



## MEMORANDUM

To: Lara Weisiger, City Clerk and Elizabeth Mackenzie, Chief Assistant City Attorney

From: Michael Roush, Special Counsel, City of Alameda

Date: November 29, 2022

Subject: Position Statement Concerning Sunshine Ordinance Complaint Filed November 14, 2022 by John Brennan, et al.

### Introduction

On November 14, 2022, John Brennan and 27 other members of the public (“complainants”) filed a complaint against the Alameda City Council alleging violations of various sections of the City’s Sunshine Ordinance (Alameda Municipal Code, beginning at Section 2-91.1; hereafter, Section references are to the Alameda Municipal Code).

At the heart of the complaint is complainants’ disagreement with the City Council’s decision to approve funding for the Grand Street project that is not to their liking. Dissatisfied with that decision, complainants have filed this complaint alleging violations, many of which they admit violate, in the best of circumstances, only the “spirit” of the Ordinance.

The alleged violations neither violate the substance nor the spirit of the Ordinance. One violation is time barred and the others lack merit. The Commission should so find.

### Violation 1

In Violation 1, complainants allege that at the November 1, 2022 meeting concerning Agenda Item 7-F, the agenda did not include public correspondence that was submitted before the meeting, in violation of Section 2-91.6 c. That section provides that prior to a meeting, persons may submit written comments regarding an agenda item and those comments will be brought to the attention of the persons conducting the meeting. Accordingly, the fundamental purpose of this section is to ensure that the decision makers have received written comments from the public so that those comments may be considered before any decision is made. There is no evidence that the City Council as decision makers had not received all of the written comments from the public before they deliberated on Agenda Item 7-F. Hence, there was no violation of Section 2-91.6 c,

The process by which written comments on an agenda item is provided to the City Council.

For regularly scheduled meetings, City Council agendas are published 12 days prior to the meeting date. Agenda materials, including correspondence that the City has received on an agenda item prior to the publication of the agenda, may be found on the City's website under "GOVERNMENT/Agendas-Minutes-Announcements." Access to agenda reports and attachments are in an agenda database and can be opened under <https://alameda.legistar.com/Calendar.aspx>. After the agenda materials are posted 12 days prior to the meeting, if the City Clerk receives correspondence concerning an agenda item, the City Clerk will add those to the database and repost the agenda. Declaration of City Clerk Lara Weisiger, filed herewith, ("Weisiger Declaration"), at paragraph 2.

Written comments received concerning the November 1, 2022 agenda item 7-F.

On the City Council's agenda for November 1, 2022 was agenda item 7-F, "Recommendation to Consider New Information Regarding the Grand Street Resurfacing and Safety Improvement Project and Authorize the Interim City Manager, or Designee, to Proceed with construction Documents for the Grand Street Resurfacing and Safety Improvement Project Final Concept." When the agenda materials for Item 7-f on the November 1, 2022 agenda were posted, there had been no correspondence received by the City Clerk for the item. Before the start of the meeting on November 1, the City Clerk had received nine pieces of correspondence on this agenda item: one on 10/28, four on 10/31, and four on 11/1, the last of which was received at 2:54 p.m. On November 1, the City Clerk reposted the agenda several times, including at 4:25 p.m., to ensure that all correspondence that had been received had been posted. Weisiger Declaration, at paragraph 3.

At the November 1 meeting when the City Council was receiving public comment on agenda item 7-F, a speaker stated that all correspondence concerning the item had not been posted. The City Clerk responded that all correspondence had been posted as described above. Weisiger Declaration, at paragraph 4.

It appears that some members of the public may have been looking at a stagnant or old PDF of the agenda which would not update when the agenda materials were republished at various times, including late in the afternoon on November 1. Weisiger Declaration, at paragraph 5. Moreover, no Councilmember stated at the meeting that he or she had not received the written comments submitted by the public. Weisiger Declaration, at paragraph 6.

Conclusion

As stated above, the fundamental purpose of Section 2-91.6 c is to ensure that the decision makers—here the City Council—had available to them the written comments of the community so that their comments could be considered in the decision-making process. The City Clerk followed her normal process and reposted the agenda several times as additional written comments were received. If members of the public were not able to view all the written comments, those persons must have been viewing material that was stagnant or an old pdf. Most significantly for purposes of determining whether Section 2-91.6 c had been violated, at no time during the meeting did any Councilmember state that he or she had not received the written comments submitted by the public. Accordingly, there was no violation of Section 2-91.6 c.

## Violation 2

In violation 2, complainants allege that at the November 1, 2022 meeting concerning Agenda Item 7-F at least four persons who wished to be heard on the item were not called upon in violation of Section 2-91.15 b. That section provides every agenda at which action is proposed to be taken shall provide an opportunity for each member of the public to directly address the body concerning the item before the body takes action. There is no evidence that the City Clerk (or any member of the City Council) saw any "hands raised") before the Mayor closed public comment. Accordingly, Section 2-91.15 b was not violated.

### The process by which members of the public are heard on an agenda item.

Since the onset of the COVID-19 pandemic, City Council meetings have been conducted remotely, via Zoom. If a person wishes to attend and/or participate in the meeting, the person must complete a "Zoom Webinar Registration", listing the person's name and email address. At the start of the meeting, the City Clerk opens the list of persons who have joined the Zoom Webinar. That list has two tabs: "Panelists" who are the Councilmembers and the relevant staff (all of whom appear "on screen"); and "Attendees", everyone else including members of the public (who do not appear "on screen"). When an agenda item is called, the City Clerk reads the title. After staff presentation of an agenda item and Council has the opportunity to ask clarifying questions, the Mayor asks the City Clerk if there are any public speakers on each of the agenda items. Weisiger Declaration, at paragraph 7.

In lieu of "speaker cards," which were used during in-person meetings, Attendees participating remotely using Zoom must click an icon on their computer screen to "raise their hand" to indicate that they wish to speak on an item. Generally, Attendees "raise their hand" after the Mayor asks if there are any public speakers but Attendees may, and often do, "raise their hand" as soon as the agenda item is introduced. In either event, once an Attendee raises their hand the Attendee is moved to the top of the list with a hand icon shown next to the person's name (or next to the person's name if the person is attending via a phone call). The City Clerk, the Mayor and all Councilmembers, and other Panelists are able to see raised hands of Attendees. Weisiger Declaration, at paragraph 8.

In addition, next to the word "Attendee" at the top of the tab, a number is added to indicate the number of "raised hands". Since public speaker time is limited depending on the number of speakers, the City Clerk pays close attention to the number of persons who wish to speak so the timing is administered correctly. The City Clerk goes down the list of speakers, calls out the speaker's name, and then the speaker is given permission to speak for up to the allotted time. Once the speaker has concluded the speaker's comments, the Mayor says "Next speaker" and the process is repeated. Weisiger Declaration, at paragraph 9.

When the Mayor says "Next speaker" and there are no more raised hands on the screen, the City Clerk says "That was the last speaker". The Mayor then closes public testimony. After the Mayor closes public testimony, it has been the City Council's practice that if a member of the public thereafter raises a hand on the item, the person will not be called on to be heard. Weisiger Declaration, at paragraph 10.

### Public testimony on the November 1, 2022's Agenda Item 7-F.

The City Council meeting of November 1, 2022 was conducted remotely, via Zoom. The process by which members of the public were heard on Agenda Item 7-F was as described above. In particular, there were seven speakers on the item. After speaker Matt Reid provided comments, the Mayor said "Next speaker". Weisiger Declaration, at paragraph 11. The City Clerk looked at her screen and did not see any additional "raised hands". Accordingly, she said, "That was the last speaker". Weisiger Declaration, at paragraph 11. The Mayor then closed the public testimony portion of the item. Weisiger Declaration, at paragraph 11. Consistent with past practice as described above, any person raising a hand after the Mayor closed public testimony was not called on to be heard on the item. Weisiger Declaration, at paragraph 11. Moreover, neither the Mayor nor any of the Councilmembers—all of whom could see if there were additional "raised hands"—immediately pointed out that there were still members of the public who wished to be heard. Declaration of Weisiger, at paragraph 12.

### Conclusion

The evidence is clear that the City's usual process for having members of the public be heard on Agenda Item 7-F was followed. Complainants contend that at least four speakers had raised their hands before public comments were closed but not only is the City Clerk's declaration to the contrary but also neither the Mayor nor any of the Councilmembers—all of whom could see if there were additional "raised hands"—immediately pointed out that there were still members of the public who wished to be heard. Every person who wanted to be heard on Item 7-F and timely raised their hand before the Mayor closed public testimony was recognized and was heard. Accordingly, Section 2-91.15 b was not violated.

### Violation 3

In Violation 3, complainants allege that the City's webpage for the Grand Street project did not properly notice the agenda item for November 1, 2022 meeting, in violation of Section 2-92.4 g. That section provides that meetings on matters related to certain projects are to be noticed at least as extensively as is required for meetings on such projects. The fundamental purpose of this section is to ensure that members of the public are aware of certain projects so that they may be heard before a decision is made on the item.

Complainants argue that the City's webpage that concerned the Grant Street project cited only to the meeting of October 4, 2022 but not the meeting on November 1 and thereby precluded the public from the opportunity to participate.

This argument is without merit. There is nothing in that section that specifically required the City's webpage to reference the November 1 meeting, or any other public meeting for that matter. The purpose of the webpage was to describe generally the proposed project which it did. Section 2-92.4 g simply requires that "meetings on said projects" (e.g., November 1) and their **related** meetings be published "as extensively"; thus, project meetings and meetings that relate to them must be published in similar ways. Complainants make no such allegation. Rather, they argue that a City informational webpage that was not intended to provide notice for any relevant project meetings (or any related meetings for that matter) failed to provide additional notice for such meetings, which is not required by the Sunshine Ordinance. Moreover, notwithstanding that the webpage had not been revised to reflect

that Council would consider new information at its November 1 meeting, it is clear that this omission did not preclude the public from the opportunity to participate. The City received written comments from nine members of the public, seven speakers provided oral comments, and complainants have alleged that at least four other members of the public had wanted to provide additional oral comments on the item.

### Conclusion

There was no violation of Section 2-92.4 g.

### Violation 4.

In Violation 4, complainants allege that subsections a, b and f of Section 2-91.5 were violated because the description of Agenda Item 5-I of the City Council's meeting on October 18, 2022 failed to describe that the Council would direct that the Grand Street improvement project would be returned to the Council at a future date.

This violation is time barred. Any person may file a complaint against any violation of the Sunshine Ordinance no more than 15 days after the alleged violation. Section 2-93.2 a. Complainants filed their complaint on November 14, 2022, more than 15 days after October 18, 2022. Accordingly, this violation is time barred.

Even if this violation were not time barred, there was no violation because the October 18, 2022 agenda description of Agenda Item 5-I satisfies the requirements of the Brown Act and the Sunshine Ordinance. Agenda Item 5-I on October 18, 2022 provided, "Adoption of a Resolution Appropriating \$126,618 in Transportation Development Act, Article 3, Grant Funding by Amending the Fiscal Year 2022-23 Capital Budget to Increase Budgeted Revenue and Expenditures in Capital Improvement Program C 14000 by \$50,000 and in Capital Improvement Program C 11000 by \$76,618 for Grant Street Improvements."

The Sunshine Ordinance requires the posting of an agenda containing a meaningful description of each item of business to be transacted or discussed. Section 2-91.5 a. A description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that the person may have reason to attend the meeting or seek more information. The description should be brief, concise and written in plain, easily understood English. Section 2-91.5 b. The Sunshine Ordinance is to be read and interpreted consistent with the Brown Act. Under the Brown Act, so long as notice of the essential nature of the matter an agency will consider has been disclosed in the agency's agenda, technical errors or immaterial omissions are not violations. *San Diegans for Open Gov't v. City of Oceanside* (2016) 4 Cal. App. 5<sup>th</sup> 637, 643.

From the agenda title, it is evident that the item on the agenda concerned the Grant Street improvements and funding sources for those improvements. The agenda item was meaningful in that it was clear and specific to a person of average intelligence and education that the City Council would consider appropriating a total of \$126,618 for Grand Street improvements and therefore any person whose interests would be affected by the item would have reason to attend the meeting or seek more information. Accordingly, the requirements of Section 2-91.5 a and b were more than satisfied.

Moreover, contrary to the assertions of complainants, the agenda item did not limit the Council to discuss or take action on just the funding for the improvements. By the agenda's identifying the reason

for the funding—the Grand Street Improvements—Council had wide discretion to discuss and take action on all aspects of such project including, as it did, directing that it be returned at a future date.

For the same reason, Council's action did not violate Section 2-91.5 f. That section simply prohibits Council action or discussion on an item not on the agenda. As stated above, the Grand Street improvement project was clearly identified on the agenda and, as such, granted wide discretion to the Council as to the disposition of the item. Council exercised that discretion and directed that it be returned to it at a future date.

