City of Alameda

Meeting Agenda

Open Government Commission

Wednesday, November 14, 2018	**7:00 PM**	**City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda, CA 94501**

1 ROLL CALL

2 ORAL COMMUNICATIONS, NON-AGENDA (Public Comment)

3 REGULAR AGENDA ITEMS

3-A 2018-6181 Minutes of the October 1, 2018 Meeting

3-B 2018-6182 Hearing on Sunshine Ordinance Complaint Filed October 30, 2018

Attachments:
Exhibit 1 - 10/16/18 Council Materials
Exhibit 2 - Complaint
Exhibit 3 - Email
Exhibit 4 - 11/7/2018 Council Materials
Exhibit 5 - Draft Commission Decision
Communication from Chair Little

4 COMMISSION COMMUNICATIONS

5 ADJOURNMENT

****NOTE****

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- Minutes of the meeting available in enlarged print.
- Video tapes of the meeting are available upon request.
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• KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE: Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City of Alameda exist to conduct the citizen of Alameda's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.

• In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

Hearing on Sunshine Ordinance Complaint Filed October 30, 2018

To: Honorable Members of the Open Government Commission

From: Alan Cohen, Acting City Attorney

Background

In compliance with the Sunshine Ordinance, the City Clerk on October 4, 2018 published the agenda and supporting materials for the City Council's meeting on October 16, 2018. In relevant part, the title for Agenda item 6-G provided that there would be a public hearing to consider the introduction of an ordinance to amend the Municipal Code in a number of respects concerning cannabis businesses, for example, by adding cannabis retail businesses as conditionally permitted uses in certain zoning districts, by adding two "delivery-only" Cannabis Retail Businesses as a conditionally permitted use in the C-M, Commercial-Manufacturing Zoning District, eliminating the dispersion requirements for "delivery-only" cannabis businesses. The agenda and supporting documents for this item are attached as Exhibit 1.

The City Council conducted a public hearing on these items on October 16, 2018. During the public hearing, Council resolved to include in the amendments a modification to the amendment allowing two "delivery-only" dispensaries, such that these cannabis businesses would be required to offer delivery of cannabis ("delivery required") and would also be open to the public, in recognition that the State and local requirements for either ("delivery-only" versus "delivery required") would be the same. Following the close of the public hearing the City Council introduced on first reading an ordinance amending various sections of the Municipal Code concerning cannabis businesses, including that two "delivery required" dispensaries, which would be open to public, be allowed. In response to a question about whether the ordinance could be introduced that evening with the inclusion of the two "delivery required" dispensaries as conditionally permitted uses, the City Attorney advised yes.

On October 30, 2018, complainant Serena Chen timely filed a Sunshine Ordinance Complaint against the Alameda City Council concerning an alleged violation of a public meeting on October 16, 2018, citing a violation of Section 2-91.5, Agenda Requirements. The complaint states the City Council voted to add two additional cannabis dispensary permits without prior notification. More specifically, the complaint states nowhere in the agenda title or text of the staff report concerning cannabis businesses was there any mention that the number of "full-service marijuana dispensaries" would be increased.

The complaint cites to Section 2-90.1 of the Municipal Code that provides that one of the goals of the Sunshine Ordinance is to ensure that Alameda residents have the opportunity to address the Council prior to a decision being made. The complaint also cites to Section 2-91.5 of the Municipal Code that provides agenda items are to be contain a meaningful description of each item of business to be transacted and that the description of such items be sufficiently clear and specific to alert a person of average intelligence and

education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information about the item. A copy of the complaint is attached as Exhibit 2.

In response to the complaint, the City Attorney's Office emailed Ms. Chen that the ordinance addressed in her complaint was not final ("are being amended"), but would be on the Council's November 7, 2018 agenda for "second reading". She was invited to attend and be heard concerning the ordinance amendments, or to submit comments in writing if she could not attend, in addition to being furnished with materials to do so. A copy of that response is attached as Exhibit 3. A copy of the Council's November 7, 2018 agenda and supporting materials is attached as Exhibit 4.

On November 7, 2018, Ms. Chen submitted a written comment to the Council via email for inclusion in the administrative record. A copy of Ms. Chen's email comment is included in Exhibit 4.

Discussion

One of the goals of the Sunshine Ordinance is that residents have the opportunity to address the City Council prior to decisions being made. Section 2-90.1, AMC. Here, Ms. Chen had the opportunity on November 7, 2018, to address the City Council about her concerns about the amendments to the cannabis ordinances prior to the City Council making a final decision on the amendments. Under those circumstances, there is no violation of Section 2-90.1, AMC.

Concerning the agenda title on October 16, 2018, the title included numerous proposed changes to the cannabis ordinances including the possibility of cannabis retail businesses being conditionally permitted in certain zoning districts, increasing the number of cannabis retail businesses and eliminating the dispersion requirements for certain cannabis businesses. Given the scope of these revisions, a person of average intelligence and education who had concerns about the number or types of cannabis businesses that the Council would consider would have attended the meeting on October 16 or sought more information. More specifically as to Ms. Chen's complaint, the agenda description was meaningful as it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services, and the City Council's action or discussion fell squarely within the ambit of that brief, concise description. In addition, Ms. Chen was offered the opportunity to and did attend the Council meeting on November 7, where she was given an opportunity to provide her concerns, and did do so, about allowing full-service cannabis businesses before the Council took final action on the ordinance amendments. For those reasons, there was no violation of Section 2-91.5, AMC.

Recommendation

The Commission should issue its written decision (attached) finding there were no violations of the Sunshine Ordinance.

Respectfully submitted,

Alan Cohen, Acting City Attorney

Exhibits:

1. October 16, 2018 City Council Materials
2. Complaint
3. Email
4. November 7, 2018 City Council Materials
5. Draft Commission Decision

City of Alameda

Meeting Agenda

City Council

Tuesday, October 16, 2018 **7:00 PM** **City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501**

REVISED on 10/8/2018 at 4:30 p.m. to correct the title of Item 6-D.

SPECIAL MEETING - CLOSED SESSION - 5:00 P.M.

1 Roll Call - City Council

2 Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item

3 Adjournment to Closed Session to consider:

3-A 2018-6030 (45 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: Acting/Interim City Attorney and City Attorney

3-B 2018-6031 (10 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Manager

3-C 2018-6029 (20 minutes) CONFERENCE WITH LABOR NEGOTIATORS (Government Code section 54957.6)
CITY NEGOTIATORS: David L. Rudat, Interim City Manager, Elizabeth D. Warmerdam, Assistant City Manager and Nancy Bronstein, Human Resources Director
EMPLOYEE ORGANIZATIONS: International Brotherhood of Electrical Workers, Local 1245 (IBEW), Electric Utility Professional Association of Alameda (EUPA), Alameda City Employees Association (ACEA), Alameda Police Officers Association Non-Sworn Unit (PANS), and Alameda Management and Confidential Employees Association (MCEA)
UNDER NEGOTIATION: Salaries and Terms of Employment

3-D 2018-6074 (20 minutes) CONFERENCE WITH REAL PROPERTY NEGOTIATORS (Government Code section 54956.8)
PROPERTY: Northwest Territories, Alameda Point
CITY NEGOTIATOR: David L. Rudat, Interim City Manager
POTENTIAL TENANT: East Bay Regional Park District

ISSUE UNDER NEGOTIATION: Real Property Negotiations Price and Terms of Payment

4 Announcement of Action Taken in Closed Session, if any

5 Adjournment - City Council

SPECIAL CITY COUNCIL MEETING - 6:45 P.M.

Pledge of Allegiance

1 Roll Call - City Council

2 Proclamations

2-A 2018-5259 (5 minutes) Proclamation Declaring October, 2018 as Childhood Lead Poisoning Prevention Week and Code Enforcement Officer Appreciation Week. (City Manager 2110)

2-B 2018-6075 (5 minutes) Proclamation Declaring October 2018 as Filipino American History Month. (City Manager 2110)

2-C 2018-5261 (5 minutes) Proclamation Declaring October 16, 2018 as Friends of the Alameda Free Library Appreciation Week. (City Manager 2110)

3 Adjournment - City Council

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

1 Roll Call - City Council

2 Agenda Changes

3 Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes

3-A 2018-5695 (5 minutes) Proclamation Declaring October 2018 as Italian American History Month. (City Manager 2110)

4 Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8

5 Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public

5-A 2018-6077 Minutes of the Special and Regular City Council Meetings Held on

September 18, 2018. (City Clerk)

5-B 2018-6078 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2018-5975 Recommendation to Receive a Report on the Continuation of the Art in City Hall Program. (City Manager 2110)

Attachments: Exhibit 1 - 2019 Guidelines

5-D 2018-5986 Recommendation to Approve the Request for Qualifications (RFQ) to Reuse the Alameda Carnegie Building. (Economic Development 227)

Attachments: Exhibit 1 - 2007 Master Plan Report
Exhibit 2 - Draft RFQ

5-E 2018-5984 Recommendation to Award a Contract to Oregon Romtec Inc. in the Amount of $970,613 for the Krusi Park Recreation Center Replacement Project. (Recreation and Park 280)

Attachments: Exhibit 1 - Contract

5-F 2018-5994 Recommendation to Authorize the Interim City Manager to Execute a Second Amendment to the Agreement with Nute Engineering, to Extend the Term One Year and Increase Compensation in an Amount Not to Exceed $394,390 for a Total Agreement Compensation Not to Exceed $727,459 for Engineering Design Services for Cyclic Sewer Rehabilitation Project, Phase 16. (Public Works 602)

Attachments: Exhibit 1 - Original Agreement
Exhibit 2 - First Amendment
Exhibit 3 - Second Amendment

5-G 2018-5985 Adoption of Resolution Amending the General Fund and the Capital Improvement Program Budget for Fiscal Year 2018-19 for the Jean Sweeney Open Space Park Project to Fund Immediate Possession of Four Remnant Parcels Totaling Approximately 2.8 Acres Owned by Union Pacific; and

Recommendation to Direct the City Attorney to Deposit the Sum of $1,098,000 with the Condemnation Deposits Fund and Seek an Order for Prejudgment Possession of the Subject Property. (Recreation and Parks 310)

Attachments: Exhibit 1 - Map of Remnant Parcels
Resolution

5-H 2018-5988 Recommendation to Expand the Façade Grant Program Boundaries; and

Adoption of Resolution Amending the Fiscal Year 2018-19 Base Reuse Fund Budget to Appropriate $50,000 for the Façade Grant Program. (Base Reuse 858)

Attachments: Resolution

5-I 2018-5992 Adoption of a Resolution Authorizing the Interim City Manager to Enter into a Joint Exercise of Powers Agreement (JPA) Establishing and Governing Operation of the Collection System Technical Advisory Committee, and a Defendant's Side Agreement to Facilitate the Environmental Protection Agency Sewer Consent Decree Compliance. (Public Works 602)

Attachments: Exhibit 1 - 1979 JPA
Exhibit 2 - 1986 JPA
Exhibit 3 - New JPA
Exhibi 4 - Side Agreement
Resolution

5-J 2018-5974 Adoption of Resolution Opposing Proposition 6 on the November 2018 Ballot, which would Repeal the Recent Gas Tax Increase and Eliminate $15 Million in Transportation Funding for Alameda. (City Manager 2110)

Attachments: Exhibit 1 - Impacts of Proposition 6
Resolution

5-K 2018-6041 Adoption of Resolution Supporting Proposition 2 on the November 2018 Ballot, which would Authorize the State of California to Use Revenue from Previously Authorized Bonds to Fund Existing Housing Programs for Individuals with Mental Illness. (City Manager 2110)

Attachments: Resolution

5-L 2018-6073 Final Passage of Ordinance Amending the Alameda Municipal Code By Adding Article 4-60 (Minimum Wage) to Chapter IX (Regulations Concerning Trade and Commerce) Concerning A Citywide Minimum Wage to Raise Alameda's Minimum Wage to $15.00 Per Hour by 2020.

6 Regular Agenda Items

6-A 2018-6009 (5 minutes) Adoption of Resolutions Appointing Rona Rothenberg as a Member of the Planning Board and Reappointing Audrey Hyman as a Member of the Social Service Human Relations Board.

6-B 2018-5910 (15 minutes) Presentation by Friends of the Alameda Animal Shelter (FAAS) - Annual Progress Report. (City Manager 2110)

Attachments: Exhibit 1 - Annual Report
Exhibit 2 - 4th Quarter Report
Exhibit 3 - Mid-Year Report
Exhibit 4 - Leash Your Dog Flyer
Exhibit 5 - FAAS Staffing
Exhibit 6 - Agreement

6-C 2018-6038 (30 minutes) Recommendation to Accept Informational Report on Activities, Quarterly Meetings and Issues Related to the Oakland International Airport. (Community Development 481005)

Attachments: Presentation

6-D 2018-6035 (15 minutes) Introduction of Ordinance Authorizing the Interim City Manager to Execute Documents Necessary to Implement a Ten-Year Lease with SpinLaunch Inc., a California Corporation, for Building 530, Located at 120 West Oriskany Avenue at Alameda Point. (Base Reuse 819099)

Attachments: Exhibit 1 - Premises
Exhibit 2 - Draft Form Lease
Ordinance

6-E 2018-6007 (20 minutes) SUMMARY: Public Hearing to Facilitate a Tax-Exempt Bond Financing for Acquisition, Construction, Improvement, and Equipping of the Site A Affordable Family and Senior Projects by Eden Housing

Public Hearing Under the Tax Equity and Fiscal Responsibility Act (TEFRA) to Consider Adoption of Resolution Approving the Issuance of Revenue Bonds by the California Municipal Finance Authority in an Aggregate Principal Amount Not to Exceed $45,000,000 to Finance a 70-Unit Multifamily Rental Housing Facility for Low- and Very Low-Income Families for the Benefit of Eden Housing Inc., or a Limited Partnership to be Established by Eden Housing Inc. (or an Affiliate); and

Adoption of Resolution Approving the Issuance of Revenue Bonds by the California Municipal Finance Authority in an Aggregate Principal Amount Not to Exceed $40,000,000 to Finance a 60-Unit Multifamily Rental Housing Facility for Low- and Very Low-Income Seniors for the Benefit of Eden Housing Inc., or a Limited Partnership to be Established by Eden Housing Inc. (or an Affiliate). These Revenue Bonds will provide for the financing of the Site A Affordable Family and Senior Projects. (Base Reuse 819099)

Attachments: Exhibit 1 - Project Funding Sources
Resolution - Family Housing Site A
Resolution - Senior Housing Site A

6-F 2018-6032 (15 minutes) Public Hearing to Consider Adoption of Resolution Calling a Special Election Regarding Alteration of the Rate and Method of Apportionment of Special Taxes for Community Facilities District No. 17-1 (Alameda Point Public Services District); and

Adoption of Resolution Amending the Fiscal Year 2018-19 Budget for the Community Facilities District 17-1 Fund by Increasing Estimated Revenue by $174,051 and Increasing the Expenditure Budget by $35,000. (Base Reuse 819099)

Attachments: Resolution - Special Election
Resolution - Budget

6-G 2018-6060 (60 minutes) Adoption of Resolution Amending Master Fee Resolution No. 12191 to Revise Fees to Add New Cannabis Business Operator and Regulatory Fees;

Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or “Adult Use” Cannabis; and (4) Amend Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses;

Introduction of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions; and

Recommendation to Confirm Continued Use of Request for Proposal (RFP) Process to Administer Cannabis Retail Dispensary Business Operators’ Permit Selection Process. (Economic Development)

Attachments: Exhibit 1 - Fee Study
Exhibit 2 - Map of Zones
Exhibit 3 - Letter
Resolution
Ordinance -Cannabis
Ordinance -Cannabis Businesses

6-H 2018-5990 (20 minutes) Recommendation to Accept $1,876,823 Grant from the Staffing for Adequate Fire and Emergency Response (SAFER) Program; and

Adoption of Resolution Amending the Fiscal Year 2018-19 Fire Grants Fund Revenue and Expenditures Budget by $3,043,494, Each, and the General Fund Expenditures Budget by $1,166,671 to Allocate the Required Matching Funds per the Grant Requirement. (Fire 220)

Attachments: Exhibit 1 - Award Package
Resolution

7 City Manager Communications - Communications from City Manager

8 Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda

9 Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item

10 Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings

10-A 2018-6076 Consideration of Mayor's Nomination for Appointment to the Lirbary Board, Planning Board and Social Service Human Relations Board.

11 Adjournment - City Council

• Meeting Rules of Order are available at https://alamedaca.gov/node/5822
• Time frames listed for agenda items are only estimates. Discussions on each item could take more or less time. Anyone interested in speaking is encouraged to arrive early rather than relying on the estimates.
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City of Alameda

Staff Report

File Number:2018-6060 (60 minutes)

City Council

Agenda Date: 10/16/2018

File Type: Regular Agenda Item

Agenda Number: 6-G

Adoption of Resolution Amending Master Fee Resolution No. 12191 to Revise Fees to Add New Cannabis Business Operator and Regulatory Fees;

Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis; and (4) Amend Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses;

Introduction of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions; and

Recommendation to Confirm Continued Use of Request for Proposal (RFP) Process to Administer Cannabis Retail Dispensary Business Operators' Permit Selection Process. (Economic Development)
To: Honorable Mayor and Members of the City Council

From: David L. Rudat, Interim City Manager

EXECUTIVE SUMMARY

In late 2017, Council directed staff to undertake a fee study to determine the cost of regulating cannabis business activities in the City. Accordingly, the City retained a consultant to assist with the preparation of a fee study.

On a parallel track, City staff has worked on potential amendments to the City's existing cannabis regulations. At its May 18, 2018 goal-setting work session, City Council directed staff to report to Council on a number of issues concerning these regulations. Staff prepared the requested analysis

in a semi-annual report for Council consideration at its July 24, 2018 meeting. At that meeting, Council directed staff to prepare the required ordinances to amend the Zoning Code and the Cannabis Business Regulatory Ordinance.

Following the August recess, on September 24, 2018, Planning Board conducted a public hearing on the proposed Zoning Code amendments related to cannabis and offered its recommendations.

At this evening's meeting, the Council is to consider: (a) adding a new cannabis regulatory fee to the City's Master Fee Schedule, based on a fee study; (b) introducing an ordinance amending the Zoning Code, after a public hearing on the Planning Board's recommendations; and (c) introducing an ordinance amending the Cannabis Business Regulatory Ordinance, as described in this staff report.

BACKGROUND

In late 2017, the City Council directed staff to undertake a Cannabis Regulatory Fee Study to ensure that the cost of regulating cannabis business activity in the City is borne by the cannabis businesses.

During that time, the City Council also adopted two ordinances that covered all aspects of regulating the operations of cannabis businesses in Alameda. One ordinance regulates land use issues and requires a use permit for cannabis business activities (Zoning Ordinance). The other ordinance regulates cannabis business activity and requires an operator's permit for cannabis businesses (Regulatory Ordinance). These ordinances were effective on January 18, 2018.

Pursuant to the regulatory ordinance, the maximum number of permits to be issued by cannabis business category is capped. The Council approved a Request for Proposals (RFP) process (including an evaluation rubric and a review panel) to select the businesses in each category that would be eligible to move forward with applying for and obtaining the requisite approvals, with the exception of testing labs, which were permitted to apply for a permit on a first-come/first-served basis.

These categories include:

- One nursery cultivation (including distributor's) permit;
- Four manufacturing permits (including distributor's) permit; and
- Two medicinal retail dispensary permits (including delivery permits)

The first RFP was issued in April 2018. Five proposals were received for retail dispensaries. No proposals were received for any other uses. Three of the proposals for retail dispensaries were deemed non-responsive as they were all located within the 1,000-foot buffer zone for sensitive uses. Two proposals were evaluated by the review panel and one proposer was awarded the right to move forward with its application for an operator's permit. The proposer who was not selected appealed the panel's determination. A hearing officer issued an opinion denying the appeal on September 24,

2018. The proposer who was selected is moving forward with its permit application.

At its May 18, 2018 goal-setting work session, the City Council directed staff to report on a number of issues related to the Regulatory Ordinance. Staff prepared the requested analysis in a semi-annual report for Council consideration at its July 24, 2018 meeting. At that meeting, Council directed staff to prepare the required ordinances to amend the Zoning Ordinance and the Regulatory Ordinance to:

- Eliminate the cap on the number of testing laboratories allowed in Alameda, but maintain the cap of two for dispensaries open to the public;
- Similar to testing laboratories, allow nursery cultivation and cannabis manufacturing businesses to apply for permits on a first-come/first-served basis;
- Maintain the buffer zone of 1,000 feet from public and private K-12 schools and reduce the buffer zone to 600 feet for all other sensitive uses for dispensaries and cultivation uses;
- Expand existing zoning to conditionally permit cannabis dispensaries in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing zoning districts;
- Maintain the existing dispersion requirement for dispensaries, but not for delivery-only dispensaries;
- Confirm continued use of the RFP process, including the scoring rubric and review panel to allocate the limited right to apply for a cannabis business permit;
- Amend ordinance language to clarify that certain uses do not qualify as a “school,” including providing a definition for tutoring centers;
- Allow adult use (recreational) cannabis to be sold in Alameda;
- Clarify that off-island cannabis delivery businesses need only apply for a business license and pay applicable fees; and
- Recommend any clean-up amendments to the Regulatory Ordinance.

The requested fee study and ordinances have been prepared, and are before Council for its consideration and action.

DISCUSSION

Cannabis Regulatory Fee Study

In 2017, Council directed staff to undertake a fee study to determine full recovery of all costs associated with permitting and regulating cannabis businesses. The fee study is attached as Exhibit 1. These fees are legally limited to recovery of actual expenditures and cannot contribute to the General Fund. SCI Consulting Group was retained to perform the cannabis fee study which includes the required calculation and documentation of costs for permitting, regulating, monitoring, and enforcing cannabis related business activities.

The Cannabis Regulatory Fee Study was prepared in the midst of an emerging industry and

regulatory framework for legalized cannabis in the State of California. After adoption, at a future date, it would be appropriate to review and update the fees identified in this fee study under the following circumstances:

- When the program under the Ordinances has been implemented for a period of time sufficient for the City to (a) have had an opportunity to review the actual costs incurred in processing permits and administering the Ordinances; and (b) have achieved some efficiencies in processing applications and undertaking monitoring and compliance;

- If the Ordinances are substantially amended such that the time and/or processes involved are substantially changed; or

- At the expiration of 10 years, which is the period over which the Fee Study proposes recovery of the City's Cannabis Business implementation costs.

The study calculated and documented cannabis costs to-date related to developing and implementing a cannabis business regulatory program in Alameda. The total cost to-date is $222,411 which have been paid for by the General Fund. These fees are projected to be recovered over a 10-year period. If they are not recovered by that time, an updated fee study would determine how the remaining amount would be recovered. This cost recovery is in addition to the "going forward" costs of implementing the City's regulatory framework for cannabis business activity including the cost of conducing the RFP process for retail dispensaries, and processing the operators permit and annual renewal permits.

To implement the fees necessary to regulate the cannabis business industry in Alameda, staff is recommending that the Council adopt a resolution amending the Master Fee Schedule based on the Cannabis Regulatory Fee Study to ensure that the cannabis business regulatory program is revenue-neutral and provides for full cost recovery.

Zoning Code Amendments

At its July 24, 2018 meeting, City Council directed staff to amend the Zoning Code to:

Expand Zoning Districts where Retail Cannabis Dispensaries can be Conditionally Permitted

The City Council directed staff to amend the Zoning Code to expand the zoning districts where retail cannabis dispensaries can be conditionally permitted to include the C-1 Neighborhood Business and C-M Commercial Manufacturing districts (Exhibit 2 is a map of C-1 and C-M zones). The purpose of the C-1 district is to "serve residential areas with convenient shopping and service facilities." The C-1 districts are primarily located along the Lincoln Avenue and Central/Encinal Avenue at locations that once served as railroad stations. Today, these areas are populated with small businesses engaged in retail, food, and office businesses.

The C-M, Commercial Manufacturing Zoning District, is intended for a broad variety of general commercial facilities and light manufacturing uses such as food distribution, research labs, and warehouses. The Harbor Bay Business Park, Wind River Campus, and Ballena Bay are the primary business locations zoned C-M. Two other locations zoned C-M include Stewart Court off of Constitution Avenue and the City block containing Fire Station 3 and the Emergency Operations Center on Grand Street. Permitting cannabis retail sales conditionally in the C-M District could be complementary to the general commercial facilities and light manufacturing uses permitted in that District.

As a conditionally permitted use in both the C-1 and C-M Districts, the City has the ability to consider and impose conditions on any aspect of the cannabis business to address potential negative impacts.

Conditionally Permit Delivery-Only Dispensaries (closed to the public) in the C-M Zone

Allowing delivery-only dispensaries as a conditionally permitted use in the C-M district would be consistent with the underlying intent for that zone. The nature of delivery-only dispensaries would be no different than other distribution or warehouse uses that already exist in those locations. With all cannabis businesses, the City has the ability to impose conditions of approval to address potential impacts through the use permit process.

At its July 24, 2018 meeting, Council requested that staff contact business park representatives to receive input on locating retail and delivery-only dispensaries in the C-M zone. Staff received the attached letter from Harbor Bay Business Park opposing the proposed zoning amendment (Exhibit 3).

Allow Retail and Delivery-Only Dispensaries to Sell Cannabis for Adult Use (recreational use)

At its July 24, 2018 meeting, Council considered lifting the ban on adult-use sales based on a number of factors, including the filing of valid notice of intent to circulate a citizen-initiated petition to legalize adult use cannabis. Although lifting the ban on the sale of adult use cannabis would not raise new concerns from a land use and zoning perspective, an amendment to the Zoning Code is required should the Council decide to allow sale for adult use, as the Code only allows the sale or delivery of medicinal cannabis. Accordingly, as requested by the Council, staff has prepared ordinance amendments to facilitate a discussion and comment on allowing the sale of adult use cannabis in Alameda.

On September 24, 2018, the Planning Board held a public hearing to consider the zoning changes described above. The Planning Board recommended that the City Council adopt an ordinance making those changes as well as several other changes including:

- Moving the one (1) mile dispersion requirement in the Zoning Ordinance to the Regulatory

Ordinance;

- Requiring that delivery-only dispensaries meet the same parking requirements as manufacturing uses rather than retail uses; and

- Review the guidelines for distances used by the California Department of Alcohol Beverage Control ("ABC") to determine if cannabis buffer zones should be consistent with ABC's.[1]

The ordinances as drafted include these changes recommended by the Planning Board. In addition, staff has further revised the draft ordinance based on the Planning Board's discussion to include two definitions, one for Cannabis Retail and one for Cannabis Retail - Delivery Only, rather than a single definition. Two definitions are appropriate as these businesses are conditionally permitted in different zones, are subject to different parking requirements, etc.

Based on the Planning Board's recommendation, staff recommends that the City Council introduce an ordinance amending the Zoning Code as described above.

Regulatory Ordinance Amendments

Staff has prepared a draft ordinance amending the Regulatory Ordinance based on Council direction received on July 24, 2018. The following is a summary of the key amendments to the Regulatory Ordinance.

Dispersion Requirement

As noted above, the Planning Board recommended that the dispersion requirement be removed from the Zoning Code and added to the Regulatory Ordinance. The Planning Board felt that the dispersion requirement was not a land use issue but a regulatory matter. The dispersion requirement prohibits retail dispensaries to be located within one mile of each other. Based on the Planning Board's recommendation, the requirement was deleted from the Zoning Ordinance and added to the Regulatory Ordinance.

In addition, staff makes two recommendations. First, as is reflected in the draft amendments to the Regulatory Ordinance, amend the Ordinance to clarify that the dispersion requirement applies to retail dispensaries, but not to delivery-only dispensaries. Therefore, as drafted, the Ordinance would allow the proposed two delivery-only dispensaries to be located within one mile of each other.

Because these businesses would be closed to the public, staff believes that concerns about over-concentration would not be the same as if these businesses were open to the public. Second, given that the dispersion requirement for retail dispensaries would remain and the timing of when an operator's permit is sought, staff recommends the regulation implementing the RFP process be amended to ensure that applicants demonstrate that they still meet the dispersion requirement. That way, applicants are aware of this issue during the LOI phase, rather the operator's permit application

phase.

Although this item relates to the buffer zones in the Regulatory Ordinance, which is not within the Planning Board's purview, staff is nonetheless communicating this recommendation at the Board's request. Accordingly, staff has no recommendation as to this item.

Two-Tier Buffer Zone

The draft ordinance retains the 1,000-foot buffer zone from public and private K-12 schools and reduces the buffer zone to 600 feet for other sensitive uses including, youth centers and tutoring centers, for retail dispensaries and nursery cultivation. The draft Regulatory Ordinance also provides that, for retail dispensaries, which are subject to the RFP process, the buffer zone will be established based on existing sensitive uses prior to the time of submittal of the Letter of Intent, or at the time of application, in the case of businesses that apply on a first-come-first-served basis. This change will ensure that businesses can proceed with the process and expend resources and funding without the risk that a sensitive use subsequently move in within the applicable buffer zone and then displace the cannabis business, rendering its proposed location ineligible.

The original Regulatory Ordinance included a definition of schools and youth centers, which are primarily recreational in nature, but did not provide a definition for uses that has an academic focus. As such, academic uses were construed as schools as a matter of application. For example, academic after-school programs and tutoring facilities fell within the plain meaning of a "school". Moreover, the Ordinance did not address the applicable buffer for academic uses, as an ancillary use, within buildings that were not intended for such use (e.g., private homes, churches, etc.). Therefore, staff is recommending two changes. First, an amendment clarifies that ancillary academic uses are not a "school" for purposes of the buffer, therefore the 600-foot radius would apply. Second, the following definition for tutoring centers has been added:

> "'Tutoring Center' means any enterprise, whether or not for profit, that operates in a commercial building or structure the principal use of which is to offer instruction of any kind to support academic instruction of K-12 students."

The buffer zone of 600 feet from sensitive uses remains the same for all other cannabis business activities.

Remove Cap on Testing Labs

One of the earliest changes to the Regulatory Ordinance proposed by Council was to remove the cap on testing labs and that change is provided for in the draft ordinance. In addition, based on direction given, an implementing regulation was issued that allows nursery cultivation and manufacturing uses to apply for an operator's permit on a first-come, first-served basis, similar to testing labs. As a result, testing labs, nursery cultivation and manufacturing businesses can all apply for an operator's permit

without going through a RFP process. To date, no applications have been received for any of these business uses.

Allow for Delivery-Only Dispensaries

On July 24, 2018, Council directed staff to expand the categories of permitted cannabis businesses to include up to two delivery-only dispensaries. These brick and mortar businesses would be regulated similar to retail cannabis dispensaries with two major features: (a) they would be closed to the public, and (b) would only be permitted in the C-M zone. To obtain the right to apply for an operator's permit, a prospective business would compete through a RFP process.

The direction to allow up to two delivery-only dispensaries was informed by an interest in providing more options to consumers. There are consumers who may be unable to purchase cannabis products in a retail setting, given the declining nature of their health, the inconvenience due to other obligations, e.g., work or health appointments hours, etc., or want to support an Alameda-based business rather than patronize an off-island delivery business. For businesses, a delivery-only business may be a model that offers a lower barrier to entry into a growing industry in the State. Based on an industry rule of thumb that the market can support one dispensary for every 15,000 people, there is likely market capacity for up to two delivery-only dispensaries in addition to the previously approved two retail dispensaries. The ordinance as drafted allows for two delivery-only dispensaries.

Adult Use of Cannabis

As was reported at the July 24, 2018 meeting, a valid notice of intent to circulate a petition to legalize adult use cannabis was submitted to the City Clerk's office on May 21, 2018. The petitioners have six months to gather signatures. If enough valid signatures are collected the Council can direct preparation of a report to evaluate the impacts of the petition and adopt an ordinance or place the measure on the ballot.

Given the anticipated high level of support for such an initiative (68% of Alameda voters supported the State ballot initiative to allow recreational use and sale of cannabis products) and the costs associated with conducting an election, should enough valid signatures be collected to put an adult use measure on the ballot, a majority of Council members expressed a willingness to allow the sale of cannabis products for adult use.

As noted above, both the draft Zoning Ordinance and Regulatory Ordinance allow for the sale of cannabis products for adult use. These ordinances already provide for the nursery cultivation and manufacturing of cannabis products for adult use.

Additional Clean-Up Amendments

Additional ordinance clean-up amendments are proposed to (1) "Permit Applications" section, which requires the applicant to provide a deed if the applicant will own the property; (2) "Cannabis Business Owner," "Review of Applications; Appeal of Denials and Suspensions," and "Labor Peace Agreement" language to comport with the State law; and, (3) reflect City department realignments.

Other substantive amendments include:

- False Statements/Representations. It shall be unlawful to make false statements in an application;

- Withdrawal of Application. Application withdrawals must be requested in writing and approved by the City. The City shall have continuing jurisdiction to deny a license even if it is withdrawn;

- Permit-Specific Conditions. Conditions specific to delivery-only businesses were added and authority to adopt by regulation other specific conditions for all permit types to expeditiously protect the public's health, safety, and welfare and

- Implementing Regulations. The Planning, Building, and Transportation Department's authority to adopt implementing regulations was expanded to encompass all cannabis ordinances, not only the Regulatory Ordinance.

Staff recommends that the Council review the draft ordinance amending the Regulatory Ordinance and make any changes necessary to accurately reflect direction given to date. Based on direction given, the Council could introduce the draft ordinance or direct staff to make additional changes and return to Council.

Request for Proposals Process

Based on direction from the July 24, 2018 Council meeting, staff is prepared to issue a second RFP, modeled after the initial RFP process, for the remaining opportunity for one retail dispensary and the new opportunity for up to two delivery-only dispensaries, with minor modifications:

- Proposers submitting a Letter of Intent for a retail dispensary location in the C-1, Neighborhood Business district would be required, at minimum, to use a third-party outside mailing service to notify neighbors located within 300 feet of its proposed retail dispensary location to provide feedback.

- The feedback would be used to inform the score for the following rubric categories:

    - Has the proposer described what methods and means it will take to ensure that the

business is integrated into the community? (5 points)

- Has the proposer adequately described its overall approach to operational safety as it relates to employees, customers, businesses, and the community? (5 points)

- Incorporate any changes needed as a result of adopting the Regulatory Ordinance amending Article XVI.

A request was made at the July 24, 2018 Council meeting to exempt Proposers that submitted Letters of Intent for locations that would qualify with the reduced buffer zones from paying an additional fee when re-submitting. Staff recommends applying the fee previously received for businesses that resubmit the same proposed dispensary location, provided that the form of the supporting Real Estate document is relatively the same (e.g., extension of term only). Those qualified Proposers who advance to the Proposal preparation phase would pay that required fee.

FINANCIAL IMPACT

There is no financial impact to the General Fund by introducing ordinances to amend the Zoning Code and Article XVI of the Municipal Code as described above. However, to date, the General Fund has been funding the staff work on this effort. Adopting a resolution amending the Master Fee Schedule to add Cannabis Business Regulatory Fees, based on the Fee Study attached as Exhibit 1, will ensure that the cost of staff work related to regulating cannabis business activities will be repaid and future work will be borne solely by cannabis businesses. Cost recovery is determined on a per permit or per proposal cost and includes $5,300 per proposal to complete the RFP process, $7,600 to process an application for an operator permit, and $2,300 to conduct the annual renewal process.

MUNICIPAL CODE/POLICY DOCUMENT CROSS REFERENCE

This report and its recommended actions have been prepared in conformance with the Alameda Municipal Code.

ENVIRONMENTAL REVIEW

California Environmental Quality Act ("CEQA") review is not required for this action pursuant to Business and Professions Code section 26055(h) as the City of Alameda requires discretionary review and approval of subsequent applications to engage in commercial cannabis activity. As a separate and independent basis, this action is exempt from CEQA pursuant to section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that this action may have a significant effect on the environment.

RECOMMENDATION

It is recommended that the City Council:

City Council

Agenda Date: 10/16/2018

File Type: Regular Agenda Item

Agenda Number: 6-G

Adopt a Resolution Amending Master Fee Resolution No. 12191 to Add Cannabis Business Regulatory Fees

Hold a Public Hearing to Consider Planning Board's Recommendations Concerning Introduction of Ordinance Amending the Alameda Municipal Code Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis; and (4) Any Other Necessary Amendments, including Amending Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses

Introduce an Ordinance Amending Article XVI (Cannabis Businesses) of the Alameda Municipal Code to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clean-Up Revisions

Confirm Continued Use of RFP Process to Administer Cannabis Retail Dispensary Business Operators' Permit Selection Process

Respectfully submitted,
Debbie Potter, Base Reuse and Economic Development Director

By,
Lois Butler, Economic Development Manager

Financial Impact section reviewed,
Elena Adair, Finance Director

Exhibits:
1. Fee Study
2. Map of Zones
3. Letter

CITY OF ALAMEDA

CANNABIS BUSINESS OPERATOR PERMIT AND REGULATORY FEE STUDY

OCTOBER 2018

PREPARED FOR:

CITY OF ALAMEDA
CITY COUNCIL

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CITY OF ALAMEDA

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ACKNOWLEDGMENTS

This Commercial Cannabis Regulatory Fee Study was prepared by SCI Consulting Group ("SCI") for the City of Alameda ("City"). The work was performed under the general direction of Lois Butler, Economic Development Manager in the Base Reuse and Economic Development Department.

We would like to acknowledge special efforts made by the following individuals and departments for this project:

Debbie Potter, Base Reuse and Economic Development Department
Allen Tai, Planning and Building Department
Sergeant David Pascoe, Alameda Police Department
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SUMMARY

INTRODUCTION

The Medical Cannabis Regulation and Safety Act ("MCRSA") was signed into law in October of 2015. MCRSA was composed of three bills: AB 266 which established a dual-licensing structure requiring a state license and a local license or permit, AB 243 which established a regulatory and licensing structure for cultivation sites under the Department of Food and Agriculture, and SB 643 which established criteria for licensing of medical cannabis businesses, regulated physicians, and recognized local authority to levy taxes and fees.

On November 8, 2016, the voters of the State of California approved Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act," which decriminalized the adult use of cannabis for non-medical purposes and established a regulatory scheme at the state level.

On June 27, 2017, Senate Bill 94, the "Medicinal and Adult-Use Cannabis Regulation and Safety Act" ("MAUCRSA") repealed and replaced MCRSA. MAUCRSA consolidates the medical MCRSA and adult use (Proposition 64) cannabis statutes.

In November 2017, the City of Alameda ("City") adopted Ordinance No. 3201 ("regulatory ordinance"), a new regulatory framework to permit and regulate the retail sale, manufacturing, testing, nursery cultivation, distribution and delivery of commercial cannabis within the City. It requires a Cannabis Business Operators Permit (CBOP) for the following cannabis commercial operations:

- Two medicinal retail dispensary permits (including delivery permits)
- Four manufacturing permits (including distributor's) permit
- One nursery cultivation permit
- Two testing laboratory permits

The City subsequently adopted Ordinance No. 3206, a zoning ordinance, in December 2017, to amend to the Alameda Municipal Code repealing the prohibition on cannabis activities and identifying the zones for commercial cannabis business locations. The City is contemplating several amendments to both the regulator and zoning ordinances including adding two delivery-only dispensaries, and the anticipated costs incurred for this activity is expected to be similar to other commercial cannabis activities (e.g., medicinal retail dispensary). Therefore, this fee study analyzes the costs of administering a program that includes regulating delivery-only dispensaries.[1]

[1] The revised regulatory ordinance for two delivery-only dispensaries is expected to be on the City Council October 16, 2018, agenda.

The purpose of this Cannabis Regulatory Fee Study ("Fee Study") is to establish the legal and policy basis for imposing regulatory fees ("fees") for permitting and regulating the operational aspects of commercial cannabis activities in the City. The fees will be used to reimburse the City departments for reasonable direct and indirect labor costs and contracted services attributable to reviewing and acting upon the applications and verifying and enforcing compliance with the regulatory ordinance.

LEGAL FRAMEWORK

In order to impose such fees, this Fee Study will present findings to meet the substantive requirements of Proposition 26, which are as follows:

1. Demonstrate that the levy, charge, or other exaction is not a tax; and
2. The amount is not more than necessary to cover the reasonable cost of the governmental activity; and
3. The manner in which those costs are allocated to a payor bears a fair or reasonable relationship to the payor's burden on, or benefits received from, the governmental activity.

Additionally, recent case law has provided further clarification of these substantive requirements, which are as follows:

- Costs need not be "finely calibrated to the precise benefit each individual fee payor might derive."[2]
- The payor's burden or benefit from the program is not measured on an individual basis. Rather, it is measured collectively, considering all fee payors.[3]
- Demonstrating that the amount collected is no more than is necessary to cover the reasonable costs of the program is satisfied by estimating the approximate cost of the activity and demonstrating that this cost is equal to or greater than the fee revenue to be received.[4]
- Reasonable costs associated with the creation of the regulatory program may be recovered by a regulatory fee.[5]

[2] Griffith v. County of Santa Cruz (2012)
[3] Griffith v. County of Santa Cruz (2012); Newhall County Water District v. Castaic Lake Water Agency (2016)
[4] Griffith v. County of Santa Cruz (2012)
[5] League of California Cities Propositions 26 and 218 Implementation Guide, May 2017, pp. 70-71.

METHODOLOGY AND APPROACH

The total annual cost of the implementation of the City's commercial cannabis activities and enforcement of the regulatory ordinance by the City was used to determine the City's commercial cannabis business regulatory fees. These costs are then allocated to the payor in a way that demonstrates that the costs bear a fair or reasonable relationship to the payor's burden on or benefits from the program.

The City went through a deliberative process to establish a reasonable expenditure plan to use in setting the fees. An interdepartmental working group of City staff worked together to develop the regulatory and zoning ordinances and review the proposed fees. The working group was comprised of representatives from the Base Reuse and Economic Development Department, including the Planning and Building Divisions, the City Manager's Office, the City Attorney's Office, the Police Department and the Finance Department.

For each of the regulatory fees established by this Fee Study, the City evaluated the regulatory ordinance and identified specific tasks and activities associated with permitting and enforcement of the regulations. Each City department then determined the specific hours and personnel needed by their department to complete their tasks and activities. The estimated labor hours for each activity were then multiplied by each relevant department's current hourly labor rate for each position completing the task. The hourly labor rates include various salary and benefits, departmental support, supervision, and other administration overhead and similar indirect costs.

The type of costs included in the fees includes labor costs, contracted services, supplies, inter-department charges, and other incidental costs. Detailed supporting analysis tables served as the mechanism to determine specific fee rates and estimated hours, as summarized in this Fee Study. These time estimates and level of effort were then reviewed and evaluated by other City staff, and SCI Consulting Group for their reasonableness.

Where a deposit-based fee is proposed, a fee deposit is required for an initial allotment of estimated staff time and any additional research, review and/or approval that exceeds the estimate, is subject to an hourly fee once actual staff hours incurred are known and will be billed at once those costs are determined. The deposits are calculated based on each department's hourly rates as of the date of this fee study, but the actual costs will be calculated and charged at the rates that apply on the date the work is conducted. Each department's rates are typically updated annually in accordance with usual fee adoption processes. If the actual time is less than the estimate, the deposit is subject to a partial refund. Deposit-based fees are commonly used by the Base Reuse and Economic Development Department and Planning and Building Division in its existing fee structure.

Where a flat fee is proposed, the time estimate remains constant for each application or appeal and the fees are based on each department's hourly rates as of the date of this fee study. Flat fees are used in those instances where the City is reasonably certain of the time necessary for the task or activity.

In order to ensure that the fees bear a fair or reasonable relationship to the payor's burden on or benefits from the regulatory program, this Fee Study proposes the use of deposit-based fees for application and permit activities and flat fees for regulatory (annual monitoring and compliance) fees.

SUMMARY OF GENERAL FINDINGS

The following general findings from the Fee Study are presented:

1. The City's proposed cannabis regulatory fees are not taxes, but regulatory fees proposed to recover costs associated with the regulatory ordinance, which created a new regulatory framework to permit and regulate retail sales, manufacturing, nursery cultivation, and testing laboratories of cannabis in the City of Alameda.
2. The City went through a deliberative process to establish reasonable costs for permitting and enforcement of the new regulations.
3. The fee amounts determined by this Fee Study do not exceed the reasonable cost of permitting and enforcement of the new regulations.
4. The fees bear a fair or reasonable relationship to the payor's burden on or benefits from the regulatory program.

SUMMARY OF RECOMMENDATIONS

Based on the findings presented in this Fee Study, it is recommended that the City consider adopting the fees shown in Figure 1 (Application and Permit Fees) and Figure 2 (Annual Regulatory Fees), including:

1. Deposit-based hourly fees (additional detail in Figures 3 - 7). For deposit-based fees, it is recommended that the City adopt deposit-based fees proposed by this Fee Study and to charge the applicant for the actual work performed at the applicable hourly rate in effect for the department; and
2. Flat fees (additional detail in Figures 9 – 16).

FIGURE 1 – SUMMARY OF PROPOSED CANNABIS BUSINESS OPERATOR APPLICATION AND PERMIT FEES

Fee Description	Fee [1]	Unit	Figure
Cannabis Business Operator Permit: LOI Review Fee	$900	flat fee	3
Cannabis Business Operator Permit: RFP Proposal Fee	$4,400	flat fee	4
Cannabis Business Operator Permit: RFP Decision Appeal Fee	$6,600	deposit-based	5
Cannabis Business Operator Permit: Application Fee	$7,600	deposit-based	6
Cannabis Business Operator Permit: Renewal Fee	$2,300	deposit-based	7

Notes:

[1] Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 2 – SUMMARY OF CANNABIS BUSINESS REGULATORY PROGRAM FEES

Fee Description	Fee [1]	Unit	Figure
Retail Dispensary	$7,400	per permit annually	9
Nusery Cultivation	$4,500	per permit annually	10
Testing Laboratory	$4,500	per permit annually	11
Manufacturing: Volatile	$8,500	per permit annually	12
Manufacturing: Non-Volatile	$7,700	per permit annually	13
Delivery-Only Dispensary	$6,000	per permit annually	14
Distribution (in conjunction with Cultivation or Manufacturing only)	$4,400	per permit annually	15
Delivery (in conjunction with Retail only)	$3,700	per permit annually	16

Notes:

[1] Proposed fees are rounded down to the nearest hundred dollars.

CANNABIS BUSINESS OPERATOR PERMIT APPLICATION FEES

The City of Alameda has adopted a Request for Proposals ("RFP") process to invite potential retail and delivery-only dispensary businesses to submit their applications for the establishment of Commercial Cannabis Operator Permit ("CBOP"). Nursery cultivation, testing laboratories, and manufacturing cannabis businesses are on a first-come, first-serve basis.

The RFP process requires: (1) submission of a Letter of Intent ("LOI"), (2) review of the LOI for minimum requirements, (3) submission and review of proposals based on a scoring rubric and evaluation criteria, including an oral interview, (4) issuance of a conditional award letter, and (5) maintenance of a waiting list of the balance of qualified proposers.

The following fees will be collected at different stages of the application process for:

- Cannabis Business Operator Permit LOI Review Fee
- Cannabis Business Operator Permit RFP Proposal Review Fee
- Cannabis Business Operator Permit RFP Decision Appeal Fee *(if Applicant appeals)*
- Cannabis Business Operator Permit Application Fee
- Cannabis Business Operator Permit Renewal Fee

Effective December 2018, the Planning and Building Division will take over oversight of the CBOP process. The Fully Burdened Hourly Rate, beginning with the LOI Review Fee in Figure 3, has been adjusted by use of a blended rate to account for the transition from Economic Development Manager to Planning Services Manager.

CANNABIS BUSINESS OPERATOR PERMIT LOI REVIEW FEE

The proposed pre-application review fee is a flat fee of $900 upon submittal of the LOI portion of the RFP process. The flat fee recovers the cost to review the LOI, evidence of secured location for the cannabis business, a statement confirming the business location is outside of the buffer zone and confirm payment of the filing fee. This includes detailed review by interdepartmental working group from various City departments.

CANNABIS BUSINESS OPERATOR PERMIT RFP PROPOSAL REVIEW FEE

All proposers with qualifying LOIs are invited to submit a proposal in response to the RFP. The proposals are then evaluated by a selection panel which includes a modified 'blind scoring' of the proposals and oral interviews.

The most qualified proposal(s) based on the scoring rubric and oral interviews will be issued the conditional award letter. Minimum score requirements must be met in order to qualify to receive a conditional award letter.

The proposed flat fee for the competitive selection process is $4,400 per eligible proposal. The Proposal fee covers the City's costs to review the proposal, draft correspondence, communicate with applicants and organize the City Selection Panel, which reviews the information provided by City staff and ranks and scores all eligible applications based on evaluation rubric and oral interview provided for in the RFP.

CANNABIS BUSINESS OPERATOR PERMIT RFP DECISION APPEAL FEE

An applicant aggrieved by an administrative decision made during the RFP process may appeal that decision. The appeals fee includes the cost to process the appeal and bring it before a Hearing Officer at a hearing. The appeals process would be subject to the hourly billing rates of each relevant department with an initial deposit of $6,600 as shown in Figure 5. The decision of the Hearing Officer shall be final.

CANNABIS BUSINESS OPERATOR PERMIT APPLICATION FEE

The proposed application deposit-based fee is $7,600. Retail and delivery-only dispensaries must receive a conditional award letter to complete an application. Application review for nursery cultivation, testing laboratories, and manufacturing cannabis businesses are on a first-come, first-serve basis.

The application deposit-based fee recovers the cost to review the components of the application such as ownership, site plans, security plans, and ventilation plans. It also includes review of Live Scan documents, evidence of approval of a Conditional-Use Permit, evidence of secured location for the cannabis business, communicate with applicants and confirm payment of the filing fee. This includes detailed review by an interdepartmental working group from various City departments.

CANNABIS BUSINESS OPERATOR PERMIT RENEWAL FEE

The CPOB is valid for one (1) year from the date of issuance. The Permit Renewal is subject to the laws and regulations effective at the time of renewal. The proposed fee for renewing the annual permit is $2,300.

FIGURE 3 – CANNABIS BUSINESS OPERATOR PERMIT LOI REVIEW FEE

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	0.50	$72.50
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	5.50	$583.00
Planning and Building	Planner II	$71	1.50	$106.50
City Attorney's Office	Assistant City Attorney	$121	1.50	$181.50
Finance	Accounting Technician	$50	0.25	$12.50
Total Labor Costs				$956.00
Contracted Services, Supplies, and Other Expenses				$0.00
Cost Recovery %:				100%
Proposed Flat Fee per application[1]				$900.00

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 4 – CANNABIS BUSINESS OPERATOR PERMIT RFP PROPOSAL REVIEW

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	1.00	$145.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	14.00	$1,484.00
City Attorney's Office	Assistant City Attorney	$121	2.00	$242.00
Finance	Accounting Technician	$50	1.00	$50.00
Selection Panel				
Real Estate/Property Management	Base Reuse and Economic Development	$129	4.00	$516.00
Finance	Financial Services Manager	$123	4.00	$492.00
Recreation and Park	Manager, Mastic Senior Center	$150	4.00	$600.00
Planning Division	Alameda Contract/PT Planner	$111	4.00	$444.00
Public Works	Public Works Director	$102	4.00	$408.00
Total Labor Costs				$4,381.00
Contracted Services, Supplies, and Other Expenses				$100.00
Cost Recovery %:				100%
Proposed Flat Fee per application[1]				$4,400.00

FIGURE 5 - CANNABIS BUSINESS OPERATOR PERMIT RFP DECISION APPEAL FEE

Department / Office	Position		Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
		Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director		$145	1.00	$145.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager		$106	10.00	$1,060.00
City Attorney's Office	Assistant City Attorney		$121	15.00	$1,815.00
City Attorney's Office	Paralegal		$66	5.00	$330.00
Contracted Services	Hearing Officer		$300	10.00	$3,000.00
Total Labor Costs					$6,350.00
Contracted Services, Supplies, and Other Expenses					$300.00
Cost Recovery %:					100%
Proposed Deposit-based Fee per application[1]					$6,600.00

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 6 – BUSINESS OPERATOR PERMIT APPLICATION FEE

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	2.00	$290.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	24.00	$2,544.00
Police Department	Police Chief	$223	1.00	$223.00
Police Department	Police Captain	$226	4.00	$904.00
Police Department	Police Sergeant	$166	10.00	$1,660.00
City Attorney's Office	Assistant City Attorney	$121	3.00	$363.00
City Attorney's Office	Paralegal	$66	1.00	$66.00
Finance	Accounting Technician	$50	2.00	$100.00
Total Labor Costs				$6,150.00
Contracted Services, Supplies, and Other Expenses				$1,500.00
Cost Recovery %:				100%
Proposed Deposit-based Fee per application[1]				$7,600.00

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 7 – CANNABIS BUSINESS OPERATOR PERMIT RENEWAL FEE

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	1.00	$145.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	4.00	$424.00
Police Department	Police Chief	$223	1.00	$223.00
Police Department	Police Captain	$226	2.00	$452.00
Police Department	Police Sergeant	$166	4.00	$664.00
City Attorney's Office	Assistant City Attorney	$121	2.00	$242.00
Finance	Accounting Technician	$50	1.00	$50.00
Total Labor Costs				$2,200.00
Contracted Services, Supplies, and Other Expenses				$100.00
Cost Recovery %:				100%
Proposed Fee per application[1]				$2,300.00

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

CANNABIS BUSINESS REGULATORY PROGRAM FEE

This section shows the determination of the Cannabis Business Annual Regulatory Program Fee ("Regulatory Program Fee") for full cost recovery for the annual monitoring and compliance of each type of commercial cannabis business in the City, as described in the regulatory ordinance and supporting City documents. The monitoring and compliance tasks include reviewing document retention practices, facility operations requirements, product inspections, and video monitoring.

Additionally, the proportional cost of the City's implementation of its commercial cannabis policy, including development of regulatory policy and ordinances, application process, etc. has been modeled to be recovered over a 10-year period and has been adjusted to reflect the relative burden of the implementation of each type of commercial activity.

Figure 8 details each involved City department's costs associated with developing the regulatory ordinance and the RFP implementation regulations. This includes fees from Base Reuse and Economic Development Department, which led and coordinated the development and implementation of the City's commercial cannabis policies, with staff from various City Departments. The total cost of hourly time spent by each of these departments during the development of the Ordinances is combined, divided between the maximum number of permits that can be issued pursuant to the Ordinances and allocated as a cost item in the Annual Regulatory Program Fee. The cost recovery for these program development costs is proposed to be recovered over a period of 10 years.

Figures 9 through 16 detail the direct and indirect labor costs attributable to the administration of the monitoring and compliance and enforcement of the regulatory ordinance. The labor costs are segmented by the task/activity and level of effort provided by specific City staff. The hours for each activity were determined by Department staff by diagraming the tasks involved with the activity and the estimated level of effort. These time estimates, and level of effort were then reviewed and evaluated by other City staff and SCI Consulting Group for their reasonableness.

Each year, the permit holder will be required to pay the following:

- the CPOB renewal fee; and
- the annual Regulatory Program Fee.

For example, each retail location is responsible for $9,700 in annual fees (CBOP renewal fee of $2,300, and an annual Regulatory Program Fee of $7,400, as seen in Figures 7 and 9, respectively.)

FIGURE 8 – ALLOCATION OF CANNABIS BUSINESS DEVELOPMENT AND IMPLEMENTATION COSTS

Department / Office	Total Cost
Base Reuse and Economic Development, and Planning and Building Departments	$73,421.00
City Attorney's Office	$25,205.00
City Clerk's Office	$630.00
City Manager's Office	$3,627.00
Finance Department	$1,772.00
Police Department	$34,856.00
Contracted Services, Supplies, and Other Expenses	$82,900.00
Total Cost[1]	$222,411.00
Total Cost Recovery Per Year (10 Years)	$22,241.10
Number of Permits	11
Annual Cost Recovery per Permit	$2,021.92
Typical Cost Recovery per Inspection (based on 2 per	$1,011.00

Notes:
[1]The Total Cost is based on the time spent by personnel based on hourly costs provided by the City as well as the cost of contracting with professions to provide services.
[2]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 9 – ANNUAL REGULATORY PROGRAM FEE: RETAIL

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$1,957.50	$1,957.50
Oversight and Reporting	2.00	3.00	1.00	6.00	$774.00	$0.00	$774.00
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	2.00	3.00	1.00	6.00	$774.00	$1,957.50	$3,742.50
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$7,400	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$14,800		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 10 – ANNUAL REGULATORY PROGRAM FEE: NURSERY CULTIVATION

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Cost	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$806.00	$806.00
Oversight and Reporting	0.75	1.50	1.00	3.25	$433.75	$0.00	$433.75
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	0.75	1.50	1.00	3.25	$433.75	$806.00	$2,250.75
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$4,500	per permit annually	
				Permits Allowed:	1	permits	
				Estimated Annual Cost Recovery to City:	$4,500		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 11 – ANNUAL REGULATORY PROGRAM FEE: TESTING

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$846.00	$846.00
Oversight and Reporting	0.75	1.50	1.00	3.25	$433.75	$0.00	$433.75
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	0.75	1.50	1.00	3.25	$433.75	$846.00	$2,290.75
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$4,500	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$9,000		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 12 - ANNUAL REGULATORY PROGRAM FEE: MANUFACTURING – VOLATILE

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$2,492.00	$2,492.00
Oversight and Reporting	2.00	3.00	1.00	6.00	$774.00	$0.00	$774.00
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	2.00	3.00	1.00	6.00	$774.00	$2,492.00	$4,277.00
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$8,500	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$17,000		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 13 – ANNUAL REGULATORY PROGRAM FEE: MANUFACTURING – NON-VOLATILE

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$2,092.00	$2,092.00
Oversight and Reporting	2.00	3.00	1.00	6.00	$774.00	$0.00	$774.00
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	2.00	3.00	1.00	6.00	$774.00	$2,092.00	$3,877.00
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$7,700	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$15,400		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 14 – ANNUAL REGULATORY PROGRAM FEE: DELIVERY-ONLY DISPENSARY

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$1,494.50	$1,494.50
Oversight and Reporting	1.00	2.00	1.00	4.00	$523.00	$0.00	$523.00
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	1.00	2.00	1.00	4.00	$523.00	$1,494.50	$3,028.50
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$6,000	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$12,000		

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 15 – ANNUAL REGULATORY PROGRAM FEE: DISTRIBUTION

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$903.00	$903.00
Oversight and Reporting	0.25	1.00	1.00	2.25	$308.25	$0.00	$308.25
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	0.25	1.00	1.00	2.25	$308.25	$903.00	$2,222.25
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$4,400	per permit annually	
				Permits Allowed:	4	permits	
			Estimated Annual Cost Recovery to City:		$17,600		

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

FIGURE 16 – ANNUAL REGULATORY PROGRAM FEE: DELIVERY *(W/RETAIL ONLY)*

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$351.50	$351.50
Oversight and Reporting	0.25	3.00	1.00	4.25	$520.25	$0.00	$520.25
Proportional Implementation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	0.25	3.00	1.00	4.25	$520.25	$351.50	$1,882.75
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	$3,700	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$7,400		

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

OTHER FEES

In addition to the fees outlined in this Fee Study, there are other fees that permit holders will be required to pay if / when they are incurred. These other fees fall into two categories:

- Fees that apply in relation to cannabis operations that are generally applicable to all businesses in the City of Alameda; and
- Fees that may be developed in relation to cannabis operations, but which are outside the scope of this Fee Study such as State of California fees.

Permit holders will be informed of these fees in the usual course of applications and communications with the involved City departments or other applicable entities.

GENERALLY APPLICABLE FEES

Existing fees that apply to cannabis operations include, for example, business license, conditional use permit and, building permit application fees. These fees which generally apply to all Alameda businesses, including cannabis operations. For example, an operator's permit is subject to approval of a conditional use permit. Although the cost of the conditional use permit is not included in this Fee Study, the fees still apply to the cannabis business applicant.

CANNABIS SPECIFIC FEES

The City may develop and apply additional fees specific to commercial cannabis operations through the relevant departments' usual processes, but which are outside the scope of this Fee Study. Such fees are outside the scope of this study because although they are related to cannabis operations, they are not directly associated with the implementation of the regulatory ordinance and RPF process.

REVIEW AND UPDATE OF FEES

This Fee Study has been prepared in the context of an emerging industry and regulatory framework for legalized cannabis in the State of California. It may be appropriate for the City to review and update the fees identified in this Fee Study:

- When the program under the Ordinances has been implemented for a period of time sufficient for the City to have had an opportunity to review the actual costs incurred in processing permits and administering the and to have achieved some efficiencies in processing applications and undertaking monitoring and compliance;
- If the Ordinances are substantially amended such that the time and/or processes involved are substantially changed; or
- At the expiration of 10 years, which is the period over which the Fee Study proposes recovery of the City's Cannabis Business implementation costs.

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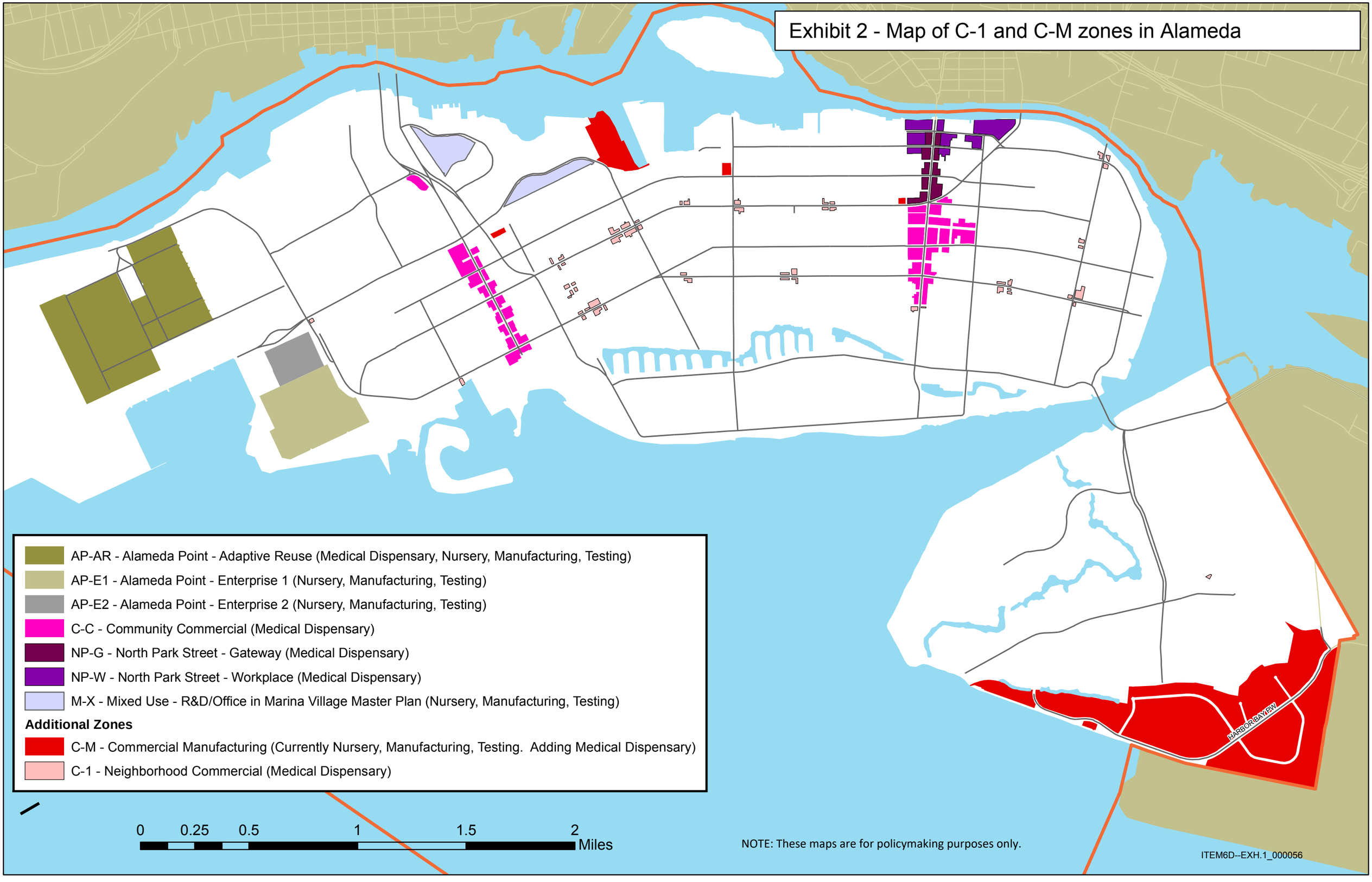
Exhibit 2 - Map of C-1 and C-M zones in Alameda



AP-AR - Alameda Point - Adaptive Reuse (Medical Dispensary, Nursery, Manufacturing, Testing)

AP-E1 - Alameda Point - Enterprise 1 (Nursery, Manufacturing, Testing)

AP-E2 - Alameda Point - Enterprise 2 (Nursery, Manufacturing, Testing)

C-C - Community Commercial (Medical Dispensary)

NP-G - North Park Street - Gateway (Medical Dispensary)

NP-W - North Park Street - Workplace (Medical Dispensary)

M-X - Mixed Use - R&D/Office in Marina Village Master Plan (Nursery, Manufacturing, Testing)

Additional Zones

C-M - Commercial Manufacturing (Currently Nursery, Manufacturing, Testing. Adding Medical Dispensary)

C-1 - Neighborhood Commercial (Medical Dispensary)

0 0.25 0.5 1 1.5 2 Miles

NOTE: These maps are for policymaking purposes only.

Exhibit 3

HARBOR BAY BUSINESS PARK ASSOCIATION

September 17, 2018

Honorable Members of the City of Alameda Planning Board
City of Alameda Community Development Department
City Hall, 2263 Santa Clara Avenue, Room 190
Alameda, California 94501-4477

RE: **Planning Board Meeting of September 24, 2018, Agenda Item 7-A**
Consideration of Cannabis Business Zoning Text Amendments
Recommendations of the Harbor Bay Business Park Association

Dear Planning Board Members:

At the Annual Meeting of the members of the Harbor Bay Business Park Association held on August 21, 2018, the members were informed that the City of Alameda was considering a policy that would allow the expansion of cannabis related uses to include retail dispensaries in the C-M Commercial-Manufacturing Zoning Districts of the City, including the Harbor Bay Business Park which is zoned C-M-PD, and that the City's Economic Development Manager has asked for feedback from the Harbor Bay Business Park property and business owners on this proposed policy and changes to the City's Zoning Code. In the meeting, a number of the property owners in the Harbor Bay Business Park expressed that they strongly preferred not to have such uses allowed to operate in the Business Park and that cannabis dispensaries and similar retail operations would not be compatible with the existing businesses and institutions in the Harbor Bay Business Park and could bring on security problems. There were no expressions of support for a City policy that would change the City's Zoning Code to allow cannabis dispensaries or similar retail facilities in the Harbor Bay Business Park.

After the Annual Meeting of the members, the Board of Directors of the Harbor Bay Business Park Association authorized and directed its President Joseph Ernst to send letters to the City on behalf of the Harbor Bay Business Park Association expressing the concerns of the Association's members about allowing cannabis dispensary operations and facilities in the Harbor Bay Business Park and recommending that the Planning Board and the City Council not approve any Zoning Text Amendments that would allow cannabis dispensaries to locate and operate within the Harbor Bay Business Park.

The Harbor Bay Business Park Association strongly recommends that the Planning Board vote against any recommendation that the City Council approve Zoning Text Amendments that would allow cannabis dispensaries to locate and operate within the C-M-PD zoned Harbor Bay Business Park.

Sincerely,

JOSEPH ERNST
President of the Harbor Bay Business Park Association

5674 Sonoma Drive • Pleasanton, CA 94566 • 925/734-0280 • Fax 925/734-8125

Dear City Council Members and City Staff:

Thank you for your hard work in creating the new cannabis ordinance! We, the West Alameda Business Association (WABA), see the economic potential of cannabis businesses not only for the West End but for the entire City of Alameda.

At the most recent planning board meeting held on September 24th, Community Development Director, Debbie Potter, presented data which indicated that a City could support 1 dispensary for every 15,000 residents. With the recent approval of Mix-Use Developments such as Site-A and Encinal Terminals, the population is expected to grow by the thousands. As the ordinance reads today, the City of Alameda is allowing only 2 retail dispensaries. We see this as an issue due to the current population of 79,000~ residents (and growing) here on island not including the additional residents as a result of approved Developments. We'd like to encourage the City Council to increase the number of retail dispensary permits to 4 total. This would allow for at least 1 more dispensary here on the West End which we believe will better serve the community and provide a positive impact on the Economic Development of Webster Business District.

With this increase in the number of dispensaries, we see the 1-mile dispersion as an issue especially with 1 location already approved here on Webster St. Given the limited amount of retail spaces available, the 1-mile dispersion would essentially block out the entire Webster Business District from potential dispensary operators. We encourage the City to follow the Planning Board's recommendation of removing the 1-mile dispersion as it is not conducive to creating opportunities in this emerging industry.

Lastly, WABA fully supports adding Adult-Use in to the ordinance. Maintaining the medicinal-only language in the ordinance will only limit the number of residence that will be able to enter into a retail dispensary. We understand neighboring cities such as: Oakland and Berkeley have adopted adult-use and we would like to give our operators a fighting chance to compete in such a competitive market.

We appreciate your consideration and cooperation.

Linda Asbury, Executive Director

West Alameda Business Association
Linda@westalamedabusiness.com
510.523.5955

Harbor Bay Business Park Owners Association
c/o GS Management
5674 Sonoma Drive
Pleasanton, CA 94566

October 15, 2018

Honorable Mayer and Members of the Alameda City Council
Attn: City Clerk, Alameda City Hall, 2263 Santa Clara Avenue
Alameda, California 94501-4477

RE: **City Council Meeting of October 16, 2018, Agenda Item 6-G**
File 2018-6060: Proposed Regulations for Cannabis Retail Businesses
Recommendations of the Harbor Bay Business Park Association

Dear Mayor and City Council Members:

At the Annual Meeting of the members of the Harbor Bay Business Park Association held on August 21, 2018, the members were informed that the City of Alameda was considering policies that would allow the expansion of Cannabis-related uses in the City to include cannabis retail businesses and dispensaries in the C-M Commercial-Manufacturing Zoning Districts of the City, including in the Harbor Bay Business Park which is zoned C-M-PD, and that the City's Economic Development Manager has asked for feedback from the Harbor Bay Business Park property and business owners on this proposed policy and changes to the City's Zoning Code. In the meeting, many property owners in the Harbor Bay Business Park expressed that they strongly preferred not to have such uses allowed to operate in the Business Park and that cannabis retail operations and dispensaries would not be compatible with the existing businesses and institutions in the Harbor Bay Business Park and could bring on security problems. On September 17, 2018, the Harbor Bay Business Park Association sent a letter to the Alameda Planning Board urging the Planning Board to recommend against Zoning Text Amendments that would allow cannabis dispensaries to locate and operate within the CM-PD zoned Harbor Bay Business Park. A copy of that letter was included in your packet for the October 16, 2018 Meeting.

After reviewing the Staff Report, the Fee Study, the Map of Zones, and the draft Resolution and Ordinances for Agenda Item 6-G on the Council's October 16, 2018 Meeting Agenda, the Board of Directors of the Harbor Bay Business Park Association authorized and directed its President Joseph Ernst to send this follow-up letter to the City on behalf of the Harbor Bay Business Park Association expressing the concerns of the Association's members about allowing cannabis retail businesses or dispensaries in the Harbor Bay Business Park.

The Harbor Bay Business Park Association acknowledges that the City is pursuing legitimate policy objectives in making the City's Municipal Code and Zoning Code comply with State laws that regulate cannabis businesses and in structuring new regulatory fees to cover the anticipated costs the City will incur in processing applications for permits and approvals of proposed cannabis business operations. However, our Association that represents the property owners and businesses in the Harbor Bay Business Park is very concerned that cannabis retail businesses and dispensaries are incompatible with the business operations currently in the Business Park --- offices, research and development, advanced manufacturing, life science laboratories, schools, day care centers, churches, institutions, and

hotels ---- and the plans for development of the remaining vacant parcels as part of a high quality community of businesses. The draft Ordinance amending the Municipal Code for Cannabis Businesses recognizes that commercial cannabis business operations may well adversely impact nearby businesses with offensive odors, trespassing, theft, violent encounters over attempted stealing of plants, fire hazards, increased crime in and about dispensaries, robberies, nuisance problems, and other negative impacts on nearby businesses. We do not have commercial retail outlets in the Harbor Bay Business Park, and our Association is strongly opposed to the City enacting regulations that would permit the retail distribution, transportation or sale of medical and recreational cannabis in the Harbor Bay Business Park.

The Harbor Bay Business Park Association strongly recommends that the City Council in its voting on this matter not approve "Adding Medical Dispensary" on the Zoning Map for the C-M Zone of the Harbor Bay Business Park, and also make specific exceptions for the Harbor Bay Business Park in the draft Resolution and Ordinances amending the Alameda Municipal Code and certain portions of the Zoning Ordinance to conditionally permit cannabis retail businesses in the C-M Commercial-Manufacturing Zoning Districts.

Sincerely,

JOSEPH ERNST
President of the Harbor Bay Business Park Association

LARA WEISIGER

From: Alan Teague <alan@alameda.morphdog.com>
Sent: Sunday, October 14, 2018 9:28 AM
To: Trish Spencer; Malia Vella; Frank Matarrese; Jim Oddie; Marilyn Ezzy Ashcraft
Cc: City Clerk
Subject: Item 6-G Clarification of Definition for Cultivation

Mayor, Vice Mayor and Council Members,

As you will be amending the Regulatory Ordinance, please take this opportunity to correct one definition in this ordinance:

> 6.59-3 Definitions
> j. "Cultivation" means the production of clones, immature plants, seeds, and other agricultural products used specifically for the propagation and cultivation of Cannabis to mature plants. It shall not include any activity involving the planting, growing, harvesting, drying, curing, grading, trimming, or processing of Cannabis, which is prohibited.

To match what is in the existing Zoning Code:

> 30-10.1 Commercial Cannabis Uses
> c.Permitted uses
> 4. Cannabis cultivation means the production of clones, immature plants, seeds, and agricultural products used specifically for the propagation and cultivation of cannabis to mature plants. Except as provided for in the preceding sentence, cannabis cultivation shall not include any activity involving the planting, growing, harvesting, drying, curing, grading, trimming, or processing of cannabis, which is prohibited.

Recommended change to Regulatory Ordinance:

Amend 6.59-3 Definitions as follows:

j. "Cultivation" means the production of clones, immature plants, seeds, and other agricultural products used specifically for the propagation and cultivation of Cannabis to mature plants. **Except as provided for in the preceding sentence, cannabis cultivation** ~~It~~ shall not include any activity involving the planting, growing, harvesting, drying, curing, grading, trimming, or processing of Cannabis, which is prohibited.

Thank you for working on this very important issue,

Alan Teague
Alameda Resident

Cannabis

CITY COUNCIL MEETING OCTOBER 16, 2018

Cannabis Fee Study, and Regulatory and Land Use Ordinance Changes

- Background: At City Council's July 24, 2018 Meeting, Council directed staff to return as soon as possible with a number of changes to the zoning and regulatory ordinances.

Cannabis Fee Study

The Study was prepared by SCI Consulting Group

Cannabis Fee Study

- Establishes cannabis business regulatory permit fees for:
  - Letter of Intent – flat fee
  - Request for Proposals – flat fee
  - Application – deposit-based fee
  - Annual Renewal – deposit-based fee
  - Annual Regulatory Program fee – deposit-based fee

Cannabis Fee Study

- Annual Regulatory Program fees include a cost recovery fee that is applied to the cost incurred to-date
- Costs-to-date are $222,411
- Repayment is over 10 years

Zoning Code Amendments

- C-1 Neighborhood Business
- C-M Commercial Manufacturing

Zoning Code Amendments

City Council directed staff to:

- Expand the cannabis zoning districts to include:
  - C-1 (Neighborhood Business)
  - C-M (Commercial Manufacturing)
- Contact C-M business district owners for feedback

Zoning Code Amendments

- Planning Board recommended adoption of the ordinance expanding cannabis zoning to the C-M and C-1 districts

Zoning Code Amendments

- Planning Board recommended the following:
  - Remove the one mile dispersion requirement from the land use ordinance (Included in draft ordinance)
  - Require delivery-only dispensaries to meet manufacturing parking requirements rather that retail
  - Consider using California Department of Alcohol Beverage Control (“ABC”) buffer zones

Regulatory Ordinance

Regulatory Ordinance

- Dispersion requirement has been added to draft regulatory ordinance
- Dispersion requirement would not apply to delivery-only dispensaries

Regulatory Ordinance

- Maintain the buffer zone of 1,000 feet from public and private K-12 schools for dispensaries and cultivation uses and reduce the buffer zone to 600 feet for all other sensitive uses

Regulatory Ordinance

- Amend ordinance language to clarify that certain uses do not qualify as a "school," including providing a definition for tutoring centers
  - "'Tutoring Center' means any enterprise, whether or not for profit, that operates in a commercial building or structure the principal use of which is to offer instruction of any kind to support academic instruction of K-12 students."

Regulatory Ordinance

- Eliminate the cap on the number of testing laboratories allowed, but maintain the cap for retail dispensaries
- Add two (2) delivery-only dispensaries
- Allow adult use (recreational) cannabis to be sold in Alameda

Regulatory Ordinance

- Add clean-up amendments to the Regulatory Ordinance
  - False Statements/Representations
  - Withdrawal of Application
  - Permit-Specific Conditions
  - Implementing Regulations
  - Revise Definition of Cultivation

Request for Proposals

Request for Proposals

- Confirm continued use of the RFP process, including the following changes:

- Proposers would need to notify neighbors in the C-1 district within 300 feet of the proposed establishment

Request for Proposals

- The feedback would be used to inform the score for the following rubric categories
  - Has the proposer described what methods and means it will take to ensure that the business is integrated into the community? (5 points)
  - Has the proposer adequately described its overall approach to operational safety as it relates to employees, customers, businesses, and the community? (5 points)

Request for Proposals

- Incorporate any changes needed as a result of adopting the Regulatory Ordinance
- Proposers submitting a LOI for the same location could qualify for a fee credit

Recommendations

- Adopt a resolution amending Master Fee Resolution
- Hold a public hearing to consider amending the Alameda Municipal Code Section 30-10 (Cannabis)
- Introduce an ordinance amending Article XVI (Cannabis Businesses)
- Confirm Continued Use of RFP Process

- Fee Study – Approve resolution to amend the Master Fee Schedule to include Cannabis

- Hold a public hearing to consider introducing an ordinance to amend the AMC Section 30-10 (Cannabis) to:
  - Add cannabis retail businesses as conditionally permitted uses in the C-1, and C-M zoning districts
  - Add delivery-only cannabis retail businesses as a conditionally permitted use in the C-M zoning district
  - Amend certain portions of the zoning code to enable cannabis retail businesses to dispense non-medicinal or "Adult Use" cannabis

- Introduce an ordinance amending Article XVI (Cannabis Businesses) of AMC to:
  - Eliminate the cap on testing laboratories
  - Add two delivery-only dispensaries
  - Allow adult Use
  - Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses
  - Make Other Clean-Up Revisions

- Confirm continued use of RFP process
  - Proposers would need to notify neighbors in the C-1 district within 300 feet of the proposed establishment
  - The feedback would be used to inform the score for two existing rubric categories
  - Incorporate any changes as a result of amendments to the zoning and cannabis business regulatory ordinances
  - Provide a credit to Proposers submitting the same location as the first RFP

CITY OF ALAMEDA ORDINANCE NO. _____

New Series

AMENDING THE ALAMEDA MUNICIPAL CODE BY AMENDING ARTICLE XVI (CANNABIS BUSINESSES) OF CHAPTER VI (BUSINESSES, OCCUPATIONS, AND INDUSTRIES)

WHEREAS, this Ordinance is adopted pursuant to the City's police powers, afforded by the state constitution and state law, and as recognized by the Adult Use of Marijuana Act (AUMA) and Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) to protect the health, safety, and welfare of the public.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ALAMEDA DOES HEREBY ORDAIN AS FOLLOWS:

Section 1: Article XVI, CANNABIS BUSINESSES, of Chapter VI (BUSINESSES, OCCUPATIONS, AND INDUSTRIES) of the Alameda Municipal Code is hereby amended to read as follows:

ARTICLE XVI – CANNABIS BUSINESSES

6-59.1 – Findings.

In enacting this section, the City Council finds as follows:

a. The Federal Controlled Substances Act (21 U.S.C. Section 841 et seq.) makes it unlawful to manufacture, distribute, dispense or possess cannabis, and accordingly, cannabis activities are illegal under federal law.

b. In 2013, Deputy Attorney General James Cole issued a memorandum updating previous guidance on all federal enforcement activity relating to cannabis in light of state ballot initiatives that decriminalized the substance under state law; specifically, the guidance instructed all federal prosecutors to review each matter on a case-by-case basis to consider, on the one hand, whether such state-enacted laws threaten certain federal enforcement priorities or interests relating to cannabis articulated therein (e.g., preventing distribution of cannabis to minors), and on the other hand, whether a state has enacted and implemented a strong and effective regulatory and enforcement system and has demonstrated the willingness to enforce its laws and regulations, which may allay the threat to those federal enforcement priorities or interests.

c. In 2014, Congress first passed legislation (Rohrabacher-Farr Amendment) to defund enforcement of the Federal Controlled Substances Act in states where such enforcement activities would prevent states from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical cannabis.

d. The voters of the State of California approved Proposition 215 (codified as Health and Safety Code Section 11362.5 et seq., “The Compassionate Use Act of 1996”); the intent of Proposition 215 was to enable persons who are in need of cannabis for medical purposes to obtain and use it without fear of State criminal prosecution.

e. On October 9, 2015, Governor Jerry Brown approved a series of bills commonly referred to as the Medical Marijuana Regulation and Safety Act (“MCRSA”), effective on January 1, 2016, which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical cannabis, also known as marijuana; and which recognizes the authority of local jurisdictions to either impose additional restrictions or prohibit certain activities related to the cultivation, manufacture, transportation, storage, distribution, delivery, and sale of medical cannabis.

f. The voters of the State of California approved Proposition 64, known as the “Control, Regulate and Tax Adult Use of Marijuana Act” (“AUMA”), which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, testing, distribution, delivery, and sale of recreational cannabis, also known as marijuana; and which recognizes the authority of local jurisdictions to either impose additional restrictions or prohibit certain activities related to the cultivation, manufacture, transportation, storage, testing, distribution, delivery, and sale of recreational cannabis.

g. On June 27, 2017, Governor Jerry Brown signed Senate Bill 94 (Medicinal and Adult-Use Cannabis Regulation and Safety Act, or “MAUCRSA”), which repealed MMRSA and merged many of its provisions into AUMA to form a single comprehensive regulatory system with the express purpose of preventing cannabis access to minors, protecting public safety, public health, and the environment, maintaining local control while providing for a single regulatory-licensing structure for medicinal and adult-use cannabis where compliance with local requirements can be demonstrated.

h. MAUCRSA preserves local control by specifically authorizing local jurisdictions to adopt and enforce local ordinances to regulate cannabis businesses such as requiring a local license, permit, or other authorization to engage in commercial cannabis activity within the local jurisdiction, in addition to adopting and enforcing local ordinances governing zoning, land use, fire, and building, business licensure, second-hand smoke, and even enacting a complete prohibition on the establishment or operation of one or more types of business licenses issued by the State.

i. Under MAUCRSA, as early as January 1, 2018, the State of California (currently, the California Bureau of Cannabis Control) will issue licenses for businesses to engage in cultivation, manufacturing, testing, distribution, and retail sale of cannabis and cannabis products.

j. The City Council of the City of Alameda has recognized, and continues to recognize, the potential adverse impacts on the health, safety, and welfare of its residents and businesses from secondary effects associated with Commercial Cannabis Activity,

which may include offensive odors, trespassing, theft, violent encounters between cultivators and persons attempting to steal plants, fire hazards, increased crime in and about the dispensary, robberies of customers, negative impacts on nearby businesses, nuisance problems, and increased DUI incidents.

k. MAUCRSA sets forth a comprehensive regulatory framework for Cannabis and Cannabis Products from seed to ingestion by a consumer, which includes uniform health and safety standards designed to implement quality control, a labeling and a track-and-trace program, and other consumer protections, which mitigates against some of the potential adverse impacts identified by the City Council in the past.

l. An effective regulatory system governing Cannabis in the City of Alameda, as provided in this and other chapters, will address potential adverse impacts to the public health, welfare, and safety, thereby allowing Commercial Cannabis Activity and other use of Cannabis and Cannabis Products consistent with federal law as applicable to the State of California and State law.

m. After studying various alternatives for the regulation of Cannabis Businesses, considering input from residents and stakeholders, and holding several public meetings the City Council of the City of Alameda finds and determines that there is a need to adopt health, safety, and welfare regulations to avoid or mitigate any adverse impacts on the community which may arise from permitting and regulating Commercial Cannabis Activity within the City of Alameda.

6-59.2 – Purpose and Intent.

It is the purpose and intent of this Article for the City Council to:

a. Exercise its police powers derived from Section 7 of Article XI of the California Constitution and state law to promote the health, safety, and general welfare of the residents and businesses of the City of Alameda by regulating Cannabis within the City's jurisdictional limits, unless preempted by federal or state law.

b. Establish a local permitting system that complements the strong and effective regulatory system adopted by the State legislature under MAUCRSA by imposing additional local controls, while addressing certain federal enforcement priorities, in a manner that does not create a positive conflict with federal law under the Controlled Substances Act (21 U.S.C. § 903).

6-59.3 – Definitions.

As used in this section, the following definitions shall apply:

a. "AUMA" refers to the California state law entitled "Control, Regulate and Tax Adult Use of Marijuana Act of 2016", also known as Proposition 64, and any regulations promulgated thereunder.

b. “Cannabis” means any and all parts of the plant Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. “Cannabis” also means the separated resin, whether crude or purified, obtained from cannabis. “Cannabis” does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. For the purpose of this Section, “Cannabis” does not mean “industrial hemp” as defined by Section 11018.5 of the Health and Safety Code.

c. “Cannabis Business” means a business or enterprise, whether for profit or not, engaged in Commercial Cannabis Activity.

d. “Cannabis Business Owner” means any of the following:

1. Each person with an aggregate ownership interest of 20 percent or more in a person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee, unless the interest is solely a security interest, lien, or encumbrance. When an entity (not a natural person) has an aggregate ownership interest of 20 percent or more, then the chief executive officer and/or members of the board of directors of each entity shall be considered owners.

2. The chief executive officer of a person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee.

3. A member of the board of directors of a nonprofit of a person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee.

4. The trustee(s) and all persons that have control of the trust and/or a person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee that is held in trust.

5. Any person, as defined herein, who assumes responsibility for the Permit.

6. Each person who participates in the direction, control, or management of person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee. Such an individual includes any of the following:

i. A general partner of a partnership.

ii. A non-member manager or managing member of a limited liability company.

iii. An officer or director of a corporation.

e. “Cannabis Product” means Cannabis that has undergone a process whereby the Cannabis has been transformed into a concentrate, or any Cannabis-containing product that may be specified by regulation of The Department, as set forth below, including, but not limited to, concentrated Cannabis, or an edible, topical, or other Cannabis-containing product.

f. “Chief of Police” shall mean the Chief of Police of the City of Alameda Police Department or the Chief’s designee.

g. “Commercial Cannabis Activity” includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, research and development, delivery, sale, or provision of Cannabis or Cannabis products for commercial purposes, whether for profit or not.

h. “Concentrated cannabis” means the separated resin, whether crude or purified, obtained from Cannabis.

i. “Customer” means a natural person 21 years of age or over or a natural person 18 years of age or older who possesses a physician’s recommendation or other authorization permitted by State law.

j. “Cultivation” means the production of clones, immature plants, seeds, and other agricultural products used specifically for the propagation and cultivation of Cannabis to mature plants. It shall not include any activity involving the planting, growing, harvesting, drying, curing, grading, trimming, or processing of Cannabis, which is prohibited.

k. “Day care center” means any licensed child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and school-age child care centers.

l. “Delivery” means the commercial transfer of Cannabis or Cannabis Products, for profit or not, to a Customer by any means. “Delivery” also includes the use by a retailer of any technology platform owned and controlled by the retailer that enables Customers to arrange for or facilitate the commercial transfer by a licensed retailer of Cannabis or Cannabis Products. Delivery, however, shall not include commercial transfer of Cannabis or Cannabis Products, for profit or not, by means of a Self-Service Display, which is strictly prohibited.

m. “Department” shall mean the Director of the Planning, Building and Transportation Department of the City of Alameda (or successor agency, department, or division), or his or her designee.

n. “Dispensary/Delivery-Only” shall mean “Dispensary/Retailer” except that the requisite licensed premises which is the physical location from which deliveries are made is not open to the public.

o. “Dispensary/Retailer” means any person who offers for sale, or gives away samples of, Cannabis, Cannabis Products, or paraphernalia related to the use or ingestion of Cannabis or Cannabis Products, either individually or in any combination for retail sale, including an establishment that delivers Cannabis or Cannabis Products, as part of selling or giving samples away. A dispensary/retailer shall have a licensed premises which is a physical location from which Commercial Cannabis Activities are conducted. Dispensing or retailing shall not include commercial transfer of Cannabis or Cannabis Products, for profit or not, by means of a Self-Service Display, which is strictly prohibited.

p. “Distribution” means the procurement, sale, and transport of Cannabis or Cannabis Products between entities licensed pursuant to the Medicinal and Adult-Use of Cannabis Regulation and Safety Act and any subsequent State of California legislation or regulation regarding the same.

q. “Edible cannabis product” means a Cannabis Product that is intended to be used, in whole or in part, for human consumption, including, but not limited to, chewing gum, but excluding products set forth in Division 15 (commencing with Section 32501) of the Food and Agricultural Code. An edible cannabis product is not considered food, as defined by Section 109935 of the Health and Safety Code, or a drug, as defined by Section 109925 of the Health and Safety Code.

r. “Manufacturer” means a person that conducts the production, preparation, propagation, or compounding of manufactured Cannabis, or Cannabis Products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis at a fixed location that packages or repackages Cannabis or Cannabis Products or labels or relabels its container, that holds a valid State license pursuant to the Medicinal and Adult-Use of Cannabis Regulation and Safety Act.

s. “MAUCRSA” refers to the California state law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act and the regulations promulgated by thereunder.

t. “Medicinal cannabis” or “medicinal cannabis product” means Cannabis or a Cannabis Product, respectively, intended to be sold for use pursuant to the Compassionate Use Act of 1996 (Proposition 215), found at Section 11362.5 of the Health and Safety Code, by a medicinal cannabis patient in California who possesses a physician’s recommendation or other authorization permitted by State law.

u. “MMRSA” refers to the California state law entitled Medicinal Marijuana Regulation and Safety Act and regulations promulgated thereunder, approved by the Legislature and signed by Governor Jerry Brown in 2016.

v. “Nursery” means a licensee that produces only clones, immature plants, seeds, and other agricultural products used specifically for the planting, propagation, propagation and cultivation of Cannabis.

w. “Permit” refers to any one of the regulatory permits described in subsection c of section 6-59.4 of this Article that affords the Permittee the privilege of conducting the activity allowed under the regulatory permit.

x. “Permittee” refers to any person who has been issued, is named on, or operates under a Permit, regardless of whether or not the Permit has been voluntarily surrendered or relinquished.

y. “Person” shall mean and include a natural person, joint venture, joint stock company, partnership, association, club, company, corporation, limited liability company, business, estate, trust, business trust, receiver, syndicate, organization, or any other group or combination acting as a unit, or the manager, lessee, agent, servant, officer or employee of any of them.

z. “Primary caregiver” shall have the same meaning as set forth in section 11362.5 of the California Health and Safety Code, as that section now appears, or may hereafter be amended or renumbered.

aa. “Qualified patient” shall have the same meaning as a patient that uses or ingests medicinal Cannabis as that term is defined in section 11362.7 of the California Health and Safety Code and who is entitled to the protections of California Health and Safety Code section 11362.5.

bb. “Self-Service Display” means the open display or storage of Cannabis or Cannabis Products in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer involving a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of Self-Service Display.

cc. “Tutoring Center” means any enterprise, whether or not for profit, that operates in a commercial building or structure the principal use of which is to offer instruction of any kind to support academic instruction of K-12 students.

dd. “Youth Centers” means any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities. Youth Centers shall also mean any facility determined by the Alameda Recreation and Parks Department to be a recreation center in a City park.

6-59.4 Permit Requirement; Exemptions from Permit Requirement

a. Permit Required. It is unlawful for any person to operate a Cannabis Business within the City without first being issued the required permits, including without limitation, a regulatory permit under this Article and a use permit under Chapter XXX (Development Regulations) of the Alameda Municipal Code. The Permit shall not be issued until a use permit is first obtained. The Permit issued under this Article is

specific to the location where the Cannabis Business is permitted to operate, is a conditional privilege to conduct activities set forth in the Permit, and shall not run with the land. Multiple operating locations for the same Cannabis Business will require separate Permits. No permit shall be issued for commercial transfer, for profit or not, of Cannabis or Cannabis Products by means of a Self-Service Display, which is strictly prohibited. Temporary permits for any purpose, including for the sale of Cannabis or Cannabis Products at festivals or fairs, shall not be issued.

b. Number of Cannabis Business Permits Allowed. Only the following Permit types shall be capped as set forth below:

1. No more than two (2) Dispensary/Retailer Permit(s) and two (2) "Delivery-Only" Dispensary/Retailer Permit(s) for Cannabis or Cannabis Product may be issued at any given time, subject to the applicable permit types, dispersion requirement, and zoning restrictions.

2. No more than four (4) Manufacturer Permit(s), subject to the applicable permit types and the zoning restrictions, may be issued at any given time.

3. No more than one (1) Cultivation Permit, subject to the applicable permit types and the zoning restrictions, may be issued at any given time.

4. The City Council may, by resolution, direct the City Manager to establish or modify any of the foregoing limits on the number of permit types that may be issued within the City. Furthermore, a process for allocating the limited number of permits for Commercial Cannabis Activity may be implemented by regulation.

c. Permit Types. Any person may apply for any of the following:

1. Cultivation Permit 7: A Cultivation Permit 7 is required for all activities for which State law requires a "Type 4" (or "nursery") for cultivation of Cannabis solely by a nursery.

2. Manufacturer Permit 1: A Manufacturer Permit 1 is required for all activities for which State law requires a "Type 6," or similar license, for the manufacture of Cannabis Products using nonvolatile or no solvents.

3. Manufacturer Permit 2: A Manufacturer Permit 2 is required for all activities for which State law requires a "Type 7," or similar license, for the manufacture of Cannabis Products using volatile solvents.

4. Testing Laboratory Permit: A Testing Laboratory Permit is required for all activities for which State law requires a "Type 8," or similar license, for the testing of Cannabis or Cannabis Products as a condition of sale pursuant to a State-issued license.

5. Dispensary/Retailer: A Dispensary/Retailer Permit is required for all activities for which State law requires a “Type 10,” or similar license, for the sale of Cannabis or Cannabis Products.

6. Dispensary/Delivery-Only Permit: A Dispensary/Delivery-Only Permit is required for all activities for which State law requires a “Type 10,” or similar license, for the sale of Cannabis or Cannabis Products, but which occurs at a location that is not open to the public.

7. Distributor Permit: A Distributor Permit is required for all activities for which State law requires a “Type 11,” or similar license, for the distribution of Cannabis or Cannabis Products. A Distributor Permit shall only be issued to a person holding or obtaining a Manufacturing Permit or Cultivation Permit 7 under this Article.

8. Delivery Permit: No local permit is required for the delivery of Cannabis by Cannabis Businesses located outside of the City to any Customer located within the City, provided that such businesses obtain a business license, pay applicable fees and taxes, and comply with State and local law.

d. Determination of Permit Type. As the State develops additional licenses for Commercial Cannabis Activities, the Department has the discretion to issue any of the above-referenced permits to the extent the additional license or sub-license activities are similar to that of any of the permits provided for in this Article.

e. Permitted Land Use. No permit shall be issued if the Commercial Cannabis Activity is not a permitted land use in the City, as set forth in Section 30-10 (Cannabis) of Chapter XXX of the Alameda Municipal Code. If not expressly provided for therein or in this Article, then the use is banned.

f. Exemptions from the Permit Requirement. The following activities are allowed and do not require a Permit under this Article, provided the activity does not constitute Commercial Cannabis Activity and complies with applicable laws:

1. Possessing, processing, transporting, purchasing, obtaining or giving away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of Cannabis not in the form of concentrated Cannabis.

2. Possessing, processing, transporting, purchasing, obtaining or giving away to persons 21 years of age or older without any compensation whatsoever, not more than the limit on Cannabis in the form of concentrated Cannabis under State law, including amounts of Cannabis or concentrated Cannabis contained in Cannabis Products.

3. Possessing, planting, cultivating, harvesting, drying or processing of not more than six living Cannabis plants, provided such activity complies with the Alameda Municipal Code, pursuant to section 30-10.2 (PERSONAL CULTIVATION OF CANNABIS), and is not used in any Commercial Cannabis Activity, which would require a Permit.

4. The smoking of Cannabis and Cannabis Products, provided smoking complies with state law and any local ordinance, including sections 24-11 (SMOKING PROHIBITIONS IN PLACES OF EMPLOYMENT AND UNENCLOSED PUBLIC PLACES) and 24-12 (SMOKING PROHIBITIONS IN HOUSING) of Chapter XXIV (PUBLIC HEALTH) of the Alameda Municipal Code.

5. The ingestion of Cannabis or Cannabis Products in compliance with applicable law.

6. Primary caregiver, who is not subject to licensing requirements of the MAUCRSA, engaged in the delivery of Cannabis or Cannabis Product to a Qualified Patient.

g. Excepted as provided herein, all other Commercial Cannabis Activities are prohibited.

6-59.5 Permit Applications.

All applications, including renewal or amended applications, must be completed in full, including the payment of all applicable fees, which shall be set by the Council by resolution. Incompleteness may be grounds for denial as set forth in section 6-59.6 of this Article. The form and content of the application for (renewal of) a Permit as required by this Article shall be specified by the Department, in consultation with the Chief of Police, and shall include the following minimum information, as applicable to the Permit type:

a. Proposed Property.

1. The address and Assessor's Parcel Number(s) of the location for the proposed Commercial Cannabis Activity; and the name and contact information for the property owner(s) where the proposed Commercial Cannabis Activity will be located.

2. A site plan with fully dimensioned interior and exterior floor plans. For dispensary/retailer Permittees, the site plan must show that there are separate rooms or partitioned areas within the property for the receipt of supplies and for the distribution of Cannabis to recreational users, qualified patients, and/or primary caregivers.

3. Exterior photographs of the entrance(s), exit(s), street frontage(s), parking, front, rear and side(s) of the property.

4. Photographs depicting the entire existing interior of buildings on the property.

5. If the property is being rented or leased or is being purchased under contract, a fully-executed copy of such lease or contract.

6. If the site is being rented or leased, written proof in a form approved by the Department that the property owner, and landlord if applicable, were given notice that the property will be used as a Cannabis Business, and that the property owner, and landlord if applicable, agree(s) to said operations. If the Cannabis Business is to be a subtenant, then "landlord" shall mean the primary tenant. If the applicant is the owner of the real property, then the applicant shall provide a copy of the title or deed to the real property to the Department. If the real property is owned in trust, the written proof noted above shall be provided by the person that holds equitable title to the real property.

7. Once a Permit is issued, any material or substantial physical modification of the licensed or permitted premises shall require a City-approved amendment to the Permit as set forth in section 6-59.9 of this Article.

b. Ownership and Management. An explanation of the legal form of business ownership, for example, sole proprietor, partnership, California Corporation, etc., and any reasonably requested documentation to validate such legal form of business.

c. Background Investigation of Owners. Each Applicant shall identify every Cannabis Business Owner (at least one person shall be identified per Permit) and shall submit the following for each Cannabis Business Owner:

1. The name, address, telephone number, title, and primary responsibility(ies).

2. A fully legible copy of one valid government-issued form of identification, such as a driver's license.

3. A summary of criminal history (e.g., "LiveScan") not more than 2 weeks prior to the date of the application for the purpose of obtaining information as to the existence and content of a record of state or federal convictions and arrests to be considered as set forth in this Article.

4. Any new Cannabis Business Owner must submit the foregoing information to the Chief of Police five (5) days prior to their employment or becoming a Cannabis Business Owner.

5. The Chief of Police shall have the discretion to require any information necessary to conduct a thorough criminal history or financial investigation (or any additional or supplemental background investigation that is criminal history or financial in nature), including the foregoing, from any Cannabis Business Owner for the purpose of preventing a threat to public health, safety, and welfare or otherwise to protect the interests set forth below in section 6-59.6 of this Article.

d. Information Regarding Cannabis Business/Applicant.

1. Written confirmation as to whether the Cannabis Business, or a business engaged in Commercial Cannabis Activity with one or more owners or key

employees in common with the applicant, previously operated in the City or any other city, county, or state under a similar license/permit, and whether the business applicant ever had such a license/permit revoked or suspended and the reason(s) therefore.

2. The name and address of the Cannabis Business' current Agent for Service of Process. Cannabis Business Permittee has a continuing duty to update this information. Sending notices and other documents to the Agent for Service of Process on file with the City, even if outdated, shall not render such service defective.

e. State License Type and Compliance. A description of the specific state Cannabis License(s) that the applicant either has applied for, obtained, or plans to obtain. The applicant shall describe how it will meet the state licensing requirements, and provide supporting documentation as required by the Department.

f. Other Local Licenses. A description of the specific Cannabis license or permits that the applicant either has applied for, obtained, or plans to obtain from other local jurisdictions.

g. Seller's Permit. A copy of a valid seller's permit from the California Board of Equalization, Department of Tax and Fee Administration, or successor agency.

h. Description of Operations. A description of the nature of the proposed Commercial Cannabis Activity within the proposed facilities, proposed hours of operation, product type, average production amounts (including each product produced by type, amount, process, and rate), source(s) of Cannabis, equipment, and delivery or distribution services.

i. Security Plan. A description and documentation of how the applicant will secure the premises 24 hours per day, 7 days per week. The security plan shall comply with general conditions set forth in subsection (p) of section 6-59.10 of this Article.

j. Tracking System. A description of how the Cannabis Business will track inventory of Cannabis or Cannabis Products from seed to sale in accordance with State law.

k. Plan for Unsold Cannabis or Waste. A plan for the disposal of any unsold Cannabis, Cannabis Product, or related waste as set forth below in subsection (w) of section 6-59.10 of this Article.

l. Insurance. Certificate of insurance demonstrating ability to comply with the insurance requirements as required for the applicable permit in a form acceptable to the City Attorney's Office set forth in subsections bb. and dd. of section 6-59.10 of this Article.

m. Labor Peace Agreement. For an applicant with ten (10) or more employees, the applicant must provide either a statement that the applicant will enter into and will abide by the terms of the agreement, or provide a copy of a fully executed labor

peace agreement as part of the application. Once a labor peace agreement is fully executed, the Permittee shall provide the City with a copy of the page of the labor peace agreement that contains the requisite signatures.

n. Compliance Statement. A copy of the Cannabis Business's operating conditions, containing a statement dated and signed by each Cannabis Business Owner, under penalty of perjury, that they have read, understand and shall ensure compliance with all operating conditions.

o. Signature of Applicant and Property Owner. The application shall be signed by each Cannabis Business Owner under the penalty of perjury, certifying that the information submitted, including all supporting documents, is to the best of the applicant's knowledge and belief, true, accurate and complete, and by the property owner for purposes of certifying that s/he has reviewed the application, and approves the use of the property for the purposes stated in the application.

p. Confidentiality. The information required by this Section shall be confidential, and shall not be subject to public inspection or disclosure except as may be required by federal, state or local law. Disclosure of information pursuant to this Section shall not be deemed a waiver of confidentiality by the applicant or any individual named in the application. The City shall incur no liability for the inadvertent or negligent disclosure of such information.

q. Other Information. Any other reasonably requested information relevant to the City's review and approval of any permit application, including denials, transfers, change of ownership, modifications, renewals, revocations, and suspensions, or the administration or enforcement of the Alameda Municipal Code governing Cannabis or any Commercial Cannabis Activity.

r. False Statements/Representations. It is unlawful to make any false statement or representation or to use or submit any false or fraudulent documentation in any application or materials submitted to the City for the purpose of evaluating or approving any permits, authorizations, or entitlements to operate or in connection with a local investigation into a person who applies for a Permit or a Cannabis Business in the City.

6-59.6 Review of Applications; Appeal of Denials and Suspensions

a. Review of Application. The Department shall review each application to determine compliance with this Article. Upon written notice that an application is incomplete, the applicant may submit additional information as requested by The Department. Failure to submit requested information within 60 days shall be deemed an abandonment of the application and no further action will be taken by The Department. The Department shall also consider the application in light of the results from any investigation into the application as deemed necessary by The Department, in consultation with the Chief of Police.

b. Withdrawal of Application.

1. An applicant may withdraw an application at any time prior to the City's issuance of a license or denial of a license.

2. Requests to withdraw an application must be submitted to the City in writing, dated, and signed by the applicant.

3. Withdrawal of an application shall not, unless the City has consented in writing to such withdrawal, deprive the City of its authority to institute or continue a proceeding against the applicant for the denial of the license upon any ground provided by law or to enter an order denying the license upon any such ground.

4. The City will not refund application fees for a withdrawn application.

5. An applicant may reapply at any time following the withdrawal of an application and will be required to submit a new application and fee.

c. Denial of Application. If The Department denies an application, the applicant shall be notified in writing, which shall include the reasons for the denial. Notification of denial shall be delivered by first class mail to the applicant, unless the applicant consents to a different mode of service, including without limitation, electronic service. No permit shall be issued unless a successful appeal of the denial is made within the requisite time frame.

d. Appeal of Denial.

1. Within 10 days after The Department serves notification of denial, an applicant may appeal the denial by notifying the City Clerk in writing of the appeal, the reasons for the appeal, and paying any applicable fees.

2. The City Clerk shall set a hearing on the appeal and shall fix a date and time certain, within 30 days after the receipt of the applicant's appeal, unless the City and the applicant agree to a longer time, to consider the appeal. The City Clerk shall provide notice of the date, time and place of hearing, at least 7 days prior to the date of the hearing.

3. The City Manager shall randomly assign a Hearing Officer to hear the appeal, determine the order of procedure, and rule on all objections to admissibility of evidence. The applicant and The Department shall each have the right to submit documents, call and examine witnesses, cross-examine witnesses and argue their respective positions. The proceeding shall be informal, and the strict rules of evidence shall not apply, and all evidence shall be admissible which is of the kind that reasonably prudent persons rely upon in making decisions.

4. The Hearing Officer shall issue a written decision within a reasonable amount of time after the close of the hearing. The decision of the Hearing Officer shall be final.

e. Grounds for Denial, Revocation or Suspension of Permit. The granting of a Permit or a renewal thereof may be denied and an existing Permit revoked or suspended if any of the following conditions exist:

1. The Permittee, or any employee, independent contractor, volunteer, or other agent having actual or apparent authority to act on behalf of a Cannabis Business, has knowingly made a false statement, omission, or negligent failure to notify the City of information required by this Article in the application or in other documents furnished to the City.

2. A Cannabis Business Owner has been convicted of an offense that is substantially related to the qualifications, functions, or duties of a Cannabis Business Owner for which the application is made, which includes but is not limited to:

   i. A violent felony conviction, as specified in Penal Code section 667.5(c).

   ii. A serious felony conviction, as specified in Penal Code section 1192.7.

   iii. A felony conviction involving fraud, deceit or embezzlement.

   iv. A felony conviction for hiring, employing, or using a minor in transporting, carrying, selling, giving away, preparing for sale, or peddling, any controlled substance to a minor; or selling, offering to sell, furnishing, offering to furnish, administering, or giving any controlled substance to a minor.

   v. A felony conviction for drug trafficking with an enhancement pursuant to Health and Safety Code section 11370.4 or 11379.8.

   vi. Except as provided in subsections (iv) and (v) above, an application for a permit shall not be denied if the sole ground for denial is based upon a prior conviction of either section 11350 or section 11357 of the California Health and Safety Code. An application for a permit also shall not be denied if the State would be prohibited from denying a license pursuant to either section 26057(b)(5) or section 26059 of the California Business and Professions Code.

3. Conviction of any controlled substance felony subsequent to permit issuance shall be grounds for revocation of a permit or denial of the renewal of a permit.

4. The Permittee has been sanctioned by any licensing or permitting authority, including any enforcement action taken by any other city or county, for unauthorized Commercial Cannabis Activity, including without limitation, denial, suspension, or revocation of a business license, operating permit, land use entitlement, or similar privilege to conduct Commercial Cannabis Activity.

5. The granting or renewing of the Permit would perpetuate or encourage any of the following:

    i. Distribution of Cannabis or Cannabis Products to minors;

    ii. Generation of revenue from the sale of Cannabis or Cannabis Products to fund criminal enterprises, gangs, or cartels;

    iii. Diversion of Cannabis or Cannabis Products to jurisdictions outside of the State where Cannabis and Cannabis Products are unlawful under state or local law;

    iv. Trafficking of other illegal drugs or facilitation of other illegal activity;

    v. Violence and the use of firearms in the cultivation and distribution of Cannabis and Cannabis Products;

    vi. Drugged driving or exacerbation of other adverse public health consequences associated with Cannabis;

    vii. The use of public lands in the cultivation of Cannabis; or

    viii. The use of federal property for Commercial Cannabis Activity.

6. For any other reason that would allow the State to deny a license under the MAUCRSA.

7. Failure to pay required fees, taxes, or other monies owed to the City outside of the 30-day grace period.

8. Violation of any provision of the AUMA or MAUCRSA, this Article, or any other permits issued by the City for the Commercial Cannabis Activity, such as a use permit.

9. Any later discovered act or conduct which would have been considered a ground for denial of the Permit in the first instance.

10. Failure to take reasonable measures to control patron conduct, where applicable, resulting in disturbances, vandalism, criminal activity, crowd control problems occurring inside of or outside the premises, traffic control problems, creation (or assist in the creation) of a public or private nuisance, or obstruction of the operation of another business.

11. Violation or failure to comply with the terms and conditions of the permit.

12. The application is speculative, made by a third party with no immediate plans for commencing operations, or is incomplete and not cured within sixty (60) days after written notification of the deficiency was mailed.

f. Suspension and Revocation.

1. Summary Suspension. If the Chief of Police or The Department deems continuation of the operation of the Cannabis Business by the Permittee, or any employee, independent contractor, volunteer, or other agent of a Cannabis Business Owner having actual or apparent authority to operate the Cannabis Business, will cause an imminent threat to the health, safety or welfare of the public, the Chief of Police or The Department may immediately and summarily suspend the Permit and all rights and privileges thereunder for a period not to exceed 30 days.

   i. The summary suspension shall take effect immediately upon service of a written notice of suspension by the Chief of Police or The Department upon the Permittee via personal delivery to any employee at the site address of the Cannabis Business. Notice given shall include the following information:

      a) The effective date and time period of the summary suspension;

      b) The grounds and reasons upon which the summary suspension is based;

      c) That the Permittee who wishes to challenge the summary suspension may request a hearing before a Hearing Officer;

      d) The method for requesting a hearing before the Hearing Officer; and

      e) The notice of summary suspension shall become final unless the Chief of Police or The Department receives a written request for a hearing from the Permittee as set forth below.

   ii. If the Permittee wishes to challenge the summary suspension, the Permittee must file a written request with the Chief of Police or The Department for a hearing within three (3) business days after service of the notice of summary suspension. If the Chief of Police or The Department does not receive a request for a hearing from the Permittee within this time period, the notice of summary suspension shall become final.

   iii. The Chief of Police or The Department must respond to the Permittee's request for a hearing by holding a hearing to affirm, modify, or overrule the summary suspension within five (5) business days of the Permittee's request for a hearing, unless the City and the Permittee agree to an extension of the time within which a hearing can be held.

   iv. The Chief of Police or The Department may recommend permanent revocation as set forth below on the basis of facts supporting summary suspension.

2. Permanent Revocation. The Chief of Police or The Department shall give notice to the Permittee of his or her intent to permanently revoke a Permit in the same manner as notice of denial and provide the City Clerk with a copy of the notice.

    i. The hearing for the revocation of the Permit shall be set and conducted in the same manner as an appeal of denial.

    ii. The decision of the Hearing Officer shall be final.

6-59.7 Permit Issuance

a. Before issuing any Permit, The Department shall determine that all of the following requirements have been met:

    1. The application is complete and all applicable City taxes, fees, or monies owed have been paid.

    2. The use permit has been approved or other land use requirements have been met, and all conditions of approval have been met or in good standing.

    3. There are no outstanding notices of nuisance or other unresolved code compliance issue at the site of the Commercial Cannabis Activity.

6-59.8 Permit Term

a. Term. The Permit shall be valid for one (1) year from the date of issuance. Once a Permit expires, it shall terminate and there is no grace period.

b. Renewal Application. A Permit renewal application and any applicable fees must be submitted at least sixty (60) days before the expiration of the Permit. Failure to submit a renewal application prior to the expiration date of the permit will result in the automatic expiration of the Permit on the expiration date. Permit renewal is subject to the laws and regulations effective at the time of renewal, which may be substantially different than the regulations currently in place and may require the submittal of additional information to ensure that the new standards are met. No person shall have any entitlement or vested right to receive a Permit under this Article. A Permittee may appeal expiration of a Permit as described in this Section in the same manner as appealing a denial in subsection (c) (Appeal of Denial) of section 6-59.6 above.

6-59.9 Transfer of or Modifications to the Permit

a. City Approval Required. A Permit is non-transferable to another location. No transfer to another person or modifications to the Permit, including changes to the permitted facility, may be made except in accordance this section.

b. Change of Ownership. A change in ownership constitutes a transfer of or modification to the Permit and as such shall require an application. A request for change in Permit ownership shall be submitted to The Department, in accordance

with subsection (f) below. Requests submitted less than sixty (60) days before the transfer will be processed only at the City's discretion and may be subject to an expedited processing fee. A new Cannabis Business Owner(s) shall meet all requirements for applicants of an initial Permit. The request shall include the following information:

1. Identifying information for the new Cannabis Business Owner(s) and management as required in an initial Permit application;

2. A written certification by the new Cannabis Business Owner as required in an initial Permit application;

3. The specific date on which the transfer is to occur; and

4. Acknowledgement of full responsibility for complying with the existing Permit.

c. Change in Security Plan. A request to modify the security plan shall be submitted to The Department, with a copy to the Chief of Police, on a City form at least sixty (60) days prior to the anticipated change, together with the applicable fee.

d. Change of Contact Information. A request for change in Cannabis Business contact information shall be submitted to The Department, with a copy to the Chief of Police, on a City form at least thirty (30) days prior to the anticipated change, together with the applicable fee.

e. Change in Trade Name. A written request for change in Cannabis Business trade or business name shall be submitted to The Department, with a copy to the Chief of Police, in a form approved by the Department at least thirty (30) days prior to the anticipated change, together with the applicable fee.

f. Application. A permit transfer or modification application and any applicable fees must be submitted at least sixty (60) days before the transfer or modification of the Permit. Failure to timely submit a transfer or modification application will result in the automatic expiration of the Permit. Permit renewal is subject to the laws and regulations effective at the time of renewal, which may be substantially different than the regulations currently in place and may require the submittal of additional information to ensure that the new standards are met. No person shall have any entitlement or vested right to receive a Permit under this Article.

6-59.10 General Conditions for All Cannabis Businesses

a. Compliance with State and Local Law. The applicant shall fully comply with all State laws and local laws for Cannabis, including the Alameda Municipal Code and all uncodified resolutions and ordinances adopted by the City Council.

b. Compliance with Laws Regarding Edible Cannabis Products. Cannabis Businesses that manufacture, prepare, dispense, and/or sell food, including Cannabis-infused foods and/or edible Cannabis Products, must comply with and are subject to the

provisions of all relevant State and local laws and County regulations regarding the preparation, distribution, labeling, and sale of such items.

c. Maintain State Licensure. At such time that the State has begun to issue licenses and at all times thereafter, the Permittee shall hold a valid State license for the equivalent State license type. All Permittees must maintain their state license and any other applicable licenses and permits required by the State, County, and City, including, for example, an Alameda business license.

d. Duty to Notify. All Applicants or Permittees have a continuing duty to immediately notify The Department of any proposed or considered change of ownership, changes to an application, or discrepancies between any information provided to the City related to Alameda Municipal Code or other local regulations governing Cannabis Businesses, and the actual facts, conditions, or circumstances concerning an applicant's or Permittee's Cannabis Business or the proposed or permitted facility. A failure to promptly notify the City may be grounds for denial or revocation. Additionally, all applicants or permittees must notify the City prior to applying for any new permits issued by the State of California.

e. Operational Radius.

1. No Cannabis Business engaging in Dispensary/Retail, Dispensary/Delivery-Only or Cultivation shall locate within a 1,000-foot radius of a public or private school providing instruction in kindergarten or any grades 1 through 12. Further, no such Cannabis Business shall locate within a 600-foot radius of a youth center, tutoring center, or day care center. The distance shall be measured via a path of travel from the nearest door of the nearest foregoing sensitive uses known when the RFP is issued or application is submitted, whichever is applicable, for a given Permit to the nearest door of the dispensary/retail/cultivation. For purposes of this section, "school" does not include any private school or similar use in which education of any kind is primarily conducted in private homes, churches or similar locations where such instruction is an ancillary use. All other sensitive uses identified in this subsection not defined herein or in this Article are defined under the California Child Health Care Act, codified in the California Health and Safety Code.

2. All other Cannabis Businesses shall not locate within a 600-foot radius of the same foregoing sensitive uses known when the application is submitted, measured via a path of travel from the nearest door of the nearest foregoing sensitive uses to the nearest door of the Cannabis Business.

f. Separation Distances. In addition to the operational radius, noted above, no two (2) cannabis businesses engaging in cannabis retail shall be permitted to operate within one (1) mile of each other. This requirement shall not apply to "delivery-only" dispensaries.

g. On-site Use or Consumption. Notwithstanding section 24-11 (SMOKING PROHIBITIONS IN PLACES OF EMPLOYMENT AND UNENCLOSED PUBLIC

PLACES) of the Alameda Municipal Code, on-site use or consumption of Cannabis or Cannabis Products is permitted in interior areas on the licensed premises of a Dispensary/Retail Permittee under their control, but shall not occur in parking areas or any other areas that cannot be excluded from public view or access by the Permittee. On-site use or consumption is strictly prohibited for any other Cannabis Business. Pursuant to section 6-59.16 in this Article, The Department shall promulgate guidelines, procedures, and regulations governing on-site consumption of Cannabis or Cannabis Products on the licensed premises of a Dispensary/Retail Permittee.

h. Free Samples. Free samples of Cannabis or Cannabis Product by any Cannabis Business or Permittee is strictly prohibited.

i. Local Hire/Local Ownership/Community Benefit. If applicable, the Permittee shall implement their voluntary plan containing feasible options to maximize local hire, local ownership, and community benefit.

j. Employee Age Requirement. Permittees shall employ only persons at least 21 years of age at any permitted facility within the City of Alameda.

k. On-site Community Relations Staff. Permittees shall post on the premises for public view the current name, phone number, secondary phone number and e-mail address of an on-site community relations staff person to whom notice of any operating problems associated with the Cannabis Business site may be reported. This information shall be updated as necessary to keep it current. The On-site Community Relations Staff can be the same individual as the On-site Operations Manager.

l. On-site Operations Manager. Permittees shall have an on-site manager at each permitted facility within the City who is responsible for overall operation at all times that employees are conducting operations, and shall provide the City with contact information for all such persons, including telephone number and email address. Permittees shall also provide the City with the name and contact information including phone number of at least one manager that can be reached 24-hours a day. The On-site Community Relations Staff can be the same individual as the On-site Operations Manager.

m. Nuisance Abatement. Permittees shall take all reasonable steps to discourage and correct conditions that constitute a public or private nuisance in parking areas, sidewalks, alleys and areas surrounding a permitted facility. Such conditions include, but are not limited to: smoking; creating or permitting a noise disturbance or odor issue; loitering; littering; and graffiti. If the City receives any nuisance complaints, the Permittee shall work with the Building Official and other relevant City departments, including the Police and Fire departments, to correct and address such concerns. Unresolved or repeated nuisance complaints may be basis for suspension or revocation of the Permit or denial of Permit renewal. Graffiti must be removed from property and parking lots under the control of the Permittee within 72 hours of discovery or notification by the City.

n. Air Quality, Odor Control, and Ventilation. All Commercial Cannabis Activity shall be operated so as not to cause offensive odors perceptible to the average person at or beyond any property line of the lot containing the premises where Commercial Cannabis Activity is being conducted. Facilities containing Commercial Cannabis Activity shall be equipped with odor control, filtration, and ventilation system(s) to control odors, humidity, and mold so that odor generated inside the property is not detected outside the property, anywhere on adjacent property or public rights-of-way, or within any other unit located within the same building as the Cannabis Business Permittee. All components of the Commercial Cannabis Activity shall comply with the requirements of the Bay Area Air Quality Management District. An odor detected no more than fifteen (15) minutes in one (1) day is acceptable.

o. Hours of Operation. All permitted facilities, except the licensed premises of Dispensary/Retail Permittees, shall be closed to the general public. For all permitted facilities any delivery, distribution, or pick-up of a substantial amount of cash, Cannabis, or Cannabis Product shall be prohibited between the hours of 10:00 p.m. and 7:00 a.m. Hours of operation for all Permittees may be between the hours of 7:00 a.m. to 9:00 p.m., except that modifications beyond this period can be approved for Manufacturing and Testing Lab Permittees only, as part of their use permit. With the exception of activities authorized pursuant to a Dispensary/Retailer Permit, no direct sales of Cannabis or Cannabis Product to the general public may occur upon the premises.

p. Fire Alarm System. The Cannabis Business must have a fully-operational fire alarm system approved by the Fire Chief.

q. Security Measures. Consistent with the approved security plan required under section 6-59.5, all Cannabis Businesses shall at a minimum provide and maintain the following security measures and all records or data, regardless of its form, related to such measures:

1. Operational Security Measures. The Security Plan shall address the following to ensure operational security:

i. Preventing individuals from remaining on the premises if they are not engaged in an activity expressly related to the operations of the Cannabis Activity;

ii. Establishing limited access areas accessible only to authorized personnel including security measures to both deter and prevent unauthorized entrance into areas containing Cannabis or Cannabis Products and theft or diversion of Cannabis or Cannabis Products;

iii. Storing all finished Cannabis and Cannabis Products in a secured and locked room, safe, or vault, and in a manner as to prevent diversion, theft, and loss, except for limited amounts of cannabis used for display purposes or immediate sale, if applicable;

iv. Providing tamper proof and tamper evident packaging for finished Cannabis Product;

v. Preventing offsite nuisance impacts to adjoining or nearby properties as required by the Permit as set forth in subsection (l) of section 6-59.10 of this Article; and

vi. Securing cash that remains on the premises.

2. Alarm System. A commercial burglar alarm system with video surveillance approved by the Chief of Police, which is capable of providing the Police Department with secure, internet-based access to unaltered surveillance footage or data of all controlled access areas, security rooms, points of ingress/egress, all point of sale (POS) areas, and other areas deemed reasonably necessary by the Chief of Police.

3. Security Guard. At all times while a Cannabis Business that is a Dispensary/Retail Permittee is open, it shall provide at least one security guard who is registered with Bureau of Security and Investigative Services, possesses a valid and current security guard registration card on their person while on-duty, and is dressed in a manner approved by the Chief of Police. Security guards are permitted, but not mandated, to carry firearms. The security guard and/or Cannabis Business personnel shall monitor the site and the immediate vicinity of the site to ensure that patrons immediately leave the site and do not consume Cannabis on the property or in the parking lot. The foregoing requirements may be imposed upon other Permittees at the discretion of either the Chief of Police or The Department as part of that Permittee's Security Plan, or if required by State law.

4. The Chief of Police shall have the authority to require additional reasonable security measures to further protect the public health, safety, and welfare, and to adopt implementing regulations and departmental guidelines related to all aspects of security measures required of Permittees, including specific technical requirements of security measures, inspections to ensure compliance, and access to records and electronic media. Failure to maintain effective security measures at all times is a violation of this Section and cause for permit revocation or suspension. All outdoor lighting used for security purposes shall be shielded and downward facing.

r. Security Breach. A Cannabis Business shall notify the Police Department within 24 hours after discovering any of the following:

1. Diversion, theft, loss, or any criminal activity by the Permittee, or any employee, independent contractor, volunteer, or other agent of the Permittee, involving the Cannabis or Cannabis Product.

2. The loss or unauthorized alteration of records related to Cannabis or Cannabis Product, registered Qualifying Patients, Primary Caregivers, or employees or agents.

3. Significant discrepancies identified in inventory.

4. Any other material breach of security.

s. Building and Fire Standards. The Chief Building Official may require additional specific standards to meet the California Building Code and Fire Code, including but not limited to installation of fire suppression sprinklers.

t. Generators. The use of generators for cultivation is prohibited, except for temporary use in the event of a power outage or emergency.

u. Water Usage or Discharge. The Cannabis Business must conform to all State and local regulations regarding water usage. Discharges of any kind into a public or private sewage or storm drainage system, watercourse, body of water or into the ground, must be in compliance with provisions of Chapter XVII of the Alameda Municipal Code, the East Bay Municipal Utility District Wastewater Control Ordinance (Ordinance No. 355-11, as amended by subsequent ordinances from time to time), and applicable Federal and State laws and regulations.

v. Use of Pesticides. No pesticides, insecticides or rodenticides that are prohibited by applicable law for fertilization or production of edible produce may be used on any Cannabis cultivated, produced, or distributed by a Cannabis Business. A Cannabis Business shall comply with all applicable law regarding use of pesticides, insecticides, or rodenticides.

w. Separation of Employee Areas. Employee breakrooms, eating areas, changing facilities, and bathrooms shall be completely separated from the storage areas for Cannabis or Cannabis Products.

x. Disposal of Unsold Cannabis, Cannabis Product, or Related Waste. All unsold Cannabis, Cannabis Product, and related waste that is to be disposed of must be made unusable and unrecognizable prior to removal from the business and must be in compliance with all applicable laws. The purpose of this condition is to protect any portion thereof from being possessed or ingested by any person or animal and to ensure it may not be utilized for unlawful purposes and complies with all state, local, and federal laws.

y. Testing. All Cannabis Businesses shall cause to be tested all of their Cannabis and Cannabis Products by a licensed testing laboratory for various metrics in accordance with applicable State law and regulations adopted by the California Bureau of Cannabis Control (or successor agency), including without limitation, chemical profiles and contaminants/contaminant thresholds. All Cannabis Businesses shall maintain a copy of the certificate of analysis or similar documentation on the premises evidencing compliance with State law and regulations regarding testing.

z. Labeling and Packages. Labels and packages of Cannabis and Cannabis Products shall meet all state and federal labeling and packaging requirements. Until such regulations are adopted by the federal and/or state authorities, as a condition of Permit issuance, The Department, in consultation with the Chief of Police, may impose labeling and packaging requirements to protect the public safety, health and welfare.

aa. Consent to Inspection. City, including City personnel from Police, Community Development, Public Works, and Fire departments, County, and State representatives may enter and inspect the property of every Cannabis Business during hours of operation, or at any other reasonable time, to ensure compliance and enforcement of the provisions of this Article and the inspection of records related to the business or otherwise required by State law, except that the inspection and copying of private medical records shall be made available to the Police Department only pursuant to a properly executed search warrant, subpoena, or court order. It is unlawful and cause for immediate suspension or revocation of the permit for any property owner, landlord, lessee, Cannabis Business, and/or its owner, agent, employee to refuse to allow, impede, obstruct or interfere with an inspection.

bb. Maintenance of Records. Records of Commercial Cannabis Activity must be maintained in accordance with State and local law, be maintained in order to show compliance with this Article, and be made available to the City upon request. Failure to provide such records is grounds for revocation of any Permit. Records maintained must include, but are not limited to the following.

1. All Permittees must maintain:

    i. Proof of a valid use permit issued in conformance with the Alameda Municipal Code.

    ii. The full name, address, and telephone number(s) of the owner, landlord and/or lessee of the property.

    iii. The full name, address, and telephone number(s) of each person engaged in the management of the Cannabis Business and the exact nature of the participation in the management of the Cannabis Business, and for cultivators, the full name, address, and telephone number(s) of each employee engaged in the cultivation of Cannabis at the property.

    iv. For a minimum of three (3) years, a written accounting or ledger of all cash, receipts, credit card transactions, and reimbursements (including any in-kind contributions) as well as records of all operational expenditures and costs incurred by the Permittee in accordance with generally accepted accounting practices and standards typically applicable to business records, which shall be made available to the City during business hours for inspection upon reasonable notice by The Department or Chief of Police.

v. Any and all records required by or related to this Article, the Alameda Municipal Code, or any conditions attached to any Permit or land use entitlement, including a use permit, issued for Commercial Cannabis Activity or otherwise associated with the property.

2. A Dispensary/Retailer Permittee that operates as a medicinal Cannabis cooperative or collective for qualified patients, shall maintain all records as required by State law.

3. A Manufacturer Permittee shall maintain the following records on the property:

   i. Evidence of: (a) verification that all Cannabis Products manufactured and packaged at the location are manufactured, packaged, and labeled in compliance with all applicable state and local laws; and (b) laboratory testing as required by State and local laws.

   ii. A list of any Cannabis Business operating under a Dispensary/Retailer Permit located in the City of Alameda that the Manufacturer Permittee has provided, or intends to provide its product to. The list shall include the name of the Dispensary/Retailer Permittee, its address, the date the Cannabis Products were distributed, and the type and amount of the product that was distributed.

4. A Manufacturer Permittee who produces edible Cannabis Products shall maintain the following records on the property:

   i. Proof of inspection and all required approvals required by the Alameda County Environmental Health Department and the County Health Officer for food manufacturers, packagers, and/or distributors.

   ii. Producers of edible Cannabis Products that are tested for contaminants shall maintain a written or computerized log documenting:

      a) The source of the Cannabis used in each batch of product;

      b) The contaminant testing date; and

      c) The testing facility for the Cannabis.

5. A Cultivator Permittee shall maintain the following records on the property:

   i. An inventory record documenting the dates and amounts of Cannabis cultivated at the property, the daily amounts of Cannabis stored on the property, and an inventory record of all Cannabis distributed to Cannabis Businesses operating under a Dispensary/Retailer Permit located in the City. The inventory shall include total plants grown by the cultivator, the total

weight of all Cannabis distributed, and receipts and documents detailing the sale or distribution of Cannabis.

ii. Evidence to verify that all Cannabis is cultivated in compliance with all applicable state and local laws.

cc. Insurance. Maintain at all times Commercial General Liability insurance on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury with per-occurrence limits set by the City Attorney's Office. The Commercial General Liability policy shall provide contractual liability, shall include a severability of interest or equivalent wording, shall specify that insurance coverage afforded to the City shall be primary, and shall include an Additional Insured Endorsement naming the City, its officials and employees as additional insured. Pollution Legal Liability shall be required for cultivation and manufacturing operations with per-occurrence limits set by the City Attorney's Office. Failure to maintain insurance as required herein at all times shall be grounds for suspension or revocation of the Permit.

dd. Project Costs. The applicant shall pay for any analysis and review by City staff or a consultant related environmental clearance for the project under applicable State and federal law, and pay for all related costs, including costs incurred by the City, associated with project review under CEQA.

ee. Worker's Compensation Insurance; Employer's Liability Insurance. Applicant or Permittee shall, at Applicant/Permittee's expense, maintain in full force and effect during duration of the Permit, worker's compensation insurance with not less than the minimum limits required by law, and employer's liability insurance with a minimum limit of coverage set by the City Attorney's Office.

ff. Indemnity. By accepting the permit, each Permittee agrees to indemnify, defend and hold harmless to the fullest extent permitted by law, the City, its officers, agents and employees from and against any all actual and alleged damages, claims, liabilities, costs (including attorney's fees), suits or other expenses resulting from and arising out of or in connection with Permittee's operations, except such liability caused by the active negligence, sole negligence of willful misconduct of City, its officers, agents and employees.

gg. Waiver of Sovereign Immunity. All tribal government applicants and Permittees applying for, or renewing an existing Permit, are required to execute and include a waiver of tribal sovereign immunity when submitting their initial or renewal application.

hh. Destruction Bond. Any Cannabis Business must provide proof of a bond of at least five thousand dollars ($5,000) and up to an amount permitted by applicable law to cover the costs of destruction of Cannabis or Cannabis Products if necessitated by a violation of applicable law, including this Article.

ii. Notification of Enforcement Action. Notify The Department, with a copy to the Chief of Police, within three days of any notices of violation or other corrective action ordered by a state or other local licensing authority, and provide copies of the relevant documents.

jj. Commencement of Operations or Abandonment. The Permittee's Cannabis Business must open at the approved premises and commence operations within one year of being issued a Permit under this Article or the date the use permit for the Commercial Cannabis Activity vests, whichever is later, as required by section 6-59.12 of this Article. Additionally, after operations have lawfully commenced, the Cannabis Business must not remain inoperative for a period of more than six months, unless upon showing of good cause. Failure to meet this condition is grounds for revocation of any Permit or land use entitlements.

6-59.11 Conditions for Specific Permits

a. Delivery/Distribution Permittees. A Cannabis Business operating within the City under either a Dispensary/Retailer, Dispensary/Delivery-Only, or Distributor Permit which delivers or distributes Cannabis shall be subject to the following conditions:

1. Delivery or distribution of Cannabis may be made only from a Dispensary-Retailer, Dispensary/Delivery Only or Distributor issued a permit by the City and the State in compliance with this ordinance and State law.

2. Maintain at all times all licenses and permits as required by California state law and the laws of the local jurisdiction in which the Permittee is located, and provide immediate notification to the Chief of Police if any license or permit is suspended or revoked.

3. Any person who delivers or distributes Cannabis to a Customer or licensee must have in his/her possession a copy of the appropriate Permit, which shall be made available upon request to law enforcement. A manifest with all information required in this section must accompany any person who delivers or distributes Cannabis to a Customer or licensee at all times during the process and hours of delivery or distribution.

4. The person delivering or distributing, in addition to their vehicle or other mode of delivery/distribution, shall not advertise any activity related to Cannabis nor shall it advertise the name of the Permittee. Any delivery or distribution vehicle or other mode of transport must be made in compliance with State and local law as it may be amended, including use of a dedicated GPS device for identifying the location of the vehicle or other method of transport (cell phones and tablets are not sufficient).

5. Delivery or distribution of Cannabis shall be directly to the residence or business address of the Customer or licensee in the State of California; delivery or distribution to any other location is prohibited. Delivery or distribution vehicles

shall not leave the State of California while in possession of Cannabis or Cannabis Products for sale, delivery, or distribution.

6. Delivery or distribution of Cannabis shall occur only between the hours of 7:00 a.m. and 9:00 p.m. Any deliveries started but not completed before the hour of 9 p.m. shall return to the permitted facility and be completed the next business day.

7. No Permittee shall deliver or distribute (nor cause to be delivered or distributed) Cannabis in excess of the limits established by the California Bureau of Cannabis Control (or successor agency) during the course of delivering or distributing Cannabis; until the California Bureau of Cannabis Control (or successor agency) establishes the limit, the limit shall be no more than $3,000 of Cannabis or Cannabis Product.

8. Submit and regularly update the following information concerning delivery or distribution:

    i. Listing of all vehicles and devices to be used for delivery or distribution of Cannabis or Cannabis Products within the City, which includes the vehicle's make, model, year, license plate number, and vehicle identification number.

    ii. Copies of applicable authorizing state and local licenses and permits issued to Cannabis Business allowing it to engage in Commercial Cannabis Activity.

9. All orders to be delivered or distributed shall be packaged bearing the names of the Customer or licensee. A Customer or licensee requesting delivery or distribution shall maintain a physical or electronic copy of the request and shall make it available upon request by the State, licensing authority, and law enforcement officers, which shall include the following information:

    i. Name and address of the licensed Dispensary-Retailer or Distributor Permittee.

    ii. The name of the employee who delivered or distributed the order.

    iii. The date and time the request was made.

    iv. The complete address where delivery or distribution occurred.

    v. A detailed description of the Cannabis or Cannabis Product(s) requested for delivery or distribution, including the weight or volume, or any accurate measure of the amount of Cannabis or Cannabis product ordered.

    vi. The date and time of delivery or distribution was made, and the signature of the person who received the delivery or distribution.

b. Dispensary-Retailer Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Dispensary-Retailer Permit:

1. Displays/Inventory. Display of Cannabis Products shall be limited to only an amount necessary to provide a visual sample for Customers. All Cannabis or Cannabis Products available for sale or display must be securely locked and stored. No Cannabis Product shall be visible from the exterior of the business.

2. Check Cashing Prohibited. No Dispensary/Retailer Permittee may engage in check cashing activities at any time.

3. Physician recommendations. No recommendations from a physician for medicinal Cannabis shall be issued on-site.

4. Minimum Operational Hours. Any Cannabis Business facility operating under a Dispensary/Retailer permit must be open to the public a minimum of 40 hours per week.

5. Underage Entrants. No one under the age of 21 shall be allowed to enter any Cannabis Business facility unless, as permitted under State law, the person is a qualified patient or a primary caregiver and they are in the presence of their parent or legal guardian.

6. Shipments. Shipments of Cannabis or Cannabis Products shall only be accepted during the regular business hours of the receiving Cannabis Business. Shipments of Cannabis or Cannabis Products from the Cannabis Business shall only be made during the regular business hours of the shipping Cannabis Business.

7. Alcohol/Tobacco. There shall be no on-site sales of alcohol or tobacco products, and no on-site consumption of alcohol or tobacco by patrons.

8. Signage/Trade Dress.

   i. All signage for Commercial Cannabis Activity shall be subject to the sign regulations in section 30-6 of Chapter XXX of the Alameda Municipal Code.

   ii. Any and all signage, packaging, and facilities shall not be “attractive,” as it is defined by the State, to minors, and shall not be visible from the exterior of the licensed premises.

   iii. Mandatory Signage. A sign must be posted in a conspicuous location inside the Cannabis Business and advise that:

      a) The use of Cannabis may impair a person’s ability to drive a motor vehicle or operate heavy machinery;

b) Loitering in a public place in a manner and under circumstances manifesting the purpose and with the intent to commit an offense specified in Chapter 6 (commencing with section 11350) and Chapter 6.5 (commencing with section 11400 of the Health and Safety Code is prohibited;

c) Loitering on private property without visible or lawful business with the owner or occupant is prohibited by California Penal Code Section 647(h); and

d) This Cannabis Dispensary/Retailer establishment is permitted in accordance with the Municipal Code, and State law, including the MAUCRSA, and Bureau of Cannabis Control regulations.

9. Safety of Products. The Dispensary/Retailer Permittee must ensure that the Cannabis and Cannabis Products it offers for sale are manufactured, packaged, tested, and labeled in compliance with all applicable state and local laws. No Dispensary/Retailer Permittee may obtain or distribute Cannabis Products from any Cannabis Business unless such business has a valid permit or license issued by the Bureau of Cannabis Control and a California city or county.

c. Dispensary/Delivery-Only Permittees. In addition to the other applicable standards, the following apply to Cannabis Businesses with a Dispensary/Delivery-Only Permit:

1. Shipments. Shipments of Cannabis or Cannabis Products shall only be accepted during the regular business hours of the receiving Cannabis Business. Shipments of Cannabis or Cannabis Products from the Cannabis Business shall only be made during the regular business hours of the shipping Cannabis Business.

2. Signage/Trade Dress.

i. All signage for Commercial Cannabis Activity shall be subject to the sign regulations in section 30-6 of Chapter XXX of the Alameda Municipal Code.

ii. Any and all signage, packaging, and facilities shall not be “attractive,” as it is defined by the State, to minors, and shall not be visible from the exterior of the licensed premises.

iii. Mandatory Signage. A sign must be posted in a conspicuous location in or around, the Cannabis Business and advise that:

a) The use of Cannabis may impair a person’s ability to drive a motor vehicle or operate heavy machinery;

b) Loitering in a public place in a manner and under circumstances manifesting the purpose and with the intent to commit an offense specified in Chapter 6 (commencing with section 11350) and Chapter

6.5 (commencing with section 11400 of the Health and Safety Code is prohibited;

c) Loitering on private property without visible or lawful business with the owner or occupant is prohibited by California Penal Code Section 647(h).

3. Safety of Products. The Dispensary/Delivery-Only Permittee must ensure that the Cannabis and Cannabis Products it offers for delivery are manufactured, packaged, tested, and labeled in compliance with all applicable state and local laws. No Dispensary/Retailer Permittee may obtain or distribute Cannabis Products from any Cannabis Business unless such business has a valid permit or license issued by the Bureau of Cannabis Control and a California city or county.

d. Cultivation Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Cultivation Permit:

1. Outdoor Cultivation Prohibited.

i. Outdoor cultivation of Cannabis is not permitted in any Zoning District.

ii. All cultivation must be done inside a fully enclosed structure, and the cultivation operation shall not be visible from the exterior of any structure on the property.

2. Public Access Restricted. A Cultivation Permittee must restrict access by members of the public to the permitted facility, except that licensees obtaining or seeking to obtain Cannabis or Cannabis Products (or their authorized representatives) may enter the licensed premises for that purpose.

3. All Cultivation Permittees must obtain and maintain a valid Distributor Permit, from the City.

e. Manufacturing Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Manufacturing Permit:

1. All manufacturing activities that will be conducted by the Permittee must be included on the application. No additional manufacturing activity not already included in the application can be conducted without a City-approved amendment to any applicable Permit providing for such additional activity.

2. The premises shall not contain an exhibition or Cannabis Product sales area or allow for retail distribution of Cannabis Products at that location.

3. Preparation, Packaging, and Labeling of Edibles. The preparation, packaging, and labeling of edible Cannabis Products shall comply with applicable federal,

state, and local law, including without limitation applicable regulations promulgated by the County of Alameda.

f. Distributor Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Distributor Permit:

1. A Distributor Permittee shall ensure that all Cannabis Product batches are stored separately and distinctly from others on the distributor's premises.

2. A distributor shall ensure a label with the following information is physically attached to each container of each batch:

i. The manufacturer or cultivator's name and license number;

ii. The date of entry into the distributor's storage area;

iii. The unique identifiers and batch number associated with the batch;

iv. A description of the Cannabis Products with enough detail to easily identify the batch; and

v. The weight of or quantity of units in the batch.

3. A Distributor Permittee shall store harvest batches and edible Cannabis Products that require refrigeration consistent with State and local law.

4. A Distributor Permittee shall store Cannabis or Cannabis Products in a building designed to permit control of temperature and humidity and shall prevent the entry of environmental contaminants such as smoke and dust. The area in which Cannabis or Cannabis Products are stored shall not be exposed to direct sunlight. A Distributor Permittee may not store Cannabis or Cannabis Products outdoors.

5. Any facilities of the Distributor Permittee shall not contain an exhibition or Cannabis Product sales area or allow for retail distribution of Cannabis or Cannabis Products at that location.

g. Additional Permit-Specific Requirements. As set forth below, The Department may issue implementing regulations to impose additional permit-specific requirements in the interest of protecting the public health, safety, and welfare in an expeditious manner.

h. Prohibited Activity. Cannabis may not be smoked, ingested, or possessed in a manner that violates State law (Health & Safety Code sections 11362.3 and 11362.79).

6-59.12 Failure to Commence Operations/Abandonment

a. The purpose of this Section is to prevent the reservation of land for future use by a Permittee that has no good faith intent to commence the proposed use, and after lawful use has commenced, to encourage productive use of land within the City.

b. If a Cannabis Business has not opened at the approved location and commenced operations within one (1) year of being issued a permit under this Article or the date the use permit for the Commercial Cannabis Activity vests, whichever is later, or if at any other time, after operations have lawfully commenced, the Cannabis Business remains inoperative for a period of more than 90 days, the Permit shall be deemed expired and void.

c. The City shall provide written notice to the Cannabis Business that the Permit has expired and is void. A Cannabis Business may appeal the Permit expiration in the same manner as appealing a denial in subsection (c) (Appeal of Denial) of section 6-59.6 of this Article.

d. Upon a factual showing of good cause by the Cannabis Business for its failure to commence or continue operations within the required time, the Hearing Officer may grant a one-time only extension, not to exceed 60 days, based upon a factual finding of good cause for the extension. The determination of good cause to support the one-time extension shall be final.

e. "Good cause" includes, but is not limited to, termination of the Cannabis Business' lease by the property owner; a change in federal, state or local law that now prohibits use of the previously approved location as a Cannabis Business; foreclosure or sale of the approved location resulting in the Cannabis business' inability to enter into a new lease; damage to or deterioration to the building that prevents the safe use and/or occupation of the structure until all required repairs are made in conformity with a Notice and Order issued to the property owner by the City's Building Official pursuant to the California Code of Regulations and the Uniform Code for Abatement of Dangerous Buildings. However, if the Cannabis Business was responsible for the condition, including any non-permitted construction or alteration of the structure, or non-permitted electrical, mechanical or plumbing, "good cause" shall not be found.

6-59.13 Fees.

Applicants and Permittees shall pay all applicable fees as set forth in the City's Master Fee Schedule adopted by resolution. Applicants and Permittees also shall pay the amount as prescribed by the Department of Justice of the State of California for the processing of fingerprints. None of the above fees shall be prorated, or refunded in the event of permit denial, suspension or revocation.

6-59.14 Regulations and Enforcement

a. Any action required by either The Department or Chief of Police under this Section may be fulfilled by designees.

b. The Department and Chief of Police are authorized to coordinate implementation and enforcement of this Article and may promulgate appropriate regulations or guidelines for such purposes.

6-59.15 Penalties

a. Each and every violation of this Section, including without limitation the causing, permitting, aiding, abetting, or concealing a violation of this Section, shall constitute a separate violation and shall be subject to all remedies and enforcement measures authorized by the Alameda Municipal Code, unless specifically provided for herein, including without limitation punishment as a misdemeanor.

b. As a nuisance per se, any violation of this Article shall be subject to injunctive relief, revocation of the business' Cannabis Business permit, disgorgement and payment to the City of any and all monies unlawfully obtained, costs of abatement, costs of investigation, attorney fees, and any other relief or remedy available at law or equity, including without limitation a civil action brought by the City. The City may also pursue any and all remedies and actions available and applicable under local and state laws for any violations committed by the Cannabis Business and persons related to or associated with the Cannabis Business.

c. A person engaging in Cannabis Business without a Permit required by this Article shall be subject to civil penalties of up to three times the amount of the Permit fee for each violation, and the State or local authority, or court may order the destruction of Cannabis associated with that violation. A violator shall be responsible for the cost of the destruction of Cannabis associated with the violation, in addition to any amount covered by a bond required as a condition of licensure. Each day of operation shall constitute a separate violation of this Section.

d. Any person violating any other provision of this Article (or any provision of the Alameda Municipal Code related to Cannabis), including refusing access to inspect the premises under subsection (z) of section 6-59.10 of this Article or knowingly or intentionally misrepresenting any material fact in procuring such required permits (i.e., regulatory permit and use permit), shall be deemed guilty of a misdemeanor punishable by a fine of not less than $250.00 and not more than $1,000.00 for each day (or portion thereof) of the violation or for each individual item constituting the violation (e.g., Cannabis or Cannabis Product), or by imprisonment for not more than 12 months, or by both such fine and imprisonment.

6-59.16 Implementing Regulations

a. The Department shall have the authority to adopt all necessary guidelines, procedures, and regulations to implement the requirements and fulfill the policies and purposes of this Article and any other local ordinance governing Cannabis, including without limitation adding or amending specific conditions imposed on any Cannabis Business.

Section 2: CEQA DETERMINATION

The City Council finds that adoption of this Ordinance is exempt from the California Environmental Quality Act ("CEQA") pursuant to Business and Professions Code section 26055(h) as discretionary review and approval, which shall include any applicable environmental review pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code, shall be required in order to engage in commercial cannabis activity within the City of Alameda under such Ordinance. Adoption of this Ordinance is additionally exempt from CEQA pursuant to section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that the adoption of this Ordinance may have a significant effect on the environment.

Section 3: SEVERABILITY

If any provision of this Ordinance is held by a court of competent jurisdiction to be invalid, this invalidity shall not affect other provisions of this Ordinance that can be given effect without the invalid provision and therefore the provisions of this Ordinance are severable. The City Council declares that it would have enacted each section, subsection, paragraph, subparagraph and sentence notwithstanding the invalidity of any other section, subsection, paragraph, subparagraph or sentence.

Section 4: EFFECTIVE DATE

This Ordinance shall be in full force and effect from and after the expiration of thirty (30) days from the date of its final passage.

