City Council pass an ordinance declaring it to be a criminal offense. 76 Ops. Cal. Atty. Gen. 289 (1993). However, if such improper disclosures were to occur, council members and any other interested parties would have civil remedies which could be invoked under Government Code section 54963, including referring offending members of the City Council to the Grand Jury for initiation of Accusation proceedings which could culminate in their removal from office. (See Government Code sections 3060 et seq.)

Very truly yours,



R. THOMAS HARRIS
Special Assistant District Attorney

RTH/rb

pc: Thousand Oaks City Council

² See Government Code section 54959: "Each member of legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor."