

11/04/2023 SHEEHAN SUNSHINE COMPLAINT submitted 10/11/2023

AKA: All Good Living Lease on Alameda Food Bank former parcel at 1900 Thau Way

Response RE: 10/18/2023 “City’s Position Statement for Second Complaint

SECTION 1. SPECIFIC RESPONSE TO CITY ATTORNEY

ISSUE 1:

The City Attorney claims the complaint is time barred because the complaint referred to the item as CC Item 3334, which was the first reading of the item, on September 19, 2023.

ANSWER 1:

However, upon reading the complaint, it is obvious that the Item number is a typo. The complete sentence noted the meeting date as October 3rd, 2023--which is the next date the Item was on the City Council Agenda, wherein it was pulled from the consent calendar and discussed prior to passing.

The correct Item number on the October 3 2023 Agenda is 5-I Item #3421.

For that reason as well as others, the Complaint is timely.

ISSUE 2:

The City Attorney claims the complaint is time barred because the complaint includes statements made by City Officials and staff during the September 19, 2023 meeting.

ANSWER 2:

This complaint rightly includes statements and materials from the 09/19/23 Council meeting on this same item that are carried over to the 10/03/2023 meeting because:

- (1) the 09/19/2023 agenda materials are defective and that meeting is the first reading of the Item and were carried over to the 10/03/2023 meeting, and
- (2) the 10/03/23 Agenda materials explicitly rely on the materials from the 09/19/23 meeting as do the discussion and votes for the item on the 10/03/23 meeting. and
- (3) the “Staff Communications” attachment to the 10/03/2023 Agenda inadequately addressed those issues and continued the discussion over from 09/19/23 and provided false information on those same issues that were discussed again at the 10/03/2023 meeting.
- (4) the Policy Body erroneously relied on this faulty information to approve the All Good Living lease.

For those reasons as well as others, the Complaint is timely.

ISSUE 3:

The City Attorney claims “the complaint contains no evidence there were violations of the AMC **2-91.9 Agendas and Related Materials; Public Records**¹

ANSWER 3.1:

Per the Public Records requirements of the Sunshine Ordinance and as asserted in my complaint,

City Planning Staff introduced issues not on the agenda and not included in Agenda materials--and therefore not timely available to the public and not sufficient--- regarding:

- (1) “nonconforming use” permits, “grandfather” zoning and land use,
- (2) expiration of the Food Bank leasehold interest,
- (3) applicability of the Surplus Lands Act, and
- (4) omitting information regarding authority of the Rec Park District and relationship to Jean Sweeney Park, Open Space and Rec Park Agreements regarding the AFB parcel.

By way of discussing material issues even if not agendaized during the meeting, these materials are part of the public record required for disclosure for the item “ in connection with a matter for discussion or consideration at a public meeting”... “whether or not <they were> actually distributed to or received by the body...”

The aforementioned supporting materials:

- (1) were not included with the Agenda materials prior to the meeting,
- (2) still are not yet available to the public-- as shown by the absence of documents released for my PRA), and
- (3) will never be available because they don’t exist.

ANSWER 3.2:

Per the Sunshine Ordinance Agenda requirements of 2-91 and all subsections inclusive—as above and if not explicitly stated in my complaint, then now as amended---

City Officials and Planning Staff failed to include in the discussion or in the Agenda materials the relevant accurate information regarding ARPD’s authority over the use of the Thau Parcel, including but not limited to the existing post-2021 agreement with ARPD for the Thau Way parcel as part of the expanded redesigned western entrance of Jean Sweeney Park’s “Urban Garden” portion of the Park.

They also failed to include the necessary information to inform of the Zoning questions, and failed to provide the supposed use permits, an accurate reporting of the lease-status, and the Surplus Lands act that could provide the factual basis for new claims made at the meetings.

For this as well as other reasons, the Agenda materials were “not sufficiently clear and specific”.

ANSWER 3.3:

Whereas per the varying related requirements of the Sunshine Ordinance Section 2-91 overlap or split, or whereas any other requirements of the Sunshine Ordinance apply, as they are relevant and applicable, shall be considered in this complaint as violations of the Sunshine Ordinance, either independently, in combination, or together, as the violations existed then and as they continue to exist.

Whereas it puts an undue burden of the complainant to require that the complaint is overly specific to the section of the Sunshine Ordinance that is violated, it is not in the public interest or in the spirit of the Sunshine Ordinance for the Commission to decide a

complaint based on said “legalese” or require members of the public to argue the matter as a professional attorney, and the Commission should allow lenience on those specifics in order to offset the unfair advantage of the legal representation that the City is afforded.