_____
Presiding Officer of the City Council

Attest:

_____
Lara Weisiger, City Clerk

I, the undersigned, hereby certify that the foregoing Ordinance was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on the _____, 2018, by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this _____, 2018.

_____
Lara Weisiger, City Clerk
City of Alameda

Approved as to form:

_____
Janet C. Kern, City Attorney
City of Alameda

CITY OF ALAMEDA ORDINANCE NO._____

New Series

AMENDING THE ALAMEDA MUNICIPAL CODE BY AMENDING SECTION 30-10 (CANNABIS) TO (1) ADD CANNABIS RETAIL BUSINESSES AS CONDITIONALLY PERMITTED USES IN THE C-1, NEIGHBORHOOD BUSINESS AND C-M, COMMERCIAL-MANUFACTURING ZONING DISTRICTS; (2) ADD DELIVERY-ONLY CANNABIS RETAIL BUSINESSES AS A CONDITIONALLY PERMITTED USE IN THE C-M, COMMERCIAL-MANUFACTURING ZONING DISTRICT; (3) AMEND CERTAIN PORTIONS OF THE ZONING ORDINANCE TO ENABLE CANNABIS RETAIL BUSINESSES TO DISPENSE NON-MEDICINAL OR "ADULT USE" CANNABIS; AND (4) AMEND CERTAIN PORTIONS OF THE ZONING CODE TO ELIMINATE THE DISPERSION REQUIREMENT FOR DELIVERY-ONLY CANNABIS BUSINESSES

BE IT ORDAINED by the City Council of the City of Alameda:

Findings.

In enacting this Section, the City Council finds as follows:

1. **The amendment maintains the integrity of the General Plan**.
   The proposed Zoning text amendments update the City's cannabis regulations in light of the City's semi-annual report on cannabis in a manner that complies with State law enacted through the Adult Use of Marijuana Act (AUMA), Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), and any implementing regulations. Specifically, the amendments add provisions further regulating cannabis businesses in the city. The proposed amendments to regulate cannabis activity are necessary to ensure a balance between the rights of cannabis businesses, providers, and users with the obligations of the City under the General Plan to protect the public health, safety, and general welfare of the community through land use regulations and processes. Furthermore, the proposed amendments establish additional land use regulations for cannabis businesses, a new industry that would support an overarching General Plan goal to provide adequate businesses and services to Alameda residents. For these reasons, the proposed amendments maintain the integrity of the General Plan.

2. **The amendment will support the general welfare of the community**.
   The primary purpose and intent of the proposed Zoning text amendments is to regulate cannabis activities in a manner that protects the public health, safety and welfare of the community. The proposed Zoning text amendments support the general welfare of the community by establishing land use regulations for cannabis business activity and personal use and cultivation. Absent appropriate regulation, cannabis business activities including, but not limited to, unregulated cultivation, manufacturing, processing, and distribution have been documented throughout communities in California to pose a potential threat to the public health, safety and welfare. The proposed amendments allow the City to ensure that land use decisions regarding cannabis business activity are made according to specific rules and

regulations and through a public process. The proposed rules and regulations ensure that cannabis business activities in the city will be conducted in an orderly manner, avoiding potential public nuisance, land use conflicts and adverse impacts to the public health, safety and general welfare that may occur in the absence of these regulations.

3. **The amendments are equitable**.
The proposed Zoning text amendments are equitable in that they balance the rights of cannabis businesses, providers, and users with the obligations of the City to protect the public health, safety, and general welfare of the community through land use regulations and processes. The proposed regulations enable cannabis businesses to operate, and personal consumption and cultivation to occur, under the rights and privileges provided under State law while establishing rules and regulations that protect the general public from potential adverse impacts of cannabis business activity and personal consumption and cultivation. The proposed Zoning text amendments are also equitable in that they establish appropriate processes and procedures for the review of cannabis business activity that balance the community's need for local cannabis businesses, but also provides appropriate oversight and discretion for individual applications.

Section 1: Section 30-10 (Cannabis) of the Alameda Municipal Code shall be amended as follows (unchanged text in plain Arial font; additions in single-underline font; deletions in ~~strikethrough~~ font):

30-10 - CANNABIS

30-10.1 - Commercial Cannabis Uses.

a. *Findings.* This section establishes regulations governing the commercial cultivation, manufacture, distribution, delivery, testing, and sale of cannabis and cannabis products. The purpose of these regulations is to provide requirements and criteria to approve of cannabis businesses engaged in such uses. The City of Alameda finds it necessary to establish such requirements and criteria in the interest of the public health, safety and welfare to regulate all cannabis-related uses.

b. *Definitions.* The applicable definitions in the Alameda Municipal Code are incorporated by this reference, unless otherwise defined herein.

1. *Cannabis* means any and all parts of the plant cannabis sativa linnaeus, cannabis indica, or cannabis ruderalis, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. "Cannabis" also means the separated resin, whether crude or purified, obtained from cannabis. "Cannabis" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted

therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. For the purpose of this section, "cannabis" does not mean "industrial hemp" as defined by Section 11018.5 of the Health and Safety Code.

2. *Cannabis business* means a business or enterprise engaged in commercial cannabis activity.

3. *Cannabis product* means cannabis that has undergone a process whereby the cannabis has been transformed into a concentrate, including, but not limited to, concentrated cannabis, or an edible, topical, or other cannabis-containing product.

4. *Chief of Police* shall mean the Chief of Police of the City of Alameda Police Department or the Chief's designee.

5. *Commercial cannabis activity* means the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, sale, delivery, or provision of cannabis or cannabis products for commercial purposes, whether for profit or not.

6. *Community Development Department* shall mean the Director of Community Development Department of the City of Alameda (or successor department), or his or her designee.

7. *Concentrated cannabis* means the separated resin, whether crude or purified, obtained from cannabis.

8. *Day care center* means any licensed child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and school-age child care centers.

9. *Delivery* means the commercial transfer of cannabis or cannabis products, for profit or not, to a customer by any means. "Delivery" also includes the use by a retailer of any technology platform owned and controlled by the retailer that enables customers to arrange for or facilitate the commercial transfer by a licensed retailer of cannabis or cannabis products. Delivery, however, shall not include commercial transfer of cannabis or cannabis products, for profit or not, by means of a self-service display, which is strictly prohibited.

10. *Distribution* means the procurement, sale, and transport of cannabis or cannabis products between entities licensed pursuant to the Medicinal and Adult-Use of Cannabis Regulation and Safety Act and any subsequent State of California legislation or regulation regarding the same.

11. *Edible cannabis product* means a cannabis product that is intended to be used, in whole or in part, for human consumption, including, but not limited to, chewing gum, but excluding products set forth in Division 15 (commencing with Section 32501) of the Food and Agricultural Code. An edible cannabis product is not considered food, as defined by Section 109935 of the Health and Safety Code, or a drug, as defined by Section 109925 of the Health and Safety Code.

12. *Medicinal cannabis* or *medicinal cannabis product* means cannabis or a cannabis product, respectively, intended to be sold for use pursuant to the

Compassionate Use Act of 1996 (Proposition 215), found at Section 11362.5 of the Health and Safety Code, by a medicinal cannabis patient in California who possesses a physician's recommendation or other authorization permitted by State law.

13. *Permit* refers to any one (1) of the regulatory permits described in subsection c of Section 6-59.4 of Article XVI that affords the permittee the privilege of conducting the activity allowed under the regulatory permit.

14. *Person* shall mean and include a natural person, joint venture, joint stock company, partnership, association, club, company, corporation, limited liability company, business, estate, trust, business trust, receiver, syndicate, organization, or any other group or combination acting as a unit, or the manager, lessee, agent, servant, officer or employee of any of them.

15. *Youth centers* means any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities. Youth centers shall also mean any facility determined by the Alameda Recreation and Parks Department to be a recreation center in a City park.

c. *Permitted uses.* The following are the permitted commercial cannabis land uses within the City of Alameda. Any Commercial Cannabis Land Use Not expressly provided for in this section is deemed prohibited.

1. *Cannabis retail*, which is distinct from *cannabis retail – delivery-only*, means the sale, delivery, or provision of cannabis or cannabis product to customers by any person, business, or organization.

2. *Cannabis retail – delivery-only* means the sale, delivery, or provision of cannabis or cannabis product to customers by any person, business, or organization from a delivery-only dispensary licensed in the City, which is closed to the public.

3. *Cannabis industry* means the possession, manufacture, distribution, processing, storing, laboratory testing, labeling, or transportation of cannabis or cannabis products, or some combination of the foregoing in accordance with State law, by any person, business, or organization for commercial purposes, whether for profit or not. This use also includes the production, preparation, or compounding of cannabis or cannabis products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis at a fixed location that packages or repackages cannabis or cannabis products or labels or relabels its container by any person, business, or organization.

4. *Cannabis cultivation* means the production of clones, immature plants, seeds, and agricultural products used specifically for the propagation and cultivation of cannabis to mature plants. Except as provided for in the preceding sentence, cannabis cultivation shall not include any activity involving the planting, growing, harvesting, drying, curing, grading, trimming, or processing of cannabis, which is prohibited.

d. *Applicability.* This section shall apply to the establishment of all land uses related to cannabis and cannabis products.

e. *Home Occupations.* It is unlawful to engage in commercial cannabis activity as a home occupation as defined in Section 30-2b of this Chapter.

f. *Use Permit.*

1. *Use Permit Requirement.* It is unlawful to engage in commercial cannabis activity, as such use classifications are described in subsection (c) above, without first obtaining a use permit.

2. *Administrative Approval.* Use permits to engage in commercial cannabis activity may be approved by the Zoning Administrator where the Administrator determines that each of the criteria of subsection 30-21.3b, pursuant to Section 30.21.4 of the Alameda Municipal Code, are satisfied.

g. *Permitted Locations.*

1. No commercial cannabis activity shall be permitted on city-owned land or federal property.

2. Notwithstanding Section 30-4 (District Uses and Regulations) of the Alameda Municipal Code, Cannabis Cultivation, as defined in the Alameda Municipal Code, may be conditionally permitted in the following zoning districts or locations:

i. C-M, Commercial Manufacturing District; and

ii. AP-E1, Alameda Point, Enterprise District 1, AP-E2, Alameda Point, Enterprise District 2, and AP-AR, Alameda Point, Adaptive Reuse subdistricts.

3. Notwithstanding Section 30-4 (District Uses and Regulations) of the Alameda Municipal Code, Cannabis Industry, to the extent permitted by the Alameda Municipal Code, may be conditionally permitted in the following zoning districts and locations:

i. C-M, Commercial Manufacturing District;

ii. AP-E1, Alameda Point, Enterprise District 1, AP-E2, Alameda Point, Enterprise District 2, and AP-AR, Alameda Point, Adaptive Reuse subdistricts; and

iii. Office, research and development, and light industrial zones in the Marina Village Master Plan area.

4. Notwithstanding Section 30-4 (District Uses and Regulations) of the Alameda Municipal Code, Cannabis Retail, to the extent permitted by the Alameda Municipal Code, may be conditionally permitted in the following zoning districts and locations:

i. C-1, Neighborhood Business District;
ii. C-C, Community Commercial Zone;
iii. C-M, Commercial Manufacturing District;
iv. AP-AR, Alameda Point, Adaptive Reuse;

v. NP-W, North Park Street Workplace subdistrict ; and
vi. NP-G, North Park Street Gateway subdistrict.

h. Notwithstanding Section 30-4 (District Uses and Regulations) of the Alameda Municipal Code, Cannabis Retail – Delivery-Only, to the extent permitted by the Alameda Municipal Code, may be conditionally permitted in the following zoning district(s) and location(s.

1. C-M, Commercial Manufacturing District.

h. *Off-Street Parking.*

1. All sites where commercial cannabis activity is permitted shall at a minimum comply with the parking regulations in Section 30-7 of Chapter XXX of the Alameda Municipal Code. Cannabis manufacturing and Cannabis retail – delivery-only uses shall be subject to the same parking requirement as a manufacturing, major use under Section 30-7.6 and Cannabis retail uses shall be subject to the same parking requirement as a general retail use.

i. *Lighting.*

1. All exterior lighting shall comply with Chapter XXX of the Alameda Municipal Code, and at a minimum, be fully shielded, downward casting and not spill over onto structures, other properties or the night sky.

j. *Business Conducted Within Building.*

1. No manufacturing, production, distribution, storage, display, retail, or wholesale of cannabis and cannabis-infused products shall be visible from the exterior of the building where the commercial cannabis activity is being conducted. All structures used for cultivation, shall comply with the setback requirements for the base zoning district and any applicable combining zoning districts. There shall be no exterior evidence of cultivation outside the structure.

k. *Conditions of Approval.*

1. All cannabis businesses shall comply with the general conditions set forth in Section 6-59.10 and all applicable specific conditions set forth in Section 6-59.11 of Article XVI of Chapter VI of the Alameda Municipal Code.

2. In approving a use permit for commercial cannabis activity, the city may also specify such additional conditions as it deems necessary to fulfill the purposes of this section and Article XVI of Chapter VI of the Alameda Municipal Code, including without limitation, conditions of approval to safeguard public health, safety, and welfare, address nuisance impacts to surrounding uses, and prevent a disproportionate burden on public services (e.g., police, fire, building, etc.) and may require reasonable guarantees and evidence that such conditions are being, or will be, complied with.

l. *Vesting of Use Permit.*

1. Notwithstanding Section 30-21.9 (Termination Due to Inaction) of Chapter XXX (Development Regulations) of the Alameda Municipal Code, a use permit, if

granted, for commercial cannabis activity shall terminate one (1) year from the date of its granting, unless actual construction or alteration, or actual commencement of the authorized activities, has begun under valid permits within such period, including without limitation the granting of a regulatory permit pursuant to Article XVI (Cannabis Businesses) of Chapter VI (Business, Occupations, and Industries) of the Alameda Municipal Code. An applicant may seek a one-time one (1) year extension to the use permit for good cause, but may only do so no earlier than sixty (60) days prior to expiration of the initial one (1) year term.

2. "Good cause" includes, but is not limited to, termination of the cannabis business' lease by the property owner; a change in federal, state or local law that now prohibits use of the previously approved location as a cannabis business; foreclosure or sale of the approved location resulting in the cannabis business' inability to enter into a new lease; damage to or deterioration to the building that prevents the safe use and/or occupation of the structure until all required repairs are made in conformity with a Notice and Order issued to the property owner by the City's Building Official pursuant to the California Code of Regulations and the Uniform Code for Abatement of Dangerous Buildings. However, if the cannabis business was responsible for the condition, including any non-permitted construction or alteration of the structure, or non-permitted electrical, mechanical or plumbing, "good cause" shall not be found.

m. *Revocation or Modification.* A use permit approved under this section may be revoked or modified at any time following a public hearing in accordance with Section 30-21.3 of this chapter.

(Ord. No. 3206 N.S., § 2, 12-19-2017)

30-10.2 - Personal Cultivation of Cannabis.

a. *Purpose.* The purpose of this section is to regulate and impose zoning restrictions on the personal cultivation of cannabis for lawful personal use (medicinal or adult-use) incidental to the residential use of the primary residential dwelling pursuant to State law. This section is not intended to interfere with a patient's right to use medical cannabis pursuant to the Compassionate Use Act, as may be amended, nor does it criminalize cannabis possession or cultivation otherwise authorized by State law. This section is not intended to give any person or entity independent legal authority to operate a cannabis business; it is intended simply to regulate and impose zoning restrictions regarding personal cultivation of cannabis in the City of Alameda pursuant to the Alameda Municipal Code and State law.

b. *Authority.* The primary responsibility for enforcement of the provisions of this section shall be vested in the Community Development Department and the Chief of Police.

c. *Definitions.* For the purpose of this section, unless the context clearly requires a different meaning, the words, terms, and phrases set forth in this section have the meanings given to them in this section:

1. *Accessory structure* shall have the same meaning as set forth in Section 30-5.7 of this chapter.

2. *Cannabis cultivation area,* means the maximum dimensions allowed for the growing of cannabis. For indoor cultivation areas, the cannabis cultivation area shall be measured in contiguous square feet using clearly identifiable boundaries of all area(s) that will contain cannabis plants at any point in time, including all of the space(s) within the boundaries, in the primary residential dwelling or permitted accessory structure.

3. *Cultivate* or *cultivation* means any activity involving the planting, growing, harvesting, drying, curing, trimming, or processing of cannabis for personal use.

4. *Primary caregiver* shall have the same definition as set forth in California Health and Safety Code Section 11362.7, as that section now appears, or may hereafter be amended or renumbered, but who does not receive remuneration for these activities except for compensation in full compliance with subdivision (c) of Section 11362.765 of the Health and Safety Code.

5. *Primary residential dwelling* shall mean the primary residential dwelling of the primary caregiver, qualified patient, or adult twenty-one (21) years of age or older who is eligible to cultivate cannabis for medicinal or adult use in compliance with this section.

6. *Qualified patient* shall have the same meaning as a patient that uses or ingests medicinal cannabis as that term is defined in Section 11362.7 of the California Health and Safety Code and who is entitled to the protections of California Health and Safety Code Section 11362.5, as may be amended.

d. *Personal Cultivation of Cannabis.*

1. A qualified patient or primary caregiver shall be allowed to cultivate and process cannabis within his/her primary residential dwelling in compliance with the standards established by subsection (e) of this section and subject to the following limitations:

   i. Any cannabis cultivated is for the exclusive personal use of the qualified patient, and is not provided, sold, distributed, or donated to any other person.

   ii. No more than six (6) living cannabis plants at any one (1) time per qualified patient for medicinal use may be cultivated at any primary residential dwelling.

   iii. In the case of a primary caregiver, the foregoing limit shall apply to each qualified patient on whose behalf the primary caregiver is cultivating, but in no event shall that amount exceed thirty (30) cannabis plants to be cultivated at any primary residential dwelling.

   iv. A copy of documentation of qualified patient status and/or primary caregiver status consistent with the provisions of California Health and Safety Code Section 11362.7 et seq. shall be maintained at the primary residential dwelling, including clear and adequate documentation, where applicable, evidencing that the qualified patient or primary caregiver may possess an

amount of cannabis in excess of the limits set forth in the preceding paragraph (i), consistent with the patient's needs.

v. A qualified patient or primary caregiver shall not participate in medicinal cannabis cultivation in any other property within the City.

2. An adult person twenty-one (21) years of age or older shall be allowed to cultivate and process cannabis for personal use within his/her primary residential dwelling in compliance with the standards established by subsection (e) of this section and subject to the following limitation:

i. No more than six (6) living cannabis plants at any one (1) time may be cultivated for adult use within the adult person's primary residential dwelling, regardless of the number persons residing thereon.

3. Cannabis cultivation is prohibited in the common areas of a multi-unit residential development and in common areas of any commercial or industrial development.

4. Nothing in this section shall be interpreted to allow a qualified patient or primary caregiver to combine limits for medicinal and adult-use to exceed the limits set forth above.

e. *Standards for Personal Cultivation of Cannabis.*

1. To the extent that the city is required to allow the cultivation of cannabis for personal use and consumption under State law, the standards set forth in this section shall apply. Nothing in this section shall be interpreted to permit cultivation of cannabis for commercial purposes.

i. *Allowed Cultivation Areas.* Cannabis may be cultivated in the interior only of the primary residential dwelling, subject to the following limitations:

a) Cultivation of cannabis plants for personal use must be in full compliance with all the applicable provisions of California law.

b) Cultivation must occur in one (1) cannabis cultivation area in a single primary residential dwelling.

1) For an adult person twenty-one (21) years of age or older or a qualified patient, the cultivation area shall be no more than one hundred (100) contiguous square feet.

2) For primary caregivers, it shall be no more than one hundred (100) contiguous square feet for each qualified patient on whose behalf the primary caregiver is cultivating, but shall in no event be more than five hundred (500) contiguous square feet.

c) The cannabis cultivation and processing area shall be in compliance with the California Building Code, California Fire Code, and other locally adopted life/safety codes, including requirements for electrical and mechanical ventilation systems.

d) Interior cultivation and processing areas are restricted to one (1) room of a primary residential dwelling, or within a self-contained outside

accessory structure that is secured, locked, and fully enclosed. The accessory structure shall comply with all requirements under section 30-5.7f (Accessory Buildings), and shall not be constructed or covered with plastic or cloth. If located in a garage, the cultivation or processing use shall not result in a reduction of required off-street parking for the residence, as required under Section 30-7.3 of this chapter. The primary residential dwelling shall maintain kitchen, bathrooms, and primary bedrooms for their intended use and not be used primarily for personal Cannabis cultivation or processing.

e) Cannabis cultivation and the establishment or use of the cultivation and processing areas cannot cause nonconformity under the Alameda Municipal Code.

ii. *Lighting and Electricity Restrictions.*

a) Any cannabis cultivation lighting shall not exceed one thousand two hundred (1,200) watts unless specifically approved in writing by the Building Official (or designee).

b) All electrical equipment used in the cultivation or processing of cannabis (e.g., lighting and ventilation) shall be plugged directly into a wall outlet or otherwise hardwired; the use of extension cords to supply power to electrical equipment used in the cultivation or processing of cannabis is prohibited.

iii. Only cannabis cultivated at the primary residential dwelling in conformance with this section shall be allowed to be processed at the primary residential dwelling.

iv. Any use of a compressed flammable gas or gas products (CO2, butane, etc.) as a solvent or other volatile solvent in the extraction of THC or other cannabinoids, or cannabis cultivation or processing for personal use is prohibited.

v. There shall be no exterior evidence, including but not limited to odor, view, or other indication of cannabis cultivation or processing on the property that is perceptible to a person with normal unaided vision standing at the property lines of the subject lot.

vi. For the convenience of the qualified patient, primary caregiver, or adult person twenty-one (21) years of age or older, to promote building safety, to assist in the enforcement of this section, and to avoid unnecessary confiscation and destruction of cannabis plants and unnecessary law enforcement investigations, persons cultivating cannabis pursuant to this section may notify the City regarding the cultivation site. The names and addresses of persons providing such notice, or of cultivation sites permitted under these regulations shall not be considered a public record under the California Public Records Act or the City of Alameda's Sunshine Ordinance.

vii. The cannabis cultivation and processing area shall not adversely affect the health or safety of the nearby residents in any manner, including but not

limited to by creating dust, glare, heat, noise, noxious gases, odor, smoke, traffic, vibration, or other impacts, or be hazardous due to use or storage of materials, processes, products or wastes.

viii. The cannabis cultivation or processing for personal use shall not adversely affect the health or safety of the occupants of the primary residential dwelling or users of the accessory building in which it is cultivated or processed, or occupants or users of nearby properties in any manner, including but not limited to creation of mold or mildew.

f. *Public Nuisance.* It is declared to be unlawful and a public nuisance for any person owning, leasing, occupying, or having charge or possession of any premises within the City of Alameda to cause or allow such premises to be used for the outdoor or indoor cultivation of cannabis plants, or processing thereof as described herein, or to process, cultivate or allow the cultivation of cannabis plants in any manner that conflicts with the limitations imposed in this section.

g. *Enforcement.*

1. The remedies provided by this section are cumulative and in addition to any other remedies available at law or in equity, including the civil and administrative enforcement and penalty provisions for municipal code violations set forth in Chapter I of the Alameda Municipal Code.

2. Any person who violates any provisions of this section shall be guilty of a misdemeanor, subject to a penalty of imprisonment in the county jail for a period of time not to exceed six (6) months, or by a fine not to exceed the amount set forth in Chapter I of the Alameda Municipal Code, or both, for each violation. Notwithstanding the classification of a violation of this section as a misdemeanor, at the time an action is commenced to enforce the provisions of this section, the trial court, upon recommendation of the prosecuting attorney, may reduce the charged offense from a misdemeanor to an infraction.

3. Any person convicted of an infraction under this section shall be punished by pursuant to Chapter I of the Alameda Municipal Code:

4. The penalties provided for herein shall attach to each violation. For purposes of this section, a violation shall accrue for each day (or portion thereof) of the violation or for each individual item constituting the violation (e.g., cannabis plant).

_____
Presiding Officer of the City Council

Attest:

_____
Lara Weisiger, City Clerk

I, the undersigned, hereby certify that the foregoing Ordinance was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on the _____, 2018, by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this _____, 2018.

_____
Lara Weisiger, City Clerk
City of Alameda

Approved as to form:

_____
Janet C. Kern, City Attorney
City of Alameda

CITY OF ALAMEDA RESOLUTION NO. _____

AMENDING MASTER FEE RESOLUTION NO. 12191 TO ADD NEW CANNABIS BUSINESS OPERATOR AND REGULATORY FEES

WHEREAS, the Alameda Municipal Code and the California Government Code provide that the City Council shall set fees reasonable to recover the cost of providing various services by resolution; and

WHEREAS, the City Council, at the August 27, 1991 Special City Council meeting directed City staff to amend the Alameda Municipal Code to reflect that City fees shall be set by City Council Resolution; and

WHEREAS, State law authorizes local governments to charge fees for services based on the estimated reasonable cost of providing the service for which the fee is charged; and

WHEREAS, the City Council is authorized to increase fees annually by the percentage increase in consumer and/or construction price indices for the San Francisco Bay Area; and

WHEREAS, the City Council established a regulatory regime by adopting various ordinances regulating Cannabis Business Activities in the city of Alameda, effective January 18, 2018, as amended from time to time; and

WHEREAS, the purpose of the regulatory regime is to ensure that the Cannabis Businesses and their operations are conducted in a secure and safe manner consistent with all applicable local and state laws, rules and regulations governing the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, research and development, delivery, sale, or provision of Cannabis or Cannabis Products for commercial purposes, whether for profit or not, including Proposition 64, known as the “Control, Regulate and Tax Adult Use of Marijuana Act” (“AUMA”) and Senate Bill 94 (Medicinal and Adult-Use Cannabis Regulation and Safety Act, or “MAUCRSA”);

WHEREAS, the City is estimated to incur certain costs associated with accepting, processing, reviewing, investigating, and formally considering the merits of each submittal for all the requisite permits, approvals, and entitlements, including applications for an operator’s permit, use permit, and other approvals associated with the operation of each type of Cannabis Business pursuant to any and all ordinances containing the rules, regulations and procedures duly adopted by the City Council and the Implementing Regulations adopted by the Planning, Building and Transportation Department, the successor to the Community Development Department for implementation of cannabis

business ordinances adopted by Council, and thereafter amended from time to time, effective January 18, 2018; and

WHEREAS, a study was commissioned and has been completed to determine the reasonable cost for issuing and regulating various cannabis permits; and

WHEREAS, the City Council desires to recover the costs that the City will incur with accepting, processing, reviewing, investigating, and formally considering the merits of each submittal by each Cannabis Business applicant for all the requisite permits, approvals, and entitlements, including applications for an operator's permit, use permit, and other approvals associated with the operation of each type of Cannabis Business and in performing certain regulatory activities associated with the operation of each type of Cannabis Business facility in a manner permitted by applicable law; accordingly, the City Council mandated that the cost of cannabis business activities shall be borne solely by cannabis businesses.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Alameda as follows:

Section 1. **FINDINGS.**

(a) That the foregoing recitals are true and correct statements of fact and are incorporated into this Resolution by this reference.

(b) That the regulatory fees adopted by this resolution pursuant to the City's adopted cannabis business regulatory regime, as evidenced by the adoption of various ordinances regulating Cannabis Business Activities in the city of Alameda, effective January 18, 2018, as amended from time to time, are fair, reasonable and equal to, or less than, the reasonable costs the City will incur with accepting, processing, reviewing, investigating, and formally considering the merits of each submittal by each Cannabis Business applicant for all the requisite permits, approvals, and entitlements, including applications for an operator's permit, use permit, and other approvals associated with the operation of each type of Cannabis Business and in performing certain regulatory activities associated with the operation of each type of Cannabis Business facility in a manner permitted by applicable law, as evidenced by the "Cannabis Business Operator Permit and Regulatory Fee Study," dated October 2018," which forms the basis of the City Council's findings.

Section 2. **ADOPTION OF FEE; AMENDMENT OF MASTER FEE SCHEDULE.**

(a) Based on the foregoing, that Master Fee Resolution No. 12191 as to fees for services provided by City Departments are adjusted as set forth in Exhibit A, which is attached hereto, and are to be included in the Master Fee Schedule, which shall be imposed on any Cannabis Business applicant for the reasonable estimated costs the City will incur with respect to accepting, processing, reviewing, investigating, and formally

considering the merits of each submittal for all the requisite permits, approvals, and entitlements, including applications for an operator's permit, use permit, and other approvals associated with the operation of each type of Cannabis Business pursuant to any and all ordinances containing the rules, regulations and procedures duly adopted by the City Council and the Implementing Regulations adopted by the Planning, Building and Transportation Department. These fees may be adjusted annually by the Bay Area Consumer Price Index (CPI).

(b) That the payment of any fees set forth in Exhibit A shall be due and payable at the time of an application or request, including submittal of a proposal in response to a RFP, is submitted to the City.

(c) That the City will not begin any review or investigation of any permits, approvals, and entitlements, including applications for an operator's permit, use permit, and other approvals associated with the operation of each type of Cannabis Business until and unless the applicable fee has been paid in full.

(d) That the payment of any fees set forth in Exhibit A does not guarantee approval of any permits, approvals, and entitlements, including applications for an operator's permit, use permit, and other approvals associated with the operation of each type of Cannabis Business.

(e) That the fees set forth in Exhibit A are solely for costs that will be incurred, for activities described herein, and do not include any other fees due for, without limitation, other permits, licenses, inspections, document preparation that may be required by the City, including, building permits, environmental review, business licensing, certificates of occupancy, or mandatory inspections (e.g., fire).

(f) That the fees set forth in Exhibit A shall be evaluated and updated from time to time to ensure that they reflect the reasonable costs to administer the cannabis regulatory regime, including without limitation, in the following instances: (i) when the regulatory regime has been implemented for a period of time sufficient for the City to have had an opportunity to review the actual costs incurred in administering the program; (ii) if the ordinances, comprising the regulatory regime, have been substantially amended such that the time and/or processes involved are substantially changed; or (iii) at the expiration of 10 years, which is the period over which the Fee Study proposes recovery of the implementation costs.

(g) That The City Manager and the Director of the Planning, Building, and Transportation Department, their successors or designees, are authorized to implement this Resolution.

(h) This Resolution is effective immediately upon its adoption.

* * * * * * *

EXHIBIT A

SUMMARY OF PROPOSED CANNABIS BUSINESS OPERATOR APPLICATION AND PERMIT FEES

Fee Description	Fee [1]	Unit	Figure
Cannabis Business Operator Permit: LOI Review Fee	**$900**	flat fee	3
Cannabis Business Operator Permit: RFP Proposal Fee	**$4,400**	flat fee	4
Cannabis Business Operator Permit: RFP Decision Appeal Fee	**$6,600**	deposit-based	5
Cannabis Business Operator Permit: Application Fee	**$7,600**	deposit-based	6
Cannabis Business Operator Permit: Renewal Fee	**$2,300**	deposit-based	7

Notes:

[1] Proposed fees are rounded down to the nearest hundred dollars.

SUMMARY OF CANNABIS BUSINESS REGULATORY PROGRAM FEES

Fee Description	Fee [1]	Unit	Figure
Retail Dispensary	**$7,400**	per permit annually	9
Nusery Cultivation	**$4,500**	per permit annually	10
Testing Laboratory	**$4,500**	per permit annually	11
Manufacturing: Volatile	**$8,500**	per permit annually	12
Manufacturing: Non-Volatile	**$7,700**	per permit annually	13
Delivery-Only Dispensary	**$6,000**	per permit annually	14
Distribution (in conjunction with Cultivation or Manufacturing only)	**$4,400**	per permit annually	15
Delivery (in conjunction with Retail only)	**$3,700**	per permit annually	16

Notes:
[1] Proposed fees are rounded down to the nearest hundred dollars.

CANNABIS BUSINESS OPERATOR PERMIT LOI REVIEW FEE

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	0.50	$72.50
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	5.50	$583.00
Planning and Building	Planner II	$71	1.50	$106.50
City Attorney's Office	Assistant City Attorney	$121	1.50	$181.50
Finance	Accounting Technician	$50	0.25	$12.50
Total Labor Costs				**$956.00**
Contracted Services, Supplies, and Other Expenses				$0.00
Cost Recovery %:				100%
Proposed Flat Fee per application[1]				**$900.00**

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

CANNABIS BUSINESS OPERATOR PERMIT RFP PROPOSAL REVIEW

Department / Office	Position		Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
		Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director		$145	1.00	$145.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager		$106	14.00	$1,484.00
City Attorney's Office	Assistant City Attorney		$121	2.00	$242.00
Finance	Accounting Technician		$50	1.00	$50.00
Selection Panel					
Real Estate/Property Management	Base Reuse and Economic Development		$129	4.00	$516.00
Finance	Financial Services Manager		$123	4.00	$492.00
Recreation and Park	Manager, Mastic Senior Center		$150	4.00	$600.00
Planning Division	Alameda Contract/PT Planner		$111	4.00	$444.00
Public Works	Public Works Director		$102	4.00	$408.00
Total Labor Costs					**$4,381.00**
Contracted Services, Supplies, and Other Expenses					$100.00
Cost Recovery %:					100%
Proposed Flat Fee per application[1]					**$4,400.00**

CANNABIS BUSINESS OPERATOR PERMIT RFP DECISION APPEAL FEE

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	1.00	$145.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	10.00	$1,060.00
City Attorney's Office	Assistant City Attorney	$121	15.00	$1,815.00
City Attorney's Office	Paralegal	$66	5.00	$330.00
Contracted Services	Hearing Officer	$300	10.00	$3,000.00
Total Labor Costs				**$6,350.00**
Contracted Services, Supplies, and Other Expenses				$300.00
Cost Recovery %:				100%
Proposed Deposit-based Fee per application[1]				**$6,600.00**

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

BUSINESS OPERATOR PERMIT APPLICATION FEE

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	2.00	$290.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	24.00	$2,544.00
Police Department	Police Chief	$223	1.00	$223.00
Police Department	Police Captain	$226	4.00	$904.00
Police Department	Police Sergeant	$166	10.00	$1,660.00
City Attorney's Office	Assistant City Attorney	$121	3.00	$363.00
City Attorney's Office	Paralegal	$66	1.00	$66.00
Finance	Accounting Technician	$50	2.00	$100.00
Total Labor Costs				**$6,150.00**
Contracted Services, Supplies, and Other Expenses				$1,500.00
Cost Recovery %:				100%
Proposed Deposit-based Fee per application[1]				**$7,600.00**

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

CANNABIS BUSINESS OPERATOR PERMIT RENEWAL FEE

Department / Office	Position	Fully Burdened Hourly Rate	Billable Hours	Estimated Labor Costs
	Calc	*a*	*b*	*a*b=c*
Base Reuse and Economic Development, and Planning and Building	Director	$145	1.00	$145.00
Base Reuse and Economic Development, and Planning and Building	Economic Development Manager/ Planning Services Manager	$106	4.00	$424.00
Police Department	Police Chief	$223	1.00	$223.00
Police Department	Police Captain	$226	2.00	$452.00
Police Department	Police Sergeant	$166	4.00	$664.00
City Attorney's Office	Assistant City Attorney	$121	2.00	$242.00
Finance	Accounting Technician	$50	1.00	$50.00
Total Labor Costs				**$2,200.00**
Contracted Services, Supplies, and Other Expenses				$100.00
Cost Recovery %:				100%
Proposed Fee per application[1]				**$2,300.00**

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

ALLOCATION OF CANNABIS BUSINESS DEVELOPMENT AND IMPLEMENTATION COSTS

Department / Office	Total Cost
Base Reuse and Economic Development, and Planning and Building Departments	$73,421.00
City Attorney's Office	$25,205.00
City Clerk's Office	$630.00
City Manager's Office	$3,627.00
Finance Department	$1,772.00
Police Department	$34,856.00
Contracted Services, Supplies, and Other Expenses	$82,900.00
Total Cost	**$222,411.00**
Total Cost Recovery Per Year (10 Years)	**$22,241.10**
Number of Permits	**11**
Annual Cost Recovery per Permit	**$2,021.92**
Typical Cost Recovery per Inspection (based on 2 per	**$1,011.00**

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: RETAIL

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$1,957.50	$1,957.50
Oversight and Reporting	2.00	3.00	1.00	6.00	$774.00	$0.00	$774.00
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**2.00**	**3.00**	**1.00**	**6.00**	**$774.00**	**$1,957.50**	**$3,742.50**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$7,400**	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$14,800		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: NURSERY CULTIVATION

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Cost	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$806.00	$806.00
Oversight and Reporting	0.75	1.50	1.00	3.25	$433.75	$0.00	$433.75
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**0.75**	**1.50**	**1.00**	**3.25**	**$433.75**	**$806.00**	**$2,250.75**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$4,500**	per permit annually	
				Permits Allowed:	1	permits	
				Estimated Annual Cost Recovery to City:	$4,500		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: TESTING

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$846.00	$846.00
Oversight and Reporting	0.75	1.50	1.00	3.25	$433.75	$0.00	$433.75
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**0.75**	**1.50**	**1.00**	**3.25**	**$433.75**	**$846.00**	**$2,290.75**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$4,500**	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$9,000		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: MANUFACTURING – VOLATILE

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$2,492.00	$2,492.00
Oversight and Reporting	2.00	3.00	1.00	6.00	$774.00	$0.00	$774.00
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**2.00**	**3.00**	**1.00**	**6.00**	**$774.00**	**$2,492.00**	**$4,277.00**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$8,500**	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$17,000		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: MANUFACTURING – NON-VOLATILE

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$2,092.00	$2,092.00
Oversight and Reporting	2.00	3.00	1.00	6.00	$774.00	$0.00	$774.00
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**2.00**	**3.00**	**1.00**	**6.00**	**$774.00**	**$2,092.00**	**$3,877.00**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$7,700**	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$15,400		

Notes:

[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: DELIVERY-ONLY DISPENSARY

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$1,494.50	$1,494.50
Oversight and Reporting	1.00	2.00	1.00	4.00	$523.00	$0.00	$523.00
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**1.00**	**2.00**	**1.00**	**4.00**	**$523.00**	**$1,494.50**	**$3,028.50**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$6,000**	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$12,000		

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: DISTRIBUTION

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$903.00	$903.00
Oversight and Reporting	0.25	1.00	1.00	2.25	$308.25	$0.00	$308.25
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**0.25**	**1.00**	**1.00**	**2.25**	**$308.25**	**$903.00**	**$2,222.25**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$4,400**	per permit annually	
				Permits Allowed:	4	permits	
				Estimated Annual Cost Recovery to City:	$17,600		

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

ANNUAL REGULATORY PROGRAM FEE: DELIVERY *(W/RETAIL ONLY)*

General Tasks/Activities	Director	Economic Development Manager/ Planning Services Manager	Police Sergeant	Labor Hours	Labor Costs	Contract Services, Supplies and Other Expenses	Total Cost
Fully Burdened Hourly Rate	*$145*	*$106*	*$166*				
Inspection, Monitoring, Compliance	0.00	0.00	0.00	0.00	$0.00	$351.50	$351.50
Oversight and Reporting	0.25	3.00	1.00	4.25	$520.25	$0.00	$520.25
Proportional Implentation Costs	-	-	-	-	-	-	$1,011.00
Total per Inspection	**0.25**	**3.00**	**1.00**	**4.25**	**$520.25**	**$351.50**	**$1,882.75**
				Cost Recovery %:	100%		
				Proposed Annual Inspections:	2		
				Proposed Annual Fee:[1]	**$3,700**	per permit annually	
				Permits Allowed:	2	permits	
				Estimated Annual Cost Recovery to City:	$7,400		

Notes:
[1]Proposed fees are rounded down to the nearest hundred dollars.

I, the undersigned, hereby certify that the foregoing Resolution was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on 16th day of October, 2018 by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

IN WITNESS, WHEREOF, I have hereunto set my hand and affixed the official seal of said City this 17th day of October, 2018.

Lara Weisiger, City Clerk
City of Alameda

Approved as to form:

Janet C. Kern, City Attorney
City of Alameda

City of Alameda

OPEN GOVERNMENT COMMISSION
2263 Santa Clara Avenue, Suite 380
Alameda, CA 94501
(510) 747-4800

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission: City Council

Name of individual contacted at Department or Commission: _____

☐ Alleged violation of public records access.
☒ Alleged violation of public meeting. Date of meeting: 10/16/2018

Sunshine Ordinance Section: 2-91.5 Agenda Requirements
(If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach all relevant documentation supporting your complaint. Documentation is required.
City Council voted to add 2 additional cannabis dispensary permits without prior notification

A complaint must be filed no more than fifteen (15) days after an alleged violation of the Sunshine Ordinance.

Name: Serena Chen Address: 931 Independence

Telephone No (510) 435-5889 E-mail Address: serenatchen@gmail.com

Date: 10/30/2018 _____
Signature

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

On Oct. 16, 2018, the city council voted 3-2 to amend section 30-10 (Cannabis) to revise and add fees. See below for published agenda item title and description. Video of council meeting.

> Title Adoption of Resolution Amending Master Fee Resolution No. 12191 to Revise Fees to Add New Cannabis Business Operator and Regulatory Fees;
>
> Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis; and (4) Amend Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses;
>
> Introduction of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions; and
>
> Recommendation to Confirm Continued Use of Request for Proposal (RFP) Process to Administer Cannabis Retail Dispensary Business Operators' Permit Selection Process. (Economic Development)

No where in the title and text of the staff report is any mention of the doubling of the number of full-service dispensaries from the two previously approved to four. The summary does mention the addition of “two delivery-only cannabis retail businesses as a conditionally permitted use in the C-M…” but I believe that delivery-only businesses are substantively different than two full-service storefront dispensaries.

Within the body of the report, staff makes it clear that the Delivery-Only Dispensaries would be closed to the public.

> *Conditionally Permit Delivery-Only Dispensaries (closed to the public) in the C-M Zone*
>
> Allowing delivery-only dispensaries as a conditionally permitted use in the C-M district would be consistent with the underlying intent for that zone. The nature of delivery-only dispensaries would be no different than other distribution or warehouse uses that already exist in those locations. With all cannabis businesses, the City has the ability to impose conditions of approval to address potential impacts through the use permit process.

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

The public was not notified in advance and the decision to transform the delivery-only businesses seemed to have occurred during the council member discussion – after public comment had been closed.

Had I known that two additional full-service retail dispensary permits were under consideration, I would have submitted comments beforehand and made every effort to attend. I was however denied that opportunity due the lack of advance public notice.

I believe that the actions of the council violated the goal of the Sunshine Ordinance.

2.90.1 - Goal.

An informed public is essential to democracy. It is the goal of the ordinance codified in this article to ensure that the citizens of Alameda have timely access to information, opportunities to address the various legislative bodies prior to decisions being made, and easy and timely access to all public records.

The published agenda did not propose doubling the number of full-service marijuana dispensaries thereby denying Alameda residents an opportunity to comment on such a significant change.

2-91.5 - Agenda Requirements; Regular Meetings.

a. Twelve (12) days before a regular meeting of City Council, and seven (7) days for all other policy bodies, the policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. These time requirements shall apply to posting on the internet.

b. 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 he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda or, if such documents are of more than one (1) page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.

John Le

From: John Le
Sent: Wednesday, October 31, 2018 2:26 PM
To: 'Serena Chen'
Cc: Dave Rudat; LARA WEISIGER
Subject: Adoption of Amendments to Cannabis Ordinances on November 7, 2018
Attachments: Cannabis Regulatory Ordinance.docx; Cannabis Land Use Ordinance.docx

Serena,

As you may know, the cannabis ordinances are being amended. On October 16, 2018, the Council introduced on “first reading” an ordinance to amend both the regulatory ordinance (Ord. 3201) and land use ordinance (Ord. 3206). You may recall this was coming because you attended and spoke at the meeting where City Council (July 24, 2018) first gave direction to amend these two ordinances.

Please be advised that this coming Wednesday, November 7, 2018, one week from today, the Council will consider adopting an ordinance that would amend both ordinances (sometimes referred to as a “second reading”). As always, you are welcome to attend and speak, or submit written comments without having to attend, whichever works for you.

Attached are the ordinances for your review. Here is a link to the agenda (the cannabis items are Nos. 5-L and 5-M), which will allow you to download all the relevant materials, including the attached ordinances and a short general description of the items:

http://legistar1.granicus.com/alameda/meetings/2018/11/4485_A_City_Council_18-11-07_Meeting_Agenda.pdf

5-L 2018-6106 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business, and C-M, Commercial-Manufacturing Zoning Districts, (2) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-medicinal or “Adult Use” Cannabis, and (3) Amend Certain Portions of the Zoning Code to Remove the Dispersion Requirement. (Economic Development)

5-M 2018-6107 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industry) to (1) Eliminate the Cap on Testing Laboratories, (2) Allow for Two Additional Cannabis Businesses to Operate as "Dispensary/Delivery" (Delivery Required) Within the Zoning Districts for Cannabis Retail, (3) Amend the

Dispersion Requirement to Require No More Than Two Cannabis Retail Businesses to Operate on Either Side of Grand Street, (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Cannabis Businesses, (4) Amend Certain Portions of the Regulatory Ordinance to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, (5) Modify Requirements for Off-Island Delivery, and (6) Make Other Clarifying or Conforming Amendments thereto. (Economic Development)

Also, I would contact the Clerk's Office if you would like to automatically be emailed the Council agenda going forward.

John D. Lê
Assistant City Attorney
City of Alameda
2263 Santa Clara Avenue, Room #280
Alameda, CA 94501
(510) 747-4765
jle@alamedacityattorney.org

****

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City of Alameda

Meeting Agenda

City Council

Wednesday, November 7, 2018 | **7:00 PM** | **City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501**

SPECIAL MEETING - CLOSED SESSION - 5:00 P.M.

1 Roll Call - City Council

2 Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item

3 Adjournment to Closed Session to consider:

3-A 2018-6064 (60 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Manager

3-B 2018-6063 (20 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: Acting/Interim City Attorney and City Attorney

3-C 2018-6062 (40 minutes) CONFERENCE WITH LABOR NEGOTIATORS (Government Code section 54957.6)
CITY NEGOTIATORS: David L. Rudat, Interim City Manager, Elizabeth D. Warmerdam, Assistant City Manager and Nancy Bronstein, Human Resources Director
EMPLOYEE ORGANIZATIONS: International Brotherhood of Electrical Workers, Local 1245 (IBEW), Electric Utility Professional Association of Alameda (EUPA), Alameda City Employees Association (ACEA), Alameda Police Officers Association Non-Sworn Unit (PANS), and Alameda Management and Confidential Employees Association (MCEA)
UNDER NEGOTIATION: Salaries and Terms of Employment

4 Announcement of Action Taken in Closed Session, if any

5 Adjournment - City Council

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

Pledge of Allegiance

1 Roll Call - City Council

2 Agenda Changes

3 Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes

3-A 2018-5260 (5 minutes) Proclamation Declaring November 7, 2018 as Extra Mile Day. (City Manager 2110)

3-B 2018-5262 (5 minutes) Proclamation Declaring November 15, 2018 as America Recycles Day. (City Manager 2110)

3-C 2018-6114 (5 minutes) Proclamation Declaring November 2018 as National Native American Heritage Month. (City Manager 2110)

3-D 2018-6115 (5 minutes) Proclamation Declaring November 2018 as National Veterans and Military Families Month. (City Manager 2110)

4 Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8

5 Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public

5-A 2018-6135 Minutes of the Joint City Council and Successor Agency to the Community Improvement Commission Meeting Held on September 18, 2018 and the Special and Regular City Council Meetings Held on October 2, 2018. (City Clerk)

5-B 2018-6136 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2018-6005 Recommendation to Authorize the Interim City Manager to Negotiate and Execute an Agreement for the Purchase of One Horton F-550 Type I Ambulance in an Amount Not to Exceed $385,178. (Fire 3200)

Attachments: Exhibit 1 - Ambulance Quote

5-D 2018-6080 Recommendation to Authorize the Interim City Manager to Execute a Three Year Contract, in an Amount Not to Exceed $30,000 Annually for a Total Three-Year Expenditure Amount Not to Exceed $90,000, with Physio Control for Warranty and Maintenance of Fire Department Advanced Life Support (ALS) Medical Monitors and Equipment. (Fire 3232)

Attachments: Exhibit 1 - Agreement

5-E 2018-6086 Recommendation to Authorize the Interim City Manager to Accept the Work of Lennar Homes, for Tract 8118, Marina Shores. (Public Works 4210310)

5-F 2018-6095 Recommendation to Authorize the Interim City Manager to Execute a One-Year Contract Amendment, with the Option of Three One-Year Extensions, for an Amount not to Exceed $150,000 Each, for a Total Five Year Expenditure not to Exceed $750,000 Each, to the Following: BKF, HEI, and Schaaf & Wheeler for On-Call Civil Engineering Consulting Services. (Public Works 310)

Attachments: Exhibit 1 - BKF First Amendment
Exhibit 2 - BKF Contract
Exhibit 3 - HEI First Amendment
Exhibit 4 - HEI Contract
Exhibit 5 - Schaaf & Wheeler First Amendment
Exhibit 6 - Schaaf & Wheeler Contract

5-G 2018-6096 Recommendation to Authorize the Interim City Manager to Execute a One-Year Contract Amendment, with the Option of Three One-Year Extensions, for an Amount not to Exceed $150,000 Each, for a Total Five Year Expenditure not to Exceed $750,000 Each, to the Following: Baseline Designs, Inc., Habitat Engineering & Forensics, Inc., JMEC Engineering, and Oakley & Oakley for On-Call Structural Engineering Consulting Services. (Public Works 310)

Attachments: Exhibit 1 - Baseline Designs First Amendment
Exhibit 2 - Baseline Designs Contract
Exhibit 3 - Habitat Engineering First Amendment
Exhibit 4 - Habitat Engineering Contract
Exhibit 5 - JMEC Engineering First Amendment
Exhibit 6 - JMEC Engineering Contract
Exhibit 7 - Oakley & Oakley First Amendment
Exhibit 8 - Oakley & Oakley Contract

5-H 2018-6052 Recommendation to Authorize the Interim City Manager to Execute a Contract in the Amount Not to Exceed $5,299,614, Including Contingency, to McGuire and Hester for the Cross Alameda Trail - Ralph Appezzato Memorial Parkway Improvements, No. P.W. 03-18-11; and

Adoption of a Resolution Amending the Fiscal Year 2018-19 Capital Projects Fund Budget for the Cross Alameda Trail (Main to Constitution) Project by $1,794,060 from Various Funding Sources.

(Public Works 310)

Attachments: Exhibit 1 - Contract
Resolution

5-I 2018-6085 Recommendation to Authorize the Interim City Manager to Execute a Three-Year Agreement in an Amount Not to Exceed $500,000 with Centro Legal de la Raza for Tenant Legal Services; and

Adoption of Resolution Amending the Fiscal Year 2018-19 General Fund Budget of the City Attorney's Office to Appropriate the Remaining $400,000 for Tenant Legal Services. (City Attorney 001-2310)

Attachments: Exhibit 1 - Request for Proposals
Exhibit 2 - Centro Legal Proposal
Exhibit 3 - Agreement
Resolution

5-J 2018-6061 Adoption of Resolution Amending Previous Authorization of a Portion of the City Base Allocation and Required Match Amount for Site A/Eden Affordable Senior Project and Affordable Family Project for Application to County Rental Housing Development Fund. (Base Reuse 819099)

Attachments: Resolution

5-K 2018-6113 Adoption of Resolution Declaring November 11 through 17 United Against Hate Week in the City of Alameda, in Conjunction with the Alameda Unified School Board and other Bay Area Cities. (City Manager 2110)

Attachments: Resolution

5-L 2018-6106 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business, and C-M, Commercial-Manufacturing Zoning Districts, (2) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, and (3) Amend Certain Portions of the Zoning Code to Remove the Dispersion Requirement. (Economic Development)

5-M 2018-6107 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industry) to (1) Eliminate the Cap on Testing Laboratories, (2) Allow for Two Additional Cannabis Businesses to Operate as "Dispensary/Delivery" (Delivery Required) Within the Zoning Districts for Cannabis Retail, (3) Amend the

Dispersion Requirement to Require No More Than Two Cannabis Retail Businesses to Operate on Either Side of Grand Street, (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Cannabis Businesses, (4) Amend Certain Portions of the Regulatory Ordinance to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, (5) Modify Requirements for Off-Island Delivery, and (6) Make Other Clarifying or Conforming Amendments thereto. (Economic Development)

6 Regular Agenda Items

6-A 2018-6039 (10 minutes) Introduction of Ordinance Approving a Lease Amendment with a Maximum Three-Year Extension of the Lease with CSI Mini-Storage, LLC, a California Limited Liability Company, for Buildings 338, 608, and 608A-C Located at 50 and 51 West Hornet Avenue at Alameda Point. [Requires four affirmative votes] (Base Reuse 819009)

Attachments: Exhibit 1 - Leasehold Area
Exhibit 2 - Original Lease
Exhibit 3 - Lease Amendment
Ordinance

6-B 2018-6097 (60 minutes) Introduction of Ordinance Amending the Alameda Municipal Code by Adding Article XVII (Tobacco Retailers) to Chapter VI (Businesses, Occupations and Industries) to Require Licensing of Tobacco Retailers in the City and to Prohibit the Sale of Flavored Tobacco Products. (City Attorney 2310)

Attachments: Exhibit 1 - Results of Community Survey
Exhibit 2 - Results of Tobacco Control Program Survey
Exhibit 3 - Alameda Unified School District Resolution
Correspondence
Ordinance

7 City Manager Communications - Communications from City Manager

8 Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda

9 Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item

10 Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings

10-A 2018-6124 Consideration of Mayor's Nomination for Appointment to the Library

City of Alameda

Staff Report

File Number: 2018-6107

City Council

Agenda Date: 11/7/2018

File Type: Consent Calendar Item

Agenda Number: 5-M

Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions. (Economic Development)

CITY OF ALAMEDA ORDINANCE NO. _____

New Series

AMENDING THE ALAMEDA MUNICIPAL CODE BY AMENDING ARTICLE XVI (CANNABIS BUSINESSES) OF CHAPTER VI (BUSINESSES, OCCUPATIONS, AND INDUSTRIES)

WHEREAS, this Ordinance is adopted pursuant to the City's police powers, afforded by the state constitution and state law, and as recognized by the Adult Use of Marijuana Act (AUMA) and Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) to protect the health, safety, and welfare of the public.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ALAMEDA DOES HEREBY ORDAIN AS FOLLOWS:

Section 1: Article XVI, CANNABIS BUSINESSES, of Chapter VI (BUSINESSES, OCCUPATIONS, AND INDUSTRIES) of the Alameda Municipal Code is hereby amended to read as follows:

ARTICLE XVI - CANNABIS BUSINESSES

6-59.1 - Findings .

In enacting this section, the City Council finds as follows:

a. The Federal Controlled Substances Act (21 U.S.C. Section 841 et seq.) makes it unlawful to manufacture, distribute, dispense or possess cannabis, and accordingly, cannabis activities are illegal under federal law.

b. In 2013, Deputy Attorney General James Cole issued a memorandum updating previous

guidance on all federal enforcement activity relating to cannabis in light of state ballot initiatives that decriminalized the substance under state law; specifically, the guidance instructed all federal prosecutors to review each matter on a case-by-case basis to consider, on the one hand, whether such state-enacted laws threaten certain federal enforcement priorities or interests relating to cannabis articulated therein (e.g., preventing distribution of cannabis to minors), and on the other hand, whether a state has enacted and implemented a strong and effective regulatory and enforcement system and has demonstrated the willingness to enforce its laws and regulations, which may allay the threat to those federal enforcement priorities or interests.

c. In 2014, Congress first passed legislation (Rohrabacher-Farr Amendment) to defund enforcement of the Federal Controlled Substances Act in states where such enforcement activities would prevent states from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical cannabis.

d. The voters of the State of California approved Proposition 215 (codified as Health and Safety Code Section 11362.5 et seq., “The Compassionate Use Act of 1996”); the intent of Proposition 215 was to enable persons who are in need of cannabis for medical purposes to obtain and use it without fear of State criminal prosecution.

e. On October 9, 2015, Governor Jerry Brown approved a series of bills commonly referred to as the Medical Marijuana Regulation and Safety Act (“MCRSA”), effective on January 1, 2016, which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, distribution, and sale of medical cannabis, also known as marijuana; and which recognizes the authority of local jurisdictions to either impose additional restrictions or prohibit certain activities related to the cultivation, manufacture, transportation, storage, distribution, delivery, and sale of medical cannabis.

f. The voters of the State of California approved Proposition 64, known as the “Control, Regulate and Tax Adult Use of Marijuana Act” (“AUMA”), which establishes a comprehensive State licensing and regulatory framework for the cultivation, manufacture, transportation, storage, testing, distribution, delivery, and sale of recreational cannabis, also known as marijuana; and which recognizes the authority of local jurisdictions to either impose additional restrictions or prohibit certain activities related to the cultivation, manufacture, transportation, storage, testing, distribution, delivery, and sale of recreational cannabis.

g. On June 27, 2017, Governor Jerry Brown signed Senate Bill 94 (Medicinal and Adult-Use Cannabis Regulation and Safety Act, or “MAUCRSA”), which repealed MMRSA and merged many of its provisions into AUMA to form a single comprehensive regulatory system with the express purpose of preventing cannabis access to minors, protecting public safety, public health, and the environment, maintaining local control while providing for a single regulatory-licensing structure for medicinal and adult-use cannabis where compliance with local

requirements can be demonstrated.

h. MAUCRSA preserves local control by specifically authorizing local jurisdictions to adopt and enforce local ordinances to regulate cannabis businesses such as requiring a local license, permit, or other authorization to engage in commercial cannabis activity within the local jurisdiction, in addition to adopting and enforcing local ordinances governing zoning, land use, fire, and building, business licensure, second-hand smoke, and even enacting a complete prohibition on the establishment or operation of one or more types of business licenses issued by the State.

i. Under MAUCRSA, as early as January 1, 2018, the State of California (currently, the California Bureau of Cannabis Control) will issue licenses for businesses to engage in cultivation, manufacturing, testing, distribution, and retail sale of cannabis and cannabis products.

j. The City Council of the City of Alameda has recognized, and continues to recognize, the potential adverse impacts on the health, safety, and welfare of its residents and businesses from secondary effects associated with Commercial Cannabis Activity, which may include offensive odors, trespassing, theft, violent encounters between cultivators and persons attempting to steal plants, fire hazards, increased crime in and about the dispensary, robberies of customers, negative impacts on nearby businesses, nuisance problems, and increased DUI incidents.

k. MAUCRSA sets forth a comprehensive regulatory framework for Cannabis and Cannabis Products from seed to ingestion by a consumer, which includes uniform health and safety standards designed to implement quality control, a labeling and a track-and-trace program, and other consumer protections, which mitigates against some of the potential adverse impacts identified by the City Council in the past.

l. An effective regulatory system governing Cannabis in the City of Alameda, as provided in this and other chapters, will address potential adverse impacts to the public health, welfare, and safety, thereby allowing Commercial Cannabis Activity and other use of Cannabis and Cannabis Products consistent with federal law as applicable to the State of California and State law.

m. After studying various alternatives for the regulation of Cannabis Businesses, considering input from residents and stakeholders, and holding several public meetings the City Council of the City of Alameda finds and determines that there is a need to adopt health, safety, and welfare regulations to avoid or mitigate any adverse impacts on the community which may arise from permitting and regulating Commercial Cannabis Activity within the City of Alameda.

6-59.2 - Purpose and Intent .

It is the purpose and intent of this Article for the City Council to:

a. Exercise its police powers derived from Section 7 of Article XI of the California Constitution and state law to promote the health, safety, and general welfare of the residents and businesses of the City of Alameda by regulating Cannabis within the City's jurisdictional limits, unless preempted by federal or state law.

b. Establish a local permitting system that complements the strong and effective regulatory system adopted by the State legislature under MAUCRSA by imposing additional local controls, while addressing certain federal enforcement priorities, in a manner that does not create a positive conflict with federal law under the Controlled Substances Act (21 U.S.C. § 903).

6-59.3 - Definitions .

As used in this section, the following definitions shall apply:

a. "AUMA" refers to the California state law entitled "Control, Regulate and Tax Adult Use of Marijuana Act of 2016", also known as Proposition 64, and any regulations promulgated thereunder.

b. "Cannabis" means any and all parts of the plant Cannabis sativa Linnaeus, Cannabis indica, or Cannabis ruderalis, whether growing or not; the seeds thereof; the resin, whether crude or purified, extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. "Cannabis" also means the separated resin, whether crude or purified, obtained from cannabis. "Cannabis" does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination. For the purpose of this Section, "Cannabis" does not mean "industrial hemp" as defined by Section 11018.5 of the Health and Safety Code.

c. "Cannabis Business" means a business or enterprise, whether for profit or not, engaged in Commercial Cannabis Activity.

d. "Cannabis Business Owner" means any of the following:

1. Each person with an aggregate ownership interest of 20 percent or more in a person,

as defined herein, who applies for a Permit or is a Cannabis Business Permittee, unless the interest is solely a security interest, lien, or encumbrance. When an entity (not a natural person) has an aggregate ownership interest of 20 percent or more, then the chief executive officer and/or members of the board of directors of each entity shall be considered owners.

2. The chief executive officer of a person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee.

3. A member of the board of directors of a nonprofit of a person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee.

4. The trustee(s) and all persons that have control of the trust and/or a person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee that is held in trust.

5. Any person, as defined herein, who assumes responsibility for the Permit.

6. Each person who participates in the direction, control, or management of person, as defined herein, who applies for a Permit or is a Cannabis Business Permittee. Such an individual includes any of the following:

i. A general partner of a partnership.

ii. A non-member manager or managing member of a limited liability company.

iii. An officer or director of a corporation.

e. “Cannabis Product” means Cannabis that has undergone a process whereby the Cannabis has been transformed into a concentrate, or any Cannabis-containing product that may be specified by regulation of the Department, as set forth below, including, but not limited to, concentrated Cannabis, or an edible, topical, or other Cannabis-containing product.

f. “Chief of Police” shall mean the Chief of Police of the City of Alameda Police Department or the Chief’s designee.

g. “Commercial Cannabis Activity” includes the cultivation, possession, manufacture, distribution, processing, storing, laboratory testing, labeling, transportation, research and development, delivery, sale, or provision of Cannabis or Cannabis products for commercial purposes, whether for profit or not.

h. “Concentrated cannabis” means the separated resin, whether crude or purified, obtained from

Cannabis.

i. “Customer” means a natural person 21 years of age or over or a natural person 18 years of age or older who possesses a physician’s recommendation or other authorization permitted by State law.

j. “Cultivation” means the production of clones, immature plants, seeds, and other agricultural products used specifically for the propagation and cultivation of Cannabis to mature plants. Except as provided for in the preceding sentence, it shall not include any activity involving the planting, growing, harvesting, drying, curing, grading, trimming, or processing of Cannabis, which is prohibited.

k. “Day care center” means any licensed child day care facility other than a family day care home, and includes infant centers, preschools, extended day care facilities, and school-age child care centers.

l. “Delivery” means the commercial transfer of Cannabis or Cannabis Products, for profit or not, to a Customer by any means. “Delivery” also includes the use by a retailer of any technology platform owned and controlled by the retailer that enables Customers to arrange for or facilitate the commercial transfer by a licensed retailer of Cannabis or Cannabis Products. Delivery, however, shall not include commercial transfer of Cannabis or Cannabis Products, for profit or not, by means of a Self-Service Display, which is strictly prohibited.

m. “Department” shall mean the Director of the Planning, Building and Transportation Department of the City of Alameda (or successor agency, department, or division), or his or her designee.

n. “Dispensary/Delivery” shall mean a “Dispensary/Retailer” permittee that must offer a cannabis delivery service to the public from the licensed premises.

o. “Dispensary/Retailer” means any person who offers for sale, or gives away samples of, Cannabis, Cannabis Products, or paraphernalia related to the use or ingestion of Cannabis or Cannabis Products, either individually or in any combination for retail sale, including an establishment that delivers Cannabis or Cannabis Products, as part of selling or giving samples away. A dispensary/retailer shall have a licensed premises which is a physical location from which Commercial Cannabis Activities are conducted. Dispensing or retailing shall not include commercial transfer of Cannabis or Cannabis Products, for profit or not, by means of a Self-Service Display, which is strictly prohibited.

p. “Distribution” means the procurement, sale, and transport of Cannabis or Cannabis Products between entities licensed pursuant to the Medicinal and Adult-Use of Cannabis Regulation and Safety Act and any subsequent State of California legislation or regulation regarding the same.

q. “Edible cannabis product” means a Cannabis Product that is intended to be used, in whole or in part, for human consumption, including, but not limited to, chewing gum, but excluding products set forth in Division 15 (commencing with Section 32501) of the Food and Agricultural Code. An edible cannabis product is not considered food, as defined by Section 109935 of the Health and Safety Code, or a drug, as defined by Section 109925 of the Health and Safety Code.

r. “Manufacturer” means a person that conducts the production, preparation, propagation, or compounding of manufactured Cannabis, or Cannabis Products either directly or indirectly or by extraction methods, or independently by means of chemical synthesis at a fixed location that packages or repackages Cannabis or Cannabis Products or labels or relabels its container, that holds a valid State license pursuant to the Medicinal and Adult-Use of Cannabis Regulation and Safety Act.

s. “MAUCRSA” refers to the California state law entitled the Medicinal and Adult-Use Cannabis Regulation and Safety Act and the regulations promulgated by thereunder.

t. “Medicinal cannabis” or “medicinal cannabis product” means Cannabis or a Cannabis Product, respectively, intended to be sold for use pursuant to the Compassionate Use Act of 1996 (Proposition 215), found at Section 11362.5 of the Health and Safety Code, by a medicinal cannabis patient in California who possesses a physician’s recommendation or other authorization permitted by State law.

u. “MMRSA” refers to the California state law entitled Medicinal Marijuana Regulation and Safety Act and regulations promulgated thereunder, approved by the Legislature and signed by Governor Jerry Brown in 2016.

v. “Nursery” means a licensee that produces only clones, immature plants, seeds, and other agricultural products used specifically for the planting, propagation, propagation and cultivation of Cannabis.

w. “Permit” refers to any one of the regulatory permits described in subsection c of section 6-59.4 of this Article that affords the Permittee the privilege of conducting the activity allowed under the regulatory permit.

x. “Permittee” refers to any person who has been issued, is named on, or operates under a Permit, regardless of whether or not the Permit has been voluntarily surrendered or relinquished.

y. “Person” shall mean and include a natural person, joint venture, joint stock company, partnership, association, club, company, corporation, limited liability company, business,

estate, trust, business trust, receiver, syndicate, organization, or any other group or combination acting as a unit, or the manager, lessee, agent, servant, officer or employee of any of them.

z. “Primary caregiver” shall have the same meaning as set forth in section 11362.5 of the California Health and Safety Code, as that section now appears, or may hereafter be amended or renumbered.

aa. “Qualified patient” shall have the same meaning as a patient that uses or ingests medicinal Cannabis as that term is defined in section 11362.7 of the California Health and Safety Code and who is entitled to the protections of California Health and Safety Code section 11362.5.

bb. “Self-Service Display” means the open display or storage of Cannabis or Cannabis Products in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer involving a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of Self-Service Display.

cc. “Tutoring Center” means any enterprise, whether or not for profit, that operates in a commercial building or structure the principal use of which is to offer instruction of any kind to support academic instruction of K-12 students.

dd. “Youth Centers” means any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities. Youth Centers shall also mean any facility determined by the Alameda Recreation and Parks Department to be a recreation center in a City park.

6-59.4 Permit Requirement; Exemptions from Permit Requirement

a. Permit Required. It is unlawful for any person to operate a Cannabis Business within the City without first being issued the required permits, including without limitation, a regulatory permit under this Article and a use permit under Chapter XXX (Development Regulations) of the Alameda Municipal Code. The Permit shall not be issued until a use permit is first obtained. The Permit issued under this Article is specific to the location where the Cannabis Business is permitted to operate, is a conditional privilege to conduct activities set forth in the Permit, and shall not run with the land. Multiple operating locations for the same Cannabis Business will require separate Permits. No permit shall be issued for commercial transfer, for profit or not, of Cannabis or Cannabis Products by means of a Self-Service Display, which is strictly prohibited. Temporary permits for any purpose, including for the sale of Cannabis or Cannabis Products at festivals or fairs, shall not be issued.

b. Number of Cannabis Business Permits Allowed. Only the following Permit types shall be capped as set forth below:

1. No more than two (2) Dispensary/Retailer Permit(s) and two (2) Dispensary/Delivery Permit(s) for Cannabis or Cannabis Product may be issued at any given time, subject to the applicable permit types, over-concentration requirement, and zoning restrictions.

2. No more than four (4) Manufacturer Permit(s), subject to the applicable permit types and the zoning restrictions, may be issued at any given time.

3. No more than one (1) Cultivation Permit, subject to the applicable permit types and the zoning restrictions, may be issued at any given time.

4. The City Council may, by resolution, direct the City Manager to establish or modify any of the foregoing limits on the number of permit types that may be issued within the City. Furthermore, a process for allocating the limited number of permits for Commercial Cannabis Activity may be implemented by regulation.

c. Permit Types. Any person may apply for any of the following:

1. Cultivation Permit 7: A Cultivation Permit 7 is required for all activities for which State law requires a “Type 4” (or “nursery”) for cultivation of Cannabis solely by a nursery.

2. Manufacturer Permit 1: A Manufacturer Permit 1 is required for all activities for which State law requires a “Type 6,” or similar license, for the manufacture of Cannabis Products using nonvolatile or no solvents.

3. Manufacturer Permit 2: A Manufacturer Permit 2 is required for all activities for which State law requires a “Type 7,” or similar license, for the manufacture of Cannabis Products using volatile solvents.

4. Testing Laboratory Permit: A Testing Laboratory Permit is required for all activities for which State law requires a “Type 8,” or similar license, for the testing of Cannabis or Cannabis Products as a condition of sale pursuant to a State-issued license.

5. Dispensary/Retailer Permit: A Dispensary/Retailer Permit is required for all activities for which State law requires a “Type 10,” or similar license, for the sale of Cannabis or Cannabis Products.

6. Dispensary/Delivery Permit: A Dispensary/Delivery Permit is required for all activities for

which State law requires a “Type 10,” or similar license, for the sale of Cannabis or Cannabis Products, but which must provide a cannabis delivery service to the public from the licensed premise.

7. Distributor Permit: A Distributor Permit is required for all activities for which State law requires a “Type 11,” or similar license, for the distribution of Cannabis or Cannabis Products. A Distributor Permit shall only be issued to a person holding or obtaining a Manufacturing Permit or Cultivation Permit 7 under this Article.

8. Delivery Permit: No local permit is required for the delivery of Cannabis by Cannabis Businesses located outside of the City to any Customer located within the City, provided that such businesses obtain a business license, pay applicable fees and taxes, and comply with State and local law.

d. Determination of Permit Type. As the State develops additional licenses for Commercial Cannabis Activities, the Department has the discretion to issue any of the above-referenced permits to the extent the additional license or sub-license activities are similar to that of any of the permits provided for in this Article.

e. Permitted Land Use. No permit shall be issued if the Commercial Cannabis Activity is not a permitted land use in the City, as set forth in Section 30-10 (Cannabis) of Chapter XXX of the Alameda Municipal Code. If not expressly provided for therein or in this Article, then the use is banned.

f. Exemptions from the Permit Requirement. The following activities are allowed and do not require a Permit under this Article, provided the activity does not constitute Commercial Cannabis Activity and complies with applicable laws:

1. Possessing, processing, transporting, purchasing, obtaining or giving away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of Cannabis not in the form of concentrated Cannabis.

2. Possessing, processing, transporting, purchasing, obtaining or giving away to persons 21 years of age or older without any compensation whatsoever, not more than the limit on Cannabis in the form of concentrated Cannabis under State law, including amounts of Cannabis or concentrated Cannabis contained in Cannabis Products.

3. Possessing, planting, cultivating, harvesting, drying or processing of not more than six living Cannabis plants, provided such activity complies with the Alameda Municipal Code, pursuant to section 30-10.2 (PERSONAL CULTIVATION OF CANNABIS), and is not used in any Commercial Cannabis Activity, which would require a Permit.

4. The smoking of Cannabis and Cannabis Products, provided smoking complies with state law and any local ordinance, including sections 24-11 (SMOKING PROHIBITIONS IN PLACES OF EMPLOYMENT AND UNENCLOSED PUBLIC PLACES) and 24-12 (SMOKING PROHIBITIONS IN HOUSING) of Chapter XXIV (PUBLIC HEALTH) of the Alameda Municipal Code.

5. The ingestion of Cannabis or Cannabis Products in compliance with applicable law.

6. Primary caregiver, who is not subject to licensing requirements of the MAUCRSA, engaged in the delivery of Cannabis or Cannabis Product to a Qualified Patient.

g. Excepted as provided herein, all other Commercial Cannabis Activities are prohibited.

6-59.5 Permit Applications .

All applications, including renewal or amended applications, must be completed in full, including the payment of all applicable fees, which shall be set by the Council by resolution. Incompleteness may be grounds for denial as set forth in section 6-59.6 of this Article. The form and content of the application for (renewal of) a Permit as required by this Article shall be specified by the Department, in consultation with the Chief of Police, and shall include the following minimum information, as applicable to the Permit type:

a. Proposed Property.

1. The address and Assessor's Parcel Number(s) of the location for the proposed Commercial Cannabis Activity; and the name and contact information for the property owner(s) where the proposed Commercial Cannabis Activity will be located.

2. A site plan with fully dimensioned interior and exterior floor plans. For dispensary/retailer Permittees, the site plan must show that there are separate rooms or partitioned areas within the property for the receipt of supplies and for the distribution of Cannabis to recreational users, qualified patients, and/or primary caregivers.

3. Exterior photographs of the entrance(s), exit(s), street frontage(s), parking, front, rear and side(s) of the property.

4. Photographs depicting the entire existing interior of buildings on the property.

5. If the property is being rented or leased or is being purchased under contract, a fully-executed copy of such lease or contract.

6. If the site is being rented or leased, written proof in a form approved by the Department that the property owner, and landlord if applicable, were given notice that the property will be used as a Cannabis Business, and that the property owner, and landlord if applicable, agree(s) to said operations. If the Cannabis Business is to be a subtenant, then "landlord" shall mean the primary tenant. If the applicant is the owner of the real property, then the applicant shall provide a copy of the title or deed to the real property to the Department. If the real property is owned in trust, the written proof noted above shall be provided by the person that holds equitable title to the real property.