Moreover, even if the Council's action to request the matter be placed on a future agenda was somehow outside the permissible bounds of the agenda description (which it was not), City Council nevertheless had the authority under the Brown Act to do so. The Brown Act provides that although generally no action or discussion shall be undertaken on any item not appearing on a posted agenda, a member of a legislative body, or the body itself may take action to direct staff to place a matter of business on a future agenda. Government Code, Section 54954.2 (a)(3); *Cruz v. City of Culver City* 2 Cal. App. 5<sup>th</sup> 239, 250 (2016). Council's action in directing the Grand Street project to return to it on a future agenda was squarely authorized by the Brown Act and comports with the guidance in the *Cruz* case, and such action, is properly subsumed within its agenda title. As it must be "brief, concise," it is not required be to as comprehensive as minutes or even the agenda report itself. It must simply provide notice of the proposed action taken so that an ordinary member of the public can decide whether it would be in their interest to participate in the meeting (or not). In addition, even if the request to have the matter placed on a future agenda was "not on the agenda", Section 2-91.5 f was not violated. The Sunshine Ordinance must be read to be consistent with the Brown Act and, as described earlier in this paragraph, the Brown Act clearly authorized this Council action. Put simply, nothing in Section 2-91.5 f prohibited this Council action.

### Conclusion

Complainants' contentions on this item center not on the agenda title but on what they perceive as a violation of the Council's procedural rules, arguing that Council action to place the item on a future agenda constituted a reconsideration of its previous decision on October 4 without following the rules to do so. Whatever the merits of these contentions—and there are none—these contentions have nothing to do with an infirmity within the description of Agenda Item 5-I on October 18.

For all of these reasons, there were no violations of Section 2-91.5 a, b, or f.

### Violation 5

In Violation 5, similar to the allegations in Violation 4, complainants allege that subsections a, b, and f of Section 2-91.5 were violated when the description of Agenda Item 7-F of the City Council's November 1, 2022 meeting failed to describe accurately the nature of the item to be discussed regarding the agenda item. As set forth above, the fundamental purpose of this section is for an agenda to convey the essential nature of an item to be discussed; if that purpose is satisfied, there is no violation.

Unlike Violation 4 which is time barred, the violations alleged in Violation 5 occurred on November 1, 2022 so the complaint is timely as to that Violation. But, as was the case with Violation 4, there was no violation because Agenda Item 7-F on the November 1, 2022 agenda satisfied the requirements of the Sunshine Ordinance. To reiterate, the Sunshine Ordinance requires the posting of an agenda containing

a meaningful description of each item of business to be transacted or discussed. Section 2-91.5 a. A description is meaningful if it sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that the person may have reason to attend the meeting or seek more information. The description should be brief, concise and written in plain, easily understood English. Section 2-91.5 b. Under Sunshine Ordinance, read consistently with the Brown Act, so long as notice of the essential nature of the matter an agency will consider has been disclosed in the agency's agenda, technical errors or immaterial omissions are not violations. *San Diegans for Open Gov't. v City of Oceanside, supra*, at 643.

Agenda Item 7-F on the November 1, 2022 provided, "Recommendation to Consider New Information Regarding the Grand Street Resurfacing and Safety Improvement Project and Authorize the Interim City Manager, or Designee, to Proceed with construction Documents for the Grand Street Resurfacing and Safety Improvement Project Final Concept." It cannot be seriously argued the agenda failed to describe that the Council would be considering new information relative to the Grant Street project. As set forth in the body of the agenda report, new information had come to the City's attention since Council took action on this project on October 4, 2022 and this fact was properly reflected in the agenda description.

The agenda item was meaningful in that it was clear and specific to a person of average intelligence and education that the City Council would consider new information concerning the Grand Street improvements and therefore any person whose interests would be affected by the item would have reason to attend the meeting or seek more information. The agenda item did not indicate or guarantee any particular outcome or that Council would authorize the Interim City Manager to proceed with construction documents based on that new information. Council retained discretion to revise or not the previously approved improvements.

By reason of written comments submitted prior to and on the date of this meeting, as well as extensive public testimony at the meeting itself, it is clear that members of the public—including many of the complainants here-- understood clearly what was before the City Council based on the agenda title and indeed several members of the public objected to any revision to the previously approved project.

Council's action concerning Agenda Item 7-F likewise did not violate Section 2-91.5 f, which prohibits action or discussion on an item not on the agenda. The agenda title provided the Council would consider new information regarding the project, which it did.

### Conclusion

As with Violation 4, complainants' real objection is not with the description of the agenda title but what complainants believe was a violation of the Council's Rules of Procedure, arguing that violating the Council's Rules also violates a foundational principle of the Sunshine Ordinance. Even if, however, Council action did violate its Rules of Procedure—which it did not—neither Section 2-91.5 nor any other section of the Sunshine Ordinance were violated.