Therefore, the Commission should hear public complaints with regard to the spirit and intent of the Ordinance and apply any and all applicable Sections of the Ordinance to the facts presented in the Complaint, regardless of whether the named Section is specified correctly or in detail by the complainant.

For those reasons as well as others, the Commission should hear my complaint, because it does in fact include allegations of violations of Section 2-91, including but not limited to 2-91.9 and other Sections of 2-91, including 2-91.5, 2-91.15, 2-91.17, and applicable sections of 2.92.

SECTION 2. COMPLAINANTS REVIEW OF THE PUBLIC RECORD RE SUNSHINE ORDINANCE VIOLATIONS

The Brown Act prohibits discussions about topics that are not properly agendized, which extends to issues introduced in an item that was not disclosed in the agenda materials and the City Attorney is constantly reminding the Council of such.

It is important to note that information provided by the Planning Dept about non-conforming uses and zoning is completely absent from all of the written documentation, as it bears-out the lack of veracity of their statements.

You can’t slip in “unauthorized” information into an Item. —especially something key to the discussion—and the Planning staff statements are not included in the Presentation that they interrupted, the topic is not referenced in the Resolution, and not in the Staff Report.

At a minimum, the Agenda materials in question needed to include some reference to these key contested issues, even just the word “non-conforming use” on a slide might make this arguable by the City.

What you should be asking yourself is: “Why didn’t Andrew Thomas put any of it in writing?”

The answer is: Because he knew it wasn’t true.

Don’t believe me? Read on...

Questions raised as a result of the information presented (or withheld) by City Staff and Officials in consideration of the Proposed Lease for All Good Living at 1900 Thau Way to commence one month after the October 3 2023 City Council meeting.

Please refer to the original complaint for Background on this item.

Whether the Brown Act prohibitions on non-agendized topics fully or partially applies to this complaint, the crux of the issue is that at no time during the hearings of this item did City staff supply truthful, objective and complete information in front of them, and in fact, all documentation shows they knowingly lied to Council and the public to get this lease approved.

The reasoning in this case appears to be cronyism, a personal grudge, or for the Food Bank to avoid the cost of trailer disposal. In any event, the process was corrupted, and approval for this lease was based on falsehoods.

The Sunshine Ordinance requirements are actually needed more for the Council than for the public, as the pre-meeting Agenda requirements and public records provisions of the Sunshine Ordinance ensure the City Council has all the information they need to make to well-informed and legal decisions prior to hearing the item.

Otherwise, they rely on representations made by staff –which may or may not be “objective, accurate and complete”.

This item is a perfect example of what happens when Staff omits topics from the Agenda materials that are germane to the decision.

The Sunshine Ordinance is also supposed to assist the public in holding staff and council accountable when false statements are made by staff that cause approval of Items that should have been rejected.

To this day, the false statements made by staff in public have not been substantiated—on the other hand, the records I’ve seen recently affirm the miscarriage of procedure that I previously reported.

As stated in my original complaint, the All Good Living Lease approval was predicated on Staffs’ assertions that the Food Bank had a current lease at the time, and had some control over the parcel—but the key issue—**the one that is not documented in any written materials**—is that the AGL lease and use was legal because the Food Bank had an existing “approved nonconforming use permit” which enabled an equivalent or more restrictive use of the trailer owned by the Food Bank to “Grandfathered in” on the city-owned parcel at 1900 Thau Way as a nonconforming use even though the parcel is zoned as Open Space.

Many legal questions arose out of the hearing discussions, that which I searched diligently through public records to find the answers.

These questions are of:

1. Status of the Food Banks leasehold interest and use-permits
2. Applicability of the AMC Zoning for nonconforming uses and grandfathering.
3. Deviation from the public RFP process
4. ARPD authority over the Thau Way parcel
5. Surplus Lands Act applicability
6. Public Records Disclosures

Q1. Food Bank Leasehold Interest:

There exists a question as to whether the Food bank even a leasehold-interest in the Thau parcel at the time the All-Good Living Lease was before council.