7. Once a Permit is issued, any material or substantial physical modification of the licensed or permitted premises shall require a City-approved amendment to the Permit as set forth in section 6-59.9 of this Article.

b. Ownership and Management. An explanation of the legal form of business ownership, for example, sole proprietor, partnership, California Corporation, etc., and any reasonably requested documentation to validate such legal form of business.

c. Background Investigation of Owners. Each Applicant shall identify every Cannabis Business Owner (at least one person shall be identified per Permit) and shall submit the following for each Cannabis Business Owner:

1. The name, address, telephone number, title, and primary responsibility(ies).

2. A fully legible copy of one valid government-issued form of identification, such as a driver's license.

3. A summary of criminal history (e.g., "LiveScan") not more than 2 weeks prior to the date of the application for the purpose of obtaining information as to the existence and content of a record of state or federal convictions and arrests to be considered as set forth in this Article.

4. Any new Cannabis Business Owner must submit the foregoing information to the Chief of Police five (5) days prior to their employment or becoming a Cannabis Business Owner.

5. The Chief of Police shall have the discretion to require any information necessary to conduct a thorough criminal history or financial investigation (or any additional or supplemental background investigation that is criminal history or financial in nature), including the foregoing, from any Cannabis Business Owner for the purpose of preventing a threat to public health, safety, and welfare or otherwise to protect the interests set forth below in section 6-59.6 of this Article.

d. Information Regarding Cannabis Business/Applicant.

1. Written confirmation as to whether the Cannabis Business, or a business engaged in Commercial Cannabis Activity with one or more owners or key employees in common with the applicant, previously operated in the City or any other city, county, or state under a similar license/permit, and whether the business applicant ever had such a license/permit revoked or suspended and the reason(s) therefore.

2. The name and address of the Cannabis Business' current Agent for Service of Process. Cannabis Business Permittee has a continuing duty to update this information. Sending notices and other documents to the Agent for Service of Process on file with the City, even if outdated, shall not render such service defective.

e. State License Type and Compliance. A description of the specific state Cannabis License(s) that the applicant either has applied for, obtained, or plans to obtain. The applicant shall describe how it will meet the state licensing requirements, and provide supporting documentation as required by the Department.

f. Other Local Licenses. A description of the specific Cannabis license or permits that the applicant either has applied for, obtained, or plans to obtain from other local jurisdictions.

g. Seller's Permit. A copy of a valid seller's permit from the California Board of Equalization, Department of Tax and Fee Administration, or successor agency.

h. Description of Operations. A description of the nature of the proposed Commercial Cannabis Activity within the proposed facilities, proposed hours of operation, product type, average production amounts (including each product produced by type, amount, process, and rate), source(s) of Cannabis, equipment, and delivery or distribution services.

i. Security Plan. A description and documentation of how the applicant will secure the premises 24 hours per day, 7 days per week. The security plan shall comply with general conditions set forth in subsection (p) of section 6-59.10 of this Article.

j. Tracking System. A description of how the Cannabis Business will track inventory of Cannabis or Cannabis Products from seed to sale in accordance with State law.

k. Plan for Unsold Cannabis or Waste. A plan for the disposal of any unsold Cannabis, Cannabis Product, or related waste as set forth below in subsection (w) of section 6-59.10 of this Article.

l. Insurance. Certificate of insurance demonstrating ability to comply with the insurance

requirements as required for the applicable permit in a form acceptable to the City Attorney's Office set forth in subsections bb. and dd. of section 6-59.10 of this Article.

m. Labor Peace Agreement. For an applicant with ten (10) or more employees, the applicant must provide either a statement that the applicant will enter into and will abide by the terms of the agreement, or provide a copy of a fully executed labor peace agreement as part of the application. Once a labor peace agreement is fully executed, the Permittee shall provide the City with a copy of the page of the labor peace agreement that contains the requisite signatures.

n. Compliance Statement. A copy of the Cannabis Business's operating conditions, containing a statement dated and signed by each Cannabis Business Owner, under penalty of perjury, that they have read, understand and shall ensure compliance with all operating conditions.

o. Signature of Applicant and Property Owner. The application shall be signed by each Cannabis Business Owner under the penalty of perjury, certifying that the information submitted, including all supporting documents, is to the best of the applicant's knowledge and belief, true, accurate and complete, and by the property owner for purposes of certifying that s/he has reviewed the application, and approves the use of the property for the purposes stated in the application.

p. Confidentiality. The information required by this Section shall be confidential, and shall not be subject to public inspection or disclosure except as may be required by federal, state or local law. Disclosure of information pursuant to this Section shall not be deemed a waiver of confidentiality by the applicant or any individual named in the application. The City shall incur no liability for the inadvertent or negligent disclosure of such information.

q. Other Information. Any other reasonably requested information relevant to the City's review and approval of any permit application, including denials, transfers, change of ownership, modifications, renewals, revocations, and suspensions, or the administration or enforcement of the Alameda Municipal Code governing Cannabis or any Commercial Cannabis Activity.

r. False Statements/Representations. It is unlawful to make any false statement or representation or to use or submit any false or fraudulent documentation in any application or materials submitted to the City for the purpose of evaluating or approving any permits, authorizations, or entitlements to operate or in connection with a local investigation into a person who applies for a Permit or a Cannabis Business in the City.

6-59.6 Review of Applications; Appeal of Denials and Suspensions

a. Review of Application. The Department shall review each application to determine compliance

with this Article. Upon written notice that an application is incomplete, the applicant may submit additional information as requested by the Department. Failure to submit requested information within 60 days shall be deemed an abandonment of the application and no further action will be taken by the Department. The Department shall also consider the application in light of the results from any investigation into the application as deemed necessary by the Department, in consultation with the Chief of Police.

b. Withdrawal of Application.

1. An applicant may withdraw an application at any time prior to the City's issuance of a license or denial of a license.

2. Requests to withdraw an application must be submitted to the City in writing, dated, and signed by the applicant.

3. Withdrawal of an application shall not, unless the City has consented in writing to such withdrawal, deprive the City of its authority to institute or continue a proceeding against the applicant for the denial of the license upon any ground provided by law or to enter an order denying the license upon any such ground.

4. The City will not refund application fees for a withdrawn application.

5. An applicant may reapply at any time following the withdrawal of an application and will be required to submit a new application and fee.

c. Denial of Application. If the Department denies an application, the applicant shall be notified in writing, which shall include the reasons for the denial. Notification of denial shall be delivered by first class mail to the applicant, unless the applicant consents to a different mode of service, including without limitation, electronic service. No permit shall be issued unless a successful appeal of the denial is made within the requisite time frame.

d. Appeal of Denial.

1. Within 10 days after the Department serves notification of denial, an applicant may appeal the denial by notifying the City Clerk in writing of the appeal, the reasons for the appeal, and paying any applicable fees.

2. The City Clerk shall set a hearing on the appeal and shall fix a date and time certain, within 30 days after the receipt of the applicant's appeal, unless the City and the applicant agree to a longer time, to consider the appeal. The City Clerk shall provide notice of the

date, time and place of hearing, at least 7 days prior to the date of the hearing.

3. The City Manager shall randomly assign a Hearing Officer to hear the appeal, determine the order of procedure, and rule on all objections to admissibility of evidence. The applicant and the Department shall each have the right to submit documents, call and examine witnesses, cross-examine witnesses and argue their respective positions. The proceeding shall be informal, and the strict rules of evidence shall not apply, and all evidence shall be admissible which is of the kind that reasonably prudent persons rely upon in making decisions.

4. The Hearing Officer shall issue a written decision within a reasonable amount of time after the close of the hearing. The decision of the Hearing Officer shall be final.

e. Grounds for Denial, Revocation or Suspension of Permit. The granting of a Permit or a renewal thereof may be denied and an existing Permit revoked or suspended if any of the following conditions exist:

1. The Permittee, or any employee, independent contractor, volunteer, or other agent having actual or apparent authority to act on behalf of a Cannabis Business, has knowingly made a false statement, omission, or negligent failure to notify the City of information required by this Article in the application or in other documents furnished to the City.

2. A Cannabis Business Owner has been convicted of an offense that is substantially related to the qualifications, functions, or duties of a Cannabis Business Owner for which the application is made, which includes but is not limited to:

i. A violent felony conviction, as specified in Penal Code section 667.5(c).

ii. A serious felony conviction, as specified in Penal Code section 1192.7.

iii. A felony conviction involving fraud, deceit or embezzlement.

iv. A felony conviction for hiring, employing, or using a minor in transporting, carrying, selling, giving away, preparing for sale, or peddling, any controlled substance to a minor; or selling, offering to sell, furnishing, offering to furnish, administering, or giving any controlled substance to a minor.

v. A felony conviction for drug trafficking with an enhancement pursuant to Health and Safety Code section 11370.4 or 11379.8.

vi. Except as provided in subsections (iv) and (v) above, an application for a permit

shall not be denied if the sole ground for denial is based upon a prior conviction of either section 11350 or section 11357 of the California Health and Safety Code. An application for a permit also shall not be denied if the State would be prohibited from denying a license pursuant to either section 26057(b)(5) or section 26059 of the California Business and Professions Code.

3. Conviction of any controlled substance felony subsequent to permit issuance shall be grounds for revocation of a permit or denial of the renewal of a permit.

4. The Permittee has been sanctioned by any licensing or permitting authority, including any enforcement action taken by any other city or county, for unauthorized Commercial Cannabis Activity, including without limitation, denial, suspension, or revocation of a business license, operating permit, land use entitlement, or similar privilege to conduct Commercial Cannabis Activity.

5. The granting or renewing of the Permit would perpetuate or encourage any of the following:

   i. Distribution of Cannabis or Cannabis Products to minors;

   ii. Generation of revenue from the sale of Cannabis or Cannabis Products to fund criminal enterprises, gangs, or cartels;

   iii. Diversion of Cannabis or Cannabis Products to jurisdictions outside of the State where Cannabis and Cannabis Products are unlawful under state or local law;

   iv. Trafficking of other illegal drugs or facilitation of other illegal activity;

   v. Violence and the use of firearms in the cultivation and distribution of Cannabis and Cannabis Products;

   vi. Drugged driving or exacerbation of other adverse public health consequences associated with Cannabis;

   vii. The use of public lands in the cultivation of Cannabis; or

   viii. The use of federal property for Commercial Cannabis Activity.

6. For any other reason that would allow the State to deny a license under the MAUCRSA.

7. Failure to pay required fees, taxes, or other monies owed to the City outside of the 30-day grace period.

8. Violation of any provision of the AUMA or MAUCRSA, this Article, or any other permits issued by the City for the Commercial Cannabis Activity, such as a use permit.

9. Any later discovered act or conduct which would have been considered a ground for denial of the Permit in the first instance.

10. Failure to take reasonable measures to control patron conduct, where applicable, resulting in disturbances, vandalism, criminal activity, crowd control problems occurring inside of or outside the premises, traffic control problems, creation (or assist in the creation) of a public or private nuisance, or obstruction of the operation of another business.

11. Violation or failure to comply with the terms and conditions of the permit.

12. The application is speculative, made by a third party with no immediate plans for commencing operations, or is incomplete and not cured within sixty (60) days after written notification of the deficiency was mailed.

f. Suspension and Revocation.

1. Summary Suspension. If the Chief of Police or the Department deems continuation of the operation of the Cannabis Business by the Permittee, or any employee, independent contractor, volunteer, or other agent of a Cannabis Business Owner having actual or apparent authority to operate the Cannabis Business, will cause an imminent threat to the health, safety or welfare of the public, the Chief of Police or the Department may immediately and summarily suspend the Permit and all rights and privileges thereunder for a period not to exceed 30 days.

i. The summary suspension shall take effect immediately upon service of a written notice of suspension by the Chief of Police or the Department upon the Permittee via personal delivery to any employee at the site address of the Cannabis Business. Notice given shall include the following information:

a) The effective date and time period of the summary suspension;

b) The grounds and reasons upon which the summary suspension is based;

c) That the Permittee who wishes to challenge the summary suspension may

request a hearing before a Hearing Officer;

d) The method for requesting a hearing before the Hearing Officer; and

e) The notice of summary suspension shall become final unless the Chief of Police or the Department receives a written request for a hearing from the Permittee as set forth below.

ii. If the Permittee wishes to challenge the summary suspension, the Permittee must file a written request with the Chief of Police or the Department for a hearing within three (3) business days after service of the notice of summary suspension. If the Chief of Police or the Department does not receive a request for a hearing from the Permittee within this time period, the notice of summary suspension shall become final.

iii. The Chief of Police or the Department must respond to the Permittee's request for a hearing by holding a hearing to affirm, modify, or overrule the summary suspension within five (5) business days of the Permittee's request for a hearing, unless the City and the Permittee agree to an extension of the time within which a hearing can be held.

iv. The Chief of Police or the Department may recommend permanent revocation as set forth below on the basis of facts supporting summary suspension.

2. Permanent Revocation. The Chief of Police or the Department shall give notice to the Permittee of his or her intent to permanently revoke a Permit in the same manner as notice of denial and provide the City Clerk with a copy of the notice.

i. The hearing for the revocation of the Permit shall be set and conducted in the same manner as an appeal of denial.

ii. The decision of the Hearing Officer shall be final.

6-59.7 Permit Issuance

a. Before issuing any Permit, the Department shall determine that all of the following requirements have been met:

1. The application is complete and all applicable City taxes, fees, or monies owed have been paid.

2. The use permit has been approved or other land use requirements have been met, and

all conditions of approval have been met or in good standing.

3. There are no outstanding notices of nuisance or other unresolved code compliance issue at the site of the Commercial Cannabis Activity.

6-59.8 Permit Term

a. Term. The Permit shall be valid for one (1) year from the date of issuance. Once a Permit expires, it shall terminate and there is no grace period.

b. Renewal Application. A Permit renewal application and any applicable fees must be submitted at least sixty (60) days before the expiration of the Permit. Failure to submit a renewal application prior to the expiration date of the permit will result in the automatic expiration of the Permit on the expiration date. Permit renewal is subject to the laws and regulations effective at the time of renewal, which may be substantially different than the regulations currently in place and may require the submittal of additional information to ensure that the new standards are met. No person shall have any entitlement or vested right to receive a Permit under this Article. A Permittee may appeal expiration of a Permit as described in this Section in the same manner as appealing a denial in subsection (c) (Appeal of Denial) of section 6-59.6 above.

6-59.9 Transfer of or Modifications to the Permit

a. City Approval Required. A Permit is non-transferable to another location. No transfer to another person or modifications to the Permit, including changes to the permitted facility, may be made except in accordance this section.

b. Change of Ownership. A change in ownership constitutes a transfer of or modification to the Permit and as such shall require an application. A request for change in Permit ownership shall be submitted to the Department, in accordance with subsection (f) below. Requests submitted less than sixty (60) days before the transfer will be processed only at the City's discretion and may be subject to an expedited processing fee. A new Cannabis Business Owner(s) shall meet all requirements for applicants of an initial Permit. The request shall include the following information:

1. Identifying information for the new Cannabis Business Owner(s) and management as required in an initial Permit application;

2. A written certification by the new Cannabis Business Owner as required in an initial Permit application;

3. The specific date on which the transfer is to occur; and

4. Acknowledgement of full responsibility for complying with the existing Permit.

c. Change in Security Plan. A request to modify the security plan shall be submitted to the Department, with a copy to the Chief of Police, on a City form at least sixty (60) days prior to the anticipated change, together with the applicable fee.

d. Change of Contact Information. A request for change in Cannabis Business contact information shall be submitted to the Department, with a copy to the Chief of Police, on a City form at least thirty (30) days prior to the anticipated change, together with the applicable fee.

e. Change in Trade Name. A written request for change in Cannabis Business trade or business name shall be submitted to the Department, with a copy to the Chief of Police, in a form approved by the Department at least thirty (30) days prior to the anticipated change, together with the applicable fee.

f. Application. A permit transfer or modification application and any applicable fees must be submitted at least sixty (60) days before the transfer or modification of the Permit. Failure to timely submit a transfer or modification application will result in the automatic expiration of the Permit. Permit renewal is subject to the laws and regulations effective at the time of renewal, which may be substantially different than the regulations currently in place and may require the submittal of additional information to ensure that the new standards are met. No person shall have any entitlement or vested right to receive a Permit under this Article.

6-59.10 General Conditions for All Cannabis Businesses

a. Compliance with State and Local Law. The applicant shall fully comply with all State laws and local laws for Cannabis, including the Alameda Municipal Code and all uncodified resolutions and ordinances adopted by the City Council.

b. Compliance with Laws Regarding Edible Cannabis Products. Cannabis Businesses that manufacture, prepare, dispense, and/or sell food, including Cannabis-infused foods and/or edible Cannabis Products, must comply with and are subject to the provisions of all relevant State and local laws and County regulations regarding the preparation, distribution, labeling, and sale of such items.

c. Maintain State Licensure. At such time that the State has begun to issue licenses and at all times thereafter, the Permittee shall hold a valid State license for the equivalent State license type. All Permittees must maintain their state license and any other applicable licenses and permits required by the State, County, and City, including, for example, an Alameda business license.

d. Duty to Notify. All Applicants or Permittees have a continuing duty to immediately notify the Department of any proposed or considered change of ownership, changes to an application, or discrepancies between any information provided to the City related to Alameda Municipal Code or other local regulations governing Cannabis Businesses, and the actual facts, conditions, or circumstances concerning an applicant's or Permittee's Cannabis Business or the proposed or permitted facility. A failure to promptly notify the City may be grounds for denial or revocation. Additionally, all applicants or permittees must notify the City prior to applying for any new permits issued by the State of California.

e. Operational Radius.

1. No Cannabis Business engaging in Dispensary/Retail or Dispensary/Delivery shall locate within a 1,000-foot radius of a public or private school providing instruction in kindergarten or any grades 1 through 12. Further, no such Cannabis Business shall locate within a 600-foot radius of a youth center, tutoring center, or day care center. The distance shall be measured via a path of travel from the nearest door of the nearest foregoing sensitive uses known when the RFP is issued to the nearest door of the dispensary. For purposes of this section, "school" does not include any private school or similar use in which education of any kind is primarily conducted in private homes, churches or similar locations where such instruction is an ancillary use. All other sensitive uses identified in this subsection not defined herein or in this Article are defined under the California Child Health Care Act, codified in the California Health and Safety Code.

2. All other Cannabis Businesses shall not locate within a 600-foot radius of the same foregoing sensitive uses known when the application is submitted, measured via a path of travel from the nearest door of the nearest foregoing sensitive uses to the nearest door of the Cannabis Business.

f. Over-Concentration. In addition to the operational radius, noted above, there shall be no more than two (2) cannabis businesses engaging in cannabis retail on either side of Grand Street.

g. On-site Use or Consumption. Notwithstanding section 24-11 (SMOKING PROHIBITIONS IN PLACES OF EMPLOYMENT AND UNENCLOSED PUBLIC PLACES) of the Alameda Municipal Code, on-site use or consumption of Cannabis or Cannabis Products is permitted in interior areas on the licensed premises of a Dispensary/Retail Permittee under their control, but shall not occur in parking areas or any other areas that cannot be excluded from public view or access by the Permittee. On-site use or consumption is strictly prohibited for any other Cannabis Business. Pursuant to section 6-59.16 in this Article, the Department shall promulgate guidelines, procedures, and regulations governing on-site consumption of Cannabis or Cannabis Products on the licensed premises of a Dispensary/Retail Permittee.

h. Free Samples. Free samples of Cannabis or Cannabis Product by any Cannabis Business or Permittee is strictly prohibited.

i. Local Hire/Local Ownership/Community Benefit. If applicable, the Permittee shall implement their voluntary plan containing feasible options to maximize local hire, local ownership, and community benefit.

j. Employee Age Requirement. Permittees shall employ only persons at least 21 years of age at any permitted facility within the City of Alameda.

k. On-site Community Relations Staff. Permittees shall post on the premises for public view the current name, phone number, secondary phone number and e-mail address of an on-site community relations staff person to whom notice of any operating problems associated with the Cannabis Business site may be reported. This information shall be updated as necessary to keep it current. The On-site Community Relations Staff can be the same individual as the On-site Operations Manager.

l. On-site Operations Manager. Permittees shall have an on-site manager at each permitted facility within the City who is responsible for overall operation at all times that employees are conducting operations, and shall provide the City with contact information for all such persons, including telephone number and email address. Permittees shall also provide the City with the name and contact information including phone number of at least one manager that can be reached 24-hours a day. The On-site Community Relations Staff can be the same individual as the On-site Operations Manager.

m. Nuisance Abatement. Permittees shall take all reasonable steps to discourage and correct conditions that constitute a public or private nuisance in parking areas, sidewalks, alleys and areas surrounding a permitted facility. Such conditions include, but are not limited to: smoking; creating or permitting a noise disturbance or odor issue; loitering; littering; and graffiti. If the City receives any nuisance complaints, the Permittee shall work with the Building Official and other relevant City departments, including the Police and Fire departments, to correct and address such concerns. Unresolved or repeated nuisance complaints may be basis for suspension or revocation of the Permit or denial of Permit renewal. Graffiti must be removed from property and parking lots under the control of the Permittee within 72 hours of discovery or notification by the City.

n. Air Quality, Odor Control, and Ventilation. All Commercial Cannabis Activity shall be operated so as not to cause offensive odors perceptible to the average person at or beyond any property line of the lot containing the premises where Commercial Cannabis Activity is being conducted. Facilities containing Commercial Cannabis Activity shall be equipped with odor

control, filtration, and ventilation system(s) to control odors, humidity, and mold so that odor generated inside the property is not detected outside the property, anywhere on adjacent property or public rights-of-way, or within any other unit located within the same building as the Cannabis Business Permittee. All components of the Commercial Cannabis Activity shall comply with the requirements of the Bay Area Air Quality Management District. An odor detected no more than fifteen (15) minutes in one (1) day is acceptable.

o. Hours of Operation. All permitted facilities, except the licensed premises of Dispensary/Retail Permittees, shall be closed to the general public. For all permitted facilities any delivery, distribution, or pick-up of a substantial amount of cash, Cannabis, or Cannabis Product shall be prohibited between the hours of 10:00 p.m. and 7:00 a.m. Hours of operation for all Permittees may be between the hours of 7:00 a.m. to 9:00 p.m., except that modifications beyond this period can be approved for Manufacturing and Testing Lab Permittees only, as part of their use permit. With the exception of activities authorized pursuant to a Dispensary/Retailer Permit, no direct sales of Cannabis or Cannabis Product to the general public may occur upon the premises.

p. Fire Alarm System. The Cannabis Business must have a fully-operational fire alarm system approved by the Fire Chief.

q. Security Measures. Consistent with the approved security plan required under section 6-59.5, all Cannabis Businesses shall at a minimum provide and maintain the following security measures and all records or data, regardless of its form, related to such measures:

1. Operational Security Measures. The Security Plan shall address the following to ensure operational security:

i. Preventing individuals from remaining on the premises if they are not engaged in an activity expressly related to the operations of the Cannabis Activity;

ii. Establishing limited access areas accessible only to authorized personnel including security measures to both deter and prevent unauthorized entrance into areas containing Cannabis or Cannabis Products and theft or diversion of Cannabis or Cannabis Products;

iii. Storing all finished Cannabis and Cannabis Products in a secured and locked room, safe, or vault, and in a manner as to prevent diversion, theft, and loss, except for limited amounts of cannabis used for display purposes or immediate sale, if applicable;

iv. Providing tamper proof and tamper evident packaging for finished Cannabis

Product;

v. Preventing offsite nuisance impacts to adjoining or nearby properties as required by the Permit as set forth in subsection (l) of section 6-59.10 of this Article; and

vi. Securing cash that remains on the premises.

2. Alarm System. A commercial burglar alarm system with video surveillance approved by the Chief of Police, which is capable of providing the Police Department with secure, internet-based access to unaltered surveillance footage or data of all controlled access areas, security rooms, points of ingress/egress, all point of sale (POS) areas, and other areas deemed reasonably necessary by the Chief of Police.

3. Security Guard. At all times while a Cannabis Business that is a Dispensary/Retail Permittee is open, it shall provide at least one security guard who is registered with Bureau of Security and Investigative Services, possesses a valid and current security guard registration card on their person while on-duty, and is dressed in a manner approved by the Chief of Police. Security guards are permitted, but not mandated, to carry firearms. The security guard and/or Cannabis Business personnel shall monitor the site and the immediate vicinity of the site to ensure that patrons immediately leave the site and do not consume Cannabis on the property or in the parking lot. The foregoing requirements may be imposed upon other Permittees at the discretion of either the Chief of Police or the Department as part of that Permittee's Security Plan, or if required by State law.

4. The Chief of Police shall have the authority to require additional reasonable security measures to further protect the public health, safety, and welfare, and to adopt implementing regulations and departmental guidelines related to all aspects of security measures required of Permittees, including specific technical requirements of security measures, inspections to ensure compliance, and access to records and electronic media. Failure to maintain effective security measures at all times is a violation of this Section and cause for permit revocation or suspension. All outdoor lighting used for security purposes shall be shielded and downward facing.

r. Security Breach. A Cannabis Business shall notify the Police Department within 24 hours after discovering any of the following:

1. Diversion, theft, loss, or any criminal activity by the Permittee, or any employee, independent contractor, volunteer, or other agent of the Permittee, involving the Cannabis or Cannabis Product.

2. The loss or unauthorized alteration of records related to Cannabis or Cannabis Product,

registered Qualifying Patients, Primary Caregivers, or employees or agents.

3. Significant discrepancies identified in inventory.

4. Any other material breach of security.

s. Building and Fire Standards. The Chief Building Official may require additional specific standards to meet the California Building Code and Fire Code, including but not limited to installation of fire suppression sprinklers.

t. Generators. The use of generators for cultivation is prohibited, except for temporary use in the event of a power outage or emergency.

u. Water Usage or Discharge. The Cannabis Business must conform to all State and local regulations regarding water usage. Discharges of any kind into a public or private sewage or storm drainage system, watercourse, body of water or into the ground, must be in compliance with provisions of Chapter XVII of the Alameda Municipal Code, the East Bay Municipal Utility District Wastewater Control Ordinance (Ordinance No. 355-11, as amended by subsequent ordinances from time to time), and applicable Federal and State laws and regulations.

v. Use of Pesticides. No pesticides, insecticides or rodenticides that are prohibited by applicable law for fertilization or production of edible produce may be used on any Cannabis cultivated, produced, or distributed by a Cannabis Business. A Cannabis Business shall comply with all applicable law regarding use of pesticides, insecticides, or rodenticides.

w. Separation of Employee Areas. Employee breakrooms, eating areas, changing facilities, and bathrooms shall be completely separated from the storage areas for Cannabis or Cannabis Products.

x. Disposal of Unsold Cannabis, Cannabis Product, or Related Waste. All unsold Cannabis, Cannabis Product, and related waste that is to be disposed of must be made unusable and unrecognizable prior to removal from the business and must be in compliance with all applicable laws. The purpose of this condition is to protect any portion thereof from being possessed or ingested by any person or animal and to ensure it may not be utilized for unlawful purposes and complies with all state, local, and federal laws.

y. Testing. All Cannabis Businesses shall cause to be tested all of their Cannabis and Cannabis Products by a licensed testing laboratory for various metrics in accordance with applicable State law and regulations adopted by the California Bureau of Cannabis Control (or successor agency), including without limitation, chemical profiles and contaminants/contaminant thresholds. All Cannabis Businesses shall maintain a copy of the certificate of analysis or similar documentation on the premises evidencing compliance with State law and regulations

regarding testing.

z. Labeling and Packages. Labels and packages of Cannabis and Cannabis Products shall meet all state and federal labeling and packaging requirements. Until such regulations are adopted by the federal and/or state authorities, as a condition of Permit issuance, the Department, in consultation with the Chief of Police, may impose labeling and packaging requirements to protect the public safety, health and welfare.

aa. Consent to Inspection. City, including City personnel from Police, Community Development, Public Works, and Fire departments, County, and State representatives may enter and inspect the property of every Cannabis Business during hours of operation, or at any other reasonable time, to ensure compliance and enforcement of the provisions of this Article and the inspection of records related to the business or otherwise required by State law, except that the inspection and copying of private medical records shall be made available to the Police Department only pursuant to a properly executed search warrant, subpoena, or court order. It is unlawful and cause for immediate suspension or revocation of the permit for any property owner, landlord, lessee, Cannabis Business, and/or its owner, agent, employee to refuse to allow, impede, obstruct or interfere with an inspection.

bb. Maintenance of Records. Records of Commercial Cannabis Activity must be maintained in accordance with State and local law, be maintained in order to show compliance with this Article, and be made available to the City upon request. Failure to provide such records is grounds for revocation of any Permit. Records maintained must include, but are not limited to the following.

1. All Permittees must maintain:

i. Proof of a valid use permit issued in conformance with the Alameda Municipal Code.

ii. The full name, address, and telephone number(s) of the owner, landlord and/or lessee of the property.

iii. The full name, address, and telephone number(s) of each person engaged in the management of the Cannabis Business and the exact nature of the participation in the management of the Cannabis Business, and for cultivators, the full name, address, and telephone number(s) of each employee engaged in the cultivation of Cannabis at the property.

iv. For a minimum of three (3) years, a written accounting or ledger of all cash, receipts, credit card transactions, and reimbursements (including any in-kind

contributions) as well as records of all operational expenditures and costs incurred by the Permittee in accordance with generally accepted accounting practices and standards typically applicable to business records, which shall be made available to the City during business hours for inspection upon reasonable notice by the Department or Chief of Police.

v. Any and all records required by or related to this Article, the Alameda Municipal Code, or any conditions attached to any Permit or land use entitlement, including a use permit, issued for Commercial Cannabis Activity or otherwise associated with the property.

2. A Dispensary/Retailer Permittee that operates as a medicinal Cannabis cooperative or collective for qualified patients, shall maintain all records as required by State law.

3. A Manufacturer Permittee shall maintain the following records on the property:

i. Evidence of: (a) verification that all Cannabis Products manufactured and packaged at the location are manufactured, packaged, and labeled in compliance with all applicable state and local laws; and (b) laboratory testing as required by State and local laws.

ii. A list of any Cannabis Business operating under a Dispensary/Retailer Permit located in the City of Alameda that the Manufacturer Permittee has provided, or intends to provide its product to. The list shall include the name of the Dispensary/Retailer Permittee, its address, the date the Cannabis Products were distributed, and the type and amount of the product that was distributed.

4. A Manufacturer Permittee who produces edible Cannabis Products shall maintain the following records on the property:

i. Proof of inspection and all required approvals required by the Alameda County Environmental Health Department and the County Health Officer for food manufacturers, packagers, and/or distributors.

ii. Producers of edible Cannabis Products that are tested for contaminants shall maintain a written or computerized log documenting:

a) The source of the Cannabis used in each batch of product;

b) The contaminant testing date; and

c) The testing facility for the Cannabis.

5. A Cultivator Permittee shall maintain the following records on the property:

i. An inventory record documenting the dates and amounts of Cannabis cultivated at the property, the daily amounts of Cannabis stored on the property, and an inventory record of all Cannabis distributed to Cannabis Businesses operating under a Dispensary/Retailer Permit located in the City. The inventory shall include total plants grown by the cultivator, the total weight of all Cannabis distributed, and receipts and documents detailing the sale or distribution of Cannabis.

ii. Evidence to verify that all Cannabis is cultivated in compliance with all applicable state and local laws.

cc. Insurance. Maintain at all times Commercial General Liability insurance on an occurrence basis for bodily injury, including death, of one or more persons, property damage and personal injury with per-occurrence limits set by the City Attorney's Office. The Commercial General Liability policy shall provide contractual liability, shall include a severability of interest or equivalent wording, shall specify that insurance coverage afforded to the City shall be primary, and shall include an Additional Insured Endorsement naming the City, its officials and employees as additional insured. Pollution Legal Liability shall be required for cultivation and manufacturing operations with per-occurrence limits set by the City Attorney's Office. Failure to maintain insurance as required herein at all times shall be grounds for suspension or revocation of the Permit.

dd. Project Costs. The applicant shall pay for any analysis and review by City staff or a consultant related environmental clearance for the project under applicable State and federal law, and pay for all related costs, including costs incurred by the City, associated with project review under CEQA.

ee. Worker's Compensation Insurance; Employer's Liability Insurance. Applicant or Permittee shall, at Applicant/Permittee's expense, maintain in full force and effect during duration of the Permit, worker's compensation insurance with not less than the minimum limits required by law, and employer's liability insurance with a minimum limit of coverage set by the City Attorney's Office.

ff. Indemnity. By accepting the permit, each Permittee agrees to indemnify, defend and hold harmless to the fullest extent permitted by law, the City, its officers, agents and employees from and against any all actual and alleged damages, claims, liabilities, costs (including attorney's fees), suits or other expenses resulting from and arising out of or in connection with Permittee's operations, except such liability caused by the active negligence, sole negligence

of willful misconduct of City, its officers, agents and employees.

gg. Waiver of Sovereign Immunity. All tribal government applicants and Permittees applying for, or renewing an existing Permit, are required to execute and include a waiver of tribal sovereign immunity when submitting their initial or renewal application.

hh. Destruction Bond. Any Cannabis Business must provide proof of a bond of at least five thousand dollars ($5,000) and up to an amount permitted by applicable law to cover the costs of destruction of Cannabis or Cannabis Products if necessitated by a violation of applicable law, including this Article.

ii. Notification of Enforcement Action. Notify the Department, with a copy to the Chief of Police, within three days of any notices of violation or other corrective action ordered by a state or other local licensing authority, and provide copies of the relevant documents.

jj. Commencement of Operations or Abandonment. The Permittee's Cannabis Business must open at the approved premises and commence operations within one year of being issued a Permit under this Article or the date the use permit for the Commercial Cannabis Activity vests, whichever is later, as required by section 6-59.12 of this Article. Additionally, after operations have lawfully commenced, the Cannabis Business must not remain inoperative for a period of more than six months, unless upon showing of good cause. Failure to meet this condition is grounds for revocation of any Permit or land use entitlements.

6-59.11 Conditions for Specific Permits

a. Delivery/Distribution Permittees. A Cannabis Business operating within the City under either a Dispensary/Retailer, Dispensary/Delivery, or Distributor Permit which delivers or distributes Cannabis shall be subject to the following conditions:

1. Delivery or distribution of Cannabis may be made only from a Dispensary-Retailer, Dispensary/Delivery or Distributor issued a permit by the City and the State in compliance with this ordinance and State law.

2. Maintain at all times all licenses and permits as required by California state law and the laws of the local jurisdiction in which the Permittee is located, and provide immediate notification to the Chief of Police if any license or permit is suspended or revoked.

3. Any person who delivers or distributes Cannabis to a Customer or licensee must have in his/her possession a copy of the appropriate Permit, which shall be made available upon request to law enforcement. A manifest with all information required in this section must accompany any person who delivers or distributes Cannabis to a Customer or licensee at

all times during the process and hours of delivery or distribution.

4. The person delivering or distributing, in addition to their vehicle or other mode of delivery/distribution, shall not advertise any activity related to Cannabis nor shall it advertise the name of the Permittee. Any delivery or distribution vehicle or other mode of transport must be made in compliance with State and local law as it may be amended, including use of a dedicated GPS device for identifying the location of the vehicle or other method of transport (cell phones and tablets are not sufficient).

5. Delivery or distribution of Cannabis shall be directly to the residence or business address of the Customer or licensee in the State of California; delivery or distribution to any other location is prohibited. Delivery or distribution vehicles shall not leave the State of California while in possession of Cannabis or Cannabis Products for sale, delivery, or distribution.

6. Delivery or distribution of Cannabis shall occur only between the hours of 7:00 a.m. and 9:00 p.m. Any deliveries started but not completed before the hour of 9 p.m. shall return to the permitted facility and be completed the next business day.

7. No Permittee shall deliver or distribute (nor cause to be delivered or distributed) Cannabis in excess of the limits established by the California Bureau of Cannabis Control (or successor agency) during the course of delivering or distributing Cannabis; until the California Bureau of Cannabis Control (or successor agency) establishes the limit, the limit shall be no more than $3,000 of Cannabis or Cannabis Product.

8. Submit and regularly update the following information concerning delivery or distribution:

   i. Listing of all vehicles and devices to be used for delivery or distribution of Cannabis or Cannabis Products within the City, which includes the vehicle's make, model, year, license plate number, and vehicle identification number.

   ii. Copies of applicable authorizing state and local licenses and permits issued to Cannabis Business allowing it to engage in Commercial Cannabis Activity.

9. All orders to be delivered or distributed shall be packaged bearing the names of the Customer or licensee. A Customer or licensee requesting delivery or distribution shall maintain a physical or electronic copy of the request and shall make it available upon request by the State, licensing authority, and law enforcement officers, which shall include the following information:

i. Name and address of the licensed Dispensary-Retailer or Distributor Permittee.

ii. The name of the employee who delivered or distributed the order.

iii. The date and time the request was made.

iv. The complete address where delivery or distribution occurred.

v. A detailed description of the Cannabis or Cannabis Product(s) requested for delivery or distribution, including the weight or volume, or any accurate measure of the amount of Cannabis or Cannabis product ordered.

vi. The date and time of delivery or distribution was made, and the signature of the person who received the delivery or distribution.

b. Dispensary-Retailer or Dispensary-Delivery Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Dispensary-Retailer Permit:

1. Displays/Inventory. Display of Cannabis Products shall be limited to only an amount necessary to provide a visual sample for Customers. All Cannabis or Cannabis Products available for sale or display must be securely locked and stored. No Cannabis Product shall be visible from the exterior of the business.

2. Check Cashing Prohibited. No Dispensary/Retailer Permittee may engage in check cashing activities at any time.

3. Physician recommendations. No recommendations from a physician for medicinal Cannabis shall be issued on-site.

4. Minimum Operational Hours. Any Cannabis Business facility operating under a Dispensary/Retailer permit must be open to the public a minimum of 40 hours per week.

5. Underage Entrants. No one under the age of 21 shall be allowed to enter any Cannabis Business facility unless, as permitted under State law, the person is a qualified patient or a primary caregiver and they are in the presence of their parent or legal guardian.

6. Shipments. Shipments of Cannabis or Cannabis Products shall only be accepted during the regular business hours of the receiving Cannabis Business. Shipments of Cannabis or Cannabis Products from the Cannabis Business shall only be made during the regular business hours of the shipping Cannabis Business.

7. Alcohol/Tobacco. There shall be no on-site sales of alcohol or tobacco products, and no on-site consumption of alcohol or tobacco by patrons.

8. Signage/Trade Dress.

   i. All signage for Commercial Cannabis Activity shall be subject to the sign regulations in section 30-6 of Chapter XXX of the Alameda Municipal Code.

   ii. Any and all signage, packaging, and facilities shall not be "attractive," as it is defined by the State, to minors, and shall not be visible from the exterior of the licensed premises.

   iii. Mandatory Signage. A sign must be posted in a conspicuous location inside the Cannabis Business and advise that:

      a) The use of Cannabis may impair a person's ability to drive a motor vehicle or operate heavy machinery;

      b) Loitering in a public place in a manner and under circumstances manifesting the purpose and with the intent to commit an offense specified in Chapter 6 (commencing with section 11350) and Chapter 6.5 (commencing with section 11400 of the Health and Safety Code is prohibited;

      c) Loitering on private property without visible or lawful business with the owner or occupant is prohibited by California Penal Code Section 647(h); and

      d) This Cannabis Dispensary/Retailer establishment is permitted in accordance with the Municipal Code, and State law, including the MAUCRSA, and Bureau of Cannabis Control regulations.

9. Safety of Products. The Dispensary/Retailer Permittee must ensure that the Cannabis and Cannabis Products it offers for sale are manufactured, packaged, tested, and labeled in compliance with all applicable state and local laws. No Dispensary/Retailer Permittee may obtain or distribute Cannabis Products from any Cannabis Business unless such business has a valid permit or license issued by the Bureau of Cannabis Control and a California city or county.

c. Cultivation Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Cultivation Permit:

1. Outdoor Cultivation Prohibited.

   i. Outdoor cultivation of Cannabis is not permitted in any Zoning District.

   ii. All cultivation must be done inside a fully enclosed structure, and the cultivation operation shall not be visible from the exterior of any structure on the property.

2. Public Access Restricted. A Cultivation Permittee must restrict access by members of the public to the permitted facility, except that licensees obtaining or seeking to obtain Cannabis or Cannabis Products (or their authorized representatives) may enter the licensed premises for that purpose.

3. All Cultivation Permittees must obtain and maintain a valid Distributor Permit, from the City.

d. Manufacturing Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Manufacturing Permit:

1. All manufacturing activities that will be conducted by the Permittee must be included on the application. No additional manufacturing activity not already included in the application can be conducted without a City-approved amendment to any applicable Permit providing for such additional activity.

2. The premises shall not contain an exhibition or Cannabis Product sales area or allow for retail distribution of Cannabis Products at that location.

3. Preparation, Packaging, and Labeling of Edibles. The preparation, packaging, and labeling of edible Cannabis Products shall comply with applicable federal, state, and local law, including without limitation applicable regulations promulgated by the County of Alameda.

e. Distributor Permittees. In addition to the standards applicable to all Cannabis Businesses, the following apply to Cannabis Businesses with a Distributor Permit:

1. A Distributor Permittee shall ensure that all Cannabis Product batches are stored separately and distinctly from others on the distributor's premises.

2. A distributor shall ensure a label with the following information is physically attached to each container of each batch:

i. The manufacturer or cultivator's name and license number;

ii. The date of entry into the distributor's storage area;

iii. The unique identifiers and batch number associated with the batch;

iv. A description of the Cannabis Products with enough detail to easily identify the batch; and

v. The weight of or quantity of units in the batch.

3. A Distributor Permittee shall store harvest batches and edible Cannabis Products that require refrigeration consistent with State and local law.

4. A Distributor Permittee shall store Cannabis or Cannabis Products in a building designed to permit control of temperature and humidity and shall prevent the entry of environmental contaminants such as smoke and dust. The area in which Cannabis or Cannabis Products are stored shall not be exposed to direct sunlight. A Distributor Permittee may not store Cannabis or Cannabis Products outdoors.

5. Any facilities of the Distributor Permittee shall not contain an exhibition or Cannabis Product sales area or allow for retail distribution of Cannabis or Cannabis Products at that location.

f. Additional Permit-Specific Requirements. As set forth below, the Department may issue implementing regulations to impose additional permit-specific requirements in the interest of protecting the public health, safety, and welfare in an expeditious manner.

g. Prohibited Activity. Cannabis may not be smoked, ingested, or possessed in a manner that violates State law (Health & Safety Code sections 11362.3 and 11362.79).

6-59.12 Failure to Commence Operations/Abandonment

a. The purpose of this Section is to prevent the reservation of land for future use by a Permittee that has no good faith intent to commence the proposed use, and after lawful use has commenced, to encourage productive use of land within the City.

b. If a Cannabis Business has not opened at the approved location and commenced operations within one (1) year of being issued a permit under this Article or the date the use permit for the Commercial Cannabis Activity vests, whichever is later, or if at any other time, after operations have lawfully commenced, the Cannabis Business remains inoperative for a period of more than 90 days, the Permit shall be deemed expired and void.

c. The City shall provide written notice to the Cannabis Business that the Permit has expired and is void. A Cannabis Business may appeal the Permit expiration in the same manner as appealing a denial in subsection (c) (Appeal of Denial) of section 6-59.6 of this Article.

d. Upon a factual showing of good cause by the Cannabis Business for its failure to commence or continue operations within the required time, the Hearing Officer may grant a one-time only extension, not to exceed 60 days, based upon a factual finding of good cause for the extension. The determination of good cause to support the one-time extension shall be final.

e. “Good cause” includes, but is not limited to, termination of the Cannabis Business’ lease by the property owner; a change in federal, state or local law that now prohibits use of the previously approved location as a Cannabis Business; foreclosure or sale of the approved location resulting in the Cannabis business’ inability to enter into a new lease; damage to or deterioration to the building that prevents the safe use and/or occupation of the structure until all required repairs are made in conformity with a Notice and Order issued to the property owner by the City’s Building Official pursuant to the California Code of Regulations and the Uniform Code for Abatement of Dangerous Buildings. However, if the Cannabis Business was responsible for the condition, including any non-permitted construction or alteration of the structure, or non-permitted electrical, mechanical or plumbing, “good cause” shall not be found.

6-59.13 Fees.

Applicants and Permittees shall pay all applicable fees as set forth in the City’s Master Fee Schedule adopted by resolution. Applicants and Permittees also shall pay the amount as prescribed by the Department of Justice of the State of California for the processing of fingerprints. None of the above fees shall be prorated, or refunded in the event of permit denial, suspension or revocation.

6-59.14 Regulations and Enforcement

h. Any action required by either the Department or Chief of Police under this Section may be fulfilled by designees.

i. The Department and Chief of Police are authorized to coordinate implementation and enforcement of this Article and may promulgate appropriate regulations or guidelines for such purposes.

6-59.15 Penalties

a. Each and every violation of this Section, including without limitation the causing, permitting,

aiding, abetting, or concealing a violation of this Section, shall constitute a separate violation and shall be subject to all remedies and enforcement measures authorized by the Alameda Municipal Code, unless specifically provided for herein, including without limitation punishment as a misdemeanor.

b. As a nuisance per se, any violation of this Article shall be subject to injunctive relief, revocation of the business' Cannabis Business permit, disgorgement and payment to the City of any and all monies unlawfully obtained, costs of abatement, costs of investigation, attorney fees, and any other relief or remedy available at law or equity, including without limitation a civil action brought by the City. The City may also pursue any and all remedies and actions available and applicable under local and state laws for any violations committed by the Cannabis Business and persons related to or associated with the Cannabis Business.

c. A person engaging in Cannabis Business without a Permit required by this Article shall be subject to civil penalties of up to three times the amount of the Permit fee for each violation, and the State or local authority, or court may order the destruction of Cannabis associated with that violation. A violator shall be responsible for the cost of the destruction of Cannabis associated with the violation, in addition to any amount covered by a bond required as a condition of licensure. Each day of operation shall constitute a separate violation of this Section.

d. Any person violating any other provision of this Article (or any provision of the Alameda Municipal Code related to Cannabis), including refusing access to inspect the premises under subsection (z) of section 6-59.10 of this Article or knowingly or intentionally misrepresenting any material fact in procuring such required permits (i.e., regulatory permit and use permit), shall be deemed guilty of a misdemeanor punishable by a fine of not less than $250.00 and not more than $1,000.00 for each day (or portion thereof) of the violation or for each individual item constituting the violation (e.g., Cannabis or Cannabis Product), or by imprisonment for not more than 12 months, or by both such fine and imprisonment.

6-59.16 Implementing Regulations

a. The Department shall have the authority to adopt all necessary guidelines, procedures, and regulations to implement the requirements and fulfill the policies and purposes of this Article and any other local ordinance governing Cannabis, including without limitation adding or amending specific conditions imposed on any Cannabis Business.

Section 2: CEQA DETERMINATION

The City Council finds that adoption of this Ordinance is exempt from the California Environmental Quality Act ("CEQA") pursuant to Business and Professions Code section 26055(h) as discretionary review and approval, which shall include any applicable environmental review pursuant to Division 13

(commencing with Section 21000) of the Public Resources Code, shall be required in order to engage in commercial cannabis activity within the City of Alameda under such Ordinance. Adoption of this Ordinance is additionally exempt from CEQA pursuant to section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that the adoption of this Ordinance may have a significant effect on the environment.

Section 3: SEVERABILITY

If any provision of this Ordinance is held by a court of competent jurisdiction to be invalid, this invalidity shall not affect other provisions of this Ordinance that can be given effect without the invalid provision and therefore the provisions of this Ordinance are severable. The City Council declares that it would have enacted each section, subsection, paragraph, subparagraph and sentence notwithstanding the invalidity of any other section, subsection, paragraph, subparagraph or sentence.

Section 4: EFFECTIVE DATE

This Ordinance shall be in full force and effect from and after the expiration of thirty (30) days from the date of its final passage.

_____
Presiding Officer of the City Council

Attest:

_____
Lara Weisiger, City Clerk

I, the undersigned, hereby certify that the foregoing Ordinance was duly and regularly adopted and passed by the Council of the City of Alameda in a regular meeting assembled on the _____, 2018, by the following vote to wit:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said City this

_____, 2018.

_____
Lara Weisiger, City Clerk
City of Alameda

Approved as to form:

_____
Janet C. Kern, City Attorney
City of Alameda

Board and Rent Review Advisory Committee.

11 Adjournment - City Council

• Meeting Rules of Order are available at https://alamedaca.gov/node/5822
• Time frames listed for agenda items are only estimates. Discussions on each item could take more or less time. Anyone interested in speaking is encouraged to arrive early rather than relying on the estimates.
• Translators and sign language interpreters will be available on request. Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 72 hours prior to the meeting to request atranslator or interpreter.
• Equipment for the hearing impaired is available for public use. For assistance, please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 either prior to, or at, the Council meeting.
• Accessible seating for persons with disabilities, including those using wheelchairs, is available.
• Minutes of the meeting available in enlarged print.
• Video tapes of the meeting are available upon request.
• Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 48 hours prior to the meeting to request agenda materials in an alternative format, or any other reasonable accommodation that may be necessary to participate in and enjoy the benefits of the meeting.
• This meeting will be broadcast live on the City's website www.alamedaca.gov/agendas.
• Documents related to this agenda are available for public inspection and copying at of the Office of the City Clerk, 2263 Santa Clara Avenue, Room 380, during normal business hours.
• KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE: Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City of Alameda exist to conduct the citizen of Alameda's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.
• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.
• In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

LARA WEISIGER

From: Serena Chen <serenatchen@gmail.com>
Sent: Wednesday, November 07, 2018 1:56 PM
To: Trish Spencer; Jim Oddie; Frank Matarrese; Malia Vella; Marilyn Ezzy Ashcraft; LARA WEISIGER
Subject: Removal of Item 5 M from consent calendar for public comment

Dear Mayor Spencer and Members of the Council,

I am deeply concerned about the decision to add two full-service recreational marijuana dispensaries to the previously approved two at the Oct. 16th city council meeting. This decision was made after public comment was closed and, in my opinion represented a significant departure from the item as detailed in the staff report which described the proposed dispensaries as Delivery-Only and closed to the public.

From the 10/16/2018 staff report:

> *Conditionally Permit Delivery-Only Dispensaries (closed to the public) in the C-M Zone*
>
> Allowing delivery-only dispensaries as a conditionally permitted use in the C-M district would be consistent with the underlying intent for that zone. The nature of delivery-only dispensaries would be no different than other distribution or warehouse uses that already exist in those locations. With all cannabis businesses, the City has the ability to impose conditions of approval to address potential impacts through the use permit process.

Please remove Item 5M from the Consent Calendar so that the public will have an opportunity to make comment and hear the council's rationale for doubling the number of dispensaries allowed, especially since there has been little interest so far in such businesses wanting to locate in Alameda.

Moreover, I would like clarification as to how the term "youth centers" is being interpreted by staff? I've been informed that 50-100 children and youth are enrolled in classes at the International Chi Institute which is located on Webster next door to the proposed location of a cannabis dispensary. Youth students often comprise over half if not more of all the students studying martial arts.

Why would a martial arts school which holds classes for youth 7 days a week, after school, on weekends, and camps during the summer not be considered a "youth center" as defined in the ordinance (and the state) and thus be covered under the buffer zone (away from dispensaries) as stipulated in the ordinance?

From the ordinance:

> "Youth Centers" means any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities. Youth Centers shall also mean any facility determined by the Alameda Recreation and Parks Department to be a recreation center in a City park.

Thank you for your consideration.

Best Regards,

Serena
Serena Chen

BEFORE THE OPEN GOVERNMENT COMMISSION

OF THE CITY OF ALAMEDA

In re: The Complaint of Serena Chen Serena Chen, Complainant The City of Alameda, Respondent	Case No. 18-02 DECISION OF THE OPEN GOVERNMENT COMMISSSION OF THE CITY OF ALAMEDA

The above entitled matter came on for hearing and a decision by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code. (All further references to Section numbers are to the Alameda Municipal Code.)

Facts

In compliance with the Sunshine Ordinance, the City Clerk on October 4, 2018 published the agenda and supporting materials for the City Council's meeting on October 16, 2018. In relevant part, the title for Agenda item 6-G provided that there would be a public hearing to consider the introduction of an ordinance to amend the Municipal Code in a number of respects concerning cannabis businesses, for example, by adding cannabis retail businesses as conditionally permitted uses in certain zoning districts, by adding two "delivery-only" Cannabis Retail Businesses as a conditionally permitted use in the C-M, Commercial-Manufacturing Zoning

District, eliminating the dispersion requirements for “delivery-only” cannabis businesses. The agenda and supporting documents for this item are attached as Exhibit 1.

The City Council conducted a public hearing on these items on October 16, 2018. During the public hearing, Council resolved to include in the amendments a modification to the amendment allowing two “delivery-only” dispensaries, such that these cannabis businesses would be required to offer delivery of cannabis (“delivery required”) and would also be open to the public, in recognition that the State and local requirements for either (“delivery-only” versus “delivery required”) would be the same. Following the close of the public hearing the City Council introduced on first reading an ordinance amending various sections of the Municipal Code concerning cannabis businesses, including that two “delivery required” dispensaries, which would be open to public, be allowed. In response to a question about whether the ordinance could be introduced that evening with the inclusion of the two “delivery required” dispensaries as conditionally permitted uses, the City Attorney advised yes.

On October 30, 2018, Serena Chen timely filed a Sunshine Ordinance Complaint against the Alameda City Council concerning an alleged violation of a public meeting on October 16, 2018, citing a violation of Section 2-91.5, Agenda Requirements. The complaint states the City Council voted to add two additional cannabis dispensary permits without prior notification. More specifically, the complaint states nowhere in the agenda title or text of the staff report concerning

cannabis businesses was there any mention that the number of "full-service marijuana dispensaries" would be increased.

The complaint cites to Section 2-90.1 of the Municipal Code that provides that one of the goals of the Sunshine Ordinance is to ensure that Alameda residents have the opportunity to address the Council prior to a decision being made. The complaint also cites to Section 2-91.5 of the Municipal Code that provides agenda items are to be contain a meaningful description of each item of business to be transacted and that the description of such items be sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information about the item. A copy of the complaint is attached as Exhibit 2.

In response to the complaint, the City Attorney's Office emailed Ms. Chen that the ordinance addressed in her complaint was not final ("are being amended"), but would be on the Council's November 7, 2018 agenda for "second reading". She was invited to attend and be heard concerning the ordinance amendments, or to submit comments in writing if she could not attend, in addition to being furnished with materials to do so. A copy of that response is attached as Exhibit 3. A copy of the Council's November 7, 2018 agenda and supporting materials is attached as Exhibit 4.

On November 7, 2018, Ms. Chen indicated she would appear at the City Council meeting to address the Council concerning the amendments. After discussion, Council adopted the ordinance as presented in the November 7 agenda.

Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the Open Government Commission, created under the Sunshine Ordinance, hears the complaint and renders a formal written decision. The complainant and the City shall appear at a hearing. During the hearing, the Open Government Commission considers the evidence and the arguments of the parties before making its decision. Section 2-93.2 (b). The Commission conducted the hearing on November 14, 2018 and considered the evidence and arguments of Ms. Chen and the City.

Discussion

One of the goals of the Sunshine Ordinance is that residents have the opportunity to address the City Council prior to decisions being made. Section 2-90.1, AMC. Here, Ms. Chen had, and took (or should have taken), the opportunity on November 7, 2018, to address the City Council about her concerns about the amendments to the cannabis ordinances prior to the City Council making a final decision on the amendments. Accordingly, we find no violation of Section 2-90.1, AMC.

Concerning the agenda title on October 16, 2018, the title included numerous proposed changes to the cannabis ordinances including the possibility of cannabis retail businesses being conditionally permitted in certain zoning districts, increasing the number of cannabis retail businesses and eliminating the dispersion

requirements for certain cannabis businesses. Given the scope of these revisions, a person of average intelligence and education who had concerns about the number or types of cannabis businesses that the Council would consider would have attended the meeting on October 16 or sought more information. More specifically as to Ms. Chen's complaint, the agenda description was meaningful as it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services, and the City Council's action or discussion fell squarely within the ambit of that brief, concise description. In addition, Ms. Chen was offered the opportunity to and did attend the Council meeting on November 7, where she was given an opportunity to provide her concerns, and did do so, about allowing full-service cannabis businesses before the Council took final action on the ordinance amendments. Accordingly, there was no violation of Section 2-91.5, AMC.

Decision

The City Council did not violate Section 2-90.1 or Section 2-91.5 of the Alameda Municipal Code as set forth in Ms. Chen's complaint of October 30, 2018. The complaint, therefore, is determined to be unfounded.

Signatures are on the following page.

Dated: November 14, 2018

Heather Little, Chair

Paul Foreman, Member

Mike Henneberry, Member

Irene Deiter, Member

Bryan Schwartz, Member

Heather Little
OGC, Chair
Sunshine Violation Hearing
November 14, 2018

1. The title of the agenda item highlights several topics to be discussed as part of the entire ordinance review which include:

   a) CC will discuss adding cannabis retail businesses (dispensaries) to identified zones (neighborhood and commercial districts)

   b) that CC will consider the addition of "two delivery-only cannabis retail businesses...", also considered dispensaries.

2. The original regulatory ordinance caps the number of retail dispensaries at two. Staff's recommendation was to maintain the cap of two dispensaries that would be open to the public. The agenda item b) above indicates that CC would be discussing the increasing of this number to a total of 4.

3. The state does not make distinctions between delivery-only and full blown dispensaries. They consider all cannabis retail as dispensaries with the same permitting requirements. They leave it to the local jurisdiction to limit use as they see fit.

3. In the meeting, CC reviewed the aspect of "delivery-only" and opted to modify the ordinance language to add these two additional dispensaries, but to not make them “delivery-only”, choosing to instead make them open to the public but require that they have a delivery service. This brings these two additional businesses into alignment with state regulations on dispensaries.

6. CC indicated that these two additional dispensaries must include a delivery option. The original intent was to cap at two retail and add two delivery only (4 total). In discussion, the total number of cannabis businesses is still 4, but all four are now considered retail, two with a delivery mandate.

7. With the two new dispensaries, as were scheduled to be discussed per the agenda, we will have a total of four permits available.

My thoughts:

- It is impossible to list all possible topics that will come up as part of the conversation during a meeting. It is clear that there was an intent to "add cannabis retail options to specific zones" and to also "add two delivery only retail locations". With the addition of the two new “delivery-only” retail locations, the city would have a total of four retail permits.

- The discussion portion of the staff report, in response to the complaint, states that the agenda included mention of "increasing the number of cannabis retail businesses" but it omits the words "delivery-only".

- I am unclear that the public was made aware that the state does not make a distinction between retail, brick and mortar dispensaries and “delivery only” dispensaries, that the permitting regulations for both are the same and the state allows for local jurisdictions to make

their own land use decisions. But is it staff's job to make sure that the public is aware of every state regulation? I don't think so.

- The circumstances were confusing, and a general person, such as myself, might not know that something defined as a "delivery only" business would carry no distinction in the permitting process from a regular retail businesses (brick and mortar, open to the public).
- The public was notified that the city was considering the addition of two more retail permits, but as the item reflected "delivery-only" might that have played a factor in their decision to attend? If a member of the public had concerns about additional permits being allowed and upping the number of retail opportunities from 2 to 4, were they sufficiently notified?
- Is it the CC's right to amend this language within the October 16th meeting? It appears from historical actions, that this is a right of the CC, to accept staff's recommendations or to make amendments to those recommendations, and voting to accept or decline accordingly.
- In reading the state regulations, there is no such thing as a "delivery-only" permit. This distinction is made within the local jurisdiction, and it seems that our CC chose not to include this language in the ordinance amendment.
- To clarify, the CC opted to not make the two new retail permits "delivery-only" and instead modified the local land use description for the additional two dispensaries to mandate the inclusion of delivery services, but opted against making them delivery only, as was their right.
- The entire situation was very confusing to someone who was not privy to all the various conversations that have taken place.

City of Alameda

Meeting Agenda

Open Government Commission

Monday, December 17, 2018	**7:00 PM**	**City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda, CA 94501**

Note: The Agenda was revised on December 13, 2018 at 11:30 a.m. because Item 3-B was withdrawn without prejudice.

1 ROLL CALL

2 ORAL COMMUNICATIONS, NON-AGENDA (Public Comment)

3 REGULAR AGENDA ITEMS

3-A 2018-6343 Hearing on the Sunshine Ordinance Complaint Filed on October 30, 2018 and the November 14, 2018 Open Government Commission Hearing and Decision, Including Scope of Legal Authority of the Open Government Commission to Impose Certain Penalties under the Sunshine Ordinance and Potential Next Steps.

Attachments: REVISED 3-A Staff Report
Attachment
Correspondence

3-B 2018-6327 [Withdrawn without prejudice] Hearing on Sunshine Ordinance Complaint Filed December 4, 2018

Attachments: Exhibit 1 - Agenda for October 8 Planning Board meeting and Exhibit 3 Public Comments
Exhibit 2 - Sunshine Ordinance Complaint
Exhibit 3 - December 6, 2019 e-mail from C. Chen to R. Graber
Decision
Withdrawl

4 COMMISSION COMMUNICATIONS

5 ADJOURNMENT

****NOTE****

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• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.

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earing on the Sunshine Ordinance Complaint Filed on October 30, 2018 and the November 14, 2018 Open Government Commission Hearing and Decision, Including Scope of Legal Authority of the Open Government Commission to Impose Certain Penalties under the Sunshine Ordinance and Potential Next Steps.

PLEASE SEE ATTACHED REVISED 3-A. STAFF REPORT

To: Honorable Chair Members of the Open Government Commission

From: Michael H. Roush, Interim City Attorney

QUESTION(S)

Whether the Open Government Commission has the legal authority under Section 2-93.8 (Penalties), subsection (a), of the Alameda Municipal Code ("AMC") to order the City Council to renotice the first reading of an ordinance based on a finding that the agenda description violated the City's Sunshine Ordinance?

ANSWER(S)

No. The Open Government Commission ("Commission") does not have the authority to invalidate a final legislative act based on a finding that the agenda description for the first reading violates the City's Sunshine Ordinance by requiring a new first reading of an ordinance, given that the Council has already adopted such an ordinance at a duly noticed regular meeting. To hold otherwise would be inconsistent with the Charter and the organic local statute that created the Commission, in addition to constituting an improper delegation of the Council's authority to legislate locally.

At the outset, this Office recognizes that although this issue may have been avoided if the Commission had had the benefit of this memo at or prior to the hearing on the complaint. That, however, did not occur for various reasons including (a) prior to Ms. Chen's complaint, the Commission had not (to our knowledge) ever heard a complaint that called for the null and void remedy, (b) our Office did not believe (and continues not to believe) that a violation of the Sunshine Ordinance occurred at the Council's October 16 meeting, and (c) the issue demanded a thorough and thoughtful legal analysis which time did not permit. For those reason, we (and I in particular) sincerely apologize.

Accordingly, we are returning this item to the Commission on December 17, requesting that it re-evaluate its decision to ensure that it complies with local law. To that end, we are attaching two draft decisions for the Commission to consider, Attachments A and B. Attachment A is generally the same as the proposed Decision provided to the Commission previously but with updated information as to Background, etc., and finding no violation of the Sunshine Ordinance. Attachment B would track the Commission's earlier decision but, for the reasons set forth herein, would be framed as a recommendation to the City Council. If the Commission adopts Attachment A (with whatever wordsmithing changes it deems necessary), staff intends to place an item on an upcoming Council agenda requesting direction as to proposed amendments to the

Sunshine Ordinance consistent with this memo. If the Commission adopts Attachment B, staff will place an item on an upcoming Council agenda for direction in order to carry out the Commission's decision as well as requesting direction as to proposed amendments to the Sunshine Ordinance consistent with this memo.

BACKGROUND

At its May 18, 2018 goal-setting work session, City Council directed staff to report to Council on a number of issues concerning cannabis regulations. Staff prepared the requested analysis in a semi-annual report for Council consideration at its July 24, 2018 meeting. At that meeting, the Council directed staff to prepare the required ordinances to amend the Zoning Code and the Cannabis Business Regulatory Ordinance.

On October 16, 2018, after a public hearing on the Planning Board's recommendations, the Council introduced two ordinances amending the Cannabis Business Regulatory Ordinance and the Land Use Ordinance (Ordinance Nos. 3227 and 3228, respectively). In relevant part, at that meeting, the Council introduced an ordinance that modified its original direction to staff from including the addition of two "delivery-only" dispensaries (closed to the public) to including the addition of two "delivery-required" dispensaries (open to the public). The Council then voted 3-2 to approve those ordinances for final passage, after these items were removed from the consent calendar to take further public comment, at the Council's regular meeting on November 7, 2018. Those Ordinances are now in effect.

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For the reasons set forth below, we continue to believe that there was no violation of the Sunshine Ordinance concerning the Council's October 16, 2018 agenda concerning the cannabis ordinances. But if the Commission continues to conclude otherwise, we are providing this memo to the Commission on an issue of first impression to clarify the jurisdictional limits of the Commission's legal authority to impose penalties under the City's Sunshine Ordinance.

DISCUSSION

The Commission's decision and order that a Council adopted ordinance is null and void implicate a number of provisions of local law, but in particular, the City's Sunshine

Ordinance, the local organic statute that created and sets forth the duties of the Commission, and the City's Charter.

Sunshine Ordinance

The City adopted the Sunshine Ordinance (Ordinance No. 3036), codified at §§ 2-90 of the Alameda Municipal Code ("AMC") *et seq.*, on November 2, 2011. Under the Sunshine Ordinance, the Commission is the primary regulatory and enforcement body of the Sunshine Ordinance and its various provisions. *See* § 2-93.1 (Primary Regulatory and Enforcement Body).

In relevant part, one such provision, section 2-91.5 (Agenda Requirements; Regular Meetings), requires that the City publish regular meeting agendas twelve (12) days before a regular meeting of the City Council. *See* § 2-91.5(a). Each item of business to be transacted or discussed must contain a "meaningful description". *See id*. A meaningful description is defined to mean one that is clear yet concise:

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The foregoing should be viewed in light of the goal of the Sunshine Ordinance, which is "to ensure that the citizens of Alameda have timely access to information, opportunities to address the various legislative bodies prior to decisions being made, and easy and timely access to all public records". *See* § 2-90.1 (Goal).

The enforcement provisions of the City's Sunshine Ordinance require that any violations of its provisions must be asserted within 15 days of the challenged action. *See* § 2-93.2(a). Upon filing of a complaint, the City must schedule a hearing within 30 days. *See id*. at subsection (b). At the hearing, after taking testimony from the complainant and the City, the Commission is to render a formal written decision on the matter. *Id*.

If the Commission finds a violation of certain provisions of the Sunshine Ordinance, it may impose penalties. At issue in this opinion is the language of Section 2-93.8. That section states that if the Commission finds a violation of section 2-91, it "may order an action of a body null and void and/or may issue an order to correct or cure." *See* 2-93.8 (Penalties), subsection (a). It may also impose a fine on the City. *Id*.

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Under Section 2-22 (Open Government Commission) of the AMC (Ordinance No. 3042, adopted January 4, 2012), the City constituted the Commission by ordinance to "advise the City Council on the administration of the Sunshine Ordinance, and hear and decide complaints of violations of the Sunshine Ordinance." *See* § 2-22.1 (Commission Created; Purpose). The Commission's duties are expressly limited to the following:

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e. From time to time as the Commission sees fit, issue public reports evaluating compliance with the Sunshine Ordinance by the City or any Department, Office, or Official thereof.
f. Consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints;
g. The Commission shall approve by-laws specifying a general schedule for meetings, requirements for attendance by its members, and procedures and criteria for removing members for non-attendance as well as all enforcement petition and complaint procedures. The schedule shall provide for monthly meetings. A meeting shall be canceled if there is no matter pending.
h. The commission will meet at least semi-annually or as needed based on the receipt of an alleged complaint of violation of this ordinance. Members of the Commission shall serve without compensation.

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Under the City Charter, the Council has all powers of the City and all powers vested in city councils, except those powers reserved to the People or delegated to other officers or boards by the Charter. See Article III (City Council), Sec. 3-1.

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final adoption." *See id.*, at Sec. 3-13. All ordinances adopted by the Council (or majority thereof) shall become effective thirty days after "final passage," with exceptions that are not relevant here. *See id.*, at Sec. 3-12. The Charter does not delegate the Council's power to legislate locally, nor is it abridged in any way. Ordinarily, the thirty-day period is reserved for the referendum process (the customary path for challenging an ordinance granted final passage) to conclude.

Council's Action Concerning Cannabis Ordinances

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At the October 16 meeting, prior to introducing the ordinances on first reading, the Council instead replaced the words "delivery only" with "delivery required," which changed the Council's direction in two respects: (1) the two additional dispensaries would be open to the public, but (2) must offer a cannabis delivery service.

Complainant's Complaint

On October 30, Ms. Serena Chen filed a complaint with the Commission alleging a violation of section 2-91.5 (Agenda Requirements; Regular Meetings) of the AMC. In sum, Ms. Chen alleged that the agenda description was inadequate because it led her to believe that she did not need to appear because the Council was considering adding two dispensaries that were closed to the public, not full-service, storefront dispensaries. The City Clerk scheduled the Commission hearing for November 14, 2018, one week after the Council granted final passage to the ordinances at issue here on second reading (November 7, 2018).

November 7, 2018 Regular Council Meeting

Prior to the Commission hearing, the City Attorney's Office emailed Ms. Chen the day she filed her complaint to apprise that she still could address the Council on the cannabis ordinances at the Council's November 7, 2018 meeting. She was informed she had the right to appear and speak publicly or submit written comments in lieu of an appearance. On November 7, 2018, when the Council considered final adoption of the two cannabis ordinances at issue here (Ordinance Nos. 3227 and 3228), two members of the public, including Ms. Chen, offered public comment. Ms. Chen also submitted written comments to the Council on the Ordinances.

Before the Council adopted the two ordinances on second reading, the Council asked staff to address some concerns raised by the public commenters, after which the Council adopted the two cannabis ordinances (Ordinance Nos. 3227 and 3228).

Commission's Deliberation and Decision

On November 14, 2018, the Commission heard Ms. Chen's complaint. After hearing from Ms. Chen and the City, the Commission began deliberation. During deliberation, the Commission was instructed on the applicable law and the implications of finding a violation. The Commission ultimately voted to sustain the complaint and found a violation of the Sunshine Ordinance's provisions that require a meaningful description. The Commission, then, granted-**for the first time**-the null-and-void remedy, by attempting to direct the Council to set aside the granting of final passage of the two ordinances and ordering the Council to renotice the introduction of the two ordinances in question on first reading.

Legal Analysis

The Commission's decision to sustain the complaint was wrongly decided for two principal reasons: (1) the City's agenda title provided a "meaningful description" within the meaning of the Sunshine Ordinance; and (2) even if the Commission disagrees, it does not have legal authority to order a new first reading under the Sunshine Ordinance via the null-and-void remedy because it would amount to an improper delegation of legislative power. A more harmonious reading of the Commission's jurisdictional authority, while giving its decision and order the intended effect, would be for the Commission to *recommend* the Council (a) re-notice the first reading of the two ordinances in question (Ordinance Nos.

3227 and 3228), using the agenda title from the Council's November 7 meeting concerning the item and (b) repeal the two Ordinances in question, in order to give effect to the Commission's decision

1. The City's Description of the Agenda Item Considered by Council Complied with the City's Sunshine Ordinance.

The City's Sunshine Ordinance requires that the City provide members of the public with a meaningful description of an agenda item. As noted above, "meaningful" is defined under the Ordinance to mean sufficiently clear and concise to inform an interested party that they may have a reason to either attend the meeting or request further information.

The City's agenda description concerning the introduction of the cannabis ordinances on first reading met this standard:

> Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District

The City Attorney's Office has opined that, based on the foregoing agenda description, members of the public were informed that the Council would consider a proposal to increase the number of "Cannabis Retail Businesses" by two. The Council was well within its authority to convert the requirement that these businesses be "delivery-only" to "delivery-required". Although the distinction between the two is that the latter is open to the public, whereas the former is not, the State does not recognize such a distinction when the cannabis business in question is issued a permit from the Bureau of Cannabis Control. Moreover, the words "open to the public" or "closed to the public" were not part of the agenda description (although it was part of the agenda report) and Ms. Chen's complaint does not take issue with this omission. This is significant because the Sunshine Ordinance provision in question only governs the agenda description, not the agenda report.

Additionally, Ms. Chen has suffered no real prejudice. She was given an opportunity, and did, speak and submit written comments on the agenda item at issue before the Council took final action, as did another member of the public, at the Council's November 7 meeting.

2. The Commission's Authority to Order Council Action Null and Void is an Impermissible Delegation of Legislative Power.

Leaving aside the issue of whether the City committed a Sunshine Ordinance violation, and assuming one exists, the Commission's authority to order an action of the City Council null and void exceeds the permissible bounds of Council's delegation authority.

A legislative body such as a city council may properly delegate powers to an administrative body such as the Commission if the legislative body retains control over fundamental policy decisions and there are adequate safeguards. This limitation on the

power to delegate legislative authority even extends to quasi-legislative power, including the power to merely suspend law.

To our knowledge, for the first time since the Sunshine Ordinance's adoption, the Commission ordered a first reading of two adopted ordinances null and void. The Commission does not have jurisdiction to annul a final Council, legislative action as such would constitute an impermissible encroachment on the Council's power to repeal or grant final passage of any ordinance.

First, when viewed in context, the Sunshine Ordinance's null-and-void remedy is without precedent. A survey of fourteen local jurisdictions that have adopted "Sunshine" ordinances did not reveal a single local jurisdiction with a null-and-void remedy. One such jurisdiction has clarified that violations of its ordinance ***do not*** invalidate actions to approve ordinances.

Additionally, as applied here, the null and void remedy is at odds with the Brown Act. Under the Brown Act, the null-and-void remedy is available in a civil action, but it is typically a judicial determination reserved for courts of law. Even in that context, there are exceptions to use of this extraordinary remedy. For example, the null-and-void remedy is not appropriate where the City substantially complied with the Brown Act. *See* Government Code § 54960.1(d)(1). Similarly, the null-and-void remedy may not be granted where the action taken is "in connection with the collection of any tax". *See id.*, at subsection (d)(4). However, the Sunshine Ordinance offers no guidelines on the proper granting of, or even limitations on, this extraordinary remedy.