According to official City statements and per the agenda materials:

- City staff stated the Food Bank had leasehold interest in September and October 2023 and that gave them the authority to “choose the successor” (i.e., no public RFP process)
- The AFB Leasehold interest ended December 2022, which is at least nine months prior to the 09/19/2023 City Council meeting Item considering the lease for All Good Living.
- As of February 2007, the Food Bank was on a month-to-month lease.
- ***By the City’s own statements, the Food Bank had no leasehold interest after December 2022, and there was no explanation of how they arrived at their erroneous conclusion.***

Public records also contradict City Officials public conclusions regarding the Food Bank’s leasehold interest on 09/19/2023 and/or 10/02/23:

- The 2007 AFB lease amendment’s automatic renewal of the AFB lease expired in February 2016 or sooner, and at all times prior and since, once the parcel becomes part of a PDA, the lease is renewable on a month-to-month basis subject to request by AFB and authorization by the City (ARPD, not Planning).
- The Food Bank abandoned 1900 Thau Way as early as March 2020 and no later than December 2020, which is at least three years and nine months prior to the consideration of the All Good Living Lease.
- The Jean Sweeney Open Space Master Plan was developed (and zoned) years before 2016, therefore the AFB lease must be affirmatively renewed as above.
- There exists no evidence that the Food Bank had a current lease agreement for 1900 Thau Way after December 2022 (and more likely December 2020).

Conclusion 1: The Food Bank had no lease-hold interest at 1900 Thau Way at least since December 2022, and therefore the ensuing discussion regarding their leasehold interest is invalid and false and the Lease for All Good Living should not have been heard or approved. Instead it should have been managed and operated per the authority of ARPD.

(See Agenda materials for 09/19/23 and 10/03/2023 City Council Meetings and PRA Request releases)

Q2. Approval of the AGL lease is based on “Grandfathering” the Food Bank’s supposed “nonconforming use permit” for ??? in the “Open Space” zoned Thau Way parcel:

There exists a question of whether the Food Bank operated the Parcel as a nonconforming use that can be “Grandfathered” into the Open Space Zoning and whether the All Good Living Use is either equivalent or more restrictive.

Any mention of this rationale is entirely missing from all written materials prior and subsequent presentations and all records presented by the City for both the September and October meetings.

The unsubstantiated rationale is dependent on all three of the following to be true: (1) the existence of a non-conforming use permit for the Food Bank, (2) an existing leasehold interest by the Food bank, and (3) proof the proposed use is equivalent to the Food Bank use.

According to City officials’ public statements **but NOT** included in any written agenda materials:

- The Food Bank was operating at 1900 Thau Way with an “approved non-conforming use-permit” that was zoned as Open Space.

- The All Good Living Lease should be approved because the use by AGL is “Grandfathered” as an equivalent or more restrictive “approved non-conforming use” than the food bank by a nonprofit organization.

According to City officials’ false public statements **that are** included in written agenda materials:

- The Thau Way parcel would be used by All Good Living to “Distribute” items onsite, and therefore is an equivalent use of the parcel as the Food Bank.

Public records contradict City Officials public statements on 09/19/2023 and/or 10/02/23:

- During the 10/03/23 meeting, AGL Director Chris Tam called in and commented that the site would only be used for storage—which is a *less* restrictive use.
- There is no documentation that supports the City’s assertion that the Food Bank ever had a non-conforming use permit.
- numerous public records exist confirming Food Bank operated as a conforming use (as a concession) in partnership and as part of the overall Jean Sweeney Open Space Master Plan western entrance and “Urban Farm” element to support Alamedans food security, something very important to Jean Sweeney.

Conclusion 2.1: The Food Bank operated and was permitted in conformance with the Open Space Zoning and as a partner of Jean Sweeney Open Space and ARPD.

Conclusion 2.2: the AMC Grandfather clause” zoning codes are not applicable and are inappropriate and in any case expired and/or invalid and is a misguided interpretation of the Zoning Code variously as further explained in my complaint because this code is not applicable to this lease, and/or it has expired and/or the use is less restrictive and/or the Food Bank did not have a leasehold interest and/or there is no existing or prior non-conforming use permit for the Food Bank on this parcel. This Parcel is part of the ARPD management plan for Jean Sweeney Park.

(See Agenda materials for 09/19/23 and 10/03/2023 City Council Meetings, Zoning Ordinances as in Complainants first submittal, and PRA request releases)

Q3. Improper RFP process:

There is a question of whether the lease offering was exempt from the public RFP process and was only offered to All Good Living without the opportunity for anyone else (including ARPD) access to the vacant parcel. This rationale is dependent on a number of various factors as put forth by City Planning Staff.

According to City officials’ public statements **but NOT** included in any written agenda materials:

- By virtue of their leasehold interest, only AFB alone has the authority to pick the successor to their lease.
- ARPD has no authority or rights of first refusal to the use of the parcel.
- AGL plans to use the parcel for a more restrictive or equivalent use like the Food Bank.

However, as stated above and according to all available public records, there is no evidence or precedent for the City’s assertions.

Conclusion 3: The City’s assertions that the Food Bank is authorized to handpick a successor lessee is totally baseless, even if it could be established that the AGL use was allowed and/or that the Food Bank still had an existing lease with the City. The authority of the supposed lessee is pure fiction. Additionally,

the parcel is under the management and operation of ARPD, and the lease process was unauthorized and should not have been heard before Council.

(See Agenda materials for 09/19/23 and 10/03/2023 City Council Meetings, and PRA request releases)

Q4. ARPD Authority and Interest in Thau Way parcel:

There is a question whether the Planning Department had the authority to bring this Item before Council.

According to City officials’ public statements **but NOT** included in any written agenda materials:

- The Planning Department failed to state their authority by right or by permission per the City Charter and/or applicable municipal codes to present this action.
- Planning Department staff admitted they did not confer with or include ARPD or the Rec Park Commission in the decision to put this Item before City Council.

Therefore, Public records contradict City Officials presumption of their authority to bring this item to Council on 09/19/2023 and/or 10/02/23 because:

- The parcel is a City-owned property designated as “Open Space” and as above and is “partnered” with the Park.
- As recognized at the meeting by Planning staff, is operated under the auspices of the Alameda Rec and Park Department and subject to the guidance and recommendations of the Rec Park Commission.

Conclusion 4: Use of the Thau Way parcel is subject to the recommendations of ARPD, and the Planning Department did not have the authority to unilaterally override the authority of ARPD when bringing this Item to City Council without ARPD’s consultation, cooperation, recommendation, or even informing ARPD of their intent to do so and the Item should not have been heard or approved by City Council.

FYI-the AFB trailer has ADA compliant bathrooms that are desperately needed for the western entrance of the Park.

(See City Charter, AMC, and City Websites)

Q5. Surplus Lands Act applicability:

There is the question of whether the Surplus Lands Act is applicable to this Item’s lease with the Alameda Food Bank as it relates to transfer to All Good Living.

According to City officials’ public statements **but NOT** included in any written agenda materials:

- The parcel and use thereof is subject to the affordable housing restrictions of the SLA and this lease prevents the SLA from being triggered so the AGL lease is a “Good thing”.
- Fifty nine months is “not that long”
- The City can revoke it at any time with a notice 6 months in advance.

Public records contradict or invalidate City Officials public statements on 09/19/2023 and/or 10/02/23 because:

- Proper reading of the Surplus Lands Act shows the Thau Way parcel is either exempt or SLA is not applicable because this parcel continues to be under the same Open Space

use and agency ownership as it was prior to 2019 and is still exempt under the current regulations, and therefore is not subject to the affordable housing requirements.

- This parcel is not eligible for nonconforming use-- and the trailer, if ARPD should choose, could be offered to the Rec Park for Jean Sweeney, or the Rec Park could reject the trailer and require it be removed.
- Leasing of this parcel to non-conforming use is actually a violation of the Surplus Lands Act because it changes the existing use and removes control of the Parcel from the appropriate agency/Department and is incompatible with the intended and existing use.

Conclusion 5: The Surplus Lands Act affordable housing restrictions are not applicable to this parcel, except that consistent with the SLA, a nonconforming use of the parcel is prohibited.

(See SLA and Alameda City Zoning Ordinances)

Q6. Public Records Disclosures:

Questions of agenda omissions and improper discussions or topics could be answered by showing where in the agenda materials those references exist—even just the word “permit” or non-conforming use” or “use-permit”, or “Grandfather clause” etc.

My allegations of improper procedures and false public statements—either verbally or in writing or by omission—could be answered by releasing the appropriate public records.

I have requested the whole of City records for the Food Bank and All good Living regarding the item in PRA 23-438 on September 25, 2023, which is 6 weeks ago. The public also has a right to internal communications about this item, but so far, the City has withheld them.

Given the City is aware these records are at issue in this complaint, the City should have already released all records related to the item---most of which should have been readily accessible (if they exist) as part of preparation for hearing the Item prior to presentation to City Council.

Records that were not and still are not available include (but are not limited to):

1. Non-conforming use permits of the Thau Way parcel by Alameda Food Bank at any time.
2. Any agreement that bifurcates the Food Banks partnership with Jean Sweeney Park at Thau Way
3. Evidence that the Food Bank had a leasehold interest after December 2020.

Conclusion 6: My assertions of falsehoods and improper process are undisputed.