Second, and most significantly, is the null-and-void remedy cannot be applied to the legislative action of a City Council without conflicting with certain provisions of the City's Charter. Under the City's Charter, the Council is vested with all powers of the City and powers vested in city councils. *See* Article III, Sec. 3-1. Chief among these powers is the power to legislate locally. To be sure, the Council also has the authority to vest in officers or boards "powers and duties additional to those set forth in the Charter." *See id*., at Sec. 3-3. However, use of the null-and-void remedy to effectively repeal an ordinance contravenes the Charter's provisions related to local lawmaking. Nowhere in the Charter is a subordinate body delegated the power to halt ordinances granted final passage by the Council. Built into the local legislative process, and enshrined in the Charter, is the ability of members of the public to be heard, no fewer than two times at two different open and public meetings. Separate and apart from this process, under State Elections Law, anyone may challenge an ordinance granted final passage by referendum, but must do so in accordance with applicable law, including garnering the requisite number of signatures. Unless cabined in some way, the null-and-void remedy is arguably an end-run around that process as well.

Third, the null-and-void remedy contradicts the local organic statute that formed the Commission and governs its continued existence. Although the Commission has the authority to hear and decide Sunshine Complaints (§ 2-22.4(a) of the AMC), it is also tasked with considering ways to informally resolve these disputes and to make

recommendations to the Council concerning them (§ 2-22.4(f) of the AMC). At a minimum, the Sunshine Ordinance lacks guidelines for assisting the Commission to decide whether to make a recommendation or use the extraordinary null-and-void remedy; indeed, the Commission's express duty to make recommendations concerning complaints under § 2-22.4(f) of the AMC contradicts their putative authorization to independently order actions of the Council null and void.

Fourth, and finally, the null-and-void remedy is an improper delegation of quasi-legislative power under common law because it gives the Commission the power to suspend (or effectively nullify) local law, a power that if left unchecked remains limitless and unbounded. It would apply even if the Council substantially complied with the noticing provisions that are applicable here, but most problematic, however, is it would even apply if the City had committed a mere technical violation. For example, if the City had failed to append an exhibit mentioned in an agenda report (see § 2-91.5(e)), the Commission could render null and void the Council's action to adopt an ordinance discussed by that agenda report. This is true not only because the null-and-void remedy applies to any violation of section 2-91.5 of the AMC, but because the Sunshine Ordinance does not contain any safeguards or limitations on this extraordinary remedy.

RECOMMENDATION

We continue to recommend that the Commission find no violation of the Sunshine Ordinance and adopt the decision referenced as Attachment A.

If the Commission concludes otherwise, the appropriate course of action would be for the Commission's decision and order be written as set forth in Attachment B. The outcome of Attachment B gives effect to Commission's conclusion but imposes a remedy harmonious with its jurisdiction and the Council's authority under the Charter. That is, the Commission's decision and order would be to *recommend* that (a) the Council consider re-introducing the two ordinances following a noticed public hearing, which would allow members of the public another opportunity to be heard on the ordinances, (b) the agenda title for these items track the agenda title that appeared on the Council's November 7 agenda concerning the items because that agenda title satisfied Sections 2-90.1 and 2-91.5, and (c) Ordinances Nos. 3227 and 3228 be repealed, even though if the ordinances were re-introduced and subsequently adopted, there would be no substantive change to either Ordinance. The Commission's recommendation, if followed, would therefore allow members of the public to be heard but would also carry out the intent of the Commission that the ordinances in question be repealed.

We look forward to discussing this item with the Commission on December 17.

Footnotes:

[1] The only exception is not relevant here: an urgency ordinance. *See id.*, at Sec. 3-12.

[2] For instance, if the Council takes no action following the Commission's decision, the cannabis ordinances adopted by the Council at its regular meeting on November 7, 2018 would not take effect under the Commission's reading of the null-and-void remedy.

REVISED 3-A STAFF REPORT #2018-6343

To: Honorable Chair
Members of the Open Government Commission

From: Michael H. Roush
Interim City Attorney

Date: December 10, 2018

QUESTION(S)

Whether the Open Government Commission has the legal authority under Section 2-93.8 (Penalties), subsection (a), of the Alameda Municipal Code ("AMC") to order the City Council to renotice the first reading of an ordinance based on a finding that the agenda description violated the City's Sunshine Ordinance?

ANSWER(S)

No. The Open Government Commission ("Commission") does not have the authority to invalidate a final legislative act based on a finding that the agenda description for the first reading violates the City's Sunshine Ordinance by requiring a new first reading of an ordinance, given that the Council has already adopted such an ordinance at a duly noticed regular meeting. To hold otherwise would be inconsistent with the Charter and the organic local statute that created the Commission, in addition to constituting an improper delegation of the Council's authority to legislate locally.

At the outset, this Office recognizes that although this issue may have been avoided if the Commission had had the benefit of this memo at or prior to the hearing on the complaint. That, however, did not occur for various reasons including (a) prior to Ms. Chen's complaint, the Commission had not (to our knowledge) ever heard a complaint that called for the null and void remedy, (b) our Office did not believe (and continues not to believe) that a violation of the Sunshine Ordinance occurred at the Council's October 16 meeting, and (c) the issue demanded a thorough and thoughtful legal analysis which time did not permit. For those reason, we (and I in particular) sincerely apologize.

Accordingly, we are returning this item to the Commission on December 17, requesting that it re-evaluate its decision to ensure that it complies with local law. To that end, we are attaching two draft decisions for the Commission to consider, Attachments A and B. Attachment A is generally the same as the proposed Decision provided to the Commission previously but with updated information as to Background, etc., and finding no violation of the Sunshine Ordinance. Attachment B would track the Commission's earlier decision but, for the reasons set forth herein, would be framed as a recommendation to the City Council. If the Commission adopts Attachment A (with whatever wordsmithing changes it deems necessary), staff intends to place an item on an upcoming Council agenda requesting direction as to proposed amendments to the Sunshine Ordinance consistent with this memo. If the Commission adopts Attachment B, staff will place an item on an upcoming Council agenda for direction in order to carry

out the Commission's decision as well as requesting direction as to proposed amendments to the Sunshine Ordinance consistent with this memo.

BACKGROUND

At its May 18, 2018 goal-setting work session, City Council directed staff to report to Council on a number of issues concerning cannabis regulations. Staff prepared the requested analysis in a semi-annual report for Council consideration at its July 24, 2018 meeting. At that meeting, the Council directed staff to prepare the required ordinances to amend the Zoning Code and the Cannabis Business Regulatory Ordinance.

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On October 30, Ms. Serena Chen filed a complaint with the Commission alleging a violation of section 2-91.5 (Agenda Requirements; Regular Meetings) of the AMC. In sum, Ms. Chen alleged that the agenda description was inadequate because it led her to believe that she did not need to appear because the Council was considering adding two dispensaries that were closed to the public, not full-service, storefront dispensaries. The City Clerk scheduled the Commission hearing for November 14, 2018, one week after the Council granted final passage to the ordinances at issue here on second reading (November 7, 2018).

November 7, 2018 Regular Council Meeting

Prior to the Commission hearing, the City Attorney's Office emailed Ms. Chen the day she filed her complaint to apprise that she still could address the Council on the cannabis ordinances at the Council's November 7, 2018 meeting. She was informed she had the right to appear and speak publicly or submit written comments in lieu of an appearance. On November 7, 2018, when the Council considered final adoption of the two cannabis ordinances at issue here (Ordinance Nos. 3227 and 3228), two members of the public, including Ms. Chen, offered public comment. Ms. Chen also submitted written comments to the Council on the Ordinances.

Before the Council adopted the two ordinances on second reading, the Council asked staff to address some concerns raised by the public commenters, after which the Council adopted the two cannabis ordinances (Ordinance Nos. 3227 and 3228).

Commission's Deliberation and Decision

On November 14, 2018, the Commission heard Ms. Chen's complaint. After hearing from Ms. Chen and the City, the Commission began deliberation. During deliberation, the Commission was instructed on the applicable law and the implications of finding a violation. The Commission ultimately voted to sustain the complaint and found a violation of the Sunshine Ordinance's provisions that require a meaningful description. The Commission, then, granted—**for the first time**—the null-and-void remedy, by attempting to direct the Council to set aside the granting of final passage of the two ordinances and ordering the Council to renotice the introduction of the two ordinances in question on first reading.

Legal Analysis

The Commission's decision to sustain the complaint was wrongly decided for two principal reasons: (1) the City's agenda title provided a "meaningful description" within the meaning of the Sunshine Ordinance; and (2) even if the Commission disagrees, it does not have legal authority to order a new first reading under the Sunshine Ordinance via the null-and-void remedy because it would amount to an improper delegation of legislative power. A more harmonious reading of the Commission's jurisdictional authority, while giving its decision and order the intended effect, would be for the

Commission to *recommend* the Council (a) re-notice the first reading of the two ordinances in question (Ordinance Nos. 3227 and 3228), using the agenda title from the Council's November 7 meeting concerning the item and (b) repeal the two Ordinances in question, in order to give effect to the Commission's decision..

1. **The City's Description of the Agenda Item Considered by Council Complied with the City's Sunshine Ordinance.**

The City's Sunshine Ordinance requires that the City provide members of the public with a meaningful description of an agenda item. As noted above, "meaningful" is defined under the Ordinance to mean sufficiently clear and concise to inform an interested party that they may have a reason to either attend the meeting or request further information.

The City's agenda description concerning the introduction of the cannabis ordinances on first reading met this standard:

> Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District

The City Attorney's Office has opined that, based on the foregoing agenda description, members of the public were informed that the Council would consider a proposal to increase the number of "Cannabis Retail Businesses" by two. The Council was well within its authority to convert the requirement that these businesses be "delivery-only" to "delivery-required". Although the distinction between the two is that the latter is open to the public, whereas the former is not, the State does not recognize such a distinction when the cannabis business in question is issued a permit from the Bureau of Cannabis Control. Moreover, the words "open to the public" or "closed to the public" were not part of the agenda description (although it was part of the agenda report) and Ms. Chen's complaint does not take issue with this omission. This is significant because the Sunshine Ordinance provision in question only governs the agenda description, not the agenda report.

Additionally, Ms. Chen has suffered no real prejudice. She was given an opportunity, and did, speak and submit written comments on the agenda item at issue before the Council took final action, as did another member of the public, at the Council's November 7 meeting.

2. **The Commission's Authority to Order Council Action Null and Void is an Impermissible Delegation of Legislative Power.**

Leaving aside the issue of whether the City committed a Sunshine Ordinance violation, and assuming one exists, the Commission's authority to order an action of the City Council null and void exceeds the permissible bounds of Council's delegation authority.

A legislative body such as a city council may properly delegate powers to an administrative body such as the Commission if the legislative body retains control over fundamental policy decisions and there are adequate safeguards. This limitation on the power to delegate legislative authority even extends to quasi-legislative power, including the power to merely suspend law.

To our knowledge, for the first time since the Sunshine Ordinance's adoption, the Commission ordered a first reading of two adopted ordinances null and void. The Commission does not have jurisdiction to annul a final Council, legislative action as such would constitute an impermissible encroachment on the Council's power to repeal or grant final passage of any ordinance.
First, when viewed in context, the Sunshine Ordinance's null-and-void remedy is without precedent. A survey of fourteen local jurisdictions that have adopted "Sunshine" ordinances did not reveal a single local jurisdiction with a null-and-void remedy. One such jurisdiction has clarified that violations of its ordinance ***do not*** invalidate actions to approve ordinances.

Additionally, as applied here, the null and void remedy is at odds with the Brown Act. Under the Brown Act, the null-and-void remedy is available in a civil action, but it is typically a judicial determination reserved for courts of law. Even in that context, there are exceptions to use of this extraordinary remedy. For example, the null-and-void remedy is not appropriate where the City substantially complied with the Brown Act. *See* Government Code § 54960.1(d)(1). Similarly, the null-and-void remedy may not be granted where the action taken is "in connection with the collection of any tax". *See id.*, at subsection (d)(4). However, the Sunshine Ordinance offers no guidelines on the proper granting of, or even limitations on, this extraordinary remedy.

Second, and most significantly, is the null-and-void remedy cannot be applied to the legislative action of a City Council without conflicting with certain provisions of the City's Charter. Under the City's Charter, the Council is vested with all powers of the City and powers vested in city councils. *See* Article III, Sec. 3-1. Chief among these powers is the power to legislate locally. To be sure, the Council also has the authority to vest in officers or boards "powers and duties additional to those set forth in the Charter." *See id*., at Sec. 3-3. However, use of the null-and-void remedy to effectively repeal an ordinance contravenes the Charter's provisions related to local lawmaking. Nowhere in the Charter is a subordinate body delegated the power to halt ordinances granted final passage by the Council. Built into the local legislative process, and enshrined in the Charter, is the ability of members of the public to be heard, no fewer than two times at two different open and public meetings. Separate and apart from this process, under State Elections Law, anyone may challenge an ordinance granted final passage by referendum, but must do so in accordance with applicable law, including garnering the requisite number of signatures. Unless cabined in some way, the null-and-void remedy is arguably an end-run around that process as well.

Third, the null-and-void remedy contradicts the local organic statute that formed the Commission and governs its continued existence. Although the Commission has the

authority to hear and decide Sunshine Complaints (§ 2-22.4(a) of the AMC), it is also tasked with considering ways to informally resolve these disputes and to make recommendations to the Council concerning them (§ 2-22.4(f) of the AMC). At a minimum, the Sunshine Ordinance lacks guidelines for assisting the Commission to decide whether to make a recommendation or use the extraordinary null-and-void remedy; indeed, the Commission's express duty to make recommendations concerning complaints under § 2-22.4(f) of the AMC contradicts their putative authorization to independently order actions of the Council null and void.

Fourth, and finally, the null-and-void remedy is an improper delegation of quasi-legislative power under common law because it gives the Commission the power to suspend (or effectively nullify[2]) local law, a power that if left unchecked remains limitless and unbounded. It would apply even if the Council substantially complied with the noticing provisions that are applicable here, but most problematic, however, is it would even apply if the City had committed a mere technical violation. For example, if the City had failed to append an exhibit mentioned in an agenda report (see § 2-91.5(e)), the Commission could render null and void the Council's action to adopt an ordinance discussed by that agenda report. This is true not only because the null-and-void remedy applies to any violation of section 2-91.5 of the AMC, but because the Sunshine Ordinance does not contain any safeguards or limitations on this extraordinary remedy.

RECOMMENDATION

We continue to recommend that the Commission find no violation of the Sunshine Ordinance and adopt the decision referenced as Attachment A.

If the Commission concludes otherwise, the appropriate course of action would be for the Commission's decision and order be written as set forth in Attachment B. The outcome of Attachment B gives effect to Commission's conclusion but imposes a remedy harmonious with its jurisdiction and the Council's authority under the Charter. That is, the Commission's decision and order would be to *recommend* that (a) the Council consider re-introducing the two ordinances following a noticed public hearing, which would allow members of the public another opportunity to be heard on the ordinances, (b) the agenda title for these items track the agenda title that appeared on the Council's November 7 agenda concerning the items because that agenda title satisfied Sections 2-90.1 and 2-91.5, and (c) Ordinances Nos. 3227 and 3228 be repealed, even though if the ordinances were re-introduced and subsequently adopted, there would be no substantive change to either Ordinance. The Commission's recommendation, if followed, would therefore allow members of the public to be heard but would also carry out the intent of the Commission that the ordinances in question be repealed.

We look forward to discussing this item with the Commission on December 17.

[2] For instance, if the Council takes no action following the Commission's decision, the cannabis ordinances adopted by the Council at its regular meeting on November 7, 2018 would not take effect under the Commission's reading of the null-and-void remedy.

BEFORE THE OPEN GOVERNMENT COMMISSION

OF THE CITY OF ALAMEDA

In re: The Complaint of Serena Chen Serena Chen, Complainant The City of Alameda, Respondent	Case No. 18-02 DECISION OF THE OPEN GOVERNMENT COMMISSSION OF THE CITY OF ALAMEDA

Originally, the above entitled matter came on for hearing by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code, at which time the Commission rendered a decision to sustain the complaint. (All further references to Section numbers are to the Alameda Municipal Code.) At the request of the City Attorney's Office, the Commission held a special meeting on December 17, 2018 to consider a memorandum from the City Attorney's Office and to provide the parties an opportunity to respond.

Facts

In compliance with the Sunshine Ordinance, the City Clerk on October 4, 2018 published the agenda and supporting materials for the City Council's meeting on October 16, 2018. In relevant part, the title for Agenda item 6-G provided that there

ATTACHMENT A

would be a public hearing to consider the introduction of an ordinance to amend the Municipal Code in a number of respects concerning cannabis businesses, for example, by adding cannabis retail businesses as conditionally permitted uses in certain zoning districts, by adding two "delivery-only" Cannabis Retail Businesses as a conditionally permitted use in the C-M, Commercial-Manufacturing Zoning District, eliminating the dispersion requirements for "delivery-only" cannabis businesses. The agenda is attached as Exhibit 1.

The City Council conducted a public hearing on these items on October 16, 2018. During the public hearing, Council resolved to include in the amendments a modification to the amendment allowing two "delivery-only" dispensaries, such that these cannabis businesses would be required to offer delivery of cannabis ("delivery required") and would also be open to the public, in recognition that the State and local requirements for either ("delivery-only" versus "delivery required") would be the same. Following the close of the public hearing the City Council introduced on first reading an ordinance amending various sections of the Municipal Code concerning cannabis businesses, including that two "delivery required" dispensaries, which would be open to public, be allowed. In response to a question about whether the ordinance could be introduced that evening with the inclusion of the two "delivery required" dispensaries as conditionally permitted uses, the City Attorney advised yes.

On October 30, 2018, Serena Chen timely filed a Sunshine Ordinance Complaint against the Alameda City Council concerning an alleged violation of a public meeting on October 16, 2018, citing a violation of Section 2-91.5, Agenda Requirements. The complaint states the City Council voted to add two additional

cannabis dispensary permits without prior notification. More specifically, the complaint states nowhere in the agenda title or text of the staff report concerning cannabis businesses was there any mention that the number of "full-service marijuana dispensaries" would be increased.

The complaint cites to Section 2-90.1 of the Municipal Code that provides that one of the goals of the Sunshine Ordinance is to ensure that Alameda residents have the opportunity to address the Council prior to a decision being made. The complaint also cites to Section 2-91.5 of the Municipal Code that provides agenda items are to be contain a meaningful description of each item of business to be transacted and that the description of such items be sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information about the item. A copy of the complaint is attached as Exhibit 2.

In response to the complaint, the City Attorney's Office emailed Ms. Chen that the ordinance addressed in her complaint was not final ("are being amended"),but would be on the Council's November 7, 2018 agenda for "second reading". She was invited to attend and be heard concerning the ordinance amendments, or to submit comments in writing if she could not attend, in addition to being furnished with materials to do so. A copy of the Council's November 7, 2018 agenda is attached as Exhibit 3.

On November 7, 2018, Ms. Chen appeared, as did other members of the public, at the City Council meeting to address the Council concerning the amendments, in addition to emailing written comments prior to the meeting.

After discussion, Council adopted the ordinance as presented in the November 7 agenda.

On November 14, 2018, the Commission conducted a hearing on the complaint. After hearing from the complainant and the City, the Commission sustained the complaint and, as provided in the Penalty section of the Sunshine Ordinance, ordered that the Ordinances in question were null and void.

Thereafter, the City Attorney's Office provided a legal memorandum to the Commission that set forth in more detail why there had not been a violation of the Sunshine Ordinance but, assuming there was a violation, that the Commission did not have the legal authority to render Ordinances adopted by the City Council as null and void. Rather, if the Commission continued to conclude that there had been a violation of the Sunshine Ordinance, it should recommend to the City Council that Ordinances be considered for re-introduction following a public hearing and that the adopted Ordinances be repealed.

At the request of the City Attorney's Office, the complaint was returned to the Commission on December 17. 2018 for further consideration in light of the City Attorney's memorandum.

Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the Open Government Commission, created under the Sunshine Ordinance, hears the complaint and renders a formal written decision. The complainant and the City

shall appear at a hearing. During the hearing, the Open Government Commission considers the evidence and the arguments of the parties before making its decision. Section 2-93.2 (b). The Commission conducted the hearing on November 14, 2018 and considered the evidence and arguments of Ms. Chen and the City. The Commission conducted a further hearing on the complaint for the limited purpose of providing the parties an opportunity to respond to the legal memorandum

Discussion

One of the goals of the Sunshine Ordinance is that residents have the opportunity to address the City Council prior to decisions being made. Section 2-90.1, AMC. Here, the agenda description was meaningful in that it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services. Moreover, Ms. Chen had, and took, the opportunity on November 7, 2018, to address the City Council about her concerns about the amendments to the cannabis ordinances prior to the City Council making a final decision on the amendments. Accordingly, the Commission finds no violation of Section 2-90.1, AMC.

Concerning the agenda title on October 16, 2018, the title included numerous proposed changes to the cannabis ordinances including the possibility of cannabis retail businesses being conditionally permitted in certain zoning districts, increasing the number of cannabis retail businesses and eliminating the dispersion requirements for certain cannabis businesses. Given the scope of these revisions, a person of average intelligence and education who had concerns about the number or types of cannabis businesses that the Council would consider would

have attended the meeting on October 16 or sought more information. More specifically as to Ms. Chen's complaint, the agenda description was meaningful as it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services, and the City Council's action or discussion fell squarely within the ambit of that brief, concise description. In addition, Ms. Chen was offered the opportunity to and did attend the Council meeting on November 7, where she was given an opportunity to provide her concerns, and did do so, about allowing full-service cannabis businesses before the Council took final action on the ordinance amendments. Accordingly, there was no violation of Section 2-91.5, AMC.

Decision

There was no violation of Section 2-90.1 or Section 2-91.5 of the Alameda Municipal Code as set forth in Ms. Chen's complaint of October 30, 2018. The complaint, therefore, is determined to be unfounded.

Signatures are on the following page.

Dated: December 17, 2018

Heather Little, Chair

Paul Foreman, Member

Mike Henneberry, Member

Irene Deiter, Member

Bryan Schwartz, Member

City of Alameda

Meeting Agenda

City Council

Tuesday, October 16, 2018 | 7:00 PM | City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501

REVISED on 10/8/2018 at 4:30 p.m. to correct the title of Item 6-D.

SPECIAL MEETING - CLOSED SESSION - 5:00 P.M.

1 **Roll Call - City Council**

2 **Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item**

3 **Adjournment to Closed Session to consider:**

3-A 2018-6030 (45 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: Acting/Interim City Attorney and City Attorney

3-B 2018-6031 (10 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Manager

3-C 2018-6029 (20 minutes) CONFERENCE WITH LABOR NEGOTIATORS (Government Code section 54957.6)
CITY NEGOTIATORS: David L. Rudat, Interim City Manager, Elizabeth D. Warmerdam, Assistant City Manager and Nancy Bronstein, Human Resources Director
EMPLOYEE ORGANIZATIONS: International Brotherhood of Electrical Workers, Local 1245 (IBEW), Electric Utility Professional Association of Alameda (EUPA), Alameda City Employees Association (ACEA), Alameda Police Officers Association Non-Sworn Unit (PANS), and Alameda Management and Confidential Employees Association (MCEA)
UNDER NEGOTIATION: Salaries and Terms of Employment

3-D 2018-6074 (20 minutes) CONFERENCE WITH REAL PROPERTY NEGOTIATORS (Government Code section 54956.8)
PROPERTY: Northwest Territories, Alameda Point
CITY NEGOTIATOR: David L. Rudat, Interim City Manager
POTENTIAL TENANT: East Bay Regional Park District

EXHIBIT 9

ISSUE UNDER NEGOTIATION: Real Property Negotiations Price and Terms of Payment

4 **Announcement of Action Taken in Closed Session, if any**

2018-6108 October 16, 2018 Closed Session Announcement

Attachments: Announcement

5 **Adjournment - City Council**

SPECIAL CITY COUNCIL MEETING - 6:45 P.M.

Pledge of Allegiance

1 **Roll Call - City Council**

2 **Proclamations**

2-A 2018-5259 (5 minutes) Proclamation Declaring October, 2018 as Childhood Lead Poisoning Prevention Week and Code Enforcement Officer Appreciation Week. (City Manager 2110)

2-B 2018-6075 (5 minutes) Proclamation Declaring October 2018 as Filipino American History Month. (City Manager 2110)

2-C 2018-5261 (5 minutes) Proclamation Declaring October 21-27, 2018 as Friends of the Alameda Free Library Appreciation Week. (City Manager 2110)

3 **Adjournment - City Council**

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

1 **Roll Call - City Council**

2 **Agenda Changes**

3 **Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes**

3-A 2018-5695 (5 minutes) Proclamation Declaring October 2018 as Italian American History Month. (City Manager 2110)

4 **Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8**

5 Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public

5-A 2018-6077 Minutes of the Special and Regular City Council Meetings Held on September 18, 2018. (City Clerk)

5-B 2018-6078 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2018-5975 Recommendation to Receive a Report on the Continuation of the Art in City Hall Program. (City Manager 2110)

Attachments: Exhibit 1 - 2019 Guidelines

5-D 2018-5986 Recommendation to Approve the Request for Qualifications (RFQ) to Reuse the Alameda Carnegie Building. (Economic Development 227)

Attachments: Exhibit 1 - 2007 Master Plan Report
Exhibit 2 - Draft RFQ

5-E 2018-5984 Recommendation to Award a Contract to Oregon Romtec Inc. in the Amount of $970,613 for the Krusi Park Recreation Center Replacement Project. (Recreation and Park 280)

Attachments: Exhibit 1 - Contract
Correspondence

5-F 2018-5994 Recommendation to Authorize the Interim City Manager to Execute a Second Amendment to the Agreement with Nute Engineering, to Extend the Term One Year and Increase Compensation in an Amount Not to Exceed $394,390 for a Total Agreement Compensation Not to Exceed $727,459 for Engineering Design Services for Cyclic Sewer Rehabilitation Project, Phase 16. (Public Works 602)

Attachments: Exhibit 1 - Original Agreement
Exhibit 2 - First Amendment
Exhibit 3 - Second Amendment

5-G 2018-5985 Adoption of Resolution Amending the General Fund and the Capital Improvement Program Budget for Fiscal Year 2018-19 for the Jean Sweeney Open Space Park Project to Fund Immediate Possession of Four Remnant Parcels Totaling Approximately 2.8 Acres Owned by Union Pacific; and

Recommendation to Direct the City Attorney to Deposit the Sum of $1,098,000 with the Condemnation Deposits Fund and Seek an Order for Prejudgment Possession of the Subject Property. (Recreation and Parks 310)

Attachments: Exhibit 1 - Map of Remnant Parcels
Resolution

5-H 2018-5988 Recommendation to Expand the Façade Grant Program Boundaries; and

Adoption of Resolution Amending the Fiscal Year 2018-19 Base Reuse Fund Budget to Appropriate $50,000 for the Façade Grant Program. (Base Reuse 858)

Attachments: Resolution

5-I 2018-5992 Adoption of a Resolution Authorizing the Interim City Manager to Enter into a Joint Exercise of Powers Agreement (JPA) Establishing and Governing Operation of the Collection System Technical Advisory Committee, and a Defendant's Side Agreement to Facilitate the Environmental Protection Agency Sewer Consent Decree Compliance. (Public Works 602)

Attachments: Exhibit 1 - 1979 JPA
Exhibit 2 - 1986 JPA
Exhibit 3 - New JPA
Exhibi 4 - Side Agreement
Resolution

5-J 2018-5974 Adoption of Resolution Opposing Proposition 6 on the November 2018 Ballot, which would Repeal the Recent Gas Tax Increase and Eliminate $15 Million in Transportation Funding for Alameda. (City Manager 2110)

Attachments: Exhibit 1 - Impacts of Proposition 6
Resolution

5-K 2018-6041 Adoption of Resolution Supporting Proposition 2 on the November 2018 Ballot, which would Authorize the State of California to Use Revenue from Previously Authorized Bonds to Fund Existing Housing Programs for Individuals with Mental Illness. (City Manager 2110)

Attachments: Resolution

5-L 2018-6073 Final Passage of Ordinance Amending the Alameda Municipal Code By Adding Article 4-60 (Minimum Wage) to Chapter IX (Regulations Concerning Trade and Commerce) Concerning A Citywide Minimum Wage to Raise Alameda's Minimum Wage to $15.00 Per Hour by 2020.

6 Regular Agenda Items

6-A 2018-6009 (5 minutes) Adoption of Resolutions Appointing Rona Rothenberg as a Member of the Planning Board and Reappointing Audrey Hyman as a Member of the Social Service Human Relations Board.

6-B 2018-5910 (15 minutes) Presentation by Friends of the Alameda Animal Shelter (FAAS) - Annual Progress Report. (City Manager 2110)

Attachments: Exhibit 1 - Annual Report
Exhibit 1 - REVISED Annual Report
Exhibit 2 - 4th Quarter Report
Exhibit 3 - Mid-Year Report
Exhibit 4 - Leash Your Dog Flyer
Exhibit 5 - FAAS Staffing
Exhibit 6 - Agreement

6-C 2018-6038 (30 minutes) Recommendation to Accept Informational Report on Activities, Quarterly Meetings and Issues Related to the Oakland International Airport. (Community Development 481005)

Attachments: Presentation

6-D 2018-6035 (15 minutes) Introduction of Ordinance Authorizing the Interim City Manager to Execute Documents Necessary to Implement a Ten-Year Lease with SpinLaunch Inc., a California Corporation, for Building 530, Located at 120 West Oriskany Avenue at Alameda Point. (Base Reuse 819099)

Attachments: Exhibit 1 - Premises
Exhibit 2 - Draft Form Lease
Ordinance

6-E 2018-6007 (20 minutes) SUMMARY: Public Hearing to Facilitate a Tax-Exempt Bond Financing for Acquisition, Construction, Improvement, and Equipping of the Site A Affordable Family and Senior Projects by Eden Housing

Public Hearing Under the Tax Equity and Fiscal Responsibility Act (TEFRA) to Consider Adoption of Resolution Approving the Issuance of Revenue Bonds by the California Municipal Finance Authority in an Aggregate Principal Amount Not to Exceed $45,000,000 to Finance a 70-Unit Multifamily Rental Housing Facility for Low- and Very Low-Income Families for the Benefit of Eden Housing Inc., or a Limited Partnership to be Established by Eden Housing Inc. (or an Affiliate); and

Adoption of Resolution Approving the Issuance of Revenue Bonds by the California Municipal Finance Authority in an Aggregate Principal Amount Not to Exceed $40,000,000 to Finance a 60-Unit Multifamily Rental Housing Facility for Low- and Very Low-Income Seniors for the

Benefit of Eden Housing Inc., or a Limited Partnership to be Established by Eden Housing Inc. (or an Affiliate). These Revenue Bonds will provide for the financing of the Site A Affordable Family and Senior Projects. (Base Reuse 819099)

Attachments: Exhibit 1 - Project Funding Sources
Resolution - Family Housing Site A
Resolution - Senior Housing Site A

6-F 2018-6032 (15 minutes) Public Hearing to Consider Adoption of Resolution Calling a Special Election Regarding Alteration of the Rate and Method of Apportionment of Special Taxes for Community Facilities District No. 17-1 (Alameda Point Public Services District); and

Adoption of Resolution Amending the Fiscal Year 2018-19 Budget for the Community Facilities District 17-1 Fund by Increasing Estimated Revenue by $174,051 and Increasing the Expenditure Budget by $35,000. (Base Reuse 819099)

Attachments: Resolution - Special Election
Resolution - Budget

6-G 2018-6060 (60 minutes) Adoption of Resolution Amending Master Fee Resolution No. 12191 to Revise Fees to Add New Cannabis Business Operator and Regulatory Fees;

Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis; and (4) Amend Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses;

Introduction of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions; and

Recommendation to Confirm Continued Use of Request for Proposal (RFP) Process to Administer Cannabis Retail Dispensary Business Operators' Permit Selection Process. (Economic Development)

Attachments: Exhibit 1 - Fee Study
Exhibit 2 - Map of Zones
Exhibit 3 - Letter
Resolution
Ordinance -Cannabis
Ordinance -Cannabis Businesses
Correspondence - Updated 10-16
Presentation

6-H 2018-5990 (20 minutes) Recommendation to Accept $1,876,823 Grant from the Staffing for Adequate Fire and Emergency Response (SAFER) Program; and

Adoption of Resolution Amending the Fiscal Year 2018-19 Fire Grants Fund Revenue and Expenditures Budget by $3,043,494, Each, and the General Fund Expenditures Budget by $1,166,671 to Allocate the Required Matching Funds per the Grant Requirement. (Fire 220)

Attachments: Exhibit 1 - Award Package
Resolution

7 City Manager Communications - Communications from City Manager

8 Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda

9 Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item

10 Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings

10-A 2018-6076 Consideration of Mayor's Nomination for Appointment to the Lirbary Board, Planning Board and Social Service Human Relations Board.

11 Adjournment - City Council

• Meeting Rules of Order are available at https://alamedaca.gov/node/5822
• Time frames listed for agenda items are only estimates. Discussions on each item could take more or less time. Anyone interested in speaking is encouraged to arrive early rather than relying on the estimates.
• Translators and sign language interpreters will be available on request. Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 72 hours prior to the meeting to request atranslator or interpreter.
• Equipment for the hearing impaired is available for public use. For assistance, please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 either prior to, or at, the Council meeting.
• Accessible seating for persons with disabilities, including those using wheelchairs, is available.
• Minutes of the meeting available in enlarged print.
• Video tapes of the meeting are available upon request.
• Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 48 hours prior to the meeting to request agenda materials in an alternative format, or any other reasonable accommodation that may be necessary to participate in and enjoy the benefits of the meeting.
• This meeting will be broadcast live on the City's website www.alamedaca.gov/agendas.
• Documents related to this agenda are available for public inspection and copying at of the Office of the City Clerk, 2263 Santa Clara Avenue, Room 380, during normal business hours.
• KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE: Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City of Alameda exist to conduct the citizen of Alameda's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.
• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.
• In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

Ex. 2

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

City of Alameda

OPEN GOVERNMENT COMMISSION
2263 Santa Clara Avenue, Suite 380
Alameda, CA 94501
(510) 747-4800

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission: City Council

Name of individual contacted at Department or Commission:

☐ Alleged violation of public records access.
☒ Alleged violation of public meeting. Date of meeting: 10/16/2018

Sunshine Ordinance Section: 2-91.5 Agenda Requirements
(If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach all relevant documentation supporting your complaint. Documentation is required.
City Council voted to add 2 additional cannabis dispensary permits without prior nAtification

A complaint must be filed no more than fifteen (15) days after an alleged violation of the Sunshine Ordinance.

Name: Serena Chen Address: 931 Independence

Telephone No: (510) 435-5889 E-mail Address: serenatchen@gmail.com

Date: 10/30/2018 Signature

EXHIBIT 2

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

On Oct. 16, 2018, the city council voted 3-2 to amend section 30-10 (Cannabis) to revise and add fees. See below for published agenda item title and description. Video of council meeting.

> Title Adoption of Resolution Amending Master Fee Resolution No. 12191 to Revise Fees to Add New Cannabis Business Operator and Regulatory Fees;
>
> Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis; and (4) Amend Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses;
>
> Introduction of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions; and
>
> Recommendation to Confirm Continued Use of Request for Proposal (RFP) Process to Administer Cannabis Retail Dispensary Business Operators' Permit Selection Process. (Economic Development)

No where in the title and text of the staff report is any mention of the doubling of the number of full-service dispensaries from the two previously approved to four. The summary does mention the addition of "two delivery-only cannabis retail businesses as a conditionally permitted use in the C-M..." but I believe that delivery-only businesses are substantively different than two full-service storefront dispensaries.

Within the body of the report, staff makes it clear that the Delivery-Only Dispensaries would be closed to the public.

> *Conditionally Permit Delivery-Only Dispensaries (closed to the public) in the C-M Zone*
>
> Allowing delivery-only dispensaries as a conditionally permitted use in the C-M district would be consistent with the underlying intent for that zone. The nature of delivery-only dispensaries would be no different than other distribution or warehouse uses that already exist in those locations. With all cannabis businesses, the City has the ability to impose conditions of approval to address potential impacts through the use permit process.

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

The public was not notified in advance and the decision to transform the delivery-only businesses seemed to have occurred during the council member discussion – after public comment had been closed.

Had I known that two additional full-service retail dispensary permits were under consideration, I would have submitted comments beforehand and made every effort to attend. I was however denied that opportunity due the lack of advance public notice.

I believe that the actions of the council violated the goal of the Sunshine Ordinance.

2.90.1 - Goal.

An informed public is essential to democracy. It is the goal of the ordinance codified in this article to ensure that the citizens of Alameda have timely access to information, opportunities to address the various legislative bodies prior to decisions being made, and easy and timely access to all public records.

The published agenda did not propose doubling the number of full-service marijuana dispensaries thereby denying Alameda residents an opportunity to comment on such a significant change.

2-91.5 - Agenda Requirements; Regular Meetings.

a. Twelve (12) days before a regular meeting of City Council, and seven (7) days for all other policy bodies, the policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. These time requirements shall apply to posting on the internet.

b. 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 he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda or, if such documents are of more than one (1) page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.

City of Alameda

Meeting Agenda

City Council

Wednesday, November 7, 2018 | 7:00 PM | City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501

SPECIAL MEETING - CLOSED SESSION - 5:00 P.M.

1 **Roll Call - City Council**

2 **Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item**

3 **Adjournment to Closed Session to consider:**

3-A 2018-6064 (60 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Manager

3-B 2018-6063 (20 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: Acting/Interim City Attorney and City Attorney

3-C 2018-6062 (40 minutes) CONFERENCE WITH LABOR NEGOTIATORS (Government Code section 54957.6)
CITY NEGOTIATORS: David L. Rudat, Interim City Manager, Elizabeth D. Warmerdam, Assistant City Manager and Nancy Bronstein, Human Resources Director
EMPLOYEE ORGANIZATIONS: International Brotherhood of Electrical Workers, Local 1245 (IBEW), Electric Utility Professional Association of Alameda (EUPA), Alameda City Employees Association (ACEA), Alameda Police Officers Association Non-Sworn Unit (PANS), and Alameda Management and Confidential Employees Association (MCEA)
UNDER NEGOTIATION: Salaries and Terms of Employment

4 **Announcement of Action Taken in Closed Session, if any**

2018-6183 November 7, 2018 Closed Session Announcement

Attachments: Announcement

5 **Adjournment - City Council**

EXHIBIT 2

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

Pledge of Allegiance

1 **Roll Call - City Council**

2 **Agenda Changes**

3 **Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes**

3-A 2018-5260 (5 minutes) Proclamation Declaring November 7, 2018 as Extra Mile Day. (City Manager 2110)

3-B 2018-5262 (5 minutes) Proclamation Declaring November 15, 2018 as America Recycles Day. (City Manager 2110)

3-C 2018-6114 (5 minutes) Proclamation Declaring November 2018 as National Native American Heritage Month. (City Manager 2110)

3-D 2018-6115 (5 minutes) Proclamation Declaring November 2018 as National Veterans and Military Families Month. (City Manager 2110)

4 **Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8**

2018-6184 November 7, 2018 Oral Communications Submittal

Attachments: Submittal

5 **Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public**

5-A 2018-6135 Minutes of the Joint City Council and Successor Agency to the Community Improvement Commission Meeting Held on September 18, 2018 and the Special and Regular City Council Meetings Held on October 2, 2018. (City Clerk)

5-B 2018-6136 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2018-6005 Recommendation to Authorize the Interim City Manager to Negotiate and Execute an Agreement for the Purchase of One Horton F-550 Type I Ambulance in an Amount Not to Exceed $385,178. (Fire 3200)

Attachments: Exhibit 1 - Ambulance Quote

5-D 2018-6080 Recommendation to Authorize the Interim City Manager to Execute a

Three Year Contract, in an Amount Not to Exceed $30,000 Annually for a Total Three-Year Expenditure Amount Not to Exceed $90,000, with Physio Control for Warranty and Maintenance of Fire Department Advanced Life Support (ALS) Medical Monitors and Equipment. (Fire 3232)

Attachments: Exhibit 1 - Agreement

5-E 2018-6086 Recommendation to Authorize the Interim City Manager to Accept the Work of Lennar Homes, for Tract 8118, Marina Shores. (Public Works 4210310)

5-F 2018-6095 Recommendation to Authorize the Interim City Manager to Execute a One-Year Contract Amendment, with the Option of Three One-Year Extensions, for an Amount not to Exceed $150,000 Each, for a Total Five Year Expenditure not to Exceed $750,000 Each, to the Following: BKF, HEI, and Schaaf & Wheeler for On-Call Civil Engineering Consulting Services. (Public Works 310)

Attachments: Exhibit 1 - BKF First Amendment
Exhibit 2 - BKF Contract
Exhibit 3 - HEI First Amendment
Exhibit 4 - HEI Contract
Exhibit 5 - Schaaf & Wheeler First Amendment
Exhibit 6 - Schaaf & Wheeler Contract

5-G 2018-6096 Recommendation to Authorize the Interim City Manager to Execute a One-Year Contract Amendment, with the Option of Three One-Year Extensions, for an Amount not to Exceed $150,000 Each, for a Total Five Year Expenditure not to Exceed $750,000 Each, to the Following: Baseline Designs, Inc., Habitat Engineering & Forensics, Inc., JMEC Engineering, and Oakley & Oakley for On-Call Structural Engineering Consulting Services. (Public Works 310)

Attachments: Exhibit 1 - Baseline Designs First Amendment
Exhibit 2 - Baseline Designs Contract
Exhibit 3 - Habitat Engineering First Amendment
Exhibit 4 - Habitat Engineering Contract
Exhibit 5 - JMEC Engineering First Amendment
Exhibit 6 - JMEC Engineering Contract
Exhibit 7 - Oakley & Oakley First Amendment
Exhibit 8 - Oakley & Oakley Contract

5-H 2018-6052 Recommendation to Authorize the Interim City Manager to Execute a Contract in the Amount Not to Exceed $5,299,614, Including Contingency, to McGuire and Hester for the Cross Alameda Trail -

Ralph Appezzato Memorial Parkway Improvements, No. P.W. 03-18-11; and

Adoption of a Resolution Amending the Fiscal Year 2018-19 Capital Projects Fund Budget for the Cross Alameda Trail (Main to Constitution) Project by $1,794,060 from Various Funding Sources. (Public Works 310)

Attachments: Exhibit 1 - Contract
Resolution

5-I 2018-6085 Recommendation to Authorize the Interim City Manager to Execute a Three-Year Agreement in an Amount Not to Exceed $500,000 with Centro Legal de la Raza for Tenant Legal Services; and

Adoption of Resolution Amending the Fiscal Year 2018-19 General Fund Budget of the City Attorney's Office to Appropriate the Remaining $400,000 for Tenant Legal Services. (City Attorney 001-2310)

Attachments: Exhibit 1 - Request for Proposals
Exhibit 2 - Centro Legal Proposal
Exhibit 3 - Agreement
Resolution

5-J 2018-6061 Adoption of Resolution Amending Previous Authorization of a Portion of the City Base Allocation and Required Match Amount for Site A/Eden Affordable Senior Project and Affordable Family Project for Application to County Rental Housing Development Fund. (Base Reuse 819099)

Attachments: Resolution

5-K 2018-6113 Adoption of Resolution Declaring November 11 through 17 United Against Hate Week in the City of Alameda, in Conjunction with the Alameda Unified School Board and other Bay Area Cities. (City Manager 2110)

Attachments: School District Resolution
Resolution
Correpsondence

5-L 2018-6106 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business, and C-M, Commercial-Manufacturing Zoning Districts; (2) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, and

(3) Amend Certain Portions of the Zoning Code to Remove the Dispersion Requirement. (Economic Development)

Attachments: Correspondence

5-M 2018-6107 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industry) to (1) Eliminate the Cap on Testing Laboratories, (2) Allow for Two Additional Cannabis Businesses to Operate as "Dispensary/Delivery" (Delivery Required) Within the Zoning Districts for Cannabis Retail, (3) Amend the Dispersion Requirement to Require No More Than Two Cannabis Retail Businesses to Operate on Either Side of Grand Street, (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Cannabis Businesses, (4) Amend Certain Portions of the Regulatory Ordinance to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, (5) Modify Requirements for Off-Island Delivery, and (6) Make Other Clarifying or Conforming Amendments thereto. (Economic Development)

Attachments: Correspondence

6 Regular Agenda Items

6-A 2018-6039 (10 minutes) Introduction of Ordinance Approving a Lease Amendment with a Maximum Three-Year Extension of the Lease with CSI Mini-Storage, LLC, a California Limited Liability Company, for Buildings 338, 608, and 608A-C Located at 50 and 51 West Hornet Avenue at Alameda Point. [Requires four affirmative votes] (Base Reuse 819009)

Attachments: Exhibit 1 - Leasehold Area
Exhibit 2 - Original Lease
Exhibit 3 - Lease Amendment
Ordinance

6-B 2018-6097 (60 minutes) Introduction of Ordinance Amending the Alameda Municipal Code by Adding Article XVII (Tobacco Retailers) to Chapter VI (Businesses, Occupations and Industries) to Require Licensing of Tobacco Retailers in the City and to Prohibit the Sale of Flavored Tobacco Products. (City Attorney 2310)

Attachments: Exhibit 1 - Results of Community Survey
Exhibit 2 - Results of Tobacco Control Program Survey
Exhibit 3 - Alameda Unified School District Resolution
Correspondence - Updated 11-5
Presentation
Ordinance
Submittals

7 **City Manager Communications - Communications from City Manager**

8 **Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda**

9 **Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item**

10 **Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings**

10-A 2018-6124 Consideration of Mayor's Nomination for Appointment to the Library Board and Rent Review Advisory Committee.

11 **Adjournment - City Council**

• Meeting Rules of Order are available at https://alamedaca.gov/node/5822
• Time frames listed for agenda items are only estimates. Discussions on each item could take more or less time. Anyone interested in speaking is encouraged to arrive early rather than relying on the estimates.
• Translators and sign language interpreters will be available on request. Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 72 hours prior to the meeting to request atranslator or interpreter.
• Equipment for the hearing impaired is available for public use. For assistance, please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 either prior to, or at, the Council meeting.
• Accessible seating for persons with disabilities, including those using wheelchairs, is available.
• Minutes of the meeting available in enlarged print.
• Video tapes of the meeting are available upon request.
• Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 48 hours prior to the meeting to request agenda materials in an alternative format, or any other reasonable accommodation that may be necessary to participate in and enjoy the benefits of the meeting.
• This meeting will be broadcast live on the City's website www.alamedaca.gov/agendas.
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BEFORE THE OPEN GOVERNMENT COMMISSION

OF THE CITY OF ALAMEDA

In re: The Complaint of Serena Chen Serena Chen, Complainant The City of Alameda, Respondent	Case No. 18-02 DECISION OF THE OPEN GOVERNMENT COMMISSSION OF THE CITY OF ALAMEDA

Originally, the above entitled matter came on for hearing by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code on November 14, 2018, at which time the Commission rendered a decision to sustain the complaint. (All further references to Section numbers are to the Alameda Municipal Code.) At the request of the City Attorney's Office, the Commission held a special meeting on December 17, 2018 to consider a memorandum from the City Attorney's Office and to provide the parties an opportunity to respond.

Facts

In compliance with the Sunshine Ordinance, the City Clerk on October 4, 2018

ATTACHMENT B

published the agenda and supporting materials for the City Council's meeting on October 16, 2018. In relevant part, the title for Agenda item 6-G provided that there would be a public hearing to consider the introduction of an ordinance to amend the Municipal Code in a number of respects concerning cannabis businesses, for example, by adding cannabis retail businesses as conditionally permitted uses in certain zoning districts, by adding two "delivery-only" Cannabis Retail Businesses as a conditionally permitted use in the C-M, Commercial-Manufacturing Zoning District, eliminating the dispersion requirements for "delivery-only" cannabis businesses. The agenda for this item is attached as Exhibit 1.

The City Council conducted a public hearing on these items on October 16, 2018. During the public hearing, Council resolved to include in the amendments a modification to the amendment allowing two "delivery-only" dispensaries, such that these cannabis businesses would be required to offer delivery of cannabis ("delivery required") and would also be open to the public, in recognition that the State and local requirements for either ("delivery-only" versus "delivery required") would be the same. Following the close of the public hearing the City Council introduced on first reading an ordinance amending various sections of the

Municipal Code concerning cannabis businesses, including that two "delivery required" dispensaries, which would be open to public, be allowed. In response to a question about whether the ordinance could be introduced that evening with the inclusion of the two "delivery required" dispensaries as conditionally permitted uses, the City Attorney advised yes.

On October 30, 2018, Serena Chen timely filed a Sunshine Ordinance Complaint against the Alameda City Council concerning an alleged violation of a public meeting on October 16, 2018, citing a violation of Section 2-91.5, Agenda Requirements. The complaint states the City Council voted to add two additional cannabis dispensary permits without prior notification. More specifically, the complaint states nowhere in the agenda title or text of the staff report concerning cannabis businesses was there any mention that the number of "full-service marijuana dispensaries" would be increased.

The complaint cites to Section 2-90.1 of the Municipal Code that provides that one of the goals of the Sunshine Ordinance is to ensure that Alameda residents have the opportunity to address the Council prior to a decision being made. The complaint also cites to Section 2-91.5 of the Municipal Code that provides agenda

items are to be contain a meaningful description of each item of business to be transacted and that the description of such items be sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information about the item. A copy of the complaint is attached as Exhibit 2.

In response to the complaint, the City Attorney's Office emailed Ms. Chen that the ordinance addressed in her complaint was not final ("are being amended"), but would be on the Council's November 7, 2018 agenda for "second reading". She was invited to attend and be heard concerning the ordinance amendments, or to submit comments in writing if she could not attend, in addition to being furnished with materials to do so. A copy of the Council's November 7, 2018 agenda is attached as Exhibit 3.

On November 7, 2018, Ms. Chen appeared, as did other members of the public, at the City Council meeting and addressed the Council concerning the amendments, in addition to emailing written comments prior to the meeting. After discussion, Council adopted the ordinances as presented in the November 7 agenda.

On November 14, 2018, the Commission conducted a hearing on the complaint. After hearing from the complainant and the City, the Commission sustained the complaint and ordered that the Ordinances in question be re-noticed for a first reading and that the Ordinances were null and void.

Thereafter, the City Attorney's Office provided a legal memorandum to the Commission that set forth in more detail why there had not been a violation of the Sunshine Ordinance. Even assuming there was a violation, the City Attorney concluded that the Commission did not have legal authority to render Ordinances adopted by the City Council as null and void. Rather, if the Commission continued to conclude that there had been a violation of the Sunshine Ordinance, it should recommend to the City Council that the Ordinances be considered for re-introduction following a public hearing and that the adopted Ordinances be repealed.

At the request of the City Attorney's Office, the complaint was returned to the Commission on December 17, 2018 for further consideration in light of the City Attorney's memorandum.

Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the Open Government Commission, created under the Sunshine Ordinance, hears the complaint and renders a formal written decision. The complainant and the City then shall appear at a hearing. During the hearing, the Open Government Commission considers the evidence and the arguments of the parties before making its decision. Section 2-93.2 (b). The Commission conducted the hearing on November 14, 2018 and considered the evidence and arguments of Ms. Chen and the City. The Commission conducted a further hearing on the complaint on December 17, 2018 for the limited purpose of considering the City Attorney's legal memorandum and providing Ms. Chen an opportunity to respond to the legal memorandum.

Discussion

One of the goals of the Sunshine Ordinance is that residents have the opportunity to address the City Council prior to decisions being made. Section 2-90.1, AMC. Here, Ms. Chen had, and took, the opportunity on November 7, 2018, to address

the City Council about her concerns about the amendments to the cannabis ordinances prior to the City Council making a final decision on the amendments. Notwithstanding that, for the following reasons, the Commission finds a violation not only of Section 2-90.1 AMC, but also of Section 2-91.5 AMC.

Concerning the agenda title on October 16, 2018, the title included numerous proposed changes to the cannabis ordinances including the possibility of cannabis retail businesses being conditionally permitted in certain zoning districts, increasing the number of cannabis retail businesses and eliminating the dispersion requirements for certain cannabis businesses. Despite the breadth of these revisions, a person of average intelligence and education who had concerns about the number of full-service cannabis dispensaries could have considered attending the meeting on October 16 (or sought more information). More specifically as to Ms. Chen's complaint, although it is arguable that the agenda description was meaningful in that it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services, the City Council's action fell outside the ambit of that brief, concise description. At a minimum, the difference between the agenda description posted for the October 16, 2018 regular meeting ("delivery only" dispensaries, closed to the public) and

the actual action taken by the Council ("delivery required," open to the public) is substantial enough that members of the public may have been confused as to whether or not they should appear to be heard or seek more information. In the end, the Commission recognizes that this complaint poses a very close question, but on balance we find that the complaint that there was a violation of Section 2-91.5, AMC should be sustained.

Turning now to the question of the appropriate penalty and how to give force and effect to Section 2-93.8 that provides that the Commission may order an action taken in violation of Section 2-91.5 "null and void" in light of the Commission's circumscribed authority to set aside Council legislative action, the Commission recommends the following:

1. City Council should consider re-introducing the two Ordinances in question following a noticed public hearing.
2. The agenda title for those items should track the agenda title that appeared on the Council's November 7, 2018 agenda concerning the Ordinances because that agenda title satisfies Sections 2-90.1 and Section 2-91.5 concerning the items.
3. City Council should consider repealing Ordinance Nos. 3227 and 3228.

Decision

There was a violation of Section 2-90.1 and Section 2-91.5 of the Alameda Municipal Code as set forth in Ms. Chen's complaint of October 30, 2018. The complaint, therefore, is **SUSTAINED**. In order to carry out this decision, the Commission recommends items 1, 2 and 3 above be agendized for future consideration by the Council.

Signatures are on the following page.

Dated: December 17, 2018

Heather Little, Chair

Paul Foreman, Member

Mike Henneberry, Member

Irene Dieter, Member

Bryan Schwartz, Member

City of Alameda

Meeting Agenda

City Council

Tuesday, October 16, 2018	7:00 PM	City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501

REVISED on 10/8/2018 at 4:30 p.m. to correct the title of Item 6-D.

SPECIAL MEETING - CLOSED SESSION - 5:00 P.M.

1 Roll Call - City Council

2 Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item

3 Adjournment to Closed Session to consider:

3-A 2018-6030 (45 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: Acting/Interim City Attorney and City Attorney

3-B 2018-6031 (10 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Manager

3-C 2018-6029 (20 minutes) CONFERENCE WITH LABOR NEGOTIATORS (Government Code section 54957.6)
CITY NEGOTIATORS: David L. Rudat, Interim City Manager, Elizabeth D. Warmerdam, Assistant City Manager and Nancy Bronstein, Human Resources Director
EMPLOYEE ORGANIZATIONS: International Brotherhood of Electrical Workers, Local 1245 (IBEW), Electric Utility Professional Association of Alameda (EUPA), Alameda City Employees Association (ACEA), Alameda Police Officers Association Non-Sworn Unit (PANS), and Alameda Management and Confidential Employees Association (MCEA)
UNDER NEGOTIATION: Salaries and Terms of Employment

3-D 2018-6074 (20 minutes) CONFERENCE WITH REAL PROPERTY NEGOTIATORS (Government Code section 54956.8)
PROPERTY: Northwest Territories, Alameda Point
CITY NEGOTIATOR: David L. Rudat, Interim City Manager
POTENTIAL TENANT: East Bay Regional Park District

ISSUE UNDER NEGOTIATION: Real Property Negotiations Price and Terms of Payment

4 **Announcement of Action Taken in Closed Session, if any**

2018-6108 October 16, 2018 Closed Session Announcement

Attachments: Announcement

5 **Adjournment - City Council**

SPECIAL CITY COUNCIL MEETING - 6:45 P.M.

Pledge of Allegiance

1 **Roll Call - City Council**

2 **Proclamations**

2-A 2018-5259 (5 minutes) Proclamation Declaring October, 2018 as Childhood Lead Poisoning Prevention Week and Code Enforcement Officer Appreciation Week. (City Manager 2110)

2-B 2018-6075 (5 minutes) Proclamation Declaring October 2018 as Filipino American History Month. (City Manager 2110)

2-C 2018-5261 (5 minutes) Proclamation Declaring October 21-27, 2018 as Friends of the Alameda Free Library Appreciation Week. (City Manager 2110)

3 **Adjournment - City Council**

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

1 **Roll Call - City Council**

2 **Agenda Changes**

3 **Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes**

3-A 2018-5695 (5 minutes) Proclamation Declaring October 2018 as Italian American History Month. (City Manager 2110)

4 **Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8**

5 Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public

5-A 2018-6077 Minutes of the Special and Regular City Council Meetings Held on September 18, 2018. (City Clerk)

5-B 2018-6078 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2018-5975 Recommendation to Receive a Report on the Continuation of the Art in City Hall Program. (City Manager 2110)

Attachments: Exhibit 1 - 2019 Guidelines

5-D 2018-5986 Recommendation to Approve the Request for Qualifications (RFQ) to Reuse the Alameda Carnegie Building. (Economic Development 227)

Attachments: Exhibit 1 - 2007 Master Plan Report
Exhibit 2 - Draft RFQ

5-E 2018-5984 Recommendation to Award a Contract to Oregon Romtec Inc. in the Amount of $970,613 for the Krusi Park Recreation Center Replacement Project. (Recreation and Park 280)

Attachments: Exhibit 1 - Contract
Correspondence

5-F 2018-5994 Recommendation to Authorize the Interim City Manager to Execute a Second Amendment to the Agreement with Nute Engineering, to Extend the Term One Year and Increase Compensation in an Amount Not to Exceed $394,390 for a Total Agreement Compensation Not to Exceed $727,459 for Engineering Design Services for Cyclic Sewer Rehabilitation Project, Phase 16. (Public Works 602)

Attachments: Exhibit 1 - Original Agreement
Exhibit 2 - First Amendment
Exhibit 3 - Second Amendment

5-G 2018-5985 Adoption of Resolution Amending the General Fund and the Capital Improvement Program Budget for Fiscal Year 2018-19 for the Jean Sweeney Open Space Park Project to Fund Immediate Possession of Four Remnant Parcels Totaling Approximately 2.8 Acres Owned by Union Pacific; and

Recommendation to Direct the City Attorney to Deposit the Sum of $1,098,000 with the Condemnation Deposits Fund and Seek an Order for Prejudgment Possession of the Subject Property. (Recreation and Parks 310)

Attachments: Exhibit 1 - Map of Remnant Parcels
Resolution

5-H 2018-5988 Recommendation to Expand the Façade Grant Program Boundaries; and

Adoption of Resolution Amending the Fiscal Year 2018-19 Base Reuse Fund Budget to Appropriate $50,000 for the Façade Grant Program. (Base Reuse 858)

Attachments: Resolution

5-I 2018-5992 Adoption of a Resolution Authorizing the Interim City Manager to Enter into a Joint Exercise of Powers Agreement (JPA) Establishing and Governing Operation of the Collection System Technical Advisory Committee, and a Defendant's Side Agreement to Facilitate the Environmental Protection Agency Sewer Consent Decree Compliance. (Public Works 602)

Attachments: Exhibit 1 - 1979 JPA
Exhibit 2 - 1986 JPA
Exhibit 3 - New JPA
Exhibi 4 - Side Agreement
Resolution

5-J 2018-5974 Adoption of Resolution Opposing Proposition 6 on the November 2018 Ballot, which would Repeal the Recent Gas Tax Increase and Eliminate $15 Million in Transportation Funding for Alameda. (City Manager 2110)

Attachments: Exhibit 1 - Impacts of Proposition 6
Resolution

5-K 2018-6041 Adoption of Resolution Supporting Proposition 2 on the November 2018 Ballot, which would Authorize the State of California to Use Revenue from Previously Authorized Bonds to Fund Existing Housing Programs for Individuals with Mental Illness. (City Manager 2110)

Attachments: Resolution

5-L 2018-6073 Final Passage of Ordinance Amending the Alameda Municipal Code By Adding Article 4-60 (Minimum Wage) to Chapter IX (Regulations Concerning Trade and Commerce) Concerning A Citywide Minimum Wage to Raise Alameda's Minimum Wage to $15.00 Per Hour by 2020.

6 Regular Agenda Items

6-A 2018-6009 (5 minutes) Adoption of Resolutions Appointing Rona Rothenberg as a Member of the Planning Board and Reappointing Audrey Hyman as a Member of the Social Service Human Relations Board.

6-B 2018-5910 (15 minutes) Presentation by Friends of the Alameda Animal Shelter (FAAS) - Annual Progress Report. (City Manager 2110)

Attachments: Exhibit 1 - Annual Report
Exhibit 1 - REVISED Annual Report
Exhibit 2 - 4th Quarter Report
Exhibit 3 - Mid-Year Report
Exhibit 4 - Leash Your Dog Flyer
Exhibit 5 - FAAS Staffing
Exhibit 6 - Agreement

6-C 2018-6038 (30 minutes) Recommendation to Accept Informational Report on Activities, Quarterly Meetings and Issues Related to the Oakland International Airport. (Community Development 481005)

Attachments: Presentation

6-D 2018-6035 (15 minutes) Introduction of Ordinance Authorizing the Interim City Manager to Execute Documents Necessary to Implement a Ten-Year Lease with SpinLaunch Inc., a California Corporation, for Building 530, Located at 120 West Oriskany Avenue at Alameda Point. (Base Reuse 819099)

Attachments: Exhibit 1 - Premises
Exhibit 2 - Draft Form Lease
Ordinance

6-E 2018-6007 (20 minutes) SUMMARY: Public Hearing to Facilitate a Tax-Exempt Bond Financing for Acquisition, Construction, Improvement, and Equipping of the Site A Affordable Family and Senior Projects by Eden Housing

Public Hearing Under the Tax Equity and Fiscal Responsibility Act (TEFRA) to Consider Adoption of Resolution Approving the Issuance of Revenue Bonds by the California Municipal Finance Authority in an Aggregate Principal Amount Not to Exceed $45,000,000 to Finance a 70-Unit Multifamily Rental Housing Facility for Low- and Very Low-Income Families for the Benefit of Eden Housing Inc., or a Limited Partnership to be Established by Eden Housing Inc. (or an Affiliate); and

Adoption of Resolution Approving the Issuance of Revenue Bonds by the California Municipal Finance Authority in an Aggregate Principal Amount Not to Exceed $40,000,000 to Finance a 60-Unit Multifamily Rental Housing Facility for Low- and Very Low-Income Seniors for the

Benefit of Eden Housing Inc., or a Limited Partnership to be Established by Eden Housing Inc. (or an Affiliate). These Revenue Bonds will provide for the financing of the Site A Affordable Family and Senior Projects. (Base Reuse 819099)

Attachments: Exhibit 1 - Project Funding Sources
Resolution - Family Housing Site A
Resolution - Senior Housing Site A

6-F 2018-6032 (15 minutes) Public Hearing to Consider Adoption of Resolution Calling a Special Election Regarding Alteration of the Rate and Method of Apportionment of Special Taxes for Community Facilities District No. 17-1 (Alameda Point Public Services District); and

Adoption of Resolution Amending the Fiscal Year 2018-19 Budget for the Community Facilities District 17-1 Fund by Increasing Estimated Revenue by $174,051 and Increasing the Expenditure Budget by $35,000. (Base Reuse 819099)

Attachments: Resolution - Special Election
Resolution - Budget

6-G 2018-6060 (60 minutes) Adoption of Resolution Amending Master Fee Resolution No. 12191 to Revise Fees to Add New Cannabis Business Operator and Regulatory Fees;

Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis; and (4) Amend Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses;

Introduction of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions; and

Recommendation to Confirm Continued Use of Request for Proposal (RFP) Process to Administer Cannabis Retail Dispensary Business Operators' Permit Selection Process. (Economic Development)

Attachments: Exhibit 1 - Fee Study
Exhibit 2 - Map of Zones
Exhibit 3 - Letter
Resolution
Ordinance -Cannabis
Ordinance -Cannabis Businesses
Correspondence - Updated 10-16
Presentation

6-H 2018-5990 (20 minutes) Recommendation to Accept $1,876,823 Grant from the Staffing for Adequate Fire and Emergency Response (SAFER) Program; and

Adoption of Resolution Amending the Fiscal Year 2018-19 Fire Grants Fund Revenue and Expenditures Budget by $3,043,494, Each, and the General Fund Expenditures Budget by $1,166,671 to Allocate the Required Matching Funds per the Grant Requirement. (Fire 220)

Attachments: Exhibit 1 - Award Package
Resolution

7 City Manager Communications - Communications from City Manager

8 Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda

9 Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item

10 Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings

10-A 2018-6076 Consideration of Mayor's Nomination for Appointment to the Lirbary Board, Planning Board and Social Service Human Relations Board.

11 Adjournment - City Council

• Meeting Rules of Order are available at https://alamedaca.gov/node/5822
• Time frames listed for agenda items are only estimates. Discussions on each item could take more or less time. Anyone interested in speaking is encouraged to arrive early rather than relying on the estimates.
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• Accessible seating for persons with disabilities, including those using wheelchairs, is available.
• Minutes of the meeting available in enlarged print.
• Video tapes of the meeting are available upon request.
• Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 48 hours prior to the meeting to request agenda materials in an alternative format, or any other reasonable accommodation that may be necessary to participate in and enjoy the benefits of the meeting.
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• Documents related to this agenda are available for public inspection and copying at of the Office of the City Clerk, 2263 Santa Clara Avenue, Room 380, during normal business hours.
• KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE: Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City of Alameda exist to conduct the citizen of Alameda's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.
• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.
• In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

Ex. 2

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

City of Alameda

OPEN GOVERNMENT COMMISSION
2263 Santa Clara Avenue, Suite 380
Alameda, CA 94501
(510) 747-4800

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission: City Council

Name of individual contacted at Department or Commission: _____

☐ Alleged violation of public records access.
☒ Alleged violation of public meeting. Date of meeting: 10/16/2018

Sunshine Ordinance Section: 2-91.5 Agenda Requirements
(If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach all relevant documentation supporting your complaint. Documentation is required.
City Council voted to add 2 additional cannabis dispensary permits without prior notification

A complaint must be filed no more than fifteen (15) days after an alleged violation of the Sunshine Ordinance.

Name: Serena Chen Address: 931 Independence

Telephone No (510) 435-5889 E-mail Address: serenatchen@gmail.com

Date: 10/30/2018 _____
Signature

ITEM6D--EXH.1_000278
EXHIBIT 2

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

On Oct. 16, 2018, the city council voted 3-2 to amend section 30-10 (Cannabis) to revise and add fees. See below for published agenda item title and description. Video of council meeting.

> Title Adoption of Resolution Amending Master Fee Resolution No. 12191 to Revise Fees to Add New Cannabis Business Operator and Regulatory Fees;
>
> Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing Zoning Districts; (2) Add Two Delivery-Only Cannabis Retail Businesses as a Conditionally Permitted Use in the C-M, Commercial-Manufacturing Zoning District; (3) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis; and (4) Amend Certain Portions of the Zoning Code to Eliminate the Dispersion Requirement for Delivery-Only Cannabis Businesses;
>
> Introduction of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industries) to (1) Eliminate the Cap on Testing Laboratories; (2) Add Two Delivery-Only Dispensaries; (3) Allow Adult Use; (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Dispensaries and Cultivation Businesses; and (5) Make Other Clarifying Revisions; and
>
> Recommendation to Confirm Continued Use of Request for Proposal (RFP) Process to Administer Cannabis Retail Dispensary Business Operators' Permit Selection Process. (Economic Development)

No where in the title and text of the staff report is any mention of the doubling of the number of full-service dispensaries from the two previously approved to four. The summary does mention the addition of "two delivery-only cannabis retail businesses as a conditionally permitted use in the C-M..." but I believe that delivery-only businesses are substantively different than two full-service storefront dispensaries.

Within the body of the report, staff makes it clear that the Delivery-Only Dispensaries would be closed to the public.

> *Conditionally Permit Delivery-Only Dispensaries (closed to the public) in the C-M Zone*
>
> Allowing delivery-only dispensaries as a conditionally permitted use in the C-M district would be consistent with the underlying intent for that zone. The nature of delivery-only dispensaries would be no different than other distribution or warehouse uses that already exist in those locations. With all cannabis businesses, the City has the ability to impose conditions of approval to address potential impacts through the use permit process.

Sunshine Ordinance Complaint, City Council Actions, 10/16/18
Complainant: Serena Chen
Date: 10/30/18

The public was not notified in advance and the decision to transform the delivery-only businesses seemed to have occurred during the council member discussion – after public comment had been closed.

Had I known that two additional full-service retail dispensary permits were under consideration, I would have submitted comments beforehand and made every effort to attend. I was however denied that opportunity due the lack of advance public notice.

I believe that the actions of the council violated the goal of the Sunshine Ordinance.

2.90.1 - Goal.

An informed public is essential to democracy. It is the goal of the ordinance codified in this article to ensure that the citizens of Alameda have timely access to information, opportunities to address the various legislative bodies prior to decisions being made, and easy and timely access to all public records.

The published agenda did not propose doubling the number of full-service marijuana dispensaries thereby denying Alameda residents an opportunity to comment on such a significant change.

2-91.5 - Agenda Requirements; Regular Meetings.

a. Twelve (12) days before a regular meeting of City Council, and seven (7) days for all other policy bodies, the policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. These time requirements shall apply to posting on the internet.

b. 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 he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda or, if such documents are of more than one (1) page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.

City of Alameda

Meeting Agenda

City Council

Wednesday, November 7, 2018	7:00 PM	City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501

SPECIAL MEETING - CLOSED SESSION - 5:00 P.M.

1 **Roll Call - City Council**

2 **Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item**

3 **Adjournment to Closed Session to consider:**

3-A 2018-6064 (60 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Manager

3-B 2018-6063 (20 minutes) PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: Acting/Interim City Attorney and City Attorney

3-C 2018-6062 (40 minutes) CONFERENCE WITH LABOR NEGOTIATORS (Government Code section 54957.6)
CITY NEGOTIATORS: David L. Rudat, Interim City Manager, Elizabeth D. Warmerdam, Assistant City Manager and Nancy Bronstein, Human Resources Director
EMPLOYEE ORGANIZATIONS: International Brotherhood of Electrical Workers, Local 1245 (IBEW), Electric Utility Professional Association of Alameda (EUPA), Alameda City Employees Association (ACEA), Alameda Police Officers Association Non-Sworn Unit (PANS), and Alameda Management and Confidential Employees Association (MCEA)
UNDER NEGOTIATION: Salaries and Terms of Employment

4 **Announcement of Action Taken in Closed Session, if any**

2018-6183 November 7, 2018 Closed Session Announcement

Attachments: Announcement

5 **Adjournment - City Council**

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

Pledge of Allegiance

1 **Roll Call - City Council**

2 **Agenda Changes**

3 **Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes**

3-A 2018-5260 (5 minutes) Proclamation Declaring November 7, 2018 as Extra Mile Day. (City Manager 2110)

3-B 2018-5262 (5 minutes) Proclamation Declaring November 15, 2018 as America Recycles Day. (City Manager 2110)

3-C 2018-6114 (5 minutes) Proclamation Declaring November 2018 as National Native American Heritage Month. (City Manager 2110)

3-D 2018-6115 (5 minutes) Proclamation Declaring November 2018 as National Veterans and Military Families Month. (City Manager 2110)

4 **Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8**

2018-6184 November 7, 2018 Oral Communications Submittal

Attachments: Submittal

5 **Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public**

5-A 2018-6135 Minutes of the Joint City Council and Successor Agency to the Community Improvement Commission Meeting Held on September 18, 2018 and the Special and Regular City Council Meetings Held on October 2, 2018. (City Clerk)

5-B 2018-6136 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2018-6005 Recommendation to Authorize the Interim City Manager to Negotiate and Execute an Agreement for the Purchase of One Horton F-550 Type I Ambulance in an Amount Not to Exceed $385,178. (Fire 3200)

Attachments: Exhibit 1 - Ambulance Quote

5-D 2018-6080 Recommendation to Authorize the Interim City Manager to Execute a

Three Year Contract, in an Amount Not to Exceed $30,000 Annually for a Total Three-Year Expenditure Amount Not to Exceed $90,000, with Physio Control for Warranty and Maintenance of Fire Department Advanced Life Support (ALS) Medical Monitors and Equipment. (Fire 3232)

Attachments: Exhibit 1 - Agreement

5-E 2018-6086 Recommendation to Authorize the Interim City Manager to Accept the Work of Lennar Homes, for Tract 8118, Marina Shores. (Public Works 4210310)

5-F 2018-6095 Recommendation to Authorize the Interim City Manager to Execute a One-Year Contract Amendment, with the Option of Three One-Year Extensions, for an Amount not to Exceed $150,000 Each, for a Total Five Year Expenditure not to Exceed $750,000 Each, to the Following: BKF, HEI, and Schaaf & Wheeler for On-Call Civil Engineering Consulting Services. (Public Works 310)

Attachments: Exhibit 1 - BKF First Amendment
Exhibit 2 - BKF Contract
Exhibit 3 - HEI First Amendment
Exhibit 4 - HEI Contract
Exhibit 5 - Schaaf & Wheeler First Amendment
Exhibit 6 - Schaaf & Wheeler Contract

5-G 2018-6096 Recommendation to Authorize the Interim City Manager to Execute a One-Year Contract Amendment, with the Option of Three One-Year Extensions, for an Amount not to Exceed $150,000 Each, for a Total Five Year Expenditure not to Exceed $750,000 Each, to the Following: Baseline Designs, Inc., Habitat Engineering & Forensics, Inc., JMEC Engineering, and Oakley & Oakley for On-Call Structural Engineering Consulting Services. (Public Works 310)

Attachments: Exhibit 1 - Baseline Designs First Amendment
Exhibit 2 - Baseline Designs Contract
Exhibit 3 - Habitat Engineering First Amendment
Exhibit 4 - Habitat Engineering Contract
Exhibit 5 - JMEC Engineering First Amendment
Exhibit 6 - JMEC Engineering Contract
Exhibit 7 - Oakley & Oakley First Amendment
Exhibit 8 - Oakley & Oakley Contract

5-H 2018-6052 Recommendation to Authorize the Interim City Manager to Execute a Contract in the Amount Not to Exceed $5,299,614, Including Contingency, to McGuire and Hester for the Cross Alameda Trail -

Ralph Appezzato Memorial Parkway Improvements, No. P.W. 03-18-11; and

Adoption of a Resolution Amending the Fiscal Year 2018-19 Capital Projects Fund Budget for the Cross Alameda Trail (Main to Constitution) Project by $1,794,060 from Various Funding Sources. (Public Works 310)

Attachments: Exhibit 1 - Contract
Resolution

5-I 2018-6085 Recommendation to Authorize the Interim City Manager to Execute a Three-Year Agreement in an Amount Not to Exceed $500,000 with Centro Legal de la Raza for Tenant Legal Services; and

Adoption of Resolution Amending the Fiscal Year 2018-19 General Fund Budget of the City Attorney's Office to Appropriate the Remaining $400,000 for Tenant Legal Services. (City Attorney 001-2310)

Attachments: Exhibit 1 - Request for Proposals
Exhibit 2 - Centro Legal Proposal
Exhibit 3 - Agreement
Resolution

5-J 2018-6061 Adoption of Resolution Amending Previous Authorization of a Portion of the City Base Allocation and Required Match Amount for Site A/Eden Affordable Senior Project and Affordable Family Project for Application to County Rental Housing Development Fund. (Base Reuse 819099)

Attachments: Resolution

5-K 2018-6113 Adoption of Resolution Declaring November 11 through 17 United Against Hate Week in the City of Alameda, in Conjunction with the Alameda Unified School Board and other Bay Area Cities. (City Manager 2110)

Attachments: School District Resolution
Resolution
Correpsondence

5-L 2018-6106 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (1) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business, and C-M, Commercial-Manufacturing Zoning Districts, (2) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, and

(3) Amend Certain Portions of the Zoning Code to Remove the Dispersion Requirement. (Economic Development)

Attachments: Correspondence

5-M 2018-6107 Final Passage of Ordinance Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industry) to (1) Eliminate the Cap on Testing Laboratories, (2) Allow for Two Additional Cannabis Businesses to Operate as "Dispensary/Delivery" (Delivery Required) Within the Zoning Districts for Cannabis Retail, (3) Amend the Dispersion Requirement to Require No More Than Two Cannabis Retail Businesses to Operate on Either Side of Grand Street, (4) Create a Two-Tier Buffer Zone from Sensitive Uses for Cannabis Businesses, (4) Amend Certain Portions of the Regulatory Ordinance to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, (5) Modify Requirements for Off-Island Delivery, and (6) Make Other Clarifying or Conforming Amendments thereto. (Economic Development)

Attachments: Correspondence

6 Regular Agenda Items

6-A 2018-6039 (10 minutes) Introduction of Ordinance Approving a Lease Amendment with a Maximum Three-Year Extension of the Lease with CSI Mini-Storage, LLC, a California Limited Liability Company, for Buildings 338, 608, and 608A-C Located at 50 and 51 West Hornet Avenue at Alameda Point. [Requires four affirmative votes] (Base Reuse 819009)

Attachments: Exhibit 1 - Leasehold Area
Exhibit 2 - Original Lease
Exhibit 3 - Lease Amendment
Ordinance

6-B 2018-6097 (60 minutes) Introduction of Ordinance Amending the Alameda Municipal Code by Adding Article XVII (Tobacco Retailers) to Chapter VI (Businesses, Occupations and Industries) to Require Licensing of Tobacco Retailers in the City and to Prohibit the Sale of Flavored Tobacco Products. (City Attorney 2310)

Attachments: Exhibit 1 - Results of Community Survey
Exhibit 2 - Results of Tobacco Control Program Survey
Exhibit 3 - Alameda Unified School District Resolution
Correspondence - Updated 11-5
Presentation
Ordinance
Submittals

7 City Manager Communications - Communications from City Manager

8 Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda

9 Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item

10 Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings

10-A 2018-6124 Consideration of Mayor's Nomination for Appointment to the Library Board and Rent Review Advisory Committee.

11 Adjournment - City Council

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LARA WEISIGER

From: Bryan Schwartz <bryan@bryanschwartzlaw.com>
Sent: Wednesday, December 12, 2018 10:14 AM
To: IRMA Glidden; Heather Little
Cc: LARA WEISIGER; Ashley Zieba
Subject: Re: REVISED 12/17/18 Open Government Commission packet

I don't appreciate missing this meeting due to an out-of-town engagement scheduled many months ago, when this meeting will basically determine the future viability of this commission. I'm sure I'm not alone in feeling disappointed, to say the least, in how this process is shaping up and the City's current response. Seems to me that the process that had ensued, and our prior decision on the Commission, were a sign of a very healthy, democratic city, and the solution was for the City to re-notice the matter more clearly, let people be heard, and, perhaps, pass the same ordinance (or maybe, upon reflection, a slightly modified one). The message in this meeting/packet feels quite different.

Bryan

On Tue, Dec 11, 2018 at 6:16 PM IRMA Glidden <IGlidden@alamedaca.gov> wrote:

> Hi All,
>
> A revised packet for the December 17th meeting is attached and available at the following link:
>
> http://legistar1.granicus.com/alameda/meetings/2018/12/4790_A_Open_Government_Commission_18-12-17_Meeting_Agenda.pdf
>
> Thank you,
>
> Lara

--
Bryan Schwartz Law
180 Grand, Suite 1380
Oakland, California 94612
Tel. (510) 444-9300
Fax (510) 444-9301
Email: Bryan@BryanSchwartzLaw.com
Website: www.BryanSchwartzLaw.com

LARA WEISIGER

From: gerstle@mindspring.com
Sent: Friday, December 14, 2018 10:59 AM
To: LARA WEISIGER
Subject: Support Open Government Commission Ruling on Cannabis Outlets

Please deliver to Open Government Commissioners

Dear Open Government Commissioners,

I strongly support your ruling to hold the City Council accountable for notice requirements on marijuana dispensaries. If the City Council can simply overrule the Open Government Commission, then there is no purpose to have that commission as it makes a mockery of its oversight. We need an independent body to hold government officials accountable.

Regards,

Steve Gerstle
Alameda, CA

LARA WEISIGER

From: Cross Creason <creasoncross@gmail.com>
Sent: Sunday, December 16, 2018 1:44 PM
To: LARA WEISIGER; bryan@bryanschwartzlaw.com; id94501@gmail.com; heatherlittle9691@gmail.com; Michael Roush; michaelhenneberry5@gmail.com; ps4man@comcast.net
Subject: Open Gov't Comm'n Meeting 12-17-18
Attachments: Microsoft Word - Letter OGC.pdf; AUTHORITIES 12-17-18.pdf

Dear Commissioners and City Attorney, please find attached correspondence and authorities concerning the meeting set for Dec. 17, 2018, for reconsideration of the Commissions November 14 decision. Thank you, Cross Creason

Open Government Commission Meeting - December 17, 2018

The Open Government Commission ("Commission") has been urged to decide that grounds exist to revisit its November 14, 2018, decision, and to accept the City Attorney's December 10, 2018 Report ("Report") which concludes that Sunshine Ordinance's "null and void" remedy is invalid and that, if nothing else, the Commission must exclude that remedy from its revised decision.

Altering the November 14 decision on the basis of the Report's conclusion about the legality of the "null and void" remedy would be problematic in several ways:

1) The Commission may not have the authority to determine the validity of the Sunshine Ordinance. Determining whether the "null and void" remedy expressly provided for in the Sunshine Ordinance is valid under the City Charter, state Constitution, etc., is not an express duty or power of the Commission under the Sunshine Ordinance or Section 2-22 of the Alameda Municipal Code ("AMC") [the Commission's "organic" statute]. The City Attorney's office also does not appear to have been assigned by the City Charter the task of retroactively determining previous City Council enactments to be invalid under the state Constitution, City Charter, etc.

See generally Hand v. Board of Examiners (1977) 66 Cal.App.3d 605, 619–620 ["since the Board of Examiners in Veterinary Medicine is…not an administrative agency of constitutional origin, it may not declare a statute enacted by the Legislature unconstitutional."]; *see also, generally, Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086 ["when, as here, a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute" and rejecting proposition that public agencies' "duty to follow the law (including the Constitution) includes the implied or inherent authority to refuse to follow an applicable statute whenever the official personally believes the statute to be unconstitutional, even though there has been no judicial determination of the statute's unconstitutionality and despite the existence of the rule that a duly enacted statute is presumed to be constitutional"].

Assuming that the Commission does not have the authority to determine the validity of the Sunshine Ordinance itself, or the remedies expressly provided for in the Ordinance, rescinding the "null and void" portion of the November 14 decision on the grounds of validity would also likely exceed the Commission's authority. *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 48–49 [agency *lacked the authority* to cure a facially unconstitutional statute by refusing to enforce it as written].

2) Assuming that the Commission somehow *does* have the authority to alter its November 14 decision based on a non-judicial determination that the "null and void" remedy expressly provided for by the City Council is invalid/unconstitutional, the Commission should also consider whether the legal analysis on these points is sufficiently developed to serve as a well-considered basis for reversing this duly-constituted body's decision. After all, the null and void remedy has been part of the Sunshine Ordinance since its enactment and was part of the original enactment with the advice of the City Attorney's office. Have there been developments in the law since the Sunshine Ordinance was enacted in 2011 that render the null and void remedy invalid? If so, it is difficult to discern from the Report because it cites to no legal authority. The legal authorities discussed below, at the very least, call into question the conclusion that the "null and void" remedy enacted by the City Council is invalid. It seems also, at the very least, that more than seven days consideration (the short period of time that has passed since the City Attorney's office first revealed its opinion that the "null and void"

remedy enacted by the City Council is invalid) should be given to this question before making it the basis for altering a previous decision of this Commission. Where the question is in doubt, the way to better implement the intent of the City Council and respect its fundamental policy determinations concerning proper noticing of public meetings would be to assume that its Sunshine Ordinance is a valid ordinance.

3. By all accounts, the Commission, and each Commissioner, took its duties under the Sunshine Ordinance seriously and faithfully in hearing and reaching a decision on Serena Chen's complaint on November 14, 2018. As much as the Report hypothesizes about the potential for abuse of a "limitless and unbounded" power granted the Commission – while downplaying both the multiple safeguards against abuse and the very limited nature of the power itself – there is no indication that the Commission abused its authority for political reasons, or at all, in this case. While the City Council has full authority to modify the Sunshine Ordinance, revise standards under it, create carve-outs for certain legislation, or do away with it entirely, the Report makes a debatable case, at best, that what City Council has already enacted is invalid on its face, much less that the Commission's decision on November 14, 2018 in particular was invalid.

None of the herein is meant to argue that the City Council should not undertake to amend the Sunshine Ordinance, if it sees fit. The Report identifies parts of the Sunshine Ordinance that the Council may very well wish to review and consider revising. The Commission, however, should proceed very cautiously before taking action such as altering the November 14 decision on the basis of the Sunshine Ordinance's purported invalidity. That does not seem to be the role assigned to the Commission by the City Council, and one that seems better suited to a court to fulfill.

Attached are copies of some of the authorities discussed herein:

Golightly v. Molina (2014) 229 Cal.App.4th 1501
Kugler v. Yocum (1968) 69 Cal.2d 371
Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055
Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859
Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal.App.3d 291
Whitmire v. City of Eureka (1972) 29 Cal.App.3d 28

1. Delegation of Legislative Power

A. General Principles

The Report does not cite to California case law in support of its assertion that "[The Commission] does not have legal authority to order a new first reading under the Sunshine Ordinance via the null-and-void remedy because it would amount to an improper delegation of legislative power". In *Kugler v. Yocum*, the California Supreme Court set forth a basic framework for evaluating the delegation of legislative power:

> 'The power * * * to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it * * *.' (citations omitted). Moreover, the same doctrine precludes delegation of the legislative powers of a city (citations omitted).
>
> Several equally well established principles, however, serve to limit the scope of the doctrine proscribing delegations of legislative power. For example, legislative

> power may properly be delegated if channeled by a sufficient standard. 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature * * *.' (citations omitted)
>
> A related doctrine holds: 'The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect * * *.' (citations omitted) Similarly, the cases establish that '(w)hile the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.' (citations omitted).
>
> 8 We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that 'truly fundamental issues (will) be resolved by the Legislature' and that a 'grant of authority (is) * * * accompanied by safeguards adequate to prevent its abuse.' * * * * This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to *377 establish an effective mechanism to assure the proper implementation of its policy decisions.

Kugler v. Yocum (1968) 69 Cal.2d 371, 374–377; see also *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1604 ["An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions. [Citations.] 'This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.']; *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1516.

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B. Delegation of Legislative Powers and Alameda's Sunshine Ordinance

It is not difficult to fit the Sunshine Ordinance, and the Committee's "null and void" remedy provided therein, within *Kugler's* framework for proper delegations of legislative power.

With passage of the Sunshine Ordinance, the ***City Council*** resolved the *"truly fundamental issue"* (*Krugler* at 377) that, "[i]t is government's duty to serve the public, reaching its decisions in full view of the public, except as provided elsewhere in this article" (AMC § 2-90.2(a)) and, as specifically relevant here, that:

> Twelve (12) days before a regular meeting of City Council, and seven (7) days for all other policy bodies, the policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. These time requirements shall apply to posting on the internet. (AMC § 2-91.5(a)).

Enforcement of, and abidance by, that easy to meet noticing standard established by the City Council, moreover, should not impose any real barrier to the Council's ability to make *other fundamental policy decisions*, such as the policy decisions underlying the two ordinances amending the Cannabis Business Regulatory Ordinance and the Land Use Ordinance (Ordinance Nos. 3227 and 3228, respectively) at issue in the complaint.

Kugler also teaches that "*legislative power may properly be delegated if channeled by a sufficient standard. 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a* ***rule*** *or* ***standard*** *previously established by the legislature*". That seems to be precisely what the City Council did with the Sunshine Ordinance, in at least two ways relevant here. The City Council did not give the Commission broad discretion to determine when the City government fails to make "its decisions in full view of the public". Instead, it gave the Commission power to determine whether the facts of a particular case constitute a violation of specific ***rules*** *established by the City Council*, including the rule that policy bodies must, within the deadlines set by the Council, "post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting" (AMC § 2-91.5(a)). The Council established not only a specific ***rule*** for the Commission to apply in this case, but also a reasonably specific and detailed ***standard*** for the Commission to apply when determining whether the "meaningful description" element of the rule is satisfied

> b. 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 he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda or, if such documents are of more than one (1) page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours. (AMC § 2-91.5(b))

Those specific City Council-established rules and standards, which the Commission must find were violated before issuing a remedy, are primary "safeguards against its abuse". *Southern Pac. Transp. Co. v. Public Util. Comm'n* (1976) 18 Cal.3d 308, 313, (overruled on other grounds by adoption of Cal. Const. Art. III, § 3.5) [PUC must make various findings before closing railroad crossing was safeguard]. Another safeguard is the very limited duration of *any* remedy the Commission can issue. A null and void remedy issued by the Commission after a noticing violation, for example, has a temporal effect no longer than it takes the policy body to properly re-notice a meeting for consideration of the voided act. That the Commission's meetings and hearings are themselves subject to the Sunshine Ordinance and, therefore, conducted in public with notice, is another safeguard. Another safeguard is the Commission enjoyment of the assistance and guidance of the City Attorney, including at its meeting and hearings. *Salmon Trollers Marketing Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 295 [adequate safeguards existed on Fish and Game Director's power to temporarily suspend or conform statute statutes to multi-state fishing plan and issue emergency fishing regulations adopted without any public procedures in that they are limited to180 days' duration and submitted to Office of Administrative Law, and must immediately be reported to Legislature].

Mandamus relief is also available from the courts if the Commission were to abuse its discretion and authority under the Sunshine Ordinance. *Scott B. v. Board of Trustees of Orange County High School of Arts* (2013) 217 Cal.App.4th 117, 122-124. Moreover, whether through the Commission's own judgment, or as imposed by a court in a mandamus action, the Sunshine Ordinance on its face does not seem to pose the risk of hyper-technical grounds being used to invalidate City government actions. In the absence of an express command in the Sunshine Ordinance that strict compliance is required, the Commission would be justified in excluding de minimis violations as the basis for a null and void remedy under the Sunshine Ordinance. *People v. Wright,* (1982) 30 Cal. 3d 705, 713 [applicable standards can be implied from the statutory purpose]. In the present case, the Commission hardly seems to have applied the Sunshine Ordinance to use trivial violations as a way to hamstring the City Council and impose its own policy ends. Assuming the noticing violation found by the Commission was a violation of the Sunshine Ordinance, it was not a de minimis violation.

All of the the safeguards described above most likely satisfy the rules set forth in *Kugler* and the cases that have followed.

C. *Whitmire v. City of Eureka* and *Salmon Trollers Marketing Assn. v. Fullerton*

Although the Report cites no case authority, the California case that perhaps comes closest to supporting the argument that the Sunshine Ordinance constitutes an improper delegation of legislative power to the Open Government Commission is the case of *Whitmire v. City of Eureka* (1972) 29 Cal.App.3d 28. However, crucial differences between Alameda's Sunshine Ordinance and the ordinance at issue in *Whitmire* render *Whitmire* very weak authority for opining that the Sunshine Ordinance is invalid.

Whitmire addressed the Firemen's and Policemen's Retirement Fund System of the City of Eureka ('System'), which was established by an ordinance that provided, in relevant part, that "This Ordinance….may be amended in the following manner, to wit: 'That any proposed improvement or amendment shall be voted upon by secret ballot in the Fire Department and Police Department, separately, and the results thereof certified to the City Council. That in the event such proposed amendment shall have passed by a majority vote by each said Fire and Police Department, then if the Council, by a majority vote, shall pass such proposed amendment, the same shall become effective and binding.' *Whitmire* at 30. Between 1960 and 1968, the unfunded liability of the System grew from $1,241,395 to $3,373,841.

The *Whitemire* court, relying on the principles discussed in *Kugler, supra,* held that an ordinance requiring the Eureka City Council to obtain prior approval from fire and police employees before amending the System's enabling ordinance would constitute an unlawful delegation of legislative power.

> As the city points out, none of the recognized exceptions or limitations to the application of the doctrine as set forth by the Supreme Court in *Kugler* are evident in section 16. Section 16 does not limit itself to a delegation of power to determine a fact or state of facts upon which the operation of the ordinance depends; rather, it delegates to a small number of private persons in the employ of the city the Original control of the enactment of laws relating to the administration of the fiscal affairs of the city and provision for maintenance of its fire and police departments and to payment of compensation for services. In effect, if section 16 is interpreted as the Exclusive procedure for amending the

> System, any proposed action by the city council regarding the retirement fund is subject to Approval or veto by the two departments' members**.** Since the power to approve or veto actions of a legislative body is, of course, part of the legislative process, this grant of authority must be accompanied by "safeguards adequate to prevent its abuse" (Kugler, supra, at p. 376, 71 Cal.Rptr. at p. 690, 445 P.2d at p. 306). None exist under appellants' 'exclusive remedy' interpretation, and therefore this section must be declared an unconstitutional delegation of legislative power if interpreted in that manner.

Whitmire at 32–33.

Alameda's Sunshine Ordinance stands in contrast with each aspect of the Eureka ordinance in *Whitmire* that failed the test of a proper delegation of legislative power. The Sunshine Ordinance establishes specific rules and standards the Commission is required to apply when determining whether proper notice was given by a published meeting agenda. By contrast, the Eureka ordinance in *Whitmire* set no standards whatsoever that fire and police employees were required to apply in deciding whether to approve of amendments to the ordinance. In essence, fire and police employees would have been given a veto power over city legislation that they could exercise for *any reason*, including for the very purpose of frustrating the city council's policy decisions.

The "null and void" sanction under Alameda's Sunshine Ordinance does not constitute a "veto" power. It cannot be imposed because the Commission dislikes, on substantive policy grounds, a particular ordinance (as the Governor and some mayors are permitted with the veto power). Instead, it can only be imposed when events – outside of the control of the Commission – occur which violate the specific rules established in the Sunshine Ordinance. Moreover, an obvious and non-burdensome way for the City Council to avoid the null and void remedy – and to make fundamental policy decisions - is to simply not violate the objective noticing rules it established in the Sunshine Ordinance or promptly cure any failure to do so. Thus, even if it were considered a very limited form of "veto" – which it is not – the null and void remedy in the Sunshine Ordinance is confined by specific standards and safeguards against abuse which *Whitmire* found lacking in the Eureka ordinance.

Indeed, the Court of Appeal in *Salmon Trollers Marketing Assn. v. Fullerton,* upheld the delegation by the Legislature of a limited power akin to a "veto" power to the Director of Fish and Game of the State of California. The delegation upheld in *Salmon Trollers* is best characterized as exceeding the power granted the Commission in the Sunshine Ordinance because, among other things, the Director was given the authority to *suspend* the operation of state statutes – with broader discretion – for up to 180 days. Here, the limited power of the Commission has a duration no longer than the *much shorter* period of time it would take the City Council to properly notice

In *Salmon Trollers* the court addressed the Legislature's grant to the Fish and Game Director power to temporarily suspend or conform statute statutes to multi-state fishing plan "if necessary to avoid a substantial adverse impact on the Pacific Fishery Management Council's plan" and issue emergency fishing regulations adopted without any public procedures up to180 days' duration.

> Reviewing sections 7650-7653, it is clear that adequate standards are set forth to guide the Director as he implements the basic policy decision already made by the Legislature. It is legislative judgment that the state shall fully cooperate and assist in the formulation of fishery management plans adopted by the council. A basic

> policy determination has also been made to support the Fishery Management Plan once adopted by the council. This support is to be carried out by the Director, when necessary, by suspending inconsistent statutes or regulations temporarily and adopting consistent regulations effective up to 180 days only. In the meantime, the Legislature clearly intends to consider conforming California statutory law to fishery management plans adopted by the council (Fish & G. Code, s 7653), based on the Director's report to the Legislature as to which statutes should be amended, repealed or adopted. (Fish & G. Code, s 7653.) A lasting and underlying policy decision is that the Legislature has determined to continue state jurisdiction over its fisheries within three miles offshore by avoiding conflict with the Federal **367 Fishery Plan. (Fish & G. Code, s 7652.) These are fundamental policy determinations made by the Legislature and not by the Director of Fish and Game.

Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal.App.3d 291, 300. For the reasons discussed above and don't need to be repeated here, Alameda's Sunshine Ordinance grants more limited authority to the Sunshine Commission, and contains comparable safeguards to those addressed in *Salmon Trollers*.

At the very least, the above-cited cases do not lead to any clear and certain conclusion that the Sunshine Ordinance's null and void remedy is invalid.

2. Alameda City Charter

The Report asserts that "Second, and most significantly, is the null-and-void remedy cannot be applied to the legislative action of a City Council without conflicting with certain provisions of the City's Charter." The Report states, more specifically, that "Under the City's Charter, the Council is vested with all powers of the City and powers vested in city councils. See Article III, Sec. 3-1. Chief among these powers is the power to legislate locally", and that "use of the null-and-void remedy to effectively repeal an ordinance contravenes the Charter's provisions related to local lawmaking."

The Report cites no authority for this reading of the City Charter and it seems mistaken. Nothing in the Charter provisions vesting legislative control in the City Council cited in the Report appear to assert principles more restrictive than the delegation of legislative power doctrine discussed above. Moreover, no express provision of the Charter prohibits the creation of the Open Government Commission or granting it the narrow authority to enforce the notice requirements set forth in the Sunshine Ordinance. As the Report acknowledges, moreover, "the Council also has the authority to vest in officers or boards "powers and duties additional to those set forth in the Charter." See id., at Sec. 3-3." That is what the Council did within its considerable and broad authority to legislate under the Charter:

> A charter constitutes a city's local constitution, and city ordinances stand in the same relationship to a charter as do statutes to the state constitution. (Porter v. City of Riverside (1968) 261 Cal.App.2d 832, 836, 837 (Porter).) Thus, ***the same presumptions favoring the constitutionality of statutes apply to ordinances.*** (Id. at p. 837.) " 'In considering the scope or nature of appellate review in a case [concerning the validity of an ordinance] we must keep in mind the fact that the courts are examining the act of a coordinate branch of the government-the legislative-in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a factfinding body.' " (Ratkovich v. City of San Bruno (1966) 245 Cal.App.2d 870, 879 (Ratkovich).) "Courts have nothing to do

with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties." (Ibid.)

Further, unless expressly limited by its charter, a city council has plenary authority to interpret and implement charter provisions and may exercise all powers not in conflict with the California Constitution. (Miller v. City of Sacramento (1977) 66 Cal.App.3d 863, 867-868 (Miller); Simons v. City of Los Angeles (1976) 63 Cal.App.3d 455, 467-468.) The City Council's action "will be upheld by the courts unless beyond its powers, 'or in its judgment or discretion is being fraudulently or corruptly exercised.' " (Porter, supra, 261 Cal.App.2d at p. 836.) **Thus, a party making a facial challenge to an ordinance, requesting that it be voided, must demonstrate that its provisions " 'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions .' "** (Personal Watercraft Coalition v. Marin County Bd. of Supervisors (2002) 100 Cal.App.4th 129, 137-138 (Personal Watercraft Coalition).) "If reasonable minds might differ as to the reasonableness of the ordinance [citations] or if the reasonableness of the ordinance is fairly debatable [citations], the ordinance must be upheld." (Ratkovich, supra, 245 Cal.App.2d at p. 878.)
Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859, at *2

Alameda's charter provides that its legislative powers are vested in the City Council, and because there is no provision in the charter limiting the authority of the City Council, the City Council had full power to enact ordinances interpreting and implementing [a Charter provision]. (See Miller, supra, 66 Cal.App.3d at pp. 867-868.)

Where a charter provision is ambiguous or susceptible of two or more meanings, the city council, not the court, has the authority to decide issues of interpretation and applicability. (*Porter, supra,* 261 Cal.App.2d at p. 836.)

Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859, at *3.

Ordinances enacted by the City Council are presumptively ***valid*** under the City Charter. Because the Charter contains no prohibition against enactments such as the Sunshine Ordinance, it is unlikely it would be found invalid under the Charter.

The argument that "unless cabined in some way, the null-and-void remedy is arguably an end-run around [the referendum] process as well" is not well developed and is doubtful. As discussed above, the remedy is cabined by specific rules, a violation of which must be found before it is imposed. Moreover, the Report cites no authority for its arguable position. One would think that there would be such authority relating to the Brown Act (under which the null and void remedy has existed for over 30 years), which has been heavily litigated and would "arguably" be just as much of a potential "end-run" around the referendum process, which has constitutional status in California. The lack of mention of any such authority indicates that this concern may be misplaced.

3. Miscellaneous Points

a. "when viewed in context, the Sunshine Ordinance's null-and-void remedy is without precedent….. Additionally, as applied here, the null and void remedy is at odds with the Brown Act."

As an initial matter, the second point raises questions about the first. The "null and void" remedy under the Sunshine Ordinance is a remedy under the much older Brown Act and can hardly be called "unprecedented". It may be "unprecedented" at the municipal level in California, but there is no applicable rule of law (derived from the Charter or the state constitution) under which "unprecedented" equates to invalid or illegal. Nor is it correct to label the Sunshine Ordinance "at odds" with the Brown Act, or clear how that invalidates the Sunshine Ordinance.

There is no claim in the Report that the Sunshine Act somehow purports to set lower standards, allow for less public participation, or to relieve City government of any of its duties under the Brown Act. Were that the case, the Sunshine Ordinance would be "at odds with" – and preempted by – the Brown Act. *People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1174 ["If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."]; *see Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 168 ["Ribakoff misperceives the relationship between the Brown Act and the ordinance. Ribakoff's argument that the ordinance must be authorized by the Brown Act evidences a misunderstanding of the fact that the City of Long Beach is a charter city and therefore has plenary power over its municipal affairs, including the police power to adopt ordinances such as LBMC 2.03.140, so long as its actions are not preempted by state or federal law. (Cal. Const., art. XI, §§ 5, 7; see *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1"], as modified (Sept. 13, 2018), reh'g denied (Oct. 3, 2018), review filed (Oct. 23, 2018)

The Report cites no authority for the suggestion that as a matter of constitutional or statutory law that such a null and void determination must be made in the first instance by a court and that it cannot be properly assigned within the *Kugler* framework to an administrative body such as the Commission. Moreover, the decisions of the Commission *are in any event* subject to judicial review in a mandamus action in court.

Lurking in the Report might be the implied argument that if the Sunshine Ordinance requires greater public access or imposes more stringent noticing standards than the Brown Act, it is invalid. It cites no authority for this proposition or the corollary notion that the Brown Act somehow establishes the maximum in terms of public access to which residents of any California city can ever be entitled. And, whatever the strength of the legal argument, it goes contrary to the intent of the City Council: **"In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply." AMC § 2-91.3.**

b. "the null-and-void remedy contradicts the local organic statute that formed the Commission and governs its continued existence"

Although the Commission might consider whether the local organic statute that formed the Commission AMC § 2-22 was intended to repeal the null and void remedy in the Sunshine Ordinance or that the two so inconsistent that they cannot both be enforced or carried out (*see e.g. Burlington N. & Santa Fe Ry. Co. v. Puc* (2003) 112 Cal.App.4th 881, 889), there does not in fact seem to be any contradiction between the two. In fact, the Commission's organic statute was enacted in the same ordinance (Ord. No. 3042, § 4, 1-3-2012) that amended the provisions in the Sunshine Ordinance that named the Commission the primarily regulatory and enforcement body under the Sunshine Ordinance AMC § 2-93.1 ["The primary regulatory and enforcement body of the Sunshine Ordinance shall be the Open Government Commission formed pursuant to Section 2-22 (Open Government Commission) of Article II (Boards and Commissions)"]. Because the *same* ordinance enacted the Commission's organic statute *and* amended the

Sunshine Ordinance, it is highly unlikely that the City Council intended to repeal any part of the Sunshine Ordinance except as explicitly stated in Ord. No. 3042. The Sunshine Ordinance also provides in AMC § 2-93.7, "Sunshine Ordinance Supersedes Other Local Laws. The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply."

Moreover, together, the organic statute and the Sunshine Ordinance direct the Commission to "Hear and decide complaints by any person concerning alleged non-compliance with the Sunshine Ordinance" and "Consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints" and grant it the power to issue a null and void remedy when the Sunshine Ordinance's noticing rules are violated. Those functions are not mutually exclusive; the Commission is capable of both considering ways to to informally resolve complaints as well as deciding cases and imposing remedies.

The Report's concern that "At a minimum, the Sunshine Ordinance lacks guidelines for assisting the Commission to decide whether to make a recommendation or use the extraordinary null-and-void remedy," does not make the Sunshine Ordinance invalid under the delegation principles discussed above. In some instances, the Commission may able to do both and in other cases a choice between remedies may be dictated by the case presented. A recommendation may be appropriate in some cases, whereas in other cases *not* imposing a null and void remedy would essentially be a judgment validating an underlying noticing violation. That does not lead the conclusion that the Ordinance itself gives unfettered and unconstitutional discretion to the Commission.

Conclusion

Thank you for considering this response to the City Attorney's December 10 Report. Finally, this is not a paid effort. Please excuse any shortcomings in it in light of the fact that it was necessarily prepared during "free time" in the very short time since the City Attorney first made public its opinion that the "null and void" remedy enacted by the City Council is an invalid remedy.

GOLIGHTLY v. MOLINA

Court of Appeal, Second District, Division 3, California.

Robert Glen GOLIGHTLY, Plaintiff and Appellant, v. Gloria MOLINA et al., Defendants and Respondents.

B246413

Decided: September 25, 2014

Huskinson, Brown & Heidenreich, David W.T. Brown and Paul E. Heidenreich for Plaintiff and Appellant.
Judy W. Whitehurst, Assistant County Counsel, Dawyn Harrison, Principal Deputy County Counsel; Miller Barondess, Louis R. Miller, Mira Hashmall and Vinay Kohli for Defendants and Respondents.
Plaintiff and appellant Robert Glen Golightly (Plaintiff) appeals a judgment following a grant of summary judgment in favor of defendants and respondents County of Los Angeles (County) and the five members of the County Board of Supervisors (Board), namely, Gloria Molina, Zev Yaroslavsky, Don Knabe, Mark Ridley–Thomas and Mike Antonovich (sometimes collectively referred to as the County).

The essential issue presented is whether the procedure by which the County enters into Social Program Agreements (SPAs) with social service organizations that provide social services to county residents is subject to the Brown Act (Gov.Code, § 54950 et seq.), a statutory scheme which imposes open meeting requirements on legislative bodies.

Proposed SPAs are individually scrutinized by the Executive Officer of the Board (Board's Executive Officer), County Counsel, County Auditor–Controller, and ultimately, by the County Chief Executive Officer (County CEO), and the approval of each is required. However, the four signatories do not collectively decide to approve an SPA. Rather, a proposed SPA is reviewed in sequence by the four signatories, for issues within each one's purview. The Brown Act applies to meetings of legislative bodies. (Gov.Code, § 54952.2.) The four SPA signatories do not constitute a legislative body and do not deliberate collectively in approving a SPA. Therefore, Plaintiff's Brown Act claim is meritless.

FACTUAL AND PROCEDURAL BACKGROUND

1. Pleadings.

On April 22, 2010, Plaintiff, a taxpayer, filed his original complaint against the County. The fourth amended complaint, which is the operative pleading, alleged causes of action for: waste of public funds (Code Civ. Proc., § 526a); violation of the Brown Act (Gov.Code, § 54950 et seq.); declaratory relief for ultra vires acts; and conflicts of interest including violations of the Political Reform Act of 1974 (Gov.Code, § 81000 et seq.).

The gravamen of Plaintiff's action is that the County "secretly uses public funds" to enter into SPAs with social service providers in violation of the Brown Act, and instead of being publicly approved by the Board, SPAs are actually entered into by County officials pursuant to an improper delegation of decisionmaking authority by the Board.

2. County's motion for summary judgment.

The County moved for summary judgment or summary adjudication of issues. It argued, inter alia: Plaintiff's Brown Act claim fails because the Board did not create a "legislative body" and there is no evidence of a secret meeting; the Board is not required to vote on every discretionary expenditure and the delegation of authority to the County CEO and others cannot support a Brown Act claim; the waste claim fails as it is predicated on the Brown Act claim; the Board's delegation of authority was lawful, and courts cannot interfere with lawful delegations. Further, there was no evidence the County violated the Political Reform Act or the conflict of interest statute.

In opposition, Plaintiff argued: the County's motion had failed to address the hundreds of allegations in his fourth amended complaint; the County failed to establish that a single discretionary expenditure was not wasteful; the decisions regarding SPA discretionary expenditures were made by a "legislative body" and required open meetings pursuant to the Brown Act; the Board has only limited power to delegate its discretionary authority; and the County did not submit sufficient evidence to summarily adjudicate the cause of action for conflicts of interest.

In reply, the County argued Plaintiff "has provided virtually no evidence in opposition to [the] summary judgment motion. Indeed, after propounding 1,700 written discovery requests, taking 18 days of deposition and receiving more than 70,000 pages of documents, Plaintiff is still unable to provide evidence that any of the Supervisors had a conflict of interest with respect to any transaction. Plaintiff has not presented any evidence of a 'secret meeting' held by the Supervisors (even though Plaintiff unequivocally makes that allegation in the [fourth amended complaint]). And Plaintiff has not presented any evidence of wasteful conduct. Plaintiff cannot defeat summary judgment by relying on his own pleadings. If Plaintiff had any evidence to support his claims, this would have been the time to submit it to the Court—he cannot proceed to trial on the basis of unsupported allegations."

3. Plaintiff's cross-motion for summary adjudication.

Plaintiff moved for summary adjudication on the County's third affirmative defense that its alleged wrongful acts or omissions were based on the exercise of a legislative or discretionary function and therefore such claims are barred by the County's legislative immunity.

4. Trial court's ruling.

After hearing the matter, the trial court granted summary judgment in favor of the County. In an extensive writing ruling, the trial court held, inter alia:

In creating a procedure for processing SPAs, the Board did not create a "legislative body" within the meaning of the Brown Act. The Board's Executive Officer, County Counsel, Auditor–Controller, and County CEO act as administrative officers who are delegated specific responsibility in reviewing proposed SPAs, but they are not a "commission, committee, board, or other body" with regard to the SPA approval process. The Brown Act "is concerned with the collective investigations and deliberations" of a legislative body. The four SPA signatories do not meet as a body to discuss proposed SPAs, and "do not collectively decide to approve a SPA, but rather . each signatory has a separate obligation to review the proposed SPAs to meet county contracting standards." Therefore, Plaintiff failed to raise a triable issue with respect to his Brown Act claim.

The "backbone of Plaintiff's waste claim appears to be that every single expenditure of SPA funds constitutes waste because Defendants failed to comply with the Brown Act." This claim fails for the reasons already stated.

Plaintiff also contended that all SPA expenditures involve waste because the Board improperly delegated authority over a discretionary process to county administrators. The claim was meritless because the evidence established the Board retained control over fundamental policy decisions, and its delegation of SPA authority contained adequate safeguards.

As for Plaintiff's claims the Supervisors allegedly participated in governmental decisions in which they had a financial interest (Gov.Code, § 87103) and violated the prohibition on elected officials being financially interested in a contract made by them in an official capacity (Gov.Code, § 1090), the trial court relied on Plaintiff's factually devoid discovery responses. Those questions were as follows: "Are you aware [from sources other than your attorney] of any conflict of interest between any of the supervisors' offices and any social program agreement recipients?"; "Are you aware of any . social program agreement recipients who provided campaign donations to any of the supervisors' officers [sic]?"; "Are you aware of any instances in which any of the supervisors had a financial interest in any organizations that received social program agreement funds?"; "Do you know whether any of the county supervisors are on the boards of directors of any of the organizations that are listed here?"; "Do you know whether any of the county supervisors are on a board of advisors with respect to any of the organizations that are listed here?"; "Do you know whether any of the county supervisors are paid by any of the organizations that are listed here?"; "Do you know whether any of the county supervisors have a financial interest in any of the organizations that are listed here?"; "Do you know whether any of the spouses, of any of the supervisors, has a financial interest [in] any of the organizations that are listed here?"; "Do you know whether any of the children, of any of the supervisors, has a financial interest [in] any of the organizations that are listed here?"; "Do you have any documents reflecting a relationship between any of the supervisors and the organizations that are listed on pages 98 and 99 of the fourth amended complaint?" To each of the above questions, Plaintiff answered, "No." Plaintiff's responses "were admissible evidence to show the absence of facts to support the allegations of the complaint."

The trial court concluded, "Under the doctrines of legislative immunity and separation of powers, the courts generally should avoid marching into the legislative domain, except in the most egregious circumstances. When the layers of the proverbial onion are stripped away in this lawsuit, we see a plaintiff as a concerned taxpayer who complains that the Los Angeles County Board of Supervisors has been illegally expending funds and failing to properly account for certain expenditures. Plaintiff has chosen theories of illegal meetings under the Brown Act, waste and conflicts of interest as his theories in pursuit of judicial intervention to right these perceived wrongs. While it is surely healthy for all levels of citizenry and government to continually look for ways to 'build a better mousetrap' in terms of government operations and accountability, not all activity of a legislative body will meet with the approval of all citizens. This case, in a nutshell, involves the question of whether the Board of Supervisors has lawfully delegated contracting authority for SPAs to the administrative level. The Court can find no secret meetings, unlawful meetings or other violation of the Brown Act, no acts of waste and no conflicts of interest under the evidence herein presented. In a county the size of Los Angeles . the concept of careful delegation makes perfect sense and is authorized by law. Additionally, the evidence discloses that the SPAs are adequately accounted for in the postings by the County. [¶] Defendants' motion for summary judgment is granted. Plaintiff's motion for summary adjudication [is] moot."

5. Judgment and postjudgment proceedings.

On November 5, 2012, pursuant to the earlier grant of summary judgment, the trial court entered judgment in favor of the County. On January 3, 2013, Plaintiff filed a timely notice of appeal from said judgment.

On January 11, 2013, during the pendency of the appeal, Plaintiff filed a motion in the trial court for attorney fees pursuant to Code of Civil Procedure section 1021.5 under a catalyst theory of recovery. (Graham v. DaimlerChrysler Corp. (2004) 34 Cal.4th 553.) On March 15, 2013, the trial court heard and denied Plaintiff's attorney fee motion. Plaintiff did not appeal that order.

CONTENTIONS

We summarize Plaintiff's contentions as follows: the Board's delegation of its power to the County CEO to enter into SPAs was improper; the County's review process for SPAs contravenes the Brown Act; because the SPAs violate open meeting requirements, SPA expenditures constitute waste; and Plaintiff was entitled to attorney fees under a catalyst theory.

DISCUSSION

1. Overview of SPA expenditures.

For the 2009–2010 fiscal year, the Board/Executive Office budgeted $147 million for its own operations, representing about 0.67 percent of the County's $23 billion budget. Said $147 million budget includes a fund called the Equal Budget Allocation (EBA). Funds from the EBA are used to pay the Supervisors' office staff salaries, office and travel expenses, and to fund SPAs pursuant to Government Code section 26227.

Government Code section 26227 gives the Board the authority to appropriate and spend funds for social service programs for county residents.[1] The County uses SPAs to provide funding to organizations to address

issues such as hunger, sexual and domestic violence, child abuse, as well as services for the elderly, physically and mentally disabled, and persons affected by HIV/AIDS, cancer and other serious illnesses. For the 2009–2010 fiscal year, approximately $17 million was allocated to the EBA. Each of the five Supervisors' offices receives a proportionate share of the EBA. The allocation for the 2009–2010 fiscal year was $3.4 million per supervisorial district.

a. Delegation by Board of its contracting authority.

In 1990, the Board formally delegated authority to the County's Chief Administrative Officer (CAO) (now the County CEO) to "execute such contracts and agreements as may be necessary to implement the social programs to be paid from funds appropriated in the Budget for discretionary use by the supervisors, when such programs are to meet the social needs of the population of the County, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons."

In 1992, the Board took additional action, directing that the CAO's "previously delegated contracting authority shall be exercised in the future only when countersigned by the Auditor–Controller and the Executive Officer of the Board."

Further, although not ordered by the Board, every SPA also is reviewed and signed by County Counsel, which is typical for many contracts entered into by the County. Thus, every SPA is signed by three County offices (Auditor–Controller, Board's Executive Officer and County Counsel) before the County CEO executes the SPA pursuant to the Board's delegation of authority.

b. The SPA approval mechanism.

The SPA process begins with requests from funding from the offices of the five individual Supervisors. After the Board's Executive Officer receives the requests, it analyzes the request and conducts research to determine whether fulfilling the request would serve a social need of County residents. The Board's Executive Officer does not discuss the request with any Supervisors other than the Supervisor's office which submitted the request.

The Board's Executive Officer does not approve a request for SPA funding. The role of the Board's Executive Officer is to evaluate the request and to determine whether the SPA is necessary to meet a social need. If the Board's Executive Officer concludes the funding request satisfies a social need of County residents, the Board's Executive Officer prepares the agreement and forwards it to County Counsel for its review and signature.

County Counsel then reviews the proposed SPAs and will reject SPAs that do not comply with the law. After County Counsel has executed and returned the proposed SPA to the Board's Executive Officer, the agreement is sent to the requesting organization for signature. The requesting organization signs the SPA and sends it back to the Board's Executive Officer.

The Board's Executive Officer then forwards the SPA to the Auditor–Controller for its approval. Once the Board's Executive Officer obtains the proposed SPA with the signature of the Auditor–Controller, the Board's Executive Officer executes the proposed SPA.

Once the proposed SPA has been approved by County Counsel, the recipient organization, the Auditor–Controller and the Board's Executive Officer, it is sent to the County CEO for final approval. The County CEO is vested with the final authority to approve the SPA.

Once the County CEO signs the SPA and returns it to the Board's Executive Officer, the Auditor–Controller issues a check to the recipient organization.

2. Standard of review.

The pivotal issue before us is the applicability of the Brown Act, specifically, whether the four signatories to a SPA constitute a legislative body within the meaning of Government Code section 54952, so as to be subject to the Act. As an appellate court, "we 'conduct independent review of the trial court's determination of questions of law.' [Citation.] Interpretation of a statute is a question of law. [Citations.] Further, application of the interpreted statute to undisputed facts is also subject to our independent determination. [Citation.]" (Harbor Fumigation, Inc. v. County of San Diego Air Pollution Control Dist. (1996) 43 Cal.App.4th 854, 859.)

3. The Brown Act' s purpose, scope and broad construction.

"Open government is a constructive value in our democratic society. [Citations.]" (Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 380 (Roberts). The Brown Act (Gov.Code, § 54950 et seq.), adopted in 1953 and since amended, is intended to ensure the public's right to attend the meetings of public agencies. (Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal.4th 821, 825.) To achieve this aim, the Act requires, inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda. (Gov.Code, § 54954.2, subd. (a); Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 555.) The Act thus serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation by public bodies. (Cohan, supra, 30 Cal.App.4th at p. 555.)

The Brown Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (Gov.Code, § 54950; Stats.1953, ch. 1588, § 1.)

The Brown Act dictates that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (Gov.Code, § 54953, subd. (a).)

The term "legislative body" has numerous definitions, set forth in Government Code section 54952. The question presented is whether the four SPA signatories constitute a legislative body within the meaning of subdivision (b) of Government Code section 54952. This provision states in relevant part: "As used in this chapter, 'legislative body' means: [¶] . [¶] (b) A commission, committee, board, or other body of a local agency,

whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." (Ibid.)

In determining whether the four SPA signatories are a legislative body within the meaning of the Brown Act, we are mindful the Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed. (San Diego Union v. City Council (1983) 146 Cal.App.3d 947, 955 [construing open-meeting requirements].) This is consistent with the rule that "civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]" (People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 313.)

4. The four SPA signatories are not a legislative body and do not engage in collective decisionmaking within the meaning of the Brown Act.

The Brown Act contemplates collective action by a legislative body. As relevant here, the Act defines a legislative body as "[a] commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." (Gov.Code, § 54952, subd. (b), italics added.) Plaintiff seeks to characterize the four signatories to a SPA as a "committee" whose decisionmaking is subject to the Brown Act.

The argument fails because the four SPA signatories do not engage in collective decisionmaking. Rather, as set forth above in some detail, the four SPA signatories act separately in scrutinizing proposed SPAs. Because they deliberate individually as opposed to collectively, their decisionmaking is outside the ambit of the Act.

a. Brown Act applies to collective decisionmaking.

The Supreme Court's decision in Roberts, supra, 5 Cal.4th 363 is instructive. It explained, "the keystone of the Brown Act is the requirement that '[a]ll meetings of the legislative body of a local agency shall be open and public.' ([Gov.Code,] § 54953, subd. (a).) An early case interpreted this language to apply only to formal meetings; an informal ' "fact-finding meeting" ' conducted by members of a city planning commission at a local country club was held not within the scope of the act. (Adler v. City Council (1960) 184 Cal.App.2d 763, 767.) The Legislature responded in 1961 with substantial revisions of the act intended to bring informal deliberative and fact-finding meetings within its scope. (Stockton Newspapers, Inc. v. Redevelopment Agency [(1985)] 171 Cal.App.3d [95,] 101–102; 42 Ops.Cal.Atty.Gen. 61, 68 (1963); Comment, Access to Governmental Information In California (1966) 54 Cal.L.Rev. 1650, 1654; 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 579, p. 788.) At that time, [Government Code] section 54952.6 was added to provide that the deliberative action covered by the act included 'a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.' (Stats.1961, ch. 1671, § 3, p. 3637.)" (Roberts, supra, 5 Cal.4th at p. 375, italics added.)

After "the 1961 revisions, the courts have applied provisions of the act to informal deliberative action, but have always required that some sort of collective decisionmaking process be at stake. Thus the action of one public official is not a ' meeting' within the terms of the act; a hearing officer whose duty it is to deliberate alone does not have to do so in public. (Wilson v. San Francisco Mun. Ry. (1973) 29 Cal.App.3d 870, 878–879.) As the Court of Appeal in Wilson reasoned, because the act uniformly speaks in terms of collective action, and because the term 'meeting,' as a matter of ordinary usage, conveys the presence of more than one person, it follows that under [Government Code] section 54953, the term ' meeting' means that ' two or more persons are required in order to conduct a " meeting" within the meaning of the Act.' (29 Cal.App.3d at p. 879.)" (Roberts, supra, 5 Cal.4th at pp. 375–376, italics added.)

Another court "has characterized the term as referring to a 'collective decision-making process ' and as a 'deliberative gathering.' (Sacramento Newspaper Guild, supra, 263 Cal.App.2d at pp. 47, 48, italics added.) More recently the Court of Appeal has opined that the term 'comprehends informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business.' (Stockton Newspapers, Inc. v. Redevelopment Agency, supra, 171 Cal.App.3d at pp. 100, 102, italics added; see also 7 Witkin, Summary of California Law, supra, Constitutional Law, § 579, p. 788.) Another court has declared that the act applies to informal collective acquisition and exchange of facts before a decision is reached. (Rowen v. Santa Clara Unified School Dist., supra, 121 Cal.App.3d at p. 234 [act prohibits closed session of school board to consider qualifications of real estate agents before public session at which agents would receive contract to dispose of public property].)" (Roberts, supra, 5 Cal.4th at p. 376, certain italics added.)

In sum, it is collective decisionmaking by a legislative body, not the solitary decisionmaking of an individual public official, which is subject to the Brown Act.

b. No collective deliberations in approval of proposed SPAs.

As set forth above, proposed SPAs are individually scrutinized by the Board's Executive Officer, County Counsel, Auditor–Controller and ultimately by the County CEO, and the approval of all four officials is required. However, the four signatories do not collectively decide to approve an SPA. Rather, a proposed SPA is reviewed in sequence by the four signatories, for issues within each one's purview. The Brown Act only applies to meetings of legislative bodies. (Gov.Code, §§ 54952.2, 54953.) The four SPA signatories do not constitute a legislative body and do not deliberate collectively in approving a SPA. Therefore, Plaintiff's Brown Act claim is meritless.

Of course, "the intent of the Brown Act cannot be avoided by subterfuge; a concerted plan to engage in collective deliberation on public business through a series of letters or telephone calls passing from one member of the governing body to the next would violate the open meeting requirement. (See, e.g., Stockton Newspapers, Inc. v. Redevelopment Agency, supra, 171 Cal.App.3d at p. 102; 65 Ops.Cal.Atty.Gen. 63, 65 (1982).)" (Roberts, supra, 5 Cal.4th at pp. 376–377.) Stockton held "the alleged participation by defendants, a majority of the legislative body of the redevelopment agency, in a series of one-to-one nonpublic and unnoticed telephone conversations with the agency's attorney for the commonly agreed purpose of collectively deciding to approve the transfer of ownership in redevelopment project property constitutes a 'meeting' at which 'action' was taken in violation of the Brown Act." (Stockton, supra, 171 Cal.App.3d at p. 105.)

Here, unlike Stockton, there is no end run around the Brown Act. The four SPA signatories, in sequence, each make their own determination with respect to a proposed SPA. Because the SPA approval process does not involve collective deliberation, the concerns presented in Stockton are absent.

5. No merit to claim the Board improperly delegated its authority to enter into SPAs.

Plaintiff contends the Board is prohibited from delegating its authority under Government Code section 26227 to appropriate and spend funds for social services, or alternatively, that the delegations lack adequate safeguards and guidelines. The arguments are unavailing.

a. Government Code authorizes delegation of authority by Board.

Plaintiff contends Government Code section 26227 prohibits the Board from delegating its authority with respect to SPAs because the statute provides, "The board of supervisors of any county may appropriate and expend money . to meet the social needs of the population." (Italics added.) However, nothing in Government Code section 26227 prohibits a board of supervisors from delegating its contracting authority with respect to SPAs.

Moreover, Government Code section 23005 states: "A county may exercise its powers only through the board of supervisors or through agents and officers acting under authority of the board or authority conferred by law." (Italics added.)

We conclude the Government Code permits a board of supervisors to delegate its authority to enter into SPAs with recipient social service organizations.

b. A legislative body may delegate administrative authority.

Moreover, delegation by legislative bodies is essential to the basic ability of government to function. "As long ago as 1917 [the Supreme Court] recognized that legislative bodies have neither the resources nor the expertise to deal adequately with every minor question potentially within their jurisdiction. (Kugler v. Yocum (1968) 69 Cal.2d 371, 383 (Kugler), citing Gaylord v. City of Pasadena (1917) 175 Cal. 433, 436.)

In 1937, the Supreme Court observed, " ' "The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions, the legislature may delegate to them administrative functions in carrying out the purpose of a statute and various governmental powers for the more efficient administration of the laws." ' " (Stanislaus Co. etc. Assn. v. Stanislaus (1937) 8 Cal.2d 378, 390.) Only "in the event of a total abdication of [legislative] power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative character of the process of reaching legislative decision." (Kugler, supra, 69 Cal.2d at p. 384, italics added.)

The nondelegation doctrine is " 'rooted in the principle of separation of powers that underlies our tripartite system of Government.' " (Samples v. Brown (2007) 146 Cal.App.4th 787, 804.) An unconstitutional delegation of legislative power occurs when a legislative body confers upon an administrative agency unrestricted authority to make fundamental policy decisions. (Ibid.)

The nondelegation doctrine serves "to assure that 'truly fundamental issues [will] be resolved by the Legislature' and that a 'grant of authority [is] . accompanied by safeguards adequate to prevent its abuse.' [Citations.] This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions." (Kugler, supra,69 Cal.2d at pp. 376–377.) [2]

Thus, the real issue is not whether the Board can lawfully delegate its authority to execute SPAs to the County CEO, but whether, in doing so, the Board has retained sufficient power and has established adequate safeguards.

c. The Board's retention of control over fundamental policy decisions.

The approval of a county budget is a fundamental legislative function and the power and obligation to enact a county's budget is vested by law in the board of supervisors. (County of Butte v. Superior Court (1985) 176 Cal.App.3d 693, 698, citing Gov.Code, § 29088.)

In contrast, the execution of SPAs with social service providers, utilizing funds which have been appropriated to the EBA, is not a fundamental policy decision. The "fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme [does not] render the legislation invalid as an unlawful delegation." (Kugler, supra, 69 Cal.2d at pp. 379–380.)

Here, the Board has retained its budgeting authority. There has been no delegation in that regard. The Board has delegated to the County CEO only its authority to execute SPAs with social service providers, using funds which the Board already has appropriated to the EBA.

Further, the Board expressly retained authority to modify or rescind its delegation of SPA authority to the County CEO. At the inception in 1990, the Board specified the delegation of SPA authority would remain in place "[u]ntil otherwise ordered by the Board." Thereafter, in 1992, the Board directed that the "previously delegated contracting authority shall be exercised in the future only when countersigned by the Auditor–Controller and the Executive Officer of the Board."

Clearly, there has been no "total abdication" by the Board of its legislative power. (Kugler, supra, 69 Cal.2d at p. 384.)

d. The SPA approval process has adequate safeguards.

The language of the original delegation in 1990 authorized the then CAO to enter into SPA agreements only "when such programs are to meet the social needs of the population of the County, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons." This language is consistent with Government Code section 26227, which gives the Board the authority to appropriate and spend funds for social service programs for county residents.

In 1991, new guidelines were added, providing, inter alia, that no more than 20 percent of the recipient organization's budget could be spent on administrative expenses. The following year, as indicated, the Board further required that SPAs also be signed by the Auditor–Controller and Board's Executive Officer.

Moreover, each proposed SPA undergoes multiple layers of scrutiny. The SPA process begins with requests from funding from the offices of the five individual Supervisors. After the Board's Executive Officer receives the requests, it analyzes the request and conducts research to determine whether fulfilling the request would serve a social need of County residents. If the Board's Executive Officer so finds, that office prepares the agreement and forwards it to County Counsel for its review and signature. County Counsel then reviews the proposed SPA for legal compliance. The SPA also requires approval by the Auditor–Controller. Once those approvals have been obtained, the Board's Executive Officer executes the proposed SPA. Thereafter, the SPA is transmitted to the County CEO for final approval. Once SPAs are approved and funded they are posted online on the County's website, on a quarterly basis.

Clearly, the County has put in place "an effective mechanism to assure the proper implementation of its policy decisions." (Kugler, supra, 69 Cal.2d at p. 377.)

In sum, we conclude the Board properly delegated to the County CEO its authority to enter into SPAs with social service providers.[3]

6. No merit to Plaintiff's cause of action for waste and related arguments.

A taxpayer may, in his or her representative capacity, sue concerning fraud, collusion, ultra vires, or a failure on the part of the governmental body to perform a duty specifically enjoined. (Torres v. City of Yorba Linda (1993) 13 Cal.App.4th 1035, 1046.) "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein." (Code Civ. Proc., § 526a.)

As the trial court found, the gravamen of Plaintiff's waste claim appears to be that every single expenditure of SPA funds constitutes waste because the County failed to comply with the Brown Act. Given our conclusion the SPA approval process is not subject to the Brown Act, the waste claim, insofar as it is predicated on alleged violations of the Brown Act, is meritless.

Likewise, to the extent Plaintiff's waste claim is predicated on a theory of improper delegation by the Board of SPA authority to the County CEO, the claim is meritless.

The appellant's opening brief also lists, without discussion, 13 other legal theories as a basis for his waste claim, and faults the County for failing to dispose of each of those theories on its motion for summary judgment. The theories of illegality include: violation of the County Budget Act (Gov.Code, § 29000 et seq.); State Controller Regulations "State of California – Accounting Standards and Procedures for Counties"; the First Amendment to the United States Constitution; Generally Accepted Accounting Principles; and the Governing Accounting Standards Board standards. "On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . '[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.' [Citation.]" (Claudio v. Regents of University of California (2005) 134 Cal.App.4th 224, 230.)

Further, Plaintiff's arguments near the end of his opening brief, pertaining to burden shifting on summary judgment and other issues, are not properly developed and require no discussion.

7. Plaintiff's contention the trial court erred in denying his motion for catalyst attorney fees is not properly before this court; because the postjudgment order was not appealed, it is final and no longer reviewable.

Lastly, Plaintiff contends the trial court erred in denying his motion for $1,949,606 in attorney fees pursuant to the catalyst theory.[4] This contention is not properly before us because Plaintiff did not appeal the postjudgment order denying his attorney fee motion.

"A postjudgment order awarding [or denying] attorney fees is separately appealable. (Code Civ. Proc., § 904.1, subd. (a)(2); Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal.App.3d 35, 46.) The failure to appeal an appealable order ordinarily deprives the appellate court of jurisdiction to review the order. (Praszker, at p. 46.) However, when the judgment awards attorney fees but does not determine the amount, the judgment is deemed to subsume the postjudgment order determining the amount awarded, and an appeal from the judgment encompasses the postjudgment order. (Grant v. List & Lathrop (1992) 2 Cal.App.4th 993, 998.)" (R.P. Richards, Inc. v. Chartered Construction Corp. (2000) 83 Cal.App.4th 146, 158; see generally, 4 Cal. Jur.3d (2014) Appellate Review, § 86.)

Here, the pertinent chronology is as follows.

On November 5, 2012, following the grant of summary judgment in favor of the County, the trial court entered judgment for the County and awarded the County costs in the amount of $21,152.01, but denied the County any recovery of attorney fees.

On January 3, 2013, Plaintiff filed a timely notice of appeal, specifying the November 5, 2012 judgment.

On January 11, 2013, after Plaintiff filed notice of appeal from the judgment, Plaintiff filed the subject motion for catalyst attorney fees.

On March 15, 2013, the trial court heard and denied Plaintiff's motion for attorney fees.

Plaintiff did not file notice of appeal from the March 15, 2013 postjudgment order denying his motion for attorney fees. However, Plaintiff asserts the March 15, 2013 order is properly before this court because his notice of appeal from the November 5, 2012 judgment embraces the March 15, 2013 order. He is mistaken. The November 5, 2012 judgment did not provide for attorney fees to Plaintiff in an amount to be determined later. In fact, the judgment did not award anything to Plaintiff, who was the losing party. To the contrary, the judgment, which was in favor of the County, awarded the County costs of suit in the amount of $21,152, but denied the County any recovery of attorney fees. Because the November 5, 2012 judgment did not award attorney fees to Plaintiff in an amount to be determined later, the January 3, 2013 notice of appeal from said judgment cannot be construed to embrace the March 15, 2013 order.

In sum, the March 15, 2013 order was separately appealable, was not appealed, and is long since final. Plaintiff's failure to appeal said order eliminates the denial of catalyst attorney fees as an issue on appeal.[5]

DISPOSITION

The November 5, 2012 judgment is affirmed. Respondents shall recover their costs on appeal.

FOOTNOTES

1. Government Code section 26227 provides in relevant part: "The board of supervisors of any county may appropriate and expend money from the general fund of the county to establish county programs or to fund other programs deemed by the board of supervisors to be necessary to meet the social needs of the population of the county, including but not limited to, the areas of health, law enforcement, public safety, rehabilitation, welfare, education, and legal services, and the needs of physically, mentally and financially handicapped persons and aged persons. [¶] The board of supervisors may contract with other public agencies or private agencies or individuals to operate those programs which the board of supervisors determines will serve public purposes."

2. In Kugler, the issue presented was whether an initiative ordinance providing for parity of firefighters' salaries constituted an improper delegation of legislative power. (69 Cal.2d at pp. 373–374.) "Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the 'fundamental issue'; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation. Thus the decision on the legislative policy has not been delegated; the implementation of the policy by reference to Los Angeles salaries is not the delegation of it." (Id. at p. 377.)

3. It is unnecessary to address the County's argument the Supervisors have legislative immunity against Plaintiff's claim challenging the SPA delegation.

4. "Under the catalyst theory, attorney fees may be awarded even when litigation does not result in a judicial resolution if the defendant changes its behavior substantially because of, and in the manner sought by, the litigation. In order to be eligible for attorney fees under [Code of Civil Procedure] section 1021.5, a plaintiff must not only be a catalyst to defendant's changed behavior, but the lawsuit must have some merit . and the plaintiff must have engaged in a reasonable attempt to settle its dispute with the defendant prior to litigation." (Graham v. DaimlerChrysler Corp., supra, 34 Cal.4th at pp. 560–561.) Plaintiff contended he was a catalyst to the County's changed behavior in that, inter alia, two of the five Supervisors now place their SPAs in excess of $1,000 on the Board's agenda for Brown Act approval.

5. Plaintiff asserts the parties "agreed" through counsel that an additional notice of appeal was not necessary. However, the timely filing of a notice of appeal is a jurisdictional prerequisite (Silverbrand v. County of Los Angeles (2009) 46 Cal.4th 106, 113) and appellate jurisdiction cannot be conferred by the consent or stipulation of the parties (Estate of Hanley (1943) 23 Cal.2d 120, 123), making any purported agreement between the parties an irrelevancy.Moreover, the record cited by Plaintiff does not reflect such an agreement. Rather, at a hearing on February 8, 2013, the trial court stated, "there are two or three different ways that are employed by different parties in these cases amending judgments, filing a separate appeal on issues related to such things as attorney's fees and costs, and then asking the Court of Appeal to consolidate. I have no idea. So I can't give you any guidance on it." (Emphasis added.) The attorney for the County then added "We'll discuss it and I think between the two of us, we can figure out how to do it so it's sensible for all." In sum, leaving aside the fact that parties cannot confer jurisdiction on the Court of Appeal by stipulation, the record does not reflect an agreement between the parties that a separate notice of appeal from the March 15, 2013 order was unnecessary.

KLEIN, P. J.

We concur: KITCHING, J. ALDRICH, J.

KUGLER v. YOCUM

Docket No. L.A. 29549.

69 Cal.2d 371 (1968)

445 P.2d 303

71 Cal. Rptr. 687

CAROL J. KUGLER et al., Plaintiffs and Respondents, v. NORMA YOCUM et al., Defendants and Appellants.

Supreme Court of California. In Bank.

October 1, 1968.

Attorney(s) appearing for the Case

Don D. Bercu, City Attorney, for Defendants and Appellants.

Weinstein, Shelley & Proctor, Weinstein & Shelley and Robert C. Proctor, Jr., for Plaintiffs and Respondents.

Charles P. Scully as Amicus Curiae on behalf of Plaintiffs and Respondents.

TOBRINER, J.

We hold here that an ordinance which decrees that the salaries of certain city employees shall be no less than the average of those of an adjoining city and those of an adjoining county does not unlawfully delegate legislative power because the power to legislate has been expressed and exerted in the enactment of the policy of such parity; future adjustment in salaries pursuant to that formula is no more than the automatic execution of that policy; that process is protected from any abusive or arbitrary consequences by its own inherent safeguards.

Plaintiffs, residents of the City of Alhambra, bring mandate to compel defendants, as members of the city council of that city, either to adopt a proposed initiative ordinance or to call a special citywide election to vote upon it. Although plaintiffs had obtained the required number of signatures to secure the election, the city council refused to hold it; the council likewise rejected the proposed ordinance.

The proposed ordinance reads, in relevant part, as follows: "Except as otherwise provided for herein the monthly salaries of the members of the Fire Department in each classification shall not be less than an amount computed as follows: Beginning January 1, 1965, and the first day of each succeeding year thereafter, the City Manager of the City of Alhambra shall determine the then existing monthly salaries of each classification of like or comparable grades or ranks of the Fire Departments of the City of Los Angeles and the County of Los Angeles. The average of the salaries for the comparable grades or ranks of the members of the Fire Departments of the City of Los Angeles and the County of Los Angeles shall be the minimum salaries payable by the City of Alhambra to the members of its Fire Department of the same or comparable

grades or ranks." Thus the proposed ordinance provides that in setting the salaries of the firemen, the council could not fix them at an amount less than

the average of the salaries received by the firemen of the City of Los Angeles and the salaries received by the firemen of the County of Los Angeles.

After the council's refusal to submit the ordinance to the electorate plaintiffs brought this action in the Superior Court of Los Angeles County to compel defendants to do so. That court found that plaintiffs had followed the proper procedure, [1] that the proposed ordinance was a proper subject for the exercise of the initiative power of the Alhambra electors, and that, if enacted, the ordinance would not improperly delegate the council's legislative power. Accordingly, the court issued a peremptory writ of mandate compelling the defendants to call a special election for consideration of the ordinance. Defendants have appealed from this judgment.

[1] The trial court correctly concluded that the subject matter of the proposed ordinance, that is the salaries of city firemen, falls within the electorate's initiative power. The city charter provides that the "Council ... shall have the power to... establish ... the amount of [the fire division's] ... salaries" (§ 81) and that the "electors ... shall have the right to ... adopt ... any ordinance which the council might enact" (§ 176). Since in dealing with wage rates, the city council acts in its "legislative" rather than its "administrative" capacity (*Spencer* v. *City of Alhambra* (1941) 44 Cal.App.2d 75, 77 [111 P.2d 910]; *Collins* v. *City & County of San Francisco* (1952) 112 Cal.App.2d 719, 730 [247 P.2d 362]; *City & County of San Francisco* v. *Boyd* (1943) 22 Cal.2d 685 [140 P.2d 666]), wage rates are a proper subject for adoption as an ordinance by a city council and, accordingly, pursuant to section 176, for enactment by an initiative.

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[2] [See fn. 2] Defendant's main contention rests upon the proposition that the enactment of the ordinance by either the council or the electorate would constitute an unlawful delegation of legislative power. [2] They point out that no representative of Alhambra can either predict or control the exact wage rates that will be established in the City or the County of Los Angeles. Accordingly, they argue, the proposed ordinance, in fixing the Los Angeles rates as the minimum for Alhambra firemen's salaries, would unlawfully delegate legislative power to those parties who establish salaries for Los Angeles firemen.

[3a] At the outset, we note that the doctrine prohibiting delegation of legislative power, although much criticized as applied (see, e.g., Witkin, Summary of Cal. Law (7th ed. 1960) p. 1834; 1 Davis, Administrative Law Treatise (1958) § 2.01), is well established in California. "The power ... to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature and cannot be delegated by it...." (*Dougherty* v. *Austin* (1892) 94 Cal. 601, 606-607 [28 P. 834, 29 P. 1092, 16 L.R.A. 161]; see also *People* v. *Johnson* (1892) 95 Cal. 471, 475 [31 P. 611]; *People* v. *Wheeler* (1902) 136 Cal. 652, 655 [69 P. 435]; *Coulter* v. *Pool* (1921) 187 Cal. 181, 190 [201 P. 120]; *Duskin* v. *State Board of Dry Cleaners* (1962) 58 Cal.2d 155, 161-162 [23 Cal.Rptr. 404, 373 P.2d 468].) Moreover, the same doctrine precludes delegation of the legislative powers of a city (*City of Redwood City* v. *Moore* (1965) 231 Cal.App.2d 563, 576 [42 Cal.Rptr. 72], and cases cited therein; see generally 2 McQuillin, The Law of Municipal Corporations (3d ed. 1966) § 10.39, p. 843, and cases cited at fn. 63).

Several equally well established principles, however, serve to limit the scope of the doctrine proscribing delegations of legislative power. For example, legislative power may properly

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be delegated if channeled by a sufficient standard. "It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature...." (*Dominguez Land Corp.* v. *Daugherty* (1925) 196 Cal. 468, 484 [238 P. 703]; see also *State Board of Dry Cleaners* v. *Thrift-D-Lux Cleaners, Inc.* (1953) 40 Cal.2d 436, 448 [254 P.2d 29]; Case Note (1959) 6 U.C.L.A.L.Rev. 312 and cases cited therein.)

A related doctrine holds: "The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the `power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect...." (*First Industrial Loan Co.* v. *Daugherty* (1945) 26 Cal.2d 545, 549 [159 P.2d 921].) Similarly, the cases establish that "[w]hile the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend." (*Wheeler* v. *Gregg* (1949) 90 Cal.App.2d 348, 363 [203 P.2d 37].)

We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that "truly fundamental issues [will] be resolved by the Legislature" and that a "grant of authority [is] ... accompanied by safeguards adequate to prevent its abuse." (*Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 369 [55 Cal.Rptr. 23, 420 P.2d 735]; see also Jaffe, *An Essay on Delegation of Legislative Power* (1947) 47 Colum. L.Rev. 359, 561; 1 Davis, Administrative Law Treatise, supra, § 2.15; *Gaylord* v. *City of Pasadena* (1917) 175 Cal. 433, 437 [166 P. 348]; *Warren* v. *Marion County* (1960) 222 Or. 307, 313-315 [353 P.2d 257]; *Lien* v. *City of Ketchikan* (Alaska 1963) 383 P.2d 721, 723-724; *Group Health Ins.* v. *Howell* (1963) 40 N.J. 436, 445, 447 [193 A.2d 103]; *Heath* v. *Mayor & City Council of Baltimore* (1946) 187 Md. 296, 303 [49 A.2d 799] (dictum).) [4a] This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to

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establish an effective mechanism to assure the proper implementation of its policy decisions.

[5a] In the instant case, the adoption of the proposed ordinance, either through promulgation by the Alhambra City Council or by initiative, will constitute the legislative body's resolution of the "fundamental issue." Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the "fundamental issue"; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation. Thus the decision on the legislative policy has not been delegated; the implementation of the policy by reference to Los Angeles salaries is not the delegation of it.

Whatever the motivation for the legislative policy, Alhambra will have rendered and pronounced it. The policy may be based upon the recognition that Alhambra could not recruit firemen at *lesser* rates than those paid in the adjoining County and City of Los Angeles. The policy may rest upon the fact that Los Angeles possesses a superior ability to canvass comparable wages for firemen and perform the research necessary to reach a fair salary decision. In any event, Alhambra will have reached the fundamental decision: the policy of parity with Los Angeles.

Alhambra's formula for salary adjustments based upon the Los Angeles rates does not differ from other formulae, recognized as lawful, that tie adjustments in compensation for employees into future events which do not lie within the power or control of the legislative body. The elemental illustration of such a formula is that which relates a wage adjustment to future dates or time periods for periodic adjustments. Moreover, adjustment

may be linked to the cost of living, to average earnings or prevailing wages of a comparable occupation, to prevailing wages or average earnings generally, or to any number of such desiderata. The fact that the formula operates upon eventualities which may lie outside the control of the legislative body and within the control of other persons does not convert the legislative action into an unlawful delegation. [3]

In upholding the prevailing wage statutes this court has recognized that a statute, which set minimum wages for contractors

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performing public work as those "prevailing" in the locality, did not "delegate" legislative power. In *Metropolitan Water Dist.* v. *Whitsett* (1932) 215 Cal. 400 [10 P.2d 751], this court rejected a variety of attacks on the statutory provision [4] that "Not less than the general prevailing rate of *per diem* wages for work of a similar character in the locality in which the work is performed ... shall be paid all laborers, workmen and mechanics employed by or on behalf of the state of California." (P. 404.) Petitioner contended "(1) that said act is void for uncertainty ... and (3) that the act makes an invalid delegation of legislative power." (P. 406.) The court points out that "The petitioner concedes that the object to be accomplished may be directed by the legislature to be carried into effect by subordinate officers and bodies having better opportunities for accomplishing the object, or doing the thing understandingly, and that the legislature may delegate the power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend...." (P. 418.) Holding that the statute has not "delegated to the board power to make law" (p. 419), the court stated: "Unless the power thus granted to fix the salary or wages of its own employees is an unlawful delegation of power to the board, and we do not intimate that it is, or that it would be conceded by the petitioner to be unlawful, the power granted by the statute under attack to fix a minimum wage for the employees of contractors with the district would not be an unlawful delegation." (P. 419.)

Although the prevailing wage statute, like the questioned ordinance, entails the alleged dual dangers which defendants contemplate here: that the legislative body will neither know in advance nor control the level of the "general prevailing rate of *per diem* wages," this court did not strike down the statute on that ground but sustained it. The *Whitsett* decision

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has an even deeper significance in the present matter because in substance it applies to the kind of enactment we ponder here. The instant ordinance in essence adopts the "prevailing" rate for firemen in the larger locality which Alhambra adjoins. Although such a rate is fixed by a governmental rather than a private agency, that factor is an inevitable one, since firemen are employed by public and not private entities, and it surely cannot serve to render one enactment an unlawful delegation of legislative power and the other not. Hence *Whitsett,* in substance, disposes of the present issue. [5]

Decisions in other states likewise sustain the power of the legislative body to base compensation for the involved employees upon comparable prevailing wages. In *Baughn* v. *Gorrell & Riley* (1949) 311 Ky. 537 [224 S.W.2d 436], for example, a statute requiring the board of education to ascertain the prevailing rates of wages and pay not less than this rate on public works projects was attacked as an unlawful delegation of legislative power to those who, cumulatively, "set" the prevailing rate. In rejecting this contention, the court said: "In the eyes of the Legislature, wages paid under agreements between labor organizations and employers constitute a fair criteria [*sic*] of reasonable compensation for different types of work. It will be noted these wages are agreed upon as the result of bargaining between labor on one side and the employer on the other ... [T]he competitive market will tend to establish a fair wage." (311 Ky. at p. 541.) The court concluded that "the Legislature has not delegated the exercise of its legislative function to private persons or interests." (311 Ky. at p. 542.) [6]

[4b] Nor does the fact that a third party, whether private or governmental, performs some role in the application and

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implementation of an established legislative scheme render the legislation invalid as an unlawful delegation. Thus, in *Brock* v. *Superior Court* (1937) 9 Cal.2d 291, [71 P.2d 209, 114 A.L.R. 127], a statute precluding the California Director of Agriculture from entering into a marketing agreement without the assent of a percentage of persons engaged in the industry was attacked as an unlawful delegation to those private persons. In rejecting this contention, this coutr said: "a statute is not invalid merely because it provides for consent of interested persons to the contemplated regulation." (9 Cal.2d at p. 299.) [7]

Furthermore, we find here, as we said in *Wilke & Holzheiser,*

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Inc. v. *Department of Alcoholic Beverage Control, supra,* 65 Cal.2d 349, 369, that the "grant of authority [is] ... accompanied by safeguards adequate to prevent its abuse." [6] As Professor Davis has stated, "The need is usually not for standards but for safeguards.... [T]he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards...." (1 Davis, Administrative Law Treatise, *supra,* § 2.15.) The requirement for "standards" is but one method for the effective implementation of the legislative policy decision; the requirement possesses no sacrosanct quality in itself so long as its purpose may otherwise be assured.

The Oregon case of *Warren* v. *Marion County, supra,* 222 Or. 307, illustrates the point that safeguards inherent in a statute which protect against its arbitrary exploitation obviate the need for standards. [8] In that case, the following ordinance was attacked as an invalid delegation of legislative power because it failed to provide sufficient standards: "ORS215.108 *Building code ordinance.* (1) The governing body of a county may adopt ordinances establishing building codes for the county, or any portion thereof, in conformity with the standards set forth in ORS 215.104.... (2) Any governing body of a county which adopts ordinances establishing building codes shall by ordinance provide procedures for appeals from decisions made under the authority of the ordinances establishing building codes." In rejecting this challenge, the Oregon Supreme Court stated: "It is now apparent that the requirement of expressed standards has, in most instances, been little more than a judicial fetish for legislative language, the recitation of which provides no additional safeguards to persons affected by the exercise of the delegated authority.... [T]he important consideration is not whether the statute

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delegating the power expresses *standards,* but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action." (222 Ore. at p. 314.) The court concluded: "We believe that the appeals procedure required by ORS 215.108(2) provided a sufficient safeguard to persons wishing to contest administrative action in the enforcement of the code." (P. 315.)

[5b] The proposed Alhambra ordinance contains built-in and automatic protections that serve as safeguards against exploitive consequences from the operation of the proposed ordinance. Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra. Los Angeles as an employer will be motivated to avoid the incurrence of an excessive wage scale; the interplay of competitive economic forces and bargaining power will tend to settle the wages at a realistic level. As we noted in an analogous area involving the establishment of prices: "the Legislature could reasonably assume that competition ... coupled with ... bargaining power ... would provide a safeguard against excessive prices. In all probability, that safeguard is at least as effective as any which the Legislature could be expected to provide by promulgating explicit standards...." (*Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control, supra,* 65 Cal.2d 349, 367-368.)

The criteria set up by the proposed enactment reasonably relate to the fulfillment of the legislative purposes. If an external private or governmental body will be involved in the application of the legislative scheme, it must be an agency that the Legislature can expect will reasonably perform its function. If, for instance, the statute provides that salaries are to be adjusted to future changes in the cost of living, the legislation must designate a body, such as the United States Department of Labor, which may be expected to reasonably perform the function of ascertaining the cost of living. Such a qualification to the operation of the statute parallels that placed upon the ministerial officer who is designated to formulate the rules or regulations under a statute which expresses the legislative policy in the matter. Thus the officer cannot promulgate a rule or regulation "which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute." (*First Industrial Loan Co.* v. *Daugherty, supra,* 26 Cal.2d 545, 550.)

Applying these criteria to the instant situation, we conclude

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that the City of Alhambra could properly expect that the appropriate bodies of the City of Los Angeles and the County of Los Angeles would reasonably discharge their obligations. Once Alhambra establishes the policy of parity between the Alhambra and the Los Angeles wages, the fact that the Los Angeles governing bodies participate in setting Los Angeles salaries does not defeat the Alhambra legislation since Alhambra could expect that the authorities would reasonably investigate, negotiate, and finally determine such salaries. Thus the designated method appropriately attains the purposes of the ordinance.

Indeed, the method comports with the practical necessities of city governments. As an effort both to achieve fair wage rates and to compete effectively for competent employees, many city governments have based employee wages to some degree on rates paid in surrounding communities. (For discussion of similar provisions in other cities, see, e.g., *San Bernardino Fire & Police Protective League* v. *City of San Bernardino, supra,* 199 Cal.App.2d 401; *Walker* v. *County of Los Angeles, supra,* 55 Cal.2d 626; *Parker* v. *Bowron* (1953) 40 Cal.2d 344 [254 P.2d 6]; *Adams* v. *Wolff, supra,* 84 Cal.App.2d 435; see, for instance, Culver City Ordinance No. 1931/2.) Reliance on rates in other communities, moreover, obviates any need for the expense, perhaps oppressive in smaller communities, of surveys or other expert assistance in determining appropriate wage scales.

In sum, the ordinance in question, if enacted, would not unlawfully delegate legislative power. As long ago as 1917 this court recognized that legislative bodies have neither the resources nor the expertise to deal adequately with every minor question potentially within their jurisdiction. "Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs — national, state, and municipal — and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many *quasi*-legislative and *quasi*-judicial functions, which in smaller communities and under more primitive conditions were performed directly by the legislative or judicial branches of the government, are intrusted to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done

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at all...." (*Gaylord* v. *City of Pasadena, supra,* 175 Cal. 433, 436.)

The complexity of government in the span of a half century since that analysis has illustrated its verity. Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. [3b] Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an "unlawful delegation," and then only to preserve the representative character of the process of reaching legislative decision.

The judgment of the trial court granting a peremptory writ of mandate is affirmed.

Traynor, C.J., Peters, J., Mosk, J., and Sullivan, J., concurred.

BURKE, J.

I dissent. If by charter amendment the people of Alhambra undertook to establish a minimum wage for members of the Fire Department of the City of Alhambra by reference to an average (to be computed periodically) of the wages generally prevailing for work of a similar character in, for example, all of the cities in the same county (County of Los Angeles) or all of the cities and unincorporated areas within a more limited geographical area, or even of a substantial number of such communities of comparable size and with similar fire problems, then I could agree that under the prevailing wage cases there would be no question of unlawful delegation of legislative authority. As an amendment to the organic law of the city this would be a lawful limitation upon the exercise of the legislative power of the local legislative body and also upon the initiative power of the city's electorate. But this is not what is attempted here. The city charter sets forth how the legislative power of the city is to be exercised and places equal power to legislate in the council and the electorate; what one may do so may the other. But here, one, the electorate by initiative ordinance, seeks to limit the *future* exercise of power by the other and this violates fundamental concepts of municipal law. Such a limitation upon future actions by the council or, if attempted by the council, upon future actions by the electorate, is void and could only be effected by an amendment of the city's organic law — the city charter. The latter may be amended only in the manner prescribed in the Constitution.

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Furthermore, when an ordinance selects from the community only two public agencies and specifies that the average wage paid by those two agencies from year to year shall be the minimum wage to be paid to Alhambra firemen, there has plainly been an invalid delegation to the legislative bodies of those agencies of the authority vested by Alhambra's Charter in the Alhambra City Council to "establish" the salaries of the Alhambra Fire Department. That such a delegation of legislative power and responsibility is illegal was the holding of the court in *Mitchell* v. *Walker,* 140 Cal.App.2d 239 [295 P.2d 90], in which case this court denied a hearing. The majority opinion erroneously, I submit, disapproves the *Walker* decision (fn. 6, *ante,* pp. 379-380).

The ordinance under consideration here would strip from Alhambra's City Council its discretion to determine one end of the wage scale (the minimum), and delegate that discretion to the governing bodies of two outside public agencies which are entirely without responsibility to the City of Alhambra, its employees, voters, or taxpayers. This seems to me to offend democratic principles in addition to the basic requirements of the city's charter. The record affords no basis whatever for the assumption indulged in by the majority that the average wage paid by the two handpicked agencies represents the prevailing wage in the general area. Obviously, the size of a city, the types of structures (residential, industrial, multi-dwellings), the heights of its buildings, the classes of fire equipment, living conditions, etc., vary to a great degree within a geographical area the size of Los Angeles County and wages may vary to a considerable degree depending upon local conditions. Furthermore, the tax resources which a small city, such as Alhambra (population 64,500), has with which to cope with such problems may be substantially different from those of Los Angeles (population 2,743,500),

Under our system of government such inquiries and policy determinations are for the duly elected and responsible officials of the particular city involved and not for this court.

In my view, the Alhambra City Council itself could not validly delegate its authority and responsibilities in the manner here attempted by the proposed ordinance. Since under section 176 of the Alhambra City Charter the electorate purports to exercise directly by means of the initiative only such legislative action as the council itself could lawfully enact, the ordinance in question was properly refused submission to the voters. No one suggests that the initiative may be used to

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enact legislation which the council itself could not enact. It follows that the judgment granting the writ should be reversed.

McComb, J., concurred.

FootNotes

1. The portions of the charter relevant to the procedure provide as follows: Section 81: "The council, subject to the provisions of this Charter, shall have power to organize the fire division and ... establish the number of its members and the amount of their salaries...." Section 176: "The electors of the city shall have the right to propose, by petition, and to adopt at the polls, any ordinance which the council might enact." Section 179: "Upon presentation to the council of such petition,... it must either adopt and enact such measure without alteration, or submit the same to the electorate at the next city election occurring subsequent to sixty days after the filing of said petition. But if said petition requests the calling of a special election and is signed and verified as herein provided and by electors in number equal to twenty-five per cent of said vote, then such ordinance, if not so adopted and enacted by the council, must be submitted to the electorate at a special election to be called within sixty days from the presentation of such petition."

2. Defendants urge a somewhat indirect argument against the validity of the proposed ordinance based upon an attempted distinction between the powers of the city council and those of the electorate. They assert that if the voters approved the ordinance, the city council, under the Alhambra Charter, would never be able to repeal it; only the electorate can repeal an ordinance enacted by initiative. The unavailability of a specific method of repeal of an ordinance, however, does not affect the type or scope of an ordinance that the electorate in the first instance can enact. Section 176 of the city charter governs the latter question. If the policy underlying the rule that the city council cannot undo what the electorate has voted to do by initiative is deemed unwise, the remedy lies in either a frontal attack on that rule or a formal amendment of section 176 to narrow the electorate's initiative power. Accordingly, we reject defendants' indirect attempt to subvert section 176.

3. The proposed Alhambra ordinance provides merely for a finding of the average Los Angeles earnings before the Alhambra council fixes the salaries. The Alhambra council thereafter decides what the salaries will be; it determines whether higher rates will be paid in any or all of the classifications. The Alhambra city manager reports to the council his findings upon the average Los Angeles rates; these serve only as a basement for the council's action; the council itself sets the salaries; the council exercises, and does not delegate, legislative power.

4. The current counterpart of the statute involved in *Whitsett* is Labor Code section 1773. Although this court has not directly confronted an attack on the validity of section 1773, we have implicitly sustained it. (*Franklin* v. *City of Riverside* (1962) 58 Cal.2d 114 [23 Cal.Rptr. 401, 373 P.2d 465]; contra, *Parrack* v. *City of Phoenix* (1959) 86 Ariz. 88 [340 P.2d 997]; *Adams* v. *City of Albuquerque* (1957) 62 N.M. 208 [307 P.2d 792].) Moreover, the federal Walsh-Healey Act (41 U.S.C. § 35(b)) contains the same prevailing wage provision for contracts with the federal government; its validity has been upheld. (*Perkins* v. *Lukens Steel Co.* (1940) 310 U.S. 113 [84 L.Ed. 1108, 60 S.Ct. 869].)

5. *Walker* v. *County of Los Angeles* (1961) 55 Cal.2d 626 [12 Cal.Rptr. 671, 361 P.2d 247], which involved a county requirement that employees receive a salary at least equal to that paid to comparable persons in private employment, makes the same point. We characterized the county board of supervisors' duty as a "fact-finding function ... in finally fixing the rate of compensation at or above the minimum coincident with the prevailing wage found" and stated that this fact-finding function "precede[s] ... the legislative act." (55 Cal.2d at p. 635; see also *San Bernardino Fire & Police Protective League* v. *City of San Bernardino* (1962) 199 Cal.App.2d 401, 416 [18 Cal.Rptr. 757].) That which "precedes legislative action" cannot literally constitute a delegation of the power to legislate.

6. The California cases of *In re Burke* (1923) 190 Cal. 326 [212 P. 193], and *Adams* v. *Wolff* (1948) 84 Cal.App.2d 435 [190 P.2d 665], cited by defendants, do not pass upon the present issue. *Burke* involves an attempted adoption of a future statute of another state; the court specifically reserves the point here at issue, as does *Wolff.* The cited case of *Mitchell* v. *Walker* (1956) 140 Cal.App.2d 239 [295 P.2d 90], does conflict with part of our ruling in the instant case, and to that extent it is disapproved.

In upholding the definition of prohibited drugs by future decision of a recognized private pharmaceutical institution, the Supreme Court of Wisconsin, in *State* v. *Wakeen* (1953) 263 Wis. 401, 411 [57 N.W.2d 364], held: "This is not a case of the *delegation* of legislative powers. The publications referred to in the statute are not published *in response* to any delegation of power, legislative or otherwise, by the statute. The compendia are published independently of the statute and not in response to it." (Italics added.) Similarly, in our case an independent, authoritative source determines the comparable Los Angeles rates, and such decision is made "independently of the statute and not in response to it." For other out-of-state cases, see *Crowley* v. *Thornbrough* (1956) 226 Ark. 768, and cases cited at page 774 [294 S.W.2d 62], and *State* ex rel. *Kirschner* v. *Urquhart* (1957) 50 Wn.2d 131 [310 P.2d 261]. See generally 1 Davis, Administrative Law Treatise, *supra,* § 2.14; Note (1934) 34 Colum.L.Rev. 1077, 1084-1086.

7. In *Currin* v. *Wallace* (1939) 306 U.S. 1 [83 L.Ed. 441, 59 S.Ct. 379], a similar challenge was levelled against the Tobacco Inspection Act of 1935, a statute authorizing the federal Secretary of Agriculture to designate markets to be regulated only if two-thirds of the growers affected favored such a designation. The Supreme Court upheld the act, noting that "[t]his is not a case where Congress has attempted to abdicate, or to transfer to others, the essential legislative functions with which it is vested by the Constitution.... So far as growers of tobacco are concerned, the required referendum does not involve any delegation of legislative authority. Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market `unless two-thirds of the growers voting favor it.' ... Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions." (306 U.S. at pp. 15-16 [83 L.Ed. at pp. 451-452]; see also *Parker* v. *Brown* (1943) 317 U.S. 341, 352 [87 L.Ed. 315, 326, 63 S.Ct. 307]; *Floresta, Inc.* v. *City Council* (1961) 190 Cal.App.2d

599, 610 fn. 4 [12 Cal.Rptr. 182] and cases cited therein.)

The private act of the producer in entering into a contract setting a price for the resale of his own brand is neither the performance of a legislative function nor the exercise of an unlawfully delegated power. (*Scoville Mfg. Co. v. Skaggs etc. Drug Stores* (1955) 45 Cal.2d 881 [291 P.2d 936]; see *Wilke & Holzheiser, Inc.* v. *Department of Alcoholic Beverage Control, supra,* 65 Cal.2d 349, 369.)

8. Other cases have also recognized that "standards" constitute merely one method, albeit the most common one, of assuring that the legislative body does not unlawfuly delegate its power. The New Jersey Supreme Court, in striking down a delegation to The Medical Society of New Jersey, stated: "We think such a power ... may not validly be delegated by the Legislature to a private body ... at least where the exercise of such power is not *accompanied by adequate legislative standards or safeguards whereby an applicant may be protected against arbitrary or self-motivated action...."* (*Group Health Ins.* v. *Howell, supra,* 40 N.J. 436, 445.) (Italics added.) The Supreme Court of Maryland has asserted: "[A]n ordinance which delegates a part of the police power to a zoning board may be valid, even though it confers upon the board a certain discretion in the exercise of that power, provided that its discretion is sufficiently limited by rules and standards to protect the people against any arbitrary or unreasonable exercise of power." (*Heath* v. *Mayor & City Council of Baltimore, supra,* 187 Md. 296, 303 (dictum).)

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17 Cal. Rptr. 3d 225, ***; 2004 Cal. LEXIS 7238

3 of 5 DOCUMENTS

BILL LOCKYER, as Attorney General, etc., Petitioner, v. CITY AND COUNTY OF SAN FRANCISCO et al., Respondents. BARBARA LEWIS et al., Petitioners, v. NANCY ALFARO, as County Clerk, etc., Respondent.

S122923, S122865

SUPREME COURT OF CALIFORNIA

33 Cal. 4th 1055; 95 P.3d 459; 17 Cal. Rptr. 3d 225; 2004 Cal. LEXIS 7238; 2004 Cal. Daily Op. Service 7342; 2004 Daily Journal DAR 9916

August 12, 2004, Filed

SUBSEQUENT HISTORY: Clarified by Lewis v. Alfaro, 2004 Cal. LEXIS 9064 (Cal., Sept. 15, 2004)
Later proceeding at Lockyer v. City & County of San Francisco, 2004 Cal. LEXIS 10498 (Cal., Oct. 26, 2004)
Costs and fees proceeding at, Motion denied by Lockyer v. City & County of San Francisco, Lewis v. Alfaro, 2005 Cal. LEXIS 1698 (Cal., Feb. 16, 2005)
Costs and fees proceeding at, Sub nomine at Lewis v. Alfaro, 2005 Cal. LEXIS 2678 (Cal., Mar. 7, 2005)

PRIOR HISTORY: Original Proceeding.

DISPOSITION: Writ of mandate issued compelling respondents to comply with the requirements and limitations of the current marriage statutes and to take particular corrective actions.

SUMMARY: CALIFORNIA OFFICIAL REPORTS SUMMARY

The Attorney General and three taxpayer-residents of the City and County of San Francisco filed original proceedings in the Supreme Court, seeking writ relief and other relief, including a stay in lower court proceedings, after local public officials began issuing marriage licenses to and solemnizing and registering the marriages of same-sex couples. The officials took these actions after the mayor sent a letter to the county clerk expressing his belief that the state Constitution prohibits discrimination against same-sex couples with respect to marriage, and requesting that the county clerk determine what changes should be made to the forms and documents used for applying for and issuing marriage licenses so that they could be provided without regard to gender or sexual orientation. Although various state marriage statutes provide that forms used for marriage license applications, marriage licenses and the certificate of registry are those prescribed by the state Department of Health Services, and also restrict marriage to a couple consisting of a man and a woman, city officials changed the forms and issued marriage licenses to approximately 4,000 same-sex couples.

The Supreme Court issued a writ of mandate directing the officials to comply with the requirements and limitations of the current marriage statutes, in performing their ministerial duties under the statutes. The court stayed all proceedings in two lower court cases, but specified that the stay did not preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes. The writ also directed the officials to take all necessary remedial steps to undo the continuing effects of their past unauthorized actions, including making appropriate corrections to all relevant official records and notifying all affected same-sex couples that the same-sex marriages authorized by the officials were [*1056] void from their inception and of no legal effect. The court held that the city officials charged with the ministerial duty of enforcing the state marriage statutes exceeded their authority when, without any court having determined that the statutes were unconstitutional, they deliberately declined to enforce the statutes because each had determined or was of the opinion that the statutory requirement limiting marriage to a union between a man and a woman was unconstitutional. The oath to support and defend the Constitution required the city officials to act within the constraints of the constitutional system and not to disregard presumptively valid statutes. Because Fam. Code, § 300, clearly defines marriage as a personal relationship arising out of a civil contract between a man and a woman and the court held that it explicitly establishes that the existing same-sex marriages are void and invalid. The court held that any asserted invalidity of Fam. Code, § 300, was not so patent or clearly established that no reasonable official could believe it was constitutional. The court emphasized that the substantive question of the

constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman was not before it. Its decision was not intended, and should not be interpreted, to reflect any view on that issue. There did exist a clear and readily available means--a lawsuit brought by a same-sex couple who had been denied a license under existing statutes--to bring the constitutionality of the current marriage statutes before a court. The city could not plausibly justify its wholesale defiance of the applicable statutes by a desire to obtain a judicial ruling on the constitutional issue. (Opinion by George, C. J., with Baxter, Chin, Brown, and Moreno, JJ., concurring. Concurring opinion by Moreno, J. (see p. 1120). Concurring and dissenting opinion by Kennard, J. (see p. 1125). Concurring and dissenting opinion by Werdegar, J. (see p. 1133).)

HEADNOTES: CALIFORNIA OFFICIAL REPORTS HEADNOTES

Classified to California Digest of Official Reports

(1) Constitutional Law § 36--Distribution of Governmental Powers--Between Branches of Government--Doctrine of Separation of Powers.--Under the separation of powers doctrine, the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. However, the doctrine does not create an absolute or rigid division of functions.

(2) Constitutional Law § 38--Distribution of Governmental Powers--Executive Power--Ministerial Duty--No Authority to Disregard Statutory Mandate.--A local executive official charged with the ministerial duty of enforcing a duly [*1057] enacted statute generally has no authority to disregard the statutory mandate, based solely on the official's own determination that the statute is unconstitutional.

(3) Marriage § 8--Validity--Void Marriages--Same-sex Marriages--Authority to License Same-sex Marriages in Absence of Judicial Determination That Marriage Statutes Are Unconstitutional.--Absent a judicial determination that statutory provisions limiting marriage to a couple comprised of a man and a woman were unconstitutional, a county clerk and county recorder lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples. Consequently, marriages conducted between same-sex couples in violation of the applicable statutes were void and of no legal effect.

[7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § § 57, 58, 110; 11 Witkin, Summary of Cal. Law (9th ed. 1990) Husband and Wife, § § 38, 57A.]

(4) Marriage § 1--Regulation Solely Within the Province of the Legislature.--The Legislature has full control of the subject of marriage and may fix the conditions under which marital status may be created or terminated. The regulation of marriage and divorce is solely within the province of the Legislature, except as it may be restricted by the Constitution.

(5) Marriage § 7--Statutory Provisions--Validity.--Family Code § 300 clearly establishes that current California statutory law limits marriage to couples comprised of a man and a woman.

(6) Marriage § 3--Requisites--Matter of Statewide Concern.--Marriage is a matter of statewide concern rather than a municipal affair, and state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.

(7) Marriage § 3--Statutory Provisions--Licensing and Registration--Authority of Local Officials--County Clerk and County Recorder.--The only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are the county clerk and the county recorder. The statutes do not authorize the mayor of a city or any other comparable local official to take any action with regard to the process of issuing marriage licenses or registering marriage certificates. Although a mayor may have authority under a local charter to supervise and control the actions of the county clerk or county recorder with regard to other subjects, the mayor has no authority to [*1058] expand or vary the authority of the county clerk or county recorder to grant marriage licenses or register marriage certificates under the governing state statutes, or to direct those officials to act in contravention of those statutes.

(8) Marriage § 3--Statutory Provisions--Licensing and Registration--Authority of Local Officials--Abdication of Statutory Responsibility.--To the extent a mayor purported to direct or instruct the county clerk and the county recorder to take specific actions with regard to the issuance of marriage licenses or the registering of marriage certificates, the mayor exceeded the scope of his authority. Furthermore, if the county clerk or the county recorder acted in contravention of the applicable statutes solely at the behest of the mayor and not on the basis of the official's own determination regarding the constitutionality of the statutes, the official acted

improperly by abdicating the statutory responsibility imposed directly on him or her as a state officer.

(9) Mandamus and Prohibition § 21--Mandamus--To Public Officers--Ministerial Duties Dictated by Statute.--If a controlling rule of law requires a public official to carry out a ministerial duty dictated by statute unless and until the statute has been judicially determined to be unconstitutional, the official cannot compel a court to rule on the constitutional issue by refusing to apply the statute. The court properly may issue a writ of mandate directing the official to comply with the statute unless and until the statute has been judicially determined to be unconstitutional.

(10) Marriage § 3--Statutory Provisions--Ministerial Duties of County Officials.--Under the statutes that deal with marriage, the duties of a county clerk and county recorder in issuing marriage licenses and recording certificates of registry of marriage are ministerial rather than discretionary. When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same token, when the statutory requirements have not been met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage.

(11) Administrative Law § 7--Powers and Functions of Administrative Agencies--Determinative or Adjudicatory Powers.--Prior to the [*1059] adoption of Cal. Const., art. III, § 3.5, it already was established under California law that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis to refuse to apply the statute. The adoption of Cal. Const., art. III, § 3.5, plainly did not grant or expand the authority of local executive officials to determine that a statute is unconstitutional and to act in contravention of the statute's terms on the basis of such a determination.

(12) Statutes § 47--Construction--Presumptions--Constitutionality Presumed.--A statute, once duly enacted, is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.

(13) Public Officers and Employees § 13--Statutory Duty--Scope of Authority.--When a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute. When a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of the power.

(14) Statutes § 20--Construction--Constitutionality--Judicial Function.--The determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution.

(15) Public Officers and Employees § 13--Powers--Local Executive Official--No Authority to Exercise Judicial Power.--A local administrative agency has no authority under the California Constitution to exercise judicial power. In light of this principle, a local executive official who makes decisions--without the benefit of even a quasi-judicial proceeding--has no authority to exercise judicial power, such as by determining the constitutionality of applicable statutory provisions.

(16) Mandamus and Prohibition § 21--Mandamus--To Public Officers--Ministerial Acts--Public Finance.--Mandate is the proper remedy to compel a public officer to perform ministerial acts such as the issuance of bonds, the letting of public contracts, or the disbursement of public funds, and the constitutionality of the law authorizing such acts may be determined in a writ proceeding.

(17) Public Officers and Employees § 13--Duties--Refusal to Perform Ministerial Acts.--The circumstance that a public official may refuse to [*1060] perform a ministerial act in the public finance context does not signify that in all other contexts every public official is free to refuse to perform a ministerial act based upon the official's view that the statute the officer is statutorily obligated to apply is unconstitutional.

(18) Public Officers and Employees § 16--Liabilities--Not Liable for Official Acts in Good Faith, Without Malice, and Under Apparent Authority.--Gov. Code, § 820.6, explicitly provides that if a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid, or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable. Thus, city officials clearly would not have incurred liability under California law simply for following the current marriage statutes and declining to contravene those statutes by issuing marriage licenses or registering marriage certificates of same-sex couples.

(19) Public Officers and Employees § 16--Liabilities--Not Liable for Official Acts.--Under federal law, a local public official generally is immunized from liability for official acts so long as the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

(20) Public Officers and Employees § 16--Liabilities--Officials Sued in Personal Capacity.--If city officials are sued in their personal capacity for actions taken pursuant to statute and in the scope of their employment, under Gov. Code, § 825, the officials are entitled to have their public employer provide a defense and pay any judgment entered in such an action, whether the action is based on a state law claim or a claim under the federal civil rights statutes.

(21) Marriage § 3--Statutory Provisions--Same-sex Marriage--Challenge to Constitutionality--Defiance of Statutory Provisions Not Justified.--A clear and readily available means, other than wholesale defiance of the applicable marriage statutes by city officials, existed to ensure that the constitutionality of the statutes as applied to same-sex couples would be decided by a court. If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes were unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. The city could not plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified its wholesale defiance of the applicable statutes.

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(22) Public Officers and Employees § 18--Powers, Duties, and Liabilities--Oath to Defend the Constitution.--A public official does not honor his or her oath to defend the Constitution by taking action in contravention of the restrictions of his or her office or authority and justifying such action by reference to his or her personal constitutional views. On the contrary, the oath to support and defend the Constitution requires a public official to act within the constraints of our constitutional system, not to disregard presumptively valid statutes and take action in violation of such statutes on the basis of the official's own determination of what the Constitution means.

(23) Marriage § 4--Requisites--A Man and a Woman--Constitutionality.--Any asserted invalidity of statutes that limit marriage to a man and a woman is not so patent or clearly established that no reasonable official could believe that the current California marriage statutes are valid. No judicial decision has held a statute limiting marriage to a man and a woman unconstitutional under the California or federal Constitution.

(24) Marriage § 4--Requisites--A Man and a Woman--Constitutionality.--The United States Supreme Court's decision holding a state sodomy statute unconstitutional has not clearly established that a state statute limiting marriage to a man and a woman is unconstitutional under the federal Constitution, in light of the court's specific disclaimer that the case did not involve whether the government must formally recognize any relationship that homosexual persons seek to enter.

(25) Public Officers and Employees § 13--Powers--Federal Supremacy Clause--No Authority to Refuse to Enforce a Statute the Official Believes Is Unconstitutional.--The supremacy clause of the United States Constitution does not prohibit a state of the power from requiring that a public official comply with a state statute that the official believes violates the federal Constitution.

(26) Mandamus and Prohibition § 68--Mandamus--Procedure--Nature of Relief.--As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case, and a court is not necessarily limited by the prayer sought in the mandate petition but may grant the relief it deems appropriate.

(27) Mandamus and Prohibition § 68--Mandamus--Procedure--Nature of Relief--City Officials Who Issued Marriage Licenses to Same-sex Couples.--It was appropriate for the Supreme Court in an original writ [*1062] proceeding, arising out of the actions of city officials in issuing marriage licenses to same-sex couples, not only to order city officials to comply with the applicable marriage statutes in the future, but also to direct the officials to take all necessary steps to remedy the continuing effect of their past unlawful actions, including correcting all relevant official records and notifying affected individuals of the invalidity of the officials' actions. The officials authorized, performed, and registered literally thousands of same-sex marriages, in direct violation of explicit state statutes, and the state Attorney General, as well as a number of local taxpayers, had filed original mandate proceedings in the Supreme Court to halt the local officials' unauthorized conduct and to compel the officials to correct or undo their numerous unlawful actions.

(28) Mandamus and Prohibition § 68--Mandamus--Procedure--Nature of Relief--Issuance of Marriage Licenses to Same-sex Couples.--In light of the clear terms of Fam. Code, § 300, defining marriage as a personal relationship arising out of a civil contract between

a man and a woman, and its legislative history, which demonstrated that the purpose of this limitation was to prohibit persons of the same sex from entering lawful marriage, it plainly followed that all same-sex marriages authorized, solemnized, or registered by city officials had to be considered void and of no legal effect from their inception.

(29) Marriage § 8--Validity--Voidable Marriages--Parties Who May Bring Action to Nullify.--Fam. Code, § 2211, sets forth the categories of individuals who may bring an action to nullify a voidable marriage--categories that generally are limited to one of the parties to the marriage or, where a party to the marriage is a minor or a person incapable of giving legal consent, the parent, guardian, or conservator of such party.

(30) Marriage § 8--Validity--Void Marriages--Unauthorized Same-sex Marriages--Mandamus Proceeding by Attorney General and Taxpayers.--The procedural requirements generally applicable in an action to nullify or annul a voidable marriage are inapplicable when a purported marriage is void from the beginning or is a legal nullity. A marriage declared to be void or void from the beginning is a legal nullity and its validity may be asserted or shown in any proceeding in which the fact of marriage may be material. A mandate action, which sought to compel public officials to correct the effects of their unauthorized official conduct in issuing marriage licenses to or registering marriage certificates of thousands of same-sex couples, was such a proceeding, because the validity or invalidity of the same-sex marriages authorized and registered by such officials was central to the scope of the remedy to be ordered. Therefore, petitioners did not lack standing to challenge the validity of the marriages.
[*1063]
(31) Marriage § 8--Validity--Void Marriages--Validity of Same-sex Marriages Licensed in Disobedience of Statutory Prohibition--Legal Question--Same-sex Couples Not Party to Mandate Action.--The Supreme Court could properly determine the validity or invalidity of thousands of existing same-sex marriages in mandate actions brought to preclude a city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples, even though the couples themselves were not before the court. The question of the validity or invalidity of the same-sex marriages did not depend upon any facts that were peculiar to any individual same-sex marriage, but rather was a purely legal question applicable to all existing same-sex marriages, and rested on the circumstance that the governing state statutes limited marriage to a union between a man and a woman. Under ordinary principles of stare decisis, an appellate decision holding that, under current California statutes, a same-sex marriage performed in California is void from its inception would effectively resolve that legal issue with respect to all couples who had participated in same-sex marriages, even though such couples had not been parties to the original action. Because the validity or invalidity of same-sex marriages under current California law involved only a pure question of law, couples who were not formal parties to the mandate action were in no different position had the question been presented and resolved in an action involving some other same-sex couple rather than in an action in which the legal arguments regarding the validity of such marriages had been vigorously asserted not only by the city officials who authorized and registered them but also by various amici curiae representing similarly situated same-sex couples. Requiring a separate legal proceeding to be brought to invalidate each of the thousands of same-sex marriages, or requiring each of the thousands of same-sex couples to be named and served as parties in the mandate action, would have added nothing of substance to the proceeding.

(32) Marriage § 8--Validity--Void Marriages--Validity of Same-sex Marriages Licensed in Disobedience of Statutory Prohibition--Same-sex Couples Not Party to Mandate Action--Due Process Rights.--Same-sex couples who obtained marriage licenses through the deliberate unauthorized conduct of city officials were not denied the right to meaningfully participate in the proceedings of mandate actions brought to preclude a city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples. Although the Supreme Court did not permit the same-sex couples to intervene formally in the actions as parties, the court's order denying intervention to a number of such couples explicitly was without prejudice to their participation as amici curiae, and numerous amicus [*1064] curiae briefs were filed on behalf of such couples, directly addressing the question of the validity of the existing same-sex marriages. Accordingly, the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages were heard and fully considered.

(33) Marriage § 8--Validity--Void and Invalid Marriages--Same-sex Marriages.--Fam. Code, § 300, explicitly establishes that existing same-sex marriages are void and invalid.

(34) Marriage § 7--Validity--Noncompliance with Procedural Requirements by Nonparty to a Marriage--Marriage Licenses Issued to Same-sex Couples Not Procedural Defect.--Fam. Code, § 306, which provides, in part, that noncompliance with certain Family

Code provisions by a nonparty to a marriage does not invalidate the marriage, does not demonstrate that if a county clerk errs in issuing marriage licenses to same-sex couples, such noncompliance by the county clerk (a nonparty to the marriage) does not invalidate the marriage. The statute had no application to mandate actions brought to preclude the city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples. The defect at issue was not simply a procedural defect in the issuance of the license or in the solemnization or registration process or even the invalidity or unauthorized nature of a county clerk's action in issuing a marriage license to a same-sex couple that rendered such marriages void. What renders a purported same-sex marriage void is the circumstance that the current California statutes reflect a clear legislative decision to prohibit persons of the same sex from entering lawful marriage. In the mandate actions, it was the substantive legislative limitation on the institution of marriage, and not simply the circumstance that the actions of the county clerk or county recorder were unauthorized, that rendered the existing same-sex marriages invalid and void from the beginning.

(35) Marriage § 10--Actions--Mandate Action to Preclude the Licensing and Registration of Same-sex Marriages--Remedy for Unauthorized and Unlawful Actions of City Officials.--In light of the explicit terms of Fam. Code, § 300, and a warning included in gender-neutral marriage license applications provided by a city, same-sex couples whose marriages were licensed by and registered with city officials clearly were on notice that the validity of their marriages was dependent upon whether a court would find that the city officials had authority to allow same-sex marriages. As city officials lacked this authority, these couples did not have a persuasive equitable claim to have the validity of the marriages left in doubt until a court ruled on the substantive constitutional challenges to the California marriage statutes, since this would have created [*1065] uncertainty and potential harm to others who may have needed to know whether the marriages were valid or not.

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Divine Queen Mariette Do-Nguyen as Amicus Curiae on behalf of Petitioner Bill Lockyer, as Attorney General of the State of California.

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Dennis J. Herrera, City Attorney, Therese M. Stewart, Chief Deputy City Attorney, Ellen Forman, Wayne K. Snodgrass, Thomas S. Lakritz, K. Scott Dickey, Kathleen S. Morris, Sherri Sokeland Kaiser, Deputy City Attorneys; Howard Rice Nemerovski Canady Falk & Rabkin, Bobbie J. Wilson, Pamela K. Fulmer, Amy E. Margolin, Sarah M. King, Kevin H. Lewis, Ceide Zapparoni, Glenn M. Levy and Chandra Miller Fienen for Respondents.

Alma Marie Triche-Winston and Charel Winston as Amici Curiae on behalf of Respondents.
[*1066]
Law Offices of Waukeen Q. McCoy and Waukeen Q. McCoy for Dr. Anthony Bernan, Andrew Neugebauer, Stephanie O'Brien, Janet Levy, Dr. Gregory Clinton, Gregory Morris, Joseph Falkner, Arthur Healey, Kristin Anderson, Michele Betegga, Derrick Anderson and Wayne Edfors II as Amici Curiae on behalf of Respondents.

Morrison & Foerster, Ruth N. Borenstein, Stuart C. Plunkett and Johnathan E. Mansfield for Marriage Equality California, Inc., and Twelve Married Same-Sex Couples as Amici Curiae on behalf of Respondents.

Ann Miller Ravel, County Counsel (Santa Clara) and Martin H. Dodd, Assistant County Counsel, as Amici Curiae on behalf of Respondents.

Dana McRae, County Counsel (Santa Cruz), Shannon M. Sullivan and Jason M. Heath, Assistant County Counsel, as Amici Curiae on behalf of Respondents.

Bingham McCutchen, John R. Reese, Matthew S. Gray, Susan Baker Manning, Huong T. Nguyen and Danielle Merida for Bay Area Lawyers for Individual Freedom as Amicus Curiae on behalf of Respondents.

National Center for Lesbian Rights, Shannon Minter, Courtney Joslin; Heller Ehrman White & McAuliffe, Stephen V. Bomse, Richard DeNatale, Hilary E. Ware; ACLU of Southern California, Martha A. Matthews; Lambda Legal Defense and Education Fund, Jon W. Davidson, Jennifer C. Pizer; Steefel, Levitt & Weiss, Dena L. Narbaitz, Clyde J. Wadsworth; ACLU Foundation of Northern California, Tamara Lange, Alan I. Schlosser; Law Office of David C. Codell, David C. Codell and Aimee Dudovitz for Del Martin and Phyllis Lyon, Sarah Conner and Gillian Smith, Margot McShane and Alexandra D'Amario, Dave Scott Chandler and Jeffrey Wayne Chandler, Theresa Michelle Petry and Cristal Rivera-Mitchel, Lancy Woo and Cristy Chung, Joshua Rymer and Tim Frazer, Jewell Gomez and Diane Sabin, Myra Beals and Ida Matson, Arthur Frederick Adams and Devin Wayne Baker, Jeanne Rizzo and Pali Cooper, Our Family Coalition and Equality California as Amici Curiae on behalf of Respondents.

Roger Jon Diamond as Amicus Curiae on behalf of Respondents.

JUDGES: George, C. J., with Baxter, Chin, Brown, and Moreno, JJ., concurring. Concurring opinion by Moreno, J. Concurring and dissenting opinions by Kennard and Werdegar, JJ.

OPINION BY: GEORGE

OPINION:

[**462] [***229] **GEORGE, C. J.**--We assumed jurisdiction in these original writ proceedings to address an important but relatively narrow legal issue--whether a local executive official who is charged with the ministerial duty of enforcing a state [*1067] statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional.

In the present case, this legal issue arises out of the refusal of local officials in the City and County of San Francisco to enforce the provisions of California's marriage statutes that limit the granting of a marriage license and marriage certificate only to a couple comprised of a man and a woman.

The same legal issue and the same applicable legal principles could come into play, however, in a multitude of situations. For example, we would face the same legal issue if the statute in question were among those that restrict the possession or require the registration of assault weapons, and a local official, charged with the ministerial duty of enforcing those statutes, refused to apply their provisions because of the official's view that they violate the Second Amendment of the federal Constitution. In like manner, the same legal issue would be presented if the statute were one of the environmental measures that impose restrictions upon a property owner's ability to obtain a building permit for a development that interferes with the public's access to the California coastline, and a local official, charged with the ministerial [**463] duty of issuing building permits, refused to apply the statutory limitations because of his or her belief that they effect an uncompensated "taking" of property in violation of the just compensation clause of the state or federal Constitution.

Indeed, another example might illustrate the point even more clearly: the same legal issue would arise if the statute at the center of the controversy were the recently enacted provision (operative January 1, 2005) that imposes a ministerial duty upon local officials to accord the same rights and benefits to registered domestic partners as are granted to spouses (see Fam. Code, § 297.5, added by Stats. 2003, ch. 421, § 4), and a local official--perhaps an officeholder in a locale where domestic partnership [***230] rights are unpopular--adopted a policy of refusing to recognize or accord to registered domestic partners the equal treatment mandated by statute, based solely upon the official's view (unsupported by any judicial determination) that the statutory provisions granting such rights to registered domestic partners are unconstitutional because they improperly amend or repeal the provisions of the voter-enacted initiative measure commonly known as Proposition 22, the California Defense of Marriage Act (Fam. Code, § 308.5) without a confirming vote of the electorate, in violation of article II, section 10, subdivision (c) of the California Constitution.

As these various examples demonstrate, although the present proceeding may be viewed by some as presenting primarily a question of the substantive [*1068] legal rights of same-sex couples, in actuality the legal issue before us implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority

granted to them as officeholders. In short, the legal question at issue--the scope of the authority entrusted to our public officials--involves the determination of a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being "a government of laws, and not of men" (or women). n1

> n1 The phrase "a government of laws, and not of men" was authored by John Adams (Adams, Novanglus Papers, No. 7 (1774), reprinted in 4 Works of John Adams (Charles Francis Adams ed. 1851) p. 106), and was included as part of the separation of powers provision of the initial Massachusetts Constitution adopted in 1780. (Mass. Const. (1780) Part The First, art. XXX.) The separation of powers provision of that state's Constitution remains unchanged to this day, and reads in full: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men*." (Italics added.)

As indicated above, that issue--phrased in the narrow terms presented by this case--is whether a local executive official, charged with the ministerial duty of enforcing a statute, has the authority to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the governing statute is unconstitutional. As we shall see, it is well established, both in California and elsewhere, that--subject to a few narrow exceptions that clearly are inapplicable here--a local executive official does *not* possess such authority.

(1) This conclusion is consistent with the classic understanding of the separation of powers doctrine--that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality. It is true, of course, that the separation of powers doctrine does not create an absolute or rigid division of functions. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52 [51 Cal. Rptr. 2d 837, 913 P.2d 1046].) **(2)** Furthermore, legislators and executive officials may take into account constitutional considerations in making discretionary decisions within their authorized sphere of action--such as whether to enact or veto proposed legislation or exercise prosecutorial discretion. When, however, a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the statute in performing a mandated act, the official generally has no [***231] authority to disregard [**464] the statutory mandate based on the official's own determination that the statute is unconstitutional. (See, e.g., *Kendall v. United States* (1838) 37 U.S. 524, 613 [9 L.Ed. 1181] ["To contend, that the obligation imposed on the president to see the [*1069] laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible"].)

Accordingly, for the reasons that follow, we agree with petitioners that local officials in San Francisco exceeded their authority by taking official action in violation of applicable statutory provisions. We therefore shall issue a writ of mandate directing the officials to enforce those provisions unless and until they are judicially determined to be unconstitutional and to take all necessary remedial steps to undo the continuing effects of the officials' past unauthorized actions, including making appropriate corrections to all relevant official records and notifying all affected same-sex couples that the same-sex marriages authorized by the officials are void and of no legal effect.

(3) To avoid any misunderstanding, we emphasize that the substantive question of the constitutional validity of California's statutory provisions limiting marriage to a union between a man and a woman is not before our court in this proceeding, and our decision in this case is not intended, and should not be interpreted, to reflect any view on that issue. We hold only that in the absence of a judicial determination that such statutory provisions are unconstitutional, local executive officials lacked authority to issue marriage licenses to, solemnize marriages of, or register certificates of marriage for same-sex couples, and marriages conducted between same-sex couples in violation of the applicable statutes are void and of no legal effect. Should the applicable statutes be judicially determined to be unconstitutional in the future, same-sex couples then would be free to obtain valid marriage licenses and enter into valid marriages.

I

The events that gave rise to this proceeding began on February 10, 2004, when Gavin Newsom, the Mayor of the City and County of San Francisco and a respondent in one of the consolidated cases before us, n2 sent a letter to [*1070] Nancy Alfaro, identified in the letter as the San Francisco County Clerk, n3 requesting that she "determine [***232] what changes should be made to

the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation." The mayor stated in his letter that "[t]he Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit [**465] discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage," and explained that it is his "belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination." The mayor indicated that the request to the county clerk was made "[p]ursuant to [his] sworn duty to uphold the California Constitution, including specifically its equal protection clause ... ." n4

n2 Petitioner in the *Lockyer* matter is Bill Lockyer, the Attorney General of California. The petition in *Lockyer* names as respondents the City and County of San Francisco, Gavin Newsom in his official capacity as Mayor of the City and County of San Francisco, Mabel S. Teng in her official capacity as Assessor-Recorder of the City and County of San Francisco, and Nancy Alfaro in her official capacity as the County Clerk of the City and County of San Francisco.

Petitioners in the *Lewis* matter are Barbara Lewis, Charles McIlhenny, and Edward Mei, San Francisco residents and taxpayers. The petition in *Lewis* names as respondent Nancy Alfaro in her official capacity as the County Clerk of the City and County of San Francisco.

For convenience, in this opinion we generally shall refer to the Attorney General and petitioners in *Lewis* collectively as "petitioners" and to respondents in both *Lockyer* and *Lewis* collectively as "the city" or "the city officials."

n3 The letter from Mayor Newsom identified Alfaro as the San Francisco County Clerk. In its answer to the petition for writ of mandate in *Lockyer*, filed in this court on March 18, 2004, however, the city alleges "that Daryl M. Burton is the San Francisco County Clerk, and that Nancy Alfaro is the Director of the County Clerk's Office, to whom all of the responsibilities and privileges of County Clerk have been delegated." The answer further alleges that "as Burton's delegate, Nancy Alfaro is the designated 'commissioner of civil marriages' for San Francisco." Alfaro has filed a declaration stating that she is the Director of the County Clerk's Office for the City and County of San Francisco and that "[i]n that capacity I perform all the duties, and hold all the responsibilities of, the County Clerk. These duties include the issuance of all marriage licenses." Petitioners do not contend that Alfaro is not the official authorized to perform the duties assigned by the applicable statutes to the county clerk, and thus we shall consider Alfaro the county clerk for purposes of this proceeding.

n4 The letter read in full: "Upon taking the Oath of Office, becoming the Mayor of the City and County of San Francisco, I swore to uphold the Constitution of the State of California. Article I, Section 7, subdivision (a) of the California Constitution provides that '[a] person may not be ... denied equal protection of the laws.' The California courts have interpreted the equal protection clause of the California Constitution to apply to lesbians and gay men and have suggested that laws that treat homosexuals differently from heterosexuals are suspect. The California courts have also stated that discrimination against gay men and lesbians is invidious. The California courts have held that gender discrimination is suspect and invidious as well. The Supreme Courts in other states have held that equal protection provisions in their state constitutions prohibit discrimination against gay men and lesbians with respect to the rights and obligations flowing from marriage. It is my belief that these decisions are persuasive and that the California Constitution similarly prohibits such discrimination.

"Pursuant to my sworn duty to uphold the California Constitution, including specifically its equal protection clause, I request that you determine what changes should be made to the forms and documents used to apply for and issue marriage licenses in order to provide marriage licenses on a non-discriminatory basis, without regard to gender or sexual orientation."

In response to the mayor's letter, the county clerk designed what she describes as "a gender-neutral application for public marriage licenses, and a gender-neutral marriage license," to be used by same-sex couples. The newly designed form altered the official state-prescribed form for the "Application [*1071] for Marriage License" and the "License and Certificate of Marriage" by eliminating the terms "bride," "groom," and "unmarried man and unmarried woman," and by replacing them with the terms "first applicant," "second applicant," and "unmarried individuals." The revised form also contained a

new warning at the top of the form, advising applicants that "[b]y entering into marriage you may lose some or all of the rights, protections and benefits you enjoy as a domestic partner" and that "marriage of gay and lesbian couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer," and encouraging same-sex couples "to seek legal advice regarding the effect of entering into marriage." n5

n5 The warning reads in full: "Please read this carefully prior to completing the application: [P] By entering into marriage you may lose some or all of the rights, protections, and benefits you enjoy as a domestic partner, including, but not limited to those rights, protections, and benefits afforded by State and local government, and by your employer. If you are currently in a domestic partnership, you are urged to seek legal advice regarding the potential loss of your rights, protections, and benefits before entering into marriage. [P] Marriage of gay and lesbian couples may not be recognized as valid by any jurisdiction other than San Francisco, and may not be recognized as valid by any employer. If you are a same-gender couple, you are encouraged to seek legal advice regarding the effect of entering into marriage."

[***233]

The county clerk, using the altered forms, began issuing marriage licenses to same-sex couples on February 12, 2004, and the county recorder thereafter registered marriage certificates submitted on behalf of same-sex couples who had received licenses from the city and had participated in marriage ceremonies. The declaration of the county clerk, filed in this court on March 5, 2004, indicates that as of that date, the clerk had issued more than approximately 4,000 marriage licenses to same-sex couples. In more recent filings, the city has indicated that approximately 4,000 same-sex marriages have been performed under licenses issued by the County Clerk of the City and County of San Francisco. [*1072]

On February 13, 2004, two separate actions were filed in San Francisco County Superior Court seeking to halt the city's issuance of marriage licenses to same-sex couples and the solemnization and registration of marriages of such couples. (*Thomasson v. Newsom* (Super. [**466] Ct. S.F. City and County, 2004, No. CGC-04-428794); *Proposition 22 Legal Defense and Education Fund v. City and County of San Francisco* (Super. Ct. S.F. City and County, 2004, No. CPF-04-50943) (hereafter *Proposition 22 Legal Defense*).) In each case, a request for an immediate stay of the city's actions was denied by the superior court after a hearing. n6

n6 On February 17, 2004, the superior court, in addition to declining to grant the request for an immediate stay, issued an alternative writ in *Proposition 22 Legal Defense*, directing the city to cease and desist issuing marriage licenses to same-sex couples or performing marriage ceremonies for such couples, or show cause why the city has not done so, and set a hearing on the show cause order for March 29, 2004. On February 19, 2004, the city filed a cross-complaint for declaratory relief against the State of California in *Proposition 22 Legal Defense*, seeking a declaration that the California statutes that deny the issuance of marriage licenses to same-sex couples are unconstitutional.

On February 27, 2004, the Attorney General filed in this court a petition for an original writ of mandate, prohibition, certiorari, and/or other relief, and a request for an immediate stay. The petition asserted that the actions of the city officials in issuing marriage licenses to same-sex couples and solemnizing and registering the marriages of such couples are unlawful, and that the problems and uncertainty created by the growing number of these marriages justify intervention by this court. The petition pointed out that despite a directive issued by the state Registrar of Vital Statistics, the San Francisco County Recorder had not ceased the practice of registering marriage certificates submitted by same-sex couples on forms other than those approved by the State of California, and that officials of the federal Social Security Administration had raised questions regarding that agency's processing of name-change applications resulting from California marriages--not confined to single-sex marriages--because of the uncertainty as to whether certain marriage certificates issued in California are valid under state law. Noting that "[t]he Attorney General has the constitutional duty to see that the laws of the state are uniformly and adequately enforced" (see Cal. Const., art. V, § 13), the petition maintained that the existing " conflict and uncertainty, and the potential for future ambiguity, instability, [***234] and inconsistent administration among various jurisdictions and levels of government, present a legal issue of statewide importance that warrants immediate intervention by this Court." The petition requested that this court issue an order (1) directing the local officials to comply with the applicable statutes in issuing marriage licenses and certificates, (2) declaring invalid the same-sex marriage licenses and certificates that have been issued, and (3) directing the city to refund

any fees collected in connection with such licenses and certificates.

Anticipating that the respondent city officials likely would oppose the petition by arguing that the applicable state laws are unconstitutional, the petition maintained that such a claim could not justify the officials' issuance of same-sex marriage licenses in violation of state law "because article III, section 3.5 of the California Constitution prohibits administrative agencies from declaring state laws unconstitutional in the absence of an appellate court determination." The petition asserted that "[t]he county is a political subdivision of the state charged with administering state government, and local registrars of vital statistics act as state officers. The state's agents at the local level simply cannot refuse to enforce state law." [*1073]

Although the Attorney General's petition acknowledged that the court could grant the relief requested in the petition without reaching the substantive question of the constitutionality of the California statutes limiting marriage to a man and a woman, the petition urged that we also resolve the substantive constitutional issue at this time, arguing that "[a]s the issues presented are pure legal issues, and there is no need for the development of a factual record, these issues are ready for this Court's review."

On February 25, 2004, two days prior to the filing of the petition in *Lockyer*, the petition in *Lewis* was filed in this court. In *Lewis*, three residents and taxpayers in the City and County of San Francisco sought a writ of mandate to compel the county clerk to cease and desist issuing marriage licenses to couples other than those who meet state law marriage requirements and on forms that do not comply with state law license requirements, and also sought an immediate stay [**467] pending the court's determination of the petition.

After receiving the petitions in *Lockyer* and *Lewis*, we requested that the city file an opposition to the petition in each case on or before March 5, 2004. The city filed its opposition to the petitions on March 5, arguing that the provisions of article III, section 3.5 of the California Constitution do not apply to local officials and that, in any event, under the supremacy clause of the United States Constitution, California Constitution article III, section 3.5 could not properly be applied to preclude a local official from refusing to enforce a statute that the official believes violates the federal Constitution. With regard to the question of the constitutionality of California's statutory ban on same-sex marriages, the opposition maintained that "the issue is one best left to the lower courts in the first instance to undertake the extensive fact-finding that will be necessary." n7

n7 The petition in *Lewis*--filed by parties who maintain that the existing California marriage statutes are constitutional--similarly took the position that "[t]he constitutionality of the marriage laws is an issue best left to full development in the lower courts."

On March 11, 2004, we issued an order in both *Lockyer* and *Lewis* directing the city officials to show cause why a writ of mandate should not issue requiring the officials to apply and abide by the current California marriage statutes in the absence [***235] of a judicial determination that the statutory provisions are unconstitutional. Pending our determination of these matters, we directed the officials to enforce the existing marriage statutes and refrain from issuing marriage licenses or certificates not authorized by such provisions. We also stayed all proceedings in the two pending San Francisco County Superior Court cases (the *Proposition 22 Legal Defense* action and the *Thomasson v. Newsom* action), but specified that the stay "does not [*1074] preclude the filing of a separate action in superior court raising a substantive constitutional challenge to the current marriage statutes."

Our March 11 order also specified that the return to be filed by the city officials in each case was to be limited "to the issue whether respondents are exceeding or acting outside the scope of their authority in refusing to enforce the provisions of Family Code sections 300, 301, 308.5, and 355 in the absence of a judicial determination that such provisions are unconstitutional," and that in addressing this issue, the return "should discuss not only the applicability and effect of article III, section 3.5 of the California Constitution" but also any other constitutional or statutory provisions or legal doctrines that bear on the question whether the city officials acted outside the scope of their authority in refusing to comply with the applicable statutes in the absence of a judicial determination that the statutes are unconstitutional.

Our March 11 order further established an expedited briefing schedule and indicated that the court would hear oral argument in these matters at its late May 2004 or June 2004 oral argument calendar. After receiving the briefs filed by the parties and numerous amici curiae, we requested that the parties file supplemental letter briefs addressing several questions relating to the validity of the marriage licenses and certificates of registry of marriage that already had been issued or registered by city officials to or on behalf of same-sex couples. The supplemental briefs were timely filed, and the cases were argued before this court on May 25, 2004. After oral argument, we filed an order consolidating the two cases for decision.

II

(4) It is well settled in California that "the Legislature has full control of the subject of marriage and may fix the conditions under which the marital status may be created or terminated. ..." (*McClure v. Donovan* (1949) 33 Cal.2d 717, 728 [205 P.2d 17].) "The regulation of marriage and divorce is solely within the province of the Legislature, except as the same may be restricted by the Constitution." (*Beeler v. Beeler* (1954) 124 Cal. App. 2d 679, 682 [268 P.2d 1074]; see, e.g., *Estate of DePasse* (2002) 97 Cal.App.4th 92, 99 [118 Cal. Rptr. 2d 143].) In view of the primacy of the Legislature's role in this area, we begin by setting forth the relevant statutes relating to marriage that have some bearing on the issue before us. As we shall [**468] see, the Legislature has dealt with the subject of marriage in considerable detail.

As applicable to the issues presented by this case, the relevant statutes dealing with marriage are contained in the Family Code and the Health and Safety Code. [*1075]

(5) The provisions regarding the validity of marriage are set forth in Family Code sections 300 to 310.

Section 300 provides in full: "*Marriage is a personal relation arising out of a civil contract between a man and a woman*, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized [***236] by this division, except as provided by Section 425 [n8] and Part 4 (commencing with Section 500). [n9]" (Italics added.)

n8 Family Code section 425 provides: "If no record of the solemnization of a marriage previously contracted is known to exist, the parties may purchase a License and Certificate of Declaration of Marriage from the county clerk in the parties' county of residence." Family Code section 350 provides that "[b]efore ... declaring a marriage pursuant to Section 425, the parties shall first obtain a marriage license from a county clerk." As the Court of Appeal explained in *Estate of DePasse, supra,* 97 Cal.App.4th 92, 104, "[t]he purpose of the [section 425] procedure is to create a record of an otherwise unrecorded marriage, thus focusing on the registration requirement, as opposed to the licensing requirement." The section 425 procedure has no bearing on the issues presented by this case.

n9 Part 4 of division 3 of the Family Code (§ § 500-536) governs confidential marriages. With respect to the issue presented in this case, the provisions governing confidential marriages parallel the provisions governing ordinary marriages. (Compare, e.g., Fam. Code, § 505 [specifying form of confidential marriage license] with Fam. Code, § 355 [specifying form of ordinary marriage license].)

Section 301 provides: "*An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 or older*, and not otherwise disqualified, *are capable of consenting to and consummating marriage.*" (Italics added.)

Section 308.5 provides: "*Only marriage between a man and a woman is valid or recognized in California.*" (Italics added.)

In the opposition filed in this court, the city takes the position that neither section 301 nor section 308.5 is relevant to the question whether current California statutes limit marriages performed in California to marriages between a man and a woman, n10 but the city concedes that section 300, both [*1076] by its terms and its purpose, imposes such a limitation on marriages performed in California. n11 Because we agree that section 300 clearly establishes that current California statutory law limits marriage to couples comprised of a man and a woman, we need not and do not [***237] address the scope or effect of sections 301 and 308.5 in this case.

n10 With respect to section 301--which, as noted above, provides that "[a]n unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years or older, ... are capable of consenting to and consummating marriage"--the opposition filed in this court maintains that "the statute is silent as to whom an unmarried male and an unmarried female may marry, and thus is irrelevant." Petitioners maintain, by contrast, that section 301 clearly contemplates that a marriage will be consummated between an unmarried male and unmarried female.

With regard to section 308.5--which provides that "[o]nly marriage between a man and woman is valid or recognized in California"--the opposition maintains that, in light of the provision's history, "[t]his statute is irrelevant to the case at hand because it addresses only out-of-state marriages." Petitioners assert, by contrast, that by

specifying that only marriage between a man and woman is "valid" or "recognized" in California, section 308.5 addresses both in-state and out-of-state marriages.

n11 The language in Family Code section 300 specifying that marriage is a relation "between a man and a woman" was adopted by the Legislature in 1977, when the provision was set forth in former section 4100 of the Civil Code. (Stats. 1977, ch. 339, § 1, p. 1295, introduced as Assem. Bill 607 (1977-1978 Reg. Sess.).) The legislative history of the measure makes its objective clear. (See Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 ["The purpose of the bill is to prohibit persons of the same sex from entering lawful marriage"].) The provisions of Civil Code former section 4100 were moved to Family Code section 300 when the Family Code was enacted in 1992. (Stats. 1992, ch. 162, § 10, p. 474.)

The Family Code provisions relating to marriage licenses and to the certificate of [**469] registry of marriage are set forth in Family Code sections 350 to 360. These statutes provide that "before entering a marriage, ... the parties shall first obtain a marriage license from a county clerk" (Fam. Code, § 350), and the provisions state what information must be contained on the license (Fam. Code, § 351) and place the responsibility on the county clerk to ensure that the statutory requirements for obtaining a marriage license are satisfied. (Fam. Code, § 354.) The statutes also specifically provide that the forms for (1) the application for a marriage license, (2) the marriage license, and (3) the certificate of registry of marriage that are to be used by the county clerk and provided to the applicants "shall be prescribed by the State Department of Health Services." (Fam. Code, § § 355, 359.) n12

n12 Family Code section 350 provides: "*Before entering a marriage*, or declaring a marriage pursuant to Section 425, *the parties shall first obtain a marriage license from a county clerk*." (Italics added.)

Section 351 provides: "The marriage license shall show all of the following: [P] (a) The identity of the parties to the marriage. [P] (b) The parties' real and full names, and places of residence. [P] (c) The parties' ages."

Section 354 provides: "(a) Each applicant for a marriage license may be required to present authentic identification as to name. [P] (b) *For the purpose of ascertaining the facts mentioned or required in this part, if the clerk deems it necessary, the clerk may examine the applicants for a marriage license on oath at the time of the application.* The clerk shall reduce the examination to writing and the applicants shall sign it. [P] (c) *If necessary, the clerk may request additional documentary proof as to the accuracy of the facts stated.* [P] (d) Applicants for a marriage license shall not be required to state, for any purpose, their race or color." (Italics added.)

Section 355 provides: "(a) *The forms for the application for a marriage license and the marriage license shall be prescribed by the State Department of Health Services, and shall be adapted to set forth the facts required in this part.* [P] (b) The form for the application for a marriage license shall include an affidavit on the back, which the applicants shall sign, affirming that they have received the brochure provided for in Section 358. [P] (c) *The affidavit required by subdivision (b) shall state:*

AFFIDAVIT

I acknowledge that I have received the brochure titled _____ _____ _____
Signature of Bride Date _____ _____
Signature of Groom Date[End of section 355.]" (Italics added.)

Section 359 provides: "(a) *Applicants for a marriage license shall obtain from the county clerk issuing the license, a certificate of registry of marriage.* [P] (b) *The contents of the certificate of registry are as provided in Division 9 (commencing with Section 102100) of Division 102 of the Health and Safety Code.* [P] (c) The certificate of registry shall be filled out by the applicants, *in the presence of the county clerk issuing the marriage license,* and shall be presented to the person solemnizing the marriage. [P] (d) The person solemnizing the marriage shall complete the registry and shall cause to be entered on the certificate of registry the signature and address of one witness to the marriage ceremony. [P] (e) The certificate of registry shall be returned by the person solemnizing the marriage *to the county recorder of the county in which the license was issued* within 10 days after the ceremony. [P] (f)

> As used in this division, 'returned' means presented to the appropriate person in person, or postmarked, before the expiration of the specified time period." (Italics added.)

[*1077]

Provisions regarding the solemnization of marriage are set forth in Family Code sections 400 to 425. These statutes contain a list of the numerous persons who may solemnize a marriage under California [***238] law (Fam. Code, § 400), and require the person solemnizing a marriage (1) to require the applicants to present the marriage license to him or her prior to solemnization (Fam. Code, § 421), (2) to sign and endorse upon or attach to the marriage license a statement, "in the form prescribed by the State Department of Health Services," setting forth specified information (Fam. Code, § 422), and (3) to return the marriage license, with the requisite endorsement, to the county recorder of the county in which the license was issued within 30 days after the marriage ceremony. (Fam. Code, § 423.) n13

> n13 Family Code section 421 provides in relevant part: "Before solemnizing a marriage, the person solemnizing the marriage shall require the presentation of the marriage license. ..."
>
> Section 422 provides in relevant part: "The person solemnizing a marriage shall make, sign, and endorse upon or attach to the marriage license a statement, *in the form prescribed by the State Department of Health Services*, showing all of the following: [P] (a) The fact, date (month, day, year), and place (city and county) of solemnization. [P] (b) The names and places of residence of one or more witnesses to the ceremony. [P] (c) The official position of the person solemnizing the marriage ... ." (Italics added.)
>
> Section 423 provides: "The person solemnizing the marriage shall return the marriage license, endorsed as required in Section 422, *to the county recorder of the county in which the license was issued* within 10 days after the ceremony." (Italics added.)

[**470]

The Health and Safety Code contains numerous additional provisions prescribing in detail the procedures governing marriage licenses and marriage [*1078] certificates as part of the state's registration and maintenance of vital statistics. These statutes designate the California Director of Health Services as the State Registrar of Vital Statistics (Health & Saf. Code, § 102175) and provide that "[e]ach live birth, fetal death, death, and *marriage* that occurs in this state shall be registered as provided in this part *on the prescribed certificate forms.* ..." (Health & Saf. Code, § 102100, italics added.) The statutes also specify that "[t]he State Registrar is charged with the execution of this part in this state, *and has supervisory power over local registrars, so that there shall be uniform compliance with all the requirements of this part*" (Health & Saf. Code, § 102180, italics added), that "[t]he Attorney General will assist in the enforcement of this part upon request of the State Registrar" (Health & Saf. Code, § 102195), and that "[t]he State Registrar *shall prescribe and furnish all record forms for use in carrying out the purpose of this part, ... and no record forms or formats other than those prescribed shall be used.*" (Health & Saf. Code, § 102200, italics added.) n14 The code also contains a specific provision pertaining to all of the official forms related to marriage, which expressly provides that "[*t*]*he forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate shall be prescribed by the State Registrar*." (Health & Saf. Code, § 103125, italics added.)

> n14 The Health and Safety Code contains a number of additional provisions that demonstrate the state's overriding interest in the uniform application of the state's marriage laws. (See, e.g., Health & Saf. Code, § § 102205, 102215.)

The relevant Health and Safety Code statutes also specify that "[t]he county recorder is the local registrar of marriages and shall perform all the duties of the local registrar of marriages" (Health & Saf. Code, § 102285), and that " [e]ach local registrar is hereby charged with the enforcement of this part in his or her registration district *under the supervision and direction of the State Registrar and shall make an immediate report to the State* [***239] *Registrar of any violation of this law coming to his or her knowledge.*" (Health & Saf. Code, § 102295, italics added.) The statutes also provide that "[t]he local registrar of marriages shall carefully examine each certificate before acceptance for registration and, if it is incomplete or unsatisfactory, he or she shall require any further information to be furnished as may be necessary to make the record satisfactory before acceptance for registration." (Health & Saf. Code, § 102310.)

Pursuant to the foregoing provisions, the State Registrar of Vital Statistics (who, as noted, is also the California Director of Health Services) has prescribed a form--Department of Health Services Form VS-117--which serves as the application for license to marry, the license to marry, and the certificate of registry of mar-

riage. One of the principal California family law practice guides describes the relevant portions of the form as follows: "The [*1079] first three sections of the form (Groom Personal Data, Bride Personal Data, and Affidavit) constitute the application for license to marry. The personal data sections are filled out by the court clerk, using information and/or documents provided by the applicants. The bride and groom must both sign the application (*see* [**471] lines 23 [entitled Signature of Groom], 24 [entitled Signature of Bride]) after the personal data sections have been completed. The fourth section of the form (lines 25A-25F) constitutes the license to marry. This section is to be completed by the clerk." (1 Kirkland et al., Cal. Family Law: Practices and Procedure (2d ed. 2003) Validity of Marriage, Forms, § 10.100[1], p. 10-80, fns. omitted.)

The city acknowledges that the county clerk altered the form prescribed by the State Registrar of Vital Statistics by replacing references to "bride," "groom," and "unmarried man and unmarried woman" with references to "first applicant," "second applicant," and "unmarried individuals," that the county clerk further issued marriage licenses to same-sex couples, and that the county recorder registered certificates of registry of marriage for such couples, despite the knowledge of these officials that the current California statutes do not authorize such actions. The city defends the actions of these officials on the ground that they were based on the belief that the statutory restriction in California law limiting marriage to a man and a woman is unconstitutional. The principal question before us is whether the local officials exceeded or acted outside of their authority in taking these actions.

III

In light of several questions raised by the briefs filed by the city in this court, we begin with a brief discussion of the respective roles of state and local officials with regard to the enforcement of the marriage statutes (in particular, the issuance of marriage licenses and the registering of marriage certificates), and of the nature of the duties of local officials under the applicable statutes.

A

(6) As is demonstrated by the above review of the relevant statutory provisions, the Legislature has enacted a comprehensive scheme regulating marriage in California, establishing the substantive standards for eligibility for marriage and setting forth in detail the procedures to be followed and the public officials who are entrusted with carrying out these procedures. In light of both the historical understanding reflected in this statutory scheme and the statutes' repeated emphasis on the importance of having uniform rules and procedures apply throughout the [***240] state to the subject of marriage, [*1080] there can be no question but that marriage is a matter of "statewide concern" rather than a "municipal affair" (see Cal. Const., art. XI, § § 4, 5, 6; see, e.g., *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 17 [283 Cal. Rptr. 569, 812 P.2d 916]), and that state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.

(7) Furthermore, the relevant statutes also reveal that the only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are *the county clerk* and *the county recorder*. The statutes do not authorize the mayor of a city (or city and county, as is San Francisco) or any other comparable local official to take any action with regard to the process of issuing marriage licenses or registering marriage certificates. Although a mayor may have authority under a local charter to supervise and control the actions of a county clerk or county recorder with regard to other subjects, a mayor has no authority to expand or vary the authority of a county clerk or county recorder to grant marriage licenses or register marriage certificates under the governing state statutes, or to direct those officials to act in contravention of those statutes. (See, e.g., *Coulter v. Pool* (1921) 187 Cal. 181, 187 [201 P. 120] ["A public officer is a public agent and as such acts only on behalf of his principal ... . The most general characteristic of a public officer ... is that a public duty is delegated and entrusted to him, as agent, *the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting*" (italics added)]; *Sacramento v. Simmons* (1924) 66 Cal.App. 18, 24-25 [225 P. 36] [when state statute designated local health officers as local registrars of vital statistics, "to the extent [such officials] are discharging such duties they are acting as state officers. *They are state officers performing state functions and are under the* [**472] *exclusive jurisdiction of the state registrar of vital statistics*" (italics added)]; *Boss v. Lewis* (1917) 33 Cal.App. 792, 794 [166 P. 843] [city clerk, when acting as local registrar of vital statistics under state law, is state officer].)

(8) Accordingly, to the extent the mayor purported to "direct" or "instruct" the county clerk and the county recorder to take specific actions with regard to the issuance of marriage licenses or the registering of marriage certificates, we conclude he exceeded the scope of his authority. (See, e.g., *Sacramento v. Simmons, supra,* 66 Cal.App. 18, 24-28.) n15 Furthermore, if the county

clerk or the county recorder acted in this case in contravention of the [*1081] applicable statutes solely at the behest of the mayor and not on the basis of the official's own determination that the statutes are unconstitutional, such official also would appear to have acted improperly by abdicating the statutory responsibility imposed directly on him or her as a state officer. (See, e.g., *California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, 874 [19 Cal. [***241] Rptr. 2d 357], disapproved on another point in *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 305, fn. 5 [105 Cal. Rptr. 2d 636, 20 P.3d 533] ["An executive or administrative officer can no more abdicate responsibility for executing the laws than the Legislature can be permitted to usurp it"].)

n15 In the mayor's February 10 letter to the county clerk, the mayor simply "request[ed]" the clerk to determine what changes should be made to the forms and documents used to apply for and issue marriage licenses. In the opposition and supplemental opposition filed in this court, however, the city states that the mayor "directed the County Clerk's Office to arrange for the issuance of marriage licenses to same-sex couples" and that "Alfaro was not the decisionmaker with respect to San Francisco's issuance of marriage licenses to same-sex couples. She and the other employees within the County Clerk's Office issued marriage licenses to such couples because Mayor Newsom told them to do so."

(9) Although it is not clear that the county clerk and the county recorder acted on the basis of each individual official's own opinion or determination as to the unconstitutionality of the applicable statutes (see fn. 15, *ante*), and the actions of these officials might be vulnerable to challenge on that ground alone, it is nonetheless appropriate in this case to address the question whether a public official may refuse to enforce a statute when he or she determines the statute to be unconstitutional. The city maintains that when, as here, a public official has asserted in a mandate proceeding that a statutory provision that the official has refused to enforce is unconstitutional, a court may not issue a writ of mandate to compel the official to perform a ministerial duty prescribed by the statute unless the court first determines that the statute is constitutional. If, however, the controlling rule of law requires such an official to carry out a ministerial duty dictated by statute unless and until the statute has been judicially determined to be unconstitutional, it follows that such an official cannot *compel* a court to rule on the constitutional issue by refusing to apply the statute and that a writ of mandate properly may issue, without a judicial determination of the statute's constitutionality, directing the official to comply with the statute unless and until the statute has been judicially determined to be unconstitutional. Accordingly, in deciding whether a writ of mandate should issue, it is appropriate to determine whether the city officials were obligated to comply with the ministerial duty prescribed by statute without regard to their view of the constitutionality of the statute.

B

(10) In addition, we believe it is appropriate to clarify at the outset that, under the statutes reviewed above, the duties of the county clerk and the county recorder at issue in this case properly are characterized as *ministerial* rather than discretionary. When the substantive and procedural requirements [*1082] established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license and record a certificate of registry of marriage; in that circumstance, the officials have no discretion to withhold a marriage license or refuse to record a marriage certificate. By the same [**473] token, when the statutory requirements have not been met, the county clerk and the county recorder are not granted any discretion under the statutes to issue a marriage license or register a certificate of registry of marriage. As we stated recently in *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916 [129 Cal. Rptr. 2d 811, 62 P.3d 54]: " 'A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists.' "

Thus, the issue before us is whether under California law the authority of a local executive official, charged with the ministerial duty of enforcing a state statute, includes the authority to disregard the statutory requirements when the official is of the opinion the provision is unconstitutional [***242] but there has been no judicial determination of unconstitutionality.

IV

In the opposition and supplemental opposition filed in this court, the city maintains that a local executive official's general duty and authority to apply the law includes the authority to refuse to apply a statute whenever the official believes it to be unconstitutional, even in the

absence of a judicial determination of unconstitutionality and even when the duty prescribed by the statute is ministerial. The city asserts that such authority flows from every public official's duty "to conform [his or her] acts to constitutional norms." The Attorney General argues, by contrast, that it is well established that a duly enacted statute is presumed to be constitutional, and he maintains that "the prospect of local governmental officials unilaterally defying state laws with which they disagree is untenable and inconsistent with the precepts of our legal system."

As we shall explain, we conclude that a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the basis of the official's view that it is unconstitutional. n16

n16 As indicated, the issue presented in this case is purely whether a local official may refuse to apply a statute solely on the basis of the official's view that the statute is unconstitutional. There is no claim here that the officials acted as they did because of questions regarding the proper interpretation of the applicable statutes or because of doubts as to which of two or more competing statutory provisions to apply. (Cf. *Burlington Northern & Santa Fe Ry. Co. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887-889 [5 Cal. Rptr. 3d 503].) Here, the officials acknowledge that the current California statutes limit marriage to a union between a man and a woman, and concede that they refused to apply the relevant statutory provisions solely because of a belief that this statutory requirement is unconstitutional.

[*1083]

A

In the initial petitions filed in this matter, petitioners relied primarily on the provisions of article III, section 3.5 of the California Constitution (hereafter generally referred to as article III, section 3.5) in maintaining that the challenged actions of the local officials were improper.

Article III, section 3.5 provides in full: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: [P] (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. [P] (b) To declare a statute unconstitutional. [P] (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Article III, section 3.5 does not define the term "administrative agency" as used in this constitutional provision. Petitioners maintain that in light of the purpose of the provision, the term "administrative agency" should be interpreted to include local executive officials, particularly local officials who [**474] are acting as state officers in carrying out a function prescribed by state statute.

Article III, section 3.5 was proposed by the Legislature and placed before the voters as Proposition 5 at the June 6, 1978 [***243] election, and was adopted by the electorate. The ballot argument in favor of Proposition 5, contained in the election brochure distributed to voters prior to the election, stated in part: "Every statute is enacted only after a long and exhaustive process, involving as many as four open legislative committee meetings where members of the public can express their views. If the agencies question the constitutionality of a measure, they can present testimony at the public hearing during legislative consideration. Committee action is followed by full consideration by both houses of the Legislature. [P] Before the Governor signs or vetoes a bill, he receives analyses from the agencies which will be called upon to implement its provisions. If the Legislature has passed the bill over the objections of the agency, the Governor is not likely to ignore valid apprehensions of his department, as he is Chief Executive of the State and is [*1084] responsible for most of its administrative functions. [P] Once the law has been enacted, however, it does not make sense for an administrative agency to refuse to carry out its legal responsibilities because the agency's members have decided the law is invalid. Yet, administrative agencies are so doing with increasing frequency. These agencies are all part of the Executive Branch of government, charged with the duty of enforcing the law. [P] The Courts, however, constitute the proper forum for determination of the validity of State statutes. There is no justification for forcing private parties to go to Court in order to require agencies of government to perform the duties they have sworn to perform. [P] Proposition 5 would prohibit the State agency from refusing to act under such circumstances, unless an appellate court has ruled the statute is invalid. [P] We urge you to support this Proposition 5 in order to insure that appointed officials do not refuse to carry out their duties by usurping the authority of the Legislature and

the Courts. Your passage of Proposition 5 will help preserve the concept of the separation of powers so wisely adopted by our founding fathers." (Ballot Pamp. Primary Elec. (June 6, 1978) argument in favor of Prop. 5, p. 26.) Petitioners maintain that the rationale set forth in this ballot argument applies to local executive officials as well as state administrative agencies, and thus that the term "administrative agency" as used in the provision properly should be construed to apply to local executive officials.

The city vigorously contests petitioners' suggested interpretation of article III, section 3.5, maintaining that this provision is addressed only to state, not local, administrative agencies, and that in any event the local officials here at issue are not an "administrative agency" within the meaning of article III, section 3.5. The city concedes there may be some anomaly in article III, section 3.5's application only to state administrative agencies and not to local executive officials, but insists such an anomaly "would not be license to rewrite Section 3.5 and give it a meaning nobody had in mind when it was passed." The city argues that "[t]he voters were responding to a specific problem [involving state administrative agencies] when they enacted Section 3.5, and they chose specific means to address that problem. In the end, if some in hindsight question the wisdom of that choice, the answer lies in amending California's Constitution, not judicially rewriting it." In sum, the city asserts that the existing terms of article III, section 3.5 cannot properly be interpreted to include local executive officials.

Although one Court of Appeal decision contains language directly supporting petitioners' argument that article III, section 3.5's reference to administrative agencies properly is interpreted to include local executive officials such as county clerks (*Billig v. Voges* (1990) 223 Cal. App. 3d 962, 969 [***244] [273 Cal. Rptr. 91] (*Billig*)), the city maintains that the question of the proper scope of article III, section 3.5 never was raised in *Billig*, and further that the [*1085] pertinent language in *Billig* clearly is dictum. Accordingly, the city argues, the appellate court's decision in *Billig* cannot properly be viewed as resolving [**475] the issue whether article III, section 3.5 applies to local officials. n17

n17 In *Billig, supra,* 223 Cal. App. 3d 962, the plaintiffs had submitted a referendum petition to the city clerk, but the clerk refused to process the petition or submit it to the city council because the petition did not include the full text of the challenged ordinance, as required by section 4052 of the Elections Code. The plaintiffs then sought a writ of mandate in superior court against the clerk, claiming that this official's authority was limited to determining whether there were sufficient signatures on the petition and did not extend to rejecting a petition for noncompliance with section 4052. The trial court ruled against the plaintiffs and the Court of Appeal affirmed.

The appellate court explained in *Billig* that the city clerk's duty "is limited to the ministerial function of ascertaining whether the *procedural* requirements for submitting a petition have been met" (*Billig, supra,* 223 Cal. App. 3d at pp. 968-969), and found that Elections Code section 4052 "involves purely procedural requirements for submitting a referendum petition. Therefore a city clerk who refuses to accept a petition for noncompliance with the statute is only performing a ministerial function involving no exercise of discretion." (*Billig,* at p. 969.)

Stating that the city clerk lacked discretion *not* to enforce the statutory provision, the Court of Appeal discussed article III, section 3.5 and observed: "Administrative agencies, *including public officials in charge of such agencies*, are expressly forbidden from declaring statutes unenforceable, unless an appellate court has determined that a particular statute is unconstitutional. (Cal. Const., art. III, § 3.5.) [Elections Code] [s]ection 4052 has not been declared unconstitutional by an appellate court in this state. Consequently, *the offices of city clerks throughout the state* are mandated by the [C]onstitution to implement and enforce the statute's procedural requirements. In the instant case, respondent had the clear and present ministerial duty to refuse to process appellants' petition because it did not comply with the procedural requirements of section 4052." (*Billig, supra,* 223 Cal. App. 3d at p. 969, italics added.)

Although the italicized language in *Billig* supports petitioners' position with regard to the scope of article III, section 3.5, there is no indication that any party in *Billig* raised the argument that article III, section 3.5 applies only to *state* agencies and not to *local* agencies or officials, and thus the court in *Billig* had no occasion to resolve that issue. Moreover, in any event the discussion of article III, section 3.5 in *Billig* clearly was dictum, because an analysis and resolution of the scope of that constitutional provision not only was unnecessary to the decision in *Billig*, but arguably was entirely irrelevant. The plaintiffs in *Billig* had *not* asked the city clerk to refrain from applying Elections Code section 4052 on the ground that the statute was unconstitutional, and the city clerk's decision not to accept the petition

did *not* involve consideration of whether he had the authority to determine the provision's constitutionality; moreover, the plaintiffs did not raise any constitutional challenge to section 4052 in the trial court or on appeal. Instead, the plaintiffs in *Billig* simply argued that the applicable provisions of section 4052 did not authorize *a city clerk* (as opposed to a court) to reject a petition for noncompliance with that statute, and that only a court was authorized to disqualify a petition for nonconformance with the requirements of section 4052.

Because the provisions of article III, section 3.5 did not bear on the question before the court in *Billig*, we believe it would be inappropriate to accord much significance to the cited language in that decision.

(11) As we shall explain, we have determined that we need not (and thus do not) decide in this case whether the actions of the local executive officials here at issue fall within the scope or reach of article III, section 3.5, because [*1086] we conclude that prior to the adoption of article III, section 3.5, it already was established under California law--as in the overwhelming majority of other states (see, *post*, at pp. 1104-1107) [***245] -- that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute. Because the adoption of article III, section 3.5 plainly *did not grant or expand* the authority of local executive officials to determine that a statute is unconstitutional and to act in contravention of the statute's terms on the basis of such a determination, we conclude that the city officials do not possess this authority and that the actions challenged in the present case were unauthorized and invalid.

B

We begin with a few basic legal principles that were well established prior to the adoption of article III, section 3.5 in 1978.

(12) First, one of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, "is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity." (7 Witkin, Summary of Cal. Law (9th ed. 1988) [**476] Constitutional Law, § 58, pp. 102-103 [citing, among numerous other authorities, *In re Madera Irrigation District* (1891) 92 Cal. 296, 308; *San Francisco v. Industrial Acc. Com.* (1920) 183 Cal. 273, 280; *People v. Globe Grain and Mill. Co.* (1930) 211 Cal. 121, 127 [294 P. 3]].)

(13) Second, it is equally well established that when, as here, a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute. "It is well settled in this state and elsewhere, that when a statute prescribes the particular method in which a public officer, acting under a special authority, shall perform his duties, the mode is the measure of the power." (*Cowell v. Martin* (1872) 43 Cal. 605, 613-614; see, e.g., *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 797 [322 P.2d 449]; *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal. App. 3d 340, 346-347 [129 Cal. Rptr. 824] ["[a]dministrative bodies and officers have only such powers as have expressly or impliedly been conferred upon them by the Constitution or by statute"].)

The city has not identified any provision in the California Constitution or in the applicable statutes that purports to grant the county clerk or the county recorder (or any other local official) the authority to determine the constitutionality of the statutes each public official has a ministerial duty to enforce. Instead, the city's position appears to be that a public executive official's duty [*1087] to follow the law (including the Constitution) includes the implied or inherent authority to refuse to follow an applicable statute whenever the official personally believes the statute to be unconstitutional, even though there has been no judicial determination of the statute's unconstitutionality and despite the existence of the rule that a duly enacted statute is presumed to be constitutional.

As we shall see, the California authorities that were in place prior to the adoption of article III, section 3.5, do not support the city's position.

C

Although in this case we need not determine the scope of article III, section 3.5, the historical background that led to the proposal and adoption of that constitutional provision in 1978 nonetheless provides a useful starting point for our analysis. As this court explained in *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002 [251 Cal. Rptr. 299, 760 P.2d 495], "[a]rticle III, section 3.5, ... [***246] was placed on the ballot by a unanimous vote of the Legislature in apparent response to this court's decision in *Southern Pac. Transportation v. Public Utilities Com.* (1976) 18 Cal.3d 308 [134 Cal. Rptr. 189] [hereafter *Southern Pacific*], in which the majority held that the Public Utilities Commission had the power to declare a state statute unconstitutional." Accordingly, the

decision in *Southern Pacific* is an appropriate place to begin.

In *Southern Pacific*, the plaintiff railroad company sought review of two decisions of the Public Utilities Commission (PUC) in which the PUC held that section 1202.3 of the Public Utilities Code, a statute enacted in 1971, was unconstitutional. Section 1202.3 was one of a number of statutes in the Public Utilities Code dealing with railroad crossings. With respect to private or farm railroad crossings, Public Utilities Code section 7537 (1) granted "the owner of adjoining lands the right to *private* or *farm* crossings necessary or convenient for egress or ingress" (*Southern Pacific, supra,* 18 Cal.3d at p. 311), (2) provided that the railroad must maintain the crossings, and (3) granted the PUC the authority to fix and assess the cost of such crossings. With respect to railroad crossings on *public* or *publicly used roads*, Public Utilities Code section 1202 gave the PUC the exclusive power "to regulate *public* or *publicly used* road or highway crossings, including locating, maintaining, protecting, and closing them" (*Southern Pacific, supra,* 18 Cal.3d at p. 312), and further granted the PUC the authority to allocate costs among the railroad and the affected public entities responsible for maintaining the public or publicly used road, including any costs involved in closing a crossing. [**477]

Public Utilities Code section 1202.3, the statute at issue in *Southern Pacific*, provided, in turn, that in any proceeding under Public Utilities Code [*1088] section 1202 "involving a *publicly used* road or highway not on a publicly maintained road system," the PUC could apportion costs to the public entity if the PUC found "(a) express dedication and acceptance of the road or (b) a judicial determination of implied dedication." (*Southern Pacific, supra,* 18 Cal.3d at p. 312.) If neither condition was found, section 1202.3 provided that the PUC "shall order the crossing abolished by physical closing." Section 1202.3 further provided that "the railroad shall in no event be required to bear improvement costs 'in excess of what it would be required to bear in connection with the improvement of a public street or highway crossing.' " (*Southern Pacific, supra,* 18 Cal.3d at pp. 312-313.)

In *Southern Pacific*, the PUC concluded in an administrative proceeding that Public Utilities Code section 1202.3 was unconstitutional because it unlawfully delegated the state's police power to private litigants by granting private litigants absolute discretion to require the closing of a railroad crossing merely by commencing a proceeding under Public Utilities Code section 1202. The PUC's conclusion was based in part on its determination that under section 1202.3, once the PUC found that there had been neither an express dedication and acceptance of the publicly used road, nor a judicial determination of an implied dedication of the road, the PUC had no alternative but to order the crossing closed and to require the railroad to pay for the closing. (*Southern Pacific, supra,* 18 Cal.3d at p. 313.) [***247]

On review, this court unanimously disagreed with the PUC's constitutional determination. Observing that Public Utilities Code section 1202.3 provided, in its introductory phrase, that the statute applied "in any proceeding under Section 1202," the court in *Southern Pacific* reasoned that "the Legislature has declared that section 1202.3 is an exception to the former section and that the provisions for cost allocation and closing crossings in the latter section *are only applicable when the commission would otherwise have ordered improvement of a crossing pursuant to the former section.* The standard for compelling crossing improvement implicit in section 1202 is obviously public convenience and necessity, including safety concerns [citations], and this standard must be read into section 1202.3. [P] Thus, before the commission may close a crossing under section 1202.3, it must not only find public use and lack of requisite dedication, but also find that necessity and convenience preclude continued use of the crossing in its existing condition. Such findings--rather than mere commencement of a proceeding under section 1202--[are] the basis for closing a crossing under section 1202.3. [P] The function of the private litigant within the statutory framework is merely to call the commission's attention to the need for improving or closing a crossing and perhaps to urge action on the commission." (*Southern Pacific, supra,* 18 Cal.3d at p. 314, italics added.) [*1089]

As noted, in *Southern Pacific* all of the justices of this court agreed that the PUC had erred in concluding that Public Utilities Code section 1202.3 was unconstitutional. Although the briefs filed in this court in *Southern Pacific* did not raise any question regarding the authority of the PUC to determine the constitutionality of section 1202.3, n18 and the majority in *Southern Pacific* did not address that question in the text of the opinion, Justice Mosk authored a vigorous concurring and dissenting opinion in *Southern Pacific*, arguing strongly that neither the PUC nor any other administrative agency "may declare a duly enacted statute unconstitutional," and that "it is incongruous for the will of the people of the state, reflected by their elected legislators, to be thwarted by a governmental body which exists only to implement that will." (*Southern Pacific, supra,* 18 Cal.3d at p. 315 (conc. & dis. opn. of Mosk, J.).)

n18 Indeed, in the petition filed in this court, the petitioner in *Southern Pacific* expressly stated that it did "not question the authority of the Commission, which has quasi judicial powers and

is a court of special jurisdiction, to declare and hold a statute to be unconstitutional."

[**478]

Justice Mosk's concurring and dissenting opinion in *Southern Pacific* acknowledged that a prior California decision-- *Walker v. Munro* (1960) 178 Cal. App. 2d 67 [2 Cal. Rptr. 737] (hereafter *Walker*)--had held that an administrative agency that has been granted judicial or quasi-judicial power by the California Constitution (a type of entity commonly referred to as a "constitutional agency") n19 has the authority to consider the constitutionality of a statute in the course of its quasi-judicial proceedings. Justice Mosk suggested, however, that *Walker* had been "indirectly [***248] criticized and implicitly disapproved" (*Southern Pacific, supra,* 18 Cal.3d at p. 316 (conc. & dis. opn. of Mosk, J.)) in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251 [115 Cal. Rptr. 497, 524 P.2d 1281] (hereafter *State of California v. Superior Court (Veta)*), and he took issue with "the debatable premise that any and all 'judicial power' inherently entails the authority to declare a law unconstitutional." (*Southern Pacific, supra,* 18 Cal.3d at p. 317.) Relying upon language in numerous decisions of the United States Supreme Court indicating that an administrative agency or executive official has no power to adjudicate constitutional issues (*id.* at p. 316), and decisions from other jurisdictions holding "that administrative agencies lack the powers appropriated in this case" (*ibid.*), Justice Mosk concluded that the extensive powers granted by the California Constitution to the PUC did not include the power to declare a statute unconstitutional and to refuse to apply it.

n19 See, e.g., *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal. App. 2d 315, 320 [314 P.2d 807] ("[The Department of Alcoholic Beverage Control] is a constitutional agency that has succeeded to some of the powers of the State Board of Equalization in alcoholic beverage control matters. Being an agency upon which the Constitution has conferred limited judicial powers, its decisions on factual matters must be affirmed if there is substantial evidence to support them").

[*1090]

The majority in *Southern Pacific* responded to Justice Mosk's concurring and dissenting opinion in a lengthy footnote. (See *Southern Pacific, supra,* 18 Cal.3d 308, 311-312, fn. 2.) The initial portion of the footnote contains some broad language that could be read to support the conclusion that the duty of any administrative agency or public official to obey the Constitution affords such agency or official the authority to determine the constitutional validity of statutes the agency or official is charged with enforcing. The majority in *Southern Pacific*, however, ultimately rested its holding that the PUC had the authority to determine the constitutional validity of statutes on the circumstance that the California Constitution grants broad judicial or quasi-judicial power to the PUC.

The majority in *Southern Pacific* stated in this regard: "[T]he Constitution and statutes of this state grant the commission wide administrative, legislative, and judicial powers. [Citations.] The Legislature has limited the judiciary from interfering with the commission by restricting review to the Supreme Court and by additionally restricting review to determining 'whether the commission has regularly pursued its authority, *including* a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.' (Italics added; [citations].) Public Utilities Code section 1732 provides corporations and individuals may not raise matters in any court not presented to the commission on petition for rehearing, reflecting, when read with the judicial review sections, legislative determination that all issues must be presented to the commission. *Under the broad powers granted it, the commission may determine the validity of statutes.*" (*Southern Pacific, supra,* 18 Cal.3d at pp. 311-312, fn. 2, italics added.)

This review of the decision in *Southern Pacific* demonstrates that there was a significant disagreement in this court on the particular question *whether a so-called constitutional agency* (like the PUC), *that has been granted the authority to exercise quasi-judicial power by the California Constitution*, has the authority to determine that a statute the agency is called upon to apply is unconstitutional and need not be followed. We are [**479] unaware, however, of any case, either prior to or subsequent to *Southern Pacific*, that suggests that under the California Constitution *a local executive official such as a county clerk*, who is charged with the *ministerial* duty to enforce a statute, has the authority [***249] to exercise judicial power by determining whether a statute is unconstitutional.

The case of *Walker, supra,* 178 Cal. App. 2d 67, cited (and criticized) in Justice Mosk's concurring and dissenting opinion in *Southern Pacific*, appears to be the first case in California to address the question whether an administrative agency has the authority to determine the constitutionality of a [*1091] statute that the agency is required to enforce. In *Walker*, the plaintiffs were retail liquor dealers who had been charged in an administrative proceeding before the Department of Alcoholic Beverage Control with violating the fair trade provisions of the

California Alcoholic Beverage Control Act. While the administrative proceeding was pending, the plaintiffs filed a declaratory judgment action in superior court against the administrative officials, seeking a declaration that the fair trade provisions of the Alcoholic Beverage Control Act were unconstitutional, and an order enjoining the officials from enforcing those provisions. The trial court in *Walker* granted summary judgment in favor of the defendants, relying upon the circumstance that the same constitutional issue had been raised in the pending administrative proceeding and upon the trial court's conclusion "that it is more expeditious and proper that the Department rule on the question before the court is required to rule on it." (178 Cal. App. 2d at p. 70.)

On appeal, the plaintiffs argued that the exhaustion of remedies doctrine upon which the trial court had relied was inapplicable, because the Department of Alcoholic Beverage Control "does not have the power ... to decide constitutional questions." (*Walker, supra,* 178 Cal. App. 2d at p. 73.) In rejecting this contention, the Court of Appeal in *Walker* began by referring to the applicable provision of the California Constitution that empowers the Alcoholic Beverage Control Appeals Board to review questions " 'whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in light of the whole record.' (Cal. Const., art. XX, § 22.)" (178 Cal. App. 2d at p. 73.) The court in *Walker* then observed: "The department and the Appeals Board are thus constitutional agencies *upon which limited judicial powers have been conferred*. [Citations.]" (*Ibid.*, italics added.)

In response to the plaintiffs' claim in *Walker* that the department only could make findings of fact and that the appeals board only was empowered "to review certain questions of law, which are only procedural" (*Walker, supra,* 178 Cal. App. 2d at p. 74), the court in *Walker* stated: "However, there does not appear to be any basis for so limiting the grant of power to the Appeals Board. The Appeals Board may determine whether the department acted within its jurisdiction. In *United Insurance Co. v. Maloney* [(1954)] 127 Cal. App. 2d [155,] 157 [273 P.2d 579], the court stated: 'A charge of unconstitutional action goes to the very jurisdiction of the administrative officer or body to entertain the proceeding ... .' [Citation.] This would also seem applicable to a charge that the statute which the agency is seeking to enforce is unconstitutional." (*Walker, supra,* 178 Cal. App. 2d at p. 74.) [*1092]

Accordingly, in concluding that the administrative agency in that case had the authority to determine, at least in the first instance, the question whether the fair trade statutes were unconstitutional, the court in *Walker* specifically relied upon the [***250] circumstance that the Alcoholic Beverage Control Appeals Board had been granted the authority by the California Constitution to exercise limited judicial power. n20

> n20 The significance attached by the court in *Walker* to the California Constitution's grant of judicial power to the Alcoholic Beverage Control Appeals Board is confirmed by the distinction the *Walker* decision drew between the case before it and a then recent decision of the California Supreme Court that was heavily relied upon by the plaintiffs. The court in *Walker* explained: " *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787 [322 P.2d 449], referred to extensively by plaintiffs, is not in point. There the county of Alpine brought an action to determine its boundaries with defendant counties. Judgment of dismissal was reversed. Defendants asserted that the county of Alpine had not exhausted an administrative remedy before the State Lands Commission. But the court held that the agency [the State Lands Commission] was empowered only to 'survey and mark' boundaries. ... [*I*]*t was without jurisdiction to make judicial determinations* of boundaries and therefore the county of Alpine could properly maintain its action." (*Walker, supra,* 178 Cal. App. 2d at p. 73, italics added.)

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As noted in Justice Mosk's concurring and dissenting opinion in *Southern Pacific*, this court held in *State of California v. Superior Court* (*Veta*), *supra*, 12 Cal.3d 237, some years after the appellate court's decision in *Walker*, that a plaintiff seeking a declaration that the California Coastal Zone Conservation Act of 1972 was unconstitutional was not required to pursue that constitutional claim before the Coastal Zone Conservation Commission prior to bringing a court action. (12 Cal.3d at pp. 250-251.) Although there is some language in *Veta* critical of *Walker*, the two cases nonetheless are clearly and easily distinguishable, because the Coastal Zone Conservation Commission, unlike the Alcoholic Beverage Control Appeals Board, had not been granted any judicial power by the California Constitution. Thus, the holding in *State of California v. Superior Court* (*Veta*) that the commission lacked authority to pass on the constitutionality of the statute establishing its status and functions was not inconsistent with the *Walker* decision.

(14) In light of the foregoing review of the relevant case law, we believe that after this court's decision in

Southern Pacific, supra, 18 Cal.3d 308, the state of the law in this area was clear: administrative agencies that had been granted judicial or quasi-judicial power by the California Constitution possessed the authority, in the exercise of their administrative functions, to determine the constitutionality of statutes, but agencies that had not been granted such power under the California Constitution lacked such authority. (See *Hand v. Board of Examiners in Veterinary Medicine* (1977) 66 Cal. App. 3d 605, 617-619 [136 Cal. Rptr. 187].) Accordingly, these decisions recognize that, under [*1093] California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution. n21

n21 In this regard it is worth noting that article III, section 3 of the California Constitution explicitly provides: "The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others *except as permitted by this Constitution*." (Italics added.)

Given the foregoing decisions and their reasoning, it appears evident that under California law as it existed prior to the adoption of article III, section 3.5 of the California Constitution, *a local executive official*, such as a county clerk or county [***251] recorder, possessed no authority to determine the constitutionality of a statute that the official had a ministerial duty to enforce. If, in the absence of a grant of judicial authority from the California Constitution, an administrative agency that was required by law to reach its decisions only after conducting court-like quasi-judicial proceedings did not generally possess the authority to pass on the constitutionality of a statute that the agency was required to enforce, it follows even more so that a local executive official who is charged simply with the ministerial duty of enforcing a statute, and who generally acts without any quasi-judicial authority or procedure whatsoever, did not possess such authority. As indicated above, we are unaware of any California case that suggests such a public official has been granted judicial or quasi-judicial power by the California Constitution. n22

n22 The city, in a footnote contained in its reply brief to several amicus curiae briefs, maintains that the actions of its officials did not constitute the exercise of judicial powers, citing a brief passage in this court's decision in *Lusardi Constr. Co. v. Aubry* (1992) 1 Cal.4th 976, 993 [4 Cal. Rptr. 2d 837, 824 P.2d 643] (*Lusardi*) (the Director of the Department of Industrial Relations' "determination that a project is a public work ... cannot be accurately characterized as 'judicial,' because it does not encompass the conduct of a hearing or a binding order for any type of relief"). In *Lusardi*, however, the director, unlike the city officials here, acted to enforce a statutory provision; he did not defy or disregard a statutory provision on the basis of his own determination that the statute was unconstitutional. *Lusardi* clearly provides no support for the city's position.

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(15) The city, in arguing that article III, section 3.5 does not apply to local officials, relies upon the statement in *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 36 [112 Cal. Rptr. 805], that the separation of powers clause in article III "is inapplicable to the government below the state level." n23 The city might well argue that this language in *Strumsky* also renders inapposite the line of California cases (*Southern* [*1094] *Pacific, supra,* 18 Cal.3d 308; *State of California v. Superior Court (Veta), supra,* 12 Cal.3d 237; and *Walker, supra,* 178 Cal. App. 2d 67) that we have just discussed. The city fails to recognize, however, that the decision in *Strumsky* emphatically did *not* hold that under the California Constitution local executive officials are free to exercise judicial power. On the contrary, in *Strumsky* this court expressly *overruled* a line of earlier California decisions that had held (for purposes of determining the appropriate standard of judicial review of a decision of a local administrative agency) that such an agency could exercise judicial power; the opinion in *Strumsky* concluded instead that a local administrative agency has *no* authority under the California Constitution to exercise judicial power. (*Strumsky, supra,* 11 Cal.3d at pp. 36-44.) In light of this holding in *Strumsky*, it appears clear that a local executive official who makes decisions-- [***252] without the benefit of even a quasi-judicial proceeding--has no authority to exercise judicial power, such as by determining the constitutionality of applicable statutory provisions.

n23 The statement in numerous California decisions that the separation of powers provision of article III is inapplicable to government below the state level means simply that, in establishing a governmental structure for the purpose of managing municipal affairs, the Legislature (through statutes) or local entities (through charter provisions and the like) may combine executive, legislative, and judicial functions in a manner different from the structure that the California Consti-

tution prescribes for state government. (See, e.g., *Wulzen v. Board of Supervisors* (1894) 101 Cal. 15, 25-26 [35 P. 353]; *People v. Provines* (1868) 34 Cal. 520, 532-540.) As explained hereafter, the statement does *not* mean that a local executive official has the inherent authority to exercise judicial power.

Accordingly, we conclude that at the time article III, section 3.5 was adopted, it was clear under California law that a local executive official did not have the authority to determine that a statute is unconstitutional or to refuse to enforce a statute in the absence of a judicial determination that the statute is unconstitutional. n24

n24 In a somewhat related context, this court held in *Farley v. Healey* (1967) 67 Cal.2d 325 [62 Cal. Rptr. 26, 431 P.2d 650] that an acting registrar of voters, who refused to determine whether sufficient signatures had been submitted to qualify a local initiative measure for the ballot because of his conclusion that the content of the initiative was not a proper subject for a local initiative, "exceeded his authority in undertaking to determine whether the proposed initiative was within the power of the electorate to adopt." (67 Cal.2d at p. 327.) We explained that under the applicable charter provision, the registrar's "duty is limited to the ministerial function of ascertaining whether the procedural requirements for submitting an initiative measure have been met. *It is not his function to determine whether a proposed initiative will be valid if enacted or whether a proposed declaration of policy is one to which the initiative may apply. These questions may involve difficult legal issues that only a court can determine. ...* Given compliance with the formal requirements for submitting an initiative, the registrar must place it on the ballot unless he is directed to do otherwise by a court on a compelling showing that a proper case has been established for interfering with the initiative power." (*Ibid.*, italics added.)

The adoption of article III, section 3.5, of course, effectively overruled the majority's holding in *Southern Pacific* and largely embraced the reasoning set forth in Justice Mosk's concurring and dissenting opinion, amending the California Constitution to provide that "[a]n administrative agency, *including an administrative agency created by the Constitution or an initiative statute, has no power ... [t]o ...* refuse to enforce a statute on the basis of its being unconstitutional unless an appellate court has made a determination that such [*1095] statute is unconstitutional." [**482] (Italics added.) As we already have noted, we need not and do not decide in this case what effect the adoption of article III, section 3.5 has on the authority of local executive officials, because it is abundantly clear that this constitutional amendment did not *expand* the authority of such officials so as to permit them to refuse to enforce a statute solely on the basis of their view that the statute is unconstitutional. Accordingly, we conclude that under California law a local executive official generally lacks such authority.

D

(16) In support of its contrary claim that, as a general matter, California law long has recognized that an executive public official has the authority to refuse to comply with a ministerial statutory duty whenever the official personally believes the statute is unconstitutional, the city relies upon a line of California decisions that have reviewed the validity of statutes or ordinances authorizing the issuance of bonds, the letting of public contracts, or the disbursement of public funds in mandate actions filed against public officials who refused to comply with a ministerial duty. As the city accurately notes, numerous California decisions addressing these three subjects have held that "mandate is the proper remedy to compel a public officer to perform ministerial acts such as issuance of bonds [and that] the constitutionality of the law authorizing a bond issuance may be determined in a proceeding for such a writ." (*California Housing Finance Agency v. Elliott* [***253] (1976) 17 Cal.3d 575, 579-580 [131 Cal. Rptr. 361, 551 P.2d 1193] [bond]; see, e.g., *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 598 [116 Cal. Rptr. 361, 526 P.2d 513] [bond]; *Metropolitan Water District v. Marquardt* (1963) 59 Cal.2d 159, 170-171 [28 Cal. Rptr. 724, 379 P.2d 28] [public contract]; *City of Whittier v. Dixon* (1944) 24 Cal.2d 664, 666 [151 P.2d 5] [warrant]; *Golden Gate Bridge etc. Dist. v. Felt* (1931) 214 Cal. 308, 315-320 [5 P.2d 585] [bond]; *Los Angeles Co. F.C. Dist. v. Hamilton* (1917) 177 Cal. 119, 121 [169 P. 1028] [bond]; *Denman v. Broderick* (1896) 111 Cal. 96, 99, 105 [43 P. 516] [warrant].)

In each of the foregoing cases, the mandate action was instituted after a public official who was under a statutory duty to perform a ministerial act that was a necessary step in the issuance of the bond, the letting of the contract, or the disbursement of public funds (such as affixing the official's signature to the bond or contract, or issuing a warrant) refused to perform that act based upon the official's ostensible doubts as to the constitutional validity of the statute authorizing the bond, contract, or

public expenditure. The city emphasizes that in none of these cases did the court criticize such a public official for declining to perform his or her ministerial act, but instead concluded that the public official's refusal to act was an appropriate means of [*1096] bringing the constitutional question of the validity of the bond, contract, or expenditure of public funds before the court for resolution. The city maintains that these decisions demonstrate that the general rule in California always has been that *every* public official is free to determine the constitutional validity of the statutory provisions that he or she has a ministerial duty to enforce or execute, and free to refuse to perform the ministerial act if he or she in good faith believes the statute to be unconstitutional. The city argues that the line of decisions we have analyzed above--holding, prior to the adoption of article III, section 3.5, that only administrative agencies constitutionally authorized to exercise judicial power have the authority to determine the constitutional validity of statutes--involved *a limited exception* applicable only to administrative agencies.

We believe the city's argument misconceives the state of the law prior to the adoption of article III, section 3.5. As we have discussed above, the general rule established by California decisions at the time *Southern Pacific, supra,* 18 Cal.3d 308, was decided was that, among administrative agencies, only one that had been granted judicial power under the California Constitution possessed the authority to determine the constitutionality of a statute it was charged with enforcing and to decline to apply the statute if the agency determined it was unconstitutional. As already [**483] explained, if a nonconstitutional administrative agency that rendered its decisions after an extensive quasi-judicial procedure--in which the arguments for and against constitutionality could be fully presented and considered in a quasi-judicial fashion--lacked authority to determine constitutional issues, it clearly would be anomalous to permit an ordinary executive official (who carries out his or her official action without the benefit of any sort of quasi-judicial procedures) to determine the constitutionality of a statute and to refuse to apply it based simply upon the official's own good faith belief that the statute is unconstitutional. Thus, the general rule in California--and, as we shall discuss below, in most jurisdictions--was (and continues to be) that an executive official does not possess such authority.

It is the line of public finance cases upon which the city relies that involves the exceptional [***254] situation. As the applicable decisions make clear, the public official in each of those cases was permitted to refuse to perform a ministerial act when he or she had doubts about the validity of the underlying bond, contract, or public expenditure, both in order to ensure that a mechanism was available for obtaining a timely *judicial* determination of the validity of the bond issue, contract, or public expenditure--a determination often essential to the marketability of bonds or to the contracting parties' willingness to go forward with the contract (see, e.g., *Golden Gate Bridge etc. Dist. v. Felt,* [*1097] *supra,* 214 Cal. 308, 315), or to avoid irreparable loss of public funds n25--and in recognition of the circumstance that, in this specific context, the public official frequently faced potential *personal* liability (as distinguished from the potential liability of a governmental entity) if the bond, contract, or public expenditure ultimately was found to be invalid. (See, e.g., *Golden Gate Bridge etc. Dist. v. Felt, supra,* 214 Cal. at pp. 316-317; *Denman v. Broderick, supra,* 111 Cal. 96, 105.)

n25 The public finance cases upon which the city relies generally preceded the adoption of California's validation statutes, which currently permit a public agency to file an in rem action in order to obtain a judicial determination of the validity of bonds, warrants, contracts, obligations, or similar evidences of indebtedness. (See Code Civ. Proc., § 860 et seq. [initially adopted in 1961 (Stats. 1961, ch. 1479, § 1, p. 3331)].) The current statutes provide that such actions "shall be given preference over all other civil actions ... to the end that such actions shall be speedily heard and determined." (Code Civ. Proc., § 867.)

(17) Although the city points to language in some of these decisions that could be read to support the city's broad position here, the *holdings* in these cases clearly are limited to a public official's ability to refuse to perform a ministerial act necessary for the execution of a bond issue or public contract, or the disbursement of public funds, where such refusal permits a judicial determination prior to the actual sale of the bonds, the carrying out of the contract, or the disbursement of public funds, and where the official's personal liability frequently is at stake. Contrary to the city's contention, the circumstance that a public official may refuse to perform a ministerial act in that context does not signify that in all other contexts every public official is free to refuse to perform a ministerial act based upon the official's view that the statute the officer is statutorily obligated to apply is unconstitutional.

The city attempts to bring the present matter within the reach of the foregoing cases by arguing that if the city officials enforced California's current marriage laws limiting marriage to a man and a woman, the officials would face possible personal liability for monetary damages under state or federal law if the marriage statutes

subsequently were determined to be unconstitutional. The city's argument in this regard clearly lacks merit.

(18) First, as a matter of state law, Government Code section 820.6 explicitly provides that "[i]f a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable." Thus, the officials clearly would not have incurred liability under California law simply for following the current marriage statutes and declining to issue marriage licenses [**484] or register marriage certificates in contravention of those statutes. **(19)** Second, under federal [*1098] law, a local public official generally is immunized from liability for official acts so long as the official's conduct "does not violate *clearly established* statutory or constitutional [***255] rights of which a reasonable person would have known" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L. Ed. 2d 396, 102 S. Ct. 2727], italics added; see *Anderson v. Creighton* (1987) 483 U.S. 635, 639 [97 L. Ed. 2d 523, 107 S. Ct. 3034]), and, as we discuss below (see, *post*, pp. 1102-1104), in this instance there simply is no plausible argument that the city officials would have violated "clearly established" constitutional rights by continuing to enforce California's current marriage statutes in the absence of a judicial determination that the statutes are unconstitutional. (Cf. *LSO, Ltd. v. Stroh* (9th Cir. 2000) 205 F.3d 1146, 1160 [finding state officials were not entitled to qualified immunity when "no reasonable official could have believed" that application of the statute at issue was constitutional in light of prior controlling judicial decisions].) **(20)** Finally, even if the city officials were to be sued in their personal capacity for actions taken pursuant to statute and in the scope of their employment, under Government Code section 825 the officials would be entitled to have their public employer provide a defense and pay any judgment entered in such an action, whether the action was based on a state law claim or a claim under the federal civil rights statutes. (See *Williams v. Horvath* (1976) 16 Cal.3d 834, 842-848 [129 Cal. Rptr. 453, 548 P.2d 1125].) Accordingly, there is no merit to the city's contention that the actions of the city officials that are challenged here can be defended as necessary to avoid the incurring of personal liability on the part of such officials.

E

Some academic commentators, while confirming that as a general rule executive officials must comply with duly enacted statutes even when the officials believe the provisions are unconstitutional, have suggested that there may be room to recognize an exception to this general rule in instances in which a public official's refusal to apply the statute would provide the most practical or reasonable means of enabling the question of the statute's constitutionality to be brought before a court. (See, e.g., May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative* (1994) 21 Hastings Const. L.Q. 865, 994-996.) n26 As we have just seen, the line of public finance cases relied upon by the city may be viewed as an example of [*1099] just such a limited exception, and there are a number of other California decisions in which a constitutional challenge to a statute or other legislative enactment has been brought before a court for judicial resolution by virtue of a public entity's refusal to comply with the statute, under circumstances in which the public entity had a personal stake or interest [***256] in the constitutional issue and the public entity's action was the most practicable or reasonable method of obtaining a judicial determination of the validity of the statute. (See, e.g., *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 [132 Cal. Rptr. 2d 713, 66 P.3d 718] [impingement on county's home rule authority]; *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 5-10 [227 Cal. Rptr. 391, 719 P.2d 987] [impingement on county's taxing authority].)

n26 A number of law review articles suggest that the federal Constitution should be interpreted as permitting the President of the United States to refuse to enforce a statute that the President believes is unconstitutional. (See, e.g., Easterbrook, *Presidential Review* (1990) 40 Case W. Res. L.Rev. 905.) Other scholars, however, have made a strong argument that the history of the proceedings of the constitutional convention that drafted the federal Constitution, and in particular the Founders' explicit rejection of a proposal for an absolute presidential veto, refutes such an interpretation. (See, e.g., May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative, supra,* 21 Hastings Const. L.Q. 865, 872-895.) To date, no court has accepted the contention that the President possesses such authority. (See, e.g., *Ameron, Inc. v. U.S. Army Corp. of Eng'rs* (3d Cir. 1986) 787 F.2d 875, 889 & fn. 11 ["This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best"].)

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(21) Although it may be appropriate in some circumstances for a public entity or public official to refuse or decline to enforce a statute as a means of bringing the constitutionality of the statute before a court for judicial resolution, it is nonetheless clear that such an exception does not justify the actions of the local officials at issue in the present case. Here, there existed a clear and readily available means, other than the officials' wholesale defiance of the applicable statutes, to ensure that the constitutionality of the current marriage statutes would be decided by a court. If the local officials charged with the ministerial duty of issuing marriage licenses and registering marriage certificates believed the state's current marriage statutes are unconstitutional and should be tested in court, they could have denied a same-sex couple's request for a marriage license and advised the couple to challenge the denial in superior court. *That* procedure--a lawsuit brought by a couple who has been denied a license under existing statutes--is the procedure that was utilized to challenge the constitutionality of California's antimiscegenation statute in *Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17], and the procedure apparently utilized in all of the other same-sex marriage cases that have been litigated recently in other states. (See, e.g., *Baehr v. Lewin* (1993) 74 Haw. 530 [852 P.2d 44]; *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309 [798 N.E.2d 941]; *Baker v. State of Vermont* (1999) 170 Vt. 194 [744 A.2d 864].) The city cannot plausibly claim that the desire to obtain a judicial ruling on the constitutional issue justified the wholesale defiance of the applicable statutes that occurred here. n27

n27 As noted above, after several mandate actions were filed against the city in superior court challenging the actions of the city officials, the city filed a cross-complaint in one of the actions, seeking a declaratory judgment that the marriage statutes are unconstitutional insofar as they limit marriage to a union between a man and a woman. (See, *ante*, p. 1071, fn. 6.) We have no occasion in this case to determine whether the city properly could maintain a declaratory judgment action in this setting, but we note that in another context the Legislature specifically has authorized a public official who questions the constitutionality or validity of an enactment to bring a declaratory judgment action rather than act in contravention of the statute. (See Rev. & Tax. Code, § 538; see also *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79-80 [124 Cal. Rptr. 2d 519, 52 P.3d 695].)

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Accordingly, the city cannot defend the challenged actions on the ground that such actions were necessary to obtain a judicial determination of the constitutionality of California's marriage statutes.

F

The city also relies on the circumstance that each of the city officials in question took an oath of office to "support and defend" the state and federal Constitutions, n28 suggesting that a public official [***257] would violate his or her oath of office were the official to perform a ministerial act under a statute that the official personally believes violates the Constitution. In our view, this contention clearly lacks merit.

n28 Article XX, section 3 of the California Constitution provides in relevant part: "Members of the Legislature, and all public officers and employees, executive, legislative, and judicial, except such inferior officers and employees as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation: [P] 'I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.' "

(22) As Justice Mosk explained in his concurring and dissenting opinion in *Southern Pacific, supra,* 18 Cal.3d 308, 319, a public official "faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid." A public official does not honor his or her oath to defend the Constitution by taking action in contravention of the restrictions of his or her office or authority and justifying such action by reference to his or her personal constitutional views. For example, it is clear that a justice of this court or of an intermediate appellate court does not act [**486] in contravention of his or her oath of office when the justice follows a controlling constitutional decision of a higher court even though the justice personally believes that the controlling decision was wrongly decided and that the Constitution

actually requires the opposite result. On the contrary, the oath to support and defend the Constitution requires a public official to act within the constraints of our constitutional system, not to disregard presumptively valid statutes and take action in violation of such statutes on the basis of the official's own [*1101] determination of what the Constitution means. n29 (See also *State v. State Board of Equalizers* (Fla. 1922) 84 Fla. 592 [94 So. 681, 682-683] ["The contention that the oath of a public official requiring him to obey the Constitution places upon him the duty or obligation to determine whether an act is constitutional before he will obey it is ... without merit. The fallacy in it is that every act of the legislature is presumptively constitutional until judicially [***258] declared otherwise, and the oath of office 'to obey the Constitution' means to obey the Constitution, not as the officer decides, but as judicially determined"].) n30

n29 The brief footnote discussion in *Board of Education v. Allen* (1968) 392 U.S. 236, 241, footnote 5 [20 L. Ed. 2d 1060, 88 S. Ct. 1923], relied upon by the city, does not conflict with this conclusion. In *Allen*, officials of a local public school district brought a court action challenging the validity, under the establishment clause of the First Amendment, of a state statute that required the school district to loan books free of charge to all students in the district, including students attending private religious schools. In the footnote in question, the court in *Allen* noted that no one had questioned the standing of the local district and its officials "to press their claim in this Court," and then stated that "[b]elieving [the statute in question] to be unconstitutional, [the officials] are in the position of having to choose between violating their oath [to support the United States Constitution] and taking a step--refusal to comply with [the applicable statute]--that would likely bring their expulsion from office and also a reduction in state funding for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation." (*Allen,* 392 U.S. at p. 241, fn. 5, quoting *Baker v. Carr* (1962) 369 U.S. 186, 204 [7 L. Ed. 2d 663, 82 S. Ct. 691].) The footnote's reference to the officials' oath to support the Constitution indicates no more than that the public officials' belief that the statute was unconstitutional afforded them standing *to bring a court action* to challenge the statute. The footnote in *Allen* does not hold that the federal Constitution, or a public official's oath to support the federal Constitution, authorizes a state official to undertake official action forbidden by a state statute based solely on the official's belief that the statute is unconstitutional, and, as discussed below (*post,* pp. 1109-1112), numerous federal authorities refute that proposition.

n30 The city also obliquely suggests that the general rule requiring a public official to perform a ministerial duty prescribed by statute, despite the official's personal view that the statute is unconstitutional, is contrary to the teaching of the Nuremberg trials, which rejected the "I was just following orders" defense. In response to a similar claim, the federal district court in *Haring v. Blumenthal* (D.D.C. 1979) 471 F. Supp. 1172, 1178, footnote 15, cogently observed: "Plaintiff's comparison of his situation with that of the Nuremberg defendants is grossly simplistic. The Nuremberg defendants could have escaped liability by failing to seek and retain positions which exposed them to the execution of objectionable activity; and, should plaintiff feel sufficiently strongly about the matter, he may do likewise. Beyond that, plaintiff's analogy demonstrates primarily that debates and dialogues on public issues have become so debased in recent years that such terms as genocide, war crime, crimes against humanity, and the like are bandied about with considerable abandon in connection with almost every conceivable controversial issue of public policy. There is not the slightest similarity between the crimes committed under the aegis of a violent dictatorship and the implementation of laws adopted under a system of government which offers free elections, freedom of expression, and an independent judiciary as safeguards against excesses and as a guarantee of the ultimate rule of a sovereign citizenry." We agree.

[*1102]

G

The city further contends that a general rule requiring an executive official to comply with an existing statute unless and until the statute has been judicially determined to be unconstitutional is impractical and would lead to intolerable circumstances. The city posits a hypothetical example of a public official faced with a statute that is identical in all respects to another statute that a court already has determined is unconstitutional, and suggests it would be absurd to require the official to apply the clearly invalid statute in that instance. For sup-

port, the city points to a passage in the majority opinion in *Southern Pacific*, which asks rhetorically: "[W]hen the United States Supreme Court, for example, [**487] repudiates the separate but equal doctrine established by the statutes of one state, should the school boards of other states continue to apply identical statutes until a court declares them invalid [?]" (*Southern Pacific, supra,* 18 Cal.3d 308, 311, fn. 2.)

(23) Whatever force this argument might have in a case in which a governing decision previously has found an identical statute unconstitutional or in which the invalidity of the statute is so patent or clearly established that no reasonable official could believe the statute is constitutional, n31 the argument plainly is of no avail here. Although we have no occasion in this case to determine the constitutionality of the current California marriage statutes, we can say with confidence that the asserted invalidity of those statutes certainly is not so patent or clearly established that no reasonable official could believe that the current California marriage [***259] statutes are valid. Indeed, the city cannot point to any judicial decision that has held a statute limiting marriage to a man and a woman unconstitutional under the California or federal Constitution. Instead, the city relies on state court decisions from Massachusetts, Vermont, and Hawaii, that, in interpreting their own state constitutions, assertedly have found similar statutory restrictions to violate provisions of their state's own constitution. (See *Goodridge v. Department of Pub. Health, supra,* 798 N.E.2d 941; *Baker v. State of* [*1103] *Vermont, supra,* 744 A.2d 864; *Baehr v. Lewin, supra,* 852 P.2d 44.) n32 A significant number of [**488] other state and federal courts, however, have reached a contrary conclusion and have upheld the constitutional validity of such a restriction on marriage under both the federal Constitution and other state constitutions. (See, e.g., *Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185, 186-187], app. dism. for want of substantial federal question (1972) 409 U.S. 810 [federal Constitution]; n33 *Standhardt v. Super. Ct., supra,* 77 P.3d [*1104] 451, 454-465 [***260] [federal and Arizona Constitutions]; *Dean v. District of Columbia* (D.C. 1995) 653 A.2d 307, 361-364 (opns. of Terry, J. & Steadman, J.) [federal Constitution]; *Jones v. Hallahan* (Ky.Ct.App. 1973) 501 S.W.2d 588, 590 [federal Constitution]; *Singer v. Hara* (1974) 11 Wn. App. 247 [522 P.2d 1187, 1189-1197] [federal and Washington Constitutions]; *Adams v. Howerton* (C.D.Cal. 1980) 486 F. Supp. 1119, 1124-1125, affd. (9th Cir. 1982) 673 F.2d 1036, cert. den. (1982) 458 U.S. 1111 [federal Constitution].) Although the state court decisions from Massachusetts, Vermont, and Hawaii relied upon by the city surely would be of interest to a California court faced with the question whether the current California marriage statutes violate the California Constitution, a California court would be equally interested in the decisions of the courts that have reached a contrary conclusion (and in the reasoning of the minority opinions in the state court decisions relied upon by the city [see *Goodridge v. Department of Pub. Health, supra,* 798 N.E.2d 941, 974-1105 (dis. opns. of Spina, J., Sosman, J., & Cordy, J.); *Baehr v. Lewin, supra,* 852 P.2d 44, 70-73 (dis. opn. of Heen, J.)]). In light of the absence of any California authority directly on point and the sharp division of judicial views expressed in the out-of-state decisions that have considered similar constitutional challenges, this plainly is not an instance in which the invalidity of the California marriage statutes is so patent or clearly established that no reasonable official could believe that the statutes are constitutional. Therefore, this case does not fall within any narrow exception that may apply to instances in which it would be absurd or unreasonable to require a public official to comply with a statute that any reasonable official would conclude is unconstitutional.

n31 See, for example, *Schmid v. Lovette* (1984) 154 Cal. App. 3d 466, 474 [201 Cal. Rptr. 424] (holding that article III, section 3.5 of the California Constitution did not require public community college officials to continue to apply a statute requiring public employees to sign an anti-Communist-Party loyalty oath when comparable statutes had been held unconstitutional by both federal and state supreme court decisions) and *LSO, Ltd. v. Stroh, supra,* 205 F.2d 1146, 1160 (holding that no reasonable official could have believed that a statute prohibiting exhibition of nonobscene erotic art on any premises holding a liquor license could constitutionally be applied in light of a then recent United States Supreme Court decision).

n32 Of the three decisions cited by the city, the Massachusetts decision in *Goodridge v. Department of Pub. Health, supra,* 798 N.E.2d 941, appears to be the only one squarely to hold that a state constitution precludes the state from withholding the status of marriage from same-sex couples.

In *Baker v. State of Vermont, supra,* 744 A.2d 864, the court summarized its conclusion under the "common benefits" clause of the Vermont Constitution, as follows: "[T]he State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within

the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative rests with the Legislature." (744 A.2d at p. 867; see also *id.* at pp. 886-887.) The Vermont Legislature subsequently enacted a civil union statute. (Vt. Stat. Ann., tit. 15, § § 1201-1207 (supp. 2001).)

In *Baehr v. Lewin, supra,* 852 P.2d 44, the Hawaii Supreme Court held that the trial court in that case had erred in granting judgment on the pleadings against three same-sex couples who had sued for declaratory and injunctive relief after being denied marriage licenses, concluding that the plaintiffs were entitled to go forward with their action and that, under the equal protection clause of the Hawaii Constitution, the state would have to demonstrate a compelling interest to justify the statutory classification. (852 P.2d at p. 68.) Following the decision in *Baehr*, the voters in Hawaii amended the Hawaii Constitution to limit marriage to unions between a man and a woman, and, in light of that amendment, the Hawaii Supreme Court thereafter ordered entry of judgment in favor of the defendants in the *Baehr* litigation. (See *Baehr v. Miike* (1999) 92 Haw. 634 [994 P.2d 566] [full order reported at 1999 Haw. Lexis 391].)

(24) In addition to relying upon *Goodridge*, *Baker*, and *Baehr*, the city points to a passage in the dissenting opinion of Justice Scalia in *Lawrence v. Texas* (2003) 539 U.S. 558 [156 L. Ed. 2d 508, 123 S. Ct. 2472], in which he expressed the view that the reasoning of the majority opinion in *Lawrence*--holding a Texas sodomy statute unconstitutional--would lead to the conclusion that a statute precluding same-sex marriages also would be unconstitutional. (*Lawrence v. Texas, supra,* 539 U.S. at pp. 604-605 (dis. opn. of Scalia, J.).) The majority opinion in *Lawrence*, however, expressly stated that "[t]he present case ... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." (*Lawrence, supra*, 539 U.S. at p. 578). In light of this very specific disclaimer in the majority opinion in *Lawrence*, we conclude that the city cannot plausibly claim that the *Lawrence* decision clearly establishes that a state statute limiting marriage to a man and a woman is unconstitutional under the federal Constitution. (See also *Standhardt v. Super. Ct.* (Ariz.Ct.App. 2003) 77 P.3d 451, 454-460, 464-465 [post-*Lawrence* case rejecting claim that *Lawrence* indicates the federal Constitution guarantees the right to same-sex marriage].)

n33 Petitioners in *Lewis* maintain that because the United States Supreme Court summarily dismissed the appeal in *Baker v. Nelson* for want of a substantial federal question and because such a summary dismissal is treated as a decision on the merits (see *Mandel v. Bradley* (1977) 432 U.S. 173, 176 [53 L. Ed. 2d 199, 97 S. Ct. 2238]; *Hicks v. Miranda* (1975) 422 U.S. 332, 344 [45 L. Ed. 2d 223, 95 S. Ct. 2281]), the summary dismissal in *Baker v. Nelson* definitively establishes that, under current federal law, a statute limiting marriage to a man and a woman does not violate the federal Constitution. The city, on the other hand, cites a number of decisions stating that when there have been subsequent doctrinal developments in the United States Supreme Court that undermine the holding in a summary dismissal, the lower courts are not bound to follow the summary dismissal as controlling authority (see, e.g., *Tenafly Eruv Ass'n v. Borough of Tenafly* (3d Cir. 2002) 309 F.3d 144, 173, fn. 33; *Lecates v. Justice of the Peace Court No. 4 of Delaware* (3d Cir. 1980) 637 F.2d 898, 904), and the city argues that there have been such doctrinal developments in subsequent high court decisions that undermine the holding in *Baker v. Nelson*. We find no need to resolve this dispute here, because whatever the current effect of the summary dismissal in *Baker v. Nelson*, the case before us clearly does not present an instance in which the invalidity of the current California marriage statutes is so patent or clearly established that no reasonable official could believe that the statutes are constitutional.

H

Accordingly, we conclude that, under California law, the city officials had no authority to refuse to perform their ministerial duty in conformity with the current California marriage statutes on the basis of their view that the [*1105] statutory limitation of marriage to a couple comprised of a man and a woman is unconstitutional.

It is worth noting that the California rule generally precluding an executive official from refusing to perform

a ministerial duty imposed by statute on the basis of the official's determination or opinion that the statute is unconstitutional is consistent with the [**489] general rule applied in the overwhelming [***261] majority of cases from other jurisdictions. (See generally Annot., Unconstitutionality of Statute as Defense to Mandamus Proceeding (1924) 30 A.L.R. 378, 379 ["[t]he weight of authority [holds] that a public officer whose duties are of a ministerial character cannot question the constitutionality of a statute as a defense to a mandamus proceeding to compel him to perform some official duty, where in the performance of such duty his personal interests or rights will not be affected, and he will not incur any personal liability, or violate his oath of office"]; Annot. (1940) 129 A.L.R. 941 [supplementing 30 A.L.R. 378]; see also Note (1928) 42 Harv. L.Rev. 1071.) n34

n34 Our review of the decisions of our sister states and the District of Columbia reflects that of the 33 jurisdictions in which decisions have been found addressing this subject, 26 appear to have recognized and endorsed the proposition that, as a general rule, an executive official who is charged with a ministerial duty to enforce a statute has no authority to refuse to apply the statute, in the absence of a judicial determination that the statute is unconstitutional, on the ground that the official believes the statute is unconstitutional, although many of the jurisdictions, like California, also recognize an exception for bond or other public finance cases, in which an official is permitted to refuse to apply a statute as a means of obtaining a timely judicial determination of the legality of the bond or public expenditure. (See *Denver Urban Renewal Authority v. Byrne* (Colo. 1980) 618 P.2d 1374, 1379-1380 [foll. *Ames v. People* (1899) 26 Colo. 83 [56 P. 656, 658]]; *Levitt v. Attorney General* (1930) 111 Conn. 634 [151 A. 171, 176]; *Panitz v. District of Columbia* (D.C. Cir. 1940) 112 F.2d 39, 41-42 [applying District of Columbia law]; *Fuchs v. Robbins* (Fla. 2002) 818 So. 2d 460, 463-464 [foll. *State v. State Board of Equalizers, supra,* 94 So. 681, 682-684]; *Taylor v. State* (1931) 174 Ga. 52 [162 S.E. 504, 508-509]; *Howell v. Board of Comm'rs* (1898) 6 Idaho 154 [53 P. 542, 543]; *People ex rel. Atty. Gen. v. Salomon* (1870) 54 Ill. 39, 44-46; *Bd. of Sup'rs of Linn Cty. v. Dept. of Revenue* (Iowa 1978) 263 N.W.2d 227, 232-234 [foll. *Charles Hewitt & Sons Co. v. Keller* (1937) 223 Iowa 1372 [275 N.W. 94, 95-97]]; *Tincher v. Commonwealth* (1925) 208 Ky. 661 [271 S.W. 1066, 1068]; *Dore v. Tugwell* (1955) 228 La. 807 [84 So. 2d 199, 201-202] [foll. *State v. Heard* (1895) 47 La. Ann. 1679 [18 So. 746, 749-752]]; *Smyth v. Titcomb* (1850) 31 Me. 272, 285; *Maryland Classified Emp. Ass'n v. Anderson* (1977) 281 Md. 496 [380 A.2d 1032, 1035-1037]; *Assessors of Haverhill v. New England Tel. & Tel. Co.* (1955) 332 Mass. 357 [124 N.E.2d 917, 920-921]; *State v. Steele County Bd. of Comm'rs* (1930) 181 Minn. 427 [232 N.W. 737, 738-739]; *St. Louis County v. Litzinger* (Mo. 1963) 372 S.W.2d 880, 881-882 [foll. *State v. Becker* (1931) 328 Mo. 541 [41 S.W.2d 188, 190-191]]; *State v. McFarlan* (1927) 78 Mont. 156 [252 P. 805, 808]; *State v. Sedillo* (1929) 34 N.M. 1 [275 P. 765, 765-767]; *Attorney General v. Taubenheimer* (1917) 178 App.Div. 321, 321 [164 N.Y.Supp. 904, 904]; *Dept. of State Highways v. Baker* (1940) 69 N.D. 702 [290 N.W. 257, 260-262]; *State v. Griffith* (1940) 136 Ohio St. 334 [25 N.E.2d 847, 848-849]; *State ex rel. Cruce v. Cease* (1911) 28 Okla. 271 [114 P. 251, 252-253]; *Commonwealth v. Mathues* (1904) 210 Pa. 372 [59 A. 961, 964-969]; *State v. Burley* (1908) 80 S.C. 127 [61 S.E. 255, 257]; *Thoreson v. State Board of Examiners* (1899) 19 Utah 18 [57 P. 175, 177-179]; *City of Montpelier v. Gates* (1934) 106 Vt. 116 [170 A. 473, 476-477]; *Capito v. Topping* (1909) 65 W. Va. 587 [64 S.E. 845, 846]; *Riverton Valley D. Dist. v. Board of County Comm'rs* (1937) 52 Wyo. 336 [74 P.2d 871, 873].)

Of the seven states that may be viewed as adopting the minority position, most have addressed the issue only in the context of actions either relating to matters affecting the expenditure of public funds or where the rights or interests of the public officer or public entity were directly at stake. (See *State v. Steinwedel* (1932) 203 Ind. 457 [180 N.E. 865, 866-868] [public expenditure]; *Toombs v. Sharkey* (1925) 140 Miss. 676 [106 So. 273, 277] [public expenditure]; *Van Horn v. State* (1895) 46 Neb. 62 [64 N.W. 365, 371-372] [county reorganization]; *State v. Slusher* (1926) 119 Ore. 141 [248 P. 358, 359-360] [tax collection]; *Holman v. Pabst* (Tex. 1930) 27 S.W.2d 340, 342-343 [local election procedure]; *Hindman v. Boyd* (1906) 42 Wash. 17 [84 P. 609, 612] [local election procedure]; *State v. Tappan* (1872) 29 Wis. 664 [9 Am. Rep. 622, 635] [tax collection].)

A number of the out-of-state cases discuss a separate line of cases that address the issue whether a public official or public entity has "standing" to bring a court action--for example, a declaratory judgment action--challenging the

constitutionality of a statute the official or entity is obligated to comply with or enforce. (See, e.g., *Fuchs v. Robbins, supra,* 818 So. 2d 460, 463-464; *Bd. of Sup'rs of Linn Cty. v. Dept. of Revenue, supra,* 263 N.W.2d 227, 233-234; see also *City of Kenosha* (1967) 35 Wis. 2d 317 [151 N.W.2d 36, 42-43].) Although the standing issue involves some of the same considerations that are applicable to the issue we face here, from a separation of powers perspective, conduct by an executive official that simply asks a court to determine the constitutionality of a statute would appear to raise much less concern than an executive official's unilateral refusal to enforce a statute based on the official's opinion that the statute is unconstitutional.

[*1106] [***262]

Although there are numerous out-of-state cases that address this issue, one of the most quoted decisions is *State v. Heard, supra,* 18 So. 746, 752, where the court, after an extensive [**490] review of the then existing authorities from various jurisdictions, concluded: "[E]xecutive officers of the State government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution. Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal, until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so the most inextricable confusion would inevitably result, and 'produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government.' 'It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it.' " (See also *Department of State Highways v. Baker, supra,* 290 N.W. 257, 259 ["There is no question as to the general rule that a subordinate ministerial officer to whom no injury can result and to whom no violation of duty can be imputed by reason of compliance with the statute may not question the constitutionality of the statute imposing such duty"]; *State v. Becker, supra,* 41 S.W.2d 188, 190 ["It is well settled in this state and in a great majority of our sister states that, as a general rule, a ministerial officer cannot defend his refusal to perform a duty prescribed by a statute on the ground that such statute is unconstitutional"]; *State v. Steele* [*1107] *County Board of Com'rs, supra,* 232 N.W. 737, 738 [although "[t]he authorities are in conflict," "[t]he better doctrine, supported by the weight of authority is that an official so charged with the performance of a ministerial duty will not be allowed to question the constitutionality of such a law. ... Officials acting ministerially are not clothed with judicial authority. ... Their authority is the command of the statute, and it is the limit of their power"]; *State v. State Board of Equalizers, supra,* 94 So. 681, 683 ["It is contended that an *individual* may refuse to obey a law that he believes to be unconstitutional, and take a chance on its fate in the courts. He does this, however, 'at his peril'; the 'peril' being to suffer the consequences, such as fine or imprisonment, or both, if the courts should hold the act to be constitutional. [P] A *ministerial officer* refusing to enforce a law because in his opinion it is unconstitutional takes no such risk. He does nothing 'at his peril,' because he subjects himself to no penalty if his opinion as to the unconstitutionality of an act is not sustained by the courts. [P] It is the doctrine of nullification, pure and simple, and whatever may have been said of the soundness of that doctrine when sought to be applied by states to acts of Congress, the most ardent [***263] followers of Mr. Calhoun never extended it to give to ministerial officers the right and power to nullify a legislative enactment" (italics added)].)

I

In addition to the California decisions reviewed above and the weight of judicial authority from other jurisdictions, consideration of the practical consequences of a contrary rule further demonstrates the unsoundness of the city's position.

To begin with, most local executive officials have no legal training and thus lack the relevant expertise to make constitutional determinations. Although every individual (lawyer or nonlawyer) is, of course, free to form his or her own opinion of what the Constitution means and how it should be interpreted and applied, a local executive official has no authority to impose his or her personal view on others by refusing to comply with a ministerial duty imposed by statute. (See, e.g., *Southern Pacific, supra,* 18 Cal.3d 308, 321 (conc. & dis. opn. of Mosk, J.) ["Certainly attorneys have no monopoly on wisdom, but a person trained for three or more years in a college of law and then tempered with at least a decade of experience within the judicial system is likely to be far better equipped to make difficult constitutional judgments than a lay administrator with no background in the law"].) n35

n35 Several amici curiae point out that nonattorney public officials are able to seek legal advice from a county counsel or city attorney (see Gov. Code, § § 27640, 41801) and assert that

such nonattorney officials presumably will do so before disobeying a statute on the ground it is unconstitutional. County counsel and city attorneys, however, also are executive officers who, like a nonattorney public official, have not been granted judicial power and thus also lack the authority to determine that a statute is unconstitutional and that it should not be followed. A nonattorney public official generally will be in no position to critically evaluate legal advice obtained from such counsel regarding the question of a statute's constitutionality. Outside the very narrow category of instances in which legal counsel can advise that the invalidity of the statute is so patent or clearly established that *any* reasonable public official would conclude that the statute in question is unconstitutional (see, *ante*, pp. 1102-1104), whenever a nonattorney official defies a statutory mandate on the basis of a county counsel's or city attorney's legal advice, the official's refusal to apply the statute actually will rest upon legal counsel's judgment on a debatable constitutional question, rather than upon the judgment of the official on whom the statute imposes a ministerial duty. Furthermore, a nonattorney official is under no obligation to act in accordance with a legal opinion (often given confidentially) provided by a county counsel or city attorney.

[*1108] [**491]

Second, if, as the city maintains, a local official were to possess the authority to act on the basis of his or her own constitutional determination, such an official generally would arrive at that determination without affording the affected individuals any due process safeguards and, in particular, without providing any opportunity for those supporting the constitutionality of the statutes to be heard. In its opposition to the initial petition filed in this case, the city urged this court not to immediately accept jurisdiction over the substantive question of the constitutionality of California's marriage laws at this time, because that question properly could be determined only after a full presentation of evidence before a trial court. The city officials themselves, however, made their own constitutional determination without conducting any such evidentiary hearing or taking other measures designed to protect the rights of those who maintain that the statute is constitutional. Thus, despite the settled rule that a duly enacted statute is presumed to be constitutional, under the city's proposed rule a local executive official [***264] would be free to determine that a statute is unconstitutional and refuse to enforce it, without providing even the most rudimentary of due process procedures--notice and an opportunity to be heard--to anyone directly affected by the official's action.

Third, there are thousands of elected and appointed public officials in California's 58 counties charged with the ministerial duty of enforcing thousands of state statutes. If each official were empowered to decide whether or not to carry out each ministerial act based upon the official's own personal judgment of the constitutionality of an underlying statute, the enforcement of statutes would become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide. (Cf. *Haring v. Blumenthal, supra,* 471 F. Supp. 1172, 1178-1179 ["Unless and until the Congress, or a court of competent jurisdiction ... , determines that a particular tax exemption ruling is invalid, the employees of the [Internal Revenue] Service ... are obliged to implement that ruling. Not merely the concept of a uniform tax policy but the effectiveness of the government of the United States as a functioning entity would be [*1109] in jeopardy if each employee could take it upon himself to decide which particular laws, regulations, and policies are legal or illegal, and to base his official actions upon that private determination"].) Although in the past the multiplicity of public officials performing similar ministerial acts under a single statute never has posed a problem in this regard, that is undoubtedly true only because most officials never imagined they had the authority to determine the constitutionality of a statute that they have a ministerial duty to enforce. Were we to hold that such officials possess this authority, it is not difficult to anticipate that private individuals who oppose enforcement of a statute and question its constitutionality would attempt to influence ministerial officials in various locales to exercise--on behalf of such opponents--the officials' newly recognized authority. The circumstance that many local officials have no legal training would only exacerbate the problem. As a consequence, the uneven enforcement of statutory [**492] mandates in different local jurisdictions likely would become a significant concern.

Fourth, the confused state of affairs arising from diverse actions by a multiplicity of local officials frequently would continue for a considerable period of time, because under the city's proposed rule a court generally could not order a public official to comply with the challenged statute until the court actually had determined that it was constitutional. In view of the many instances in which a constitutional challenge to a statute entails lengthy litigation, the lack of uniform treatment afforded to similarly situated citizens throughout the state often would be a long-term phenomenon.

These practical considerations simply confirm the soundness of the established rule that an executive official generally does not have the authority to refuse to comply with a ministerial duty imposed by statute on the

basis of the official's opinion that the statute is unconstitutional. n36

n36 Despite the suggestion in Justice Werdegar's concurring and dissenting opinion (*post*, at pp. 1136-1139), this established rule does not represent any sort of broad claim of *judicial* power over the *executive* branch, but on the contrary reflects the general duty of an *executive* official, in carrying out a ministerial function authorized by statute, not to assume the authority to supersede or contravene the directions of the *legislative* branch or to exercise the traditional function of the *judicial* branch.

[***265]

V

The city further claims, however, that even if *California law* does not recognize the authority of a local official to refuse to comply with a statutorily mandated ministerial duty absent a judicial determination that the statute is unconstitutional, under the federal supremacy clause (U.S. Const., art. VI, § 2) California lacks the power to require a public official to comply with a state statute that the official believes violates the federal Constitution. [*1110] Although in the present case the mayor's initial letter to the county clerk relied solely upon the asserted unconstitutionality of the California marriage statutes under the *California* Constitution, the city, in the opposition filed in this court, for the first time advanced the position that the action taken by the city officials was based, at least in part, on their belief that the California statutes violate the *federal* Constitution, and the city now rests its supremacy clause claim on this newly asserted belief. Putting aside the question of the bona fides of this belatedly proffered rationale, we conclude that, in any event, the federal supremacy clause provides no support for the city's argument.

To begin with, the principal cases upon which the city relies-- *Ex Parte Young* (1908) 209 U.S. 123 [52 L. Ed. 714, 28 S. Ct. 441] and *LSO, Ltd. v. Stroh, supra,* 205 F.3d 1146--are readily distinguishable from the present case. Those cases stand only for the proposition that the circumstance that a state official is acting pursuant to the provisions of an applicable state statute does not necessarily shield the official (or the public entity on whose behalf the official acts) either from an injunction or a monetary judgment issued by a federal court, where the federal court subsequently determines that the state statute violates the federal Constitution. n37 The city has not cited any case holding that the federal Constitution prohibits a state from defining the authority of a state's executive officials in a manner that requires such officials to comply with a clearly applicable statute unless and until such a statute is judicially determined to be unconstitutional, nor any case holding that the federal Constitution compels a state to permit every executive official, state or local, to refuse to enforce an applicable statutory provision whenever the official personally believes the statute violates the federal Constitution.

n37 As explained above (*ante*, pp. 1097-1098), under the circumstances in this case there is no plausible basis for suggesting that the city officials would have subjected themselves to personal liability had they acted in conformity with the terms of the current California marriage statutes.

(25) Furthermore, numerous pronouncements by the United States Supreme Court directly refute the city's contention that the supremacy clause or any other provision of the federal Constitution embodies such a principle. To begin with, the high court's position on the proper role of federal executive [**493] officials with regard to constitutional determinations is instructive. In *Davies Warehouse Co. v. Bowles* (1944) 321 U.S. 144, 152-153 [88 L. Ed. 635, 64 S. Ct. 474], for example, in response to the plaintiff's contention that under one proposed reading of the applicable statute "the [federal Price] Administrator [an executive official] would have to decide whether the state regulation is constitutional before he should recognize it," the United States Supreme [*1111] Court stated: "We cannot give weight to this view of [the Price Administrator's] functions, which we think it unduly magnifies. *State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared. Certainly* [***266] *no power to adjudicate constitutional issues is conferred on the Administrator. ... We think the Administrator will not be remiss in his duties if he assumes the constitutionality of state regulatory statutes, under both state and federal constitutions, in the absence of a contrary judicial determination.*" (Italics added; see also *Weinberger v. Salfi* (1975) 422 U.S. 749, 765 [45 L. Ed. 2d 522, 95 S. Ct. 2457] ["[T]he constitutionality of a statutory requirement [is] a matter which is beyond [the Secretary of Health, Education, and Welfare's] jurisdiction to determine"]; *Johnson v. Robison* (1974) 415 U.S. 361, 368 [39 L. Ed. 2d 389, 94 S. Ct. 1160] ["[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"]; *Oestereich v. Selective Service Board* (1968) 393 U.S. 233, 242 [21 L. Ed. 2d 402, 89 S. Ct. 414] (conc.

opn. of Harlan, J.) [same]; cf. *Thunder Basin Coast Co. v. Reich* (1994) 510 U.S. 200, 215 [127 L. Ed. 2d 29, 114 S. Ct. 771].) In light of the high court's repeated statements that federal executive officials generally lack authority to determine the constitutionality of statutes, the city's claim that the federal supremacy clause itself grants a state or local official the authority to refuse to enforce a statute that the official believes is unconstitutional is plainly untenable.

Furthermore, there are several earlier United States Supreme Court cases that even more directly refute the city's contention. *Smith v. Indiana* (1903) 191 U.S. 138 [48 L. Ed. 125, 24 S. Ct. 51] was a case, arising from the Indiana state courts, in which a county auditor had refused to grant a statutorily authorized exemption to a taxpayer because the auditor believed the exemption violated the federal Constitution. A mandate action was filed against the auditor, and the state courts permitted the auditor to raise and litigate the asserted unconstitutionality of the statute as a defense in the mandate action, ultimately determining that the exemption was constitutionally permissible and directing the auditor to grant the exemption. The auditor appealed the state court decision upholding the constitutionality of the state statute to the United States Supreme Court.

In its opinion in *Smith*, the high court observed that "there are many authorities to the effect that a ministerial officer, charged by law with the duty of enforcing a certain statute, cannot refuse to perform his plain duty thereunder upon the ground that in his opinion it is repugnant to the Constitution" (*Smith v. Indiana, supra,* 191 U.S. at p. 148), but it recognized that a state court has "the power ... to assume jurisdiction [in such] a case if [it] choose[s] to do so." (*Ibid*.) At the same time, however, the court in *Smith* stated explicitly that " the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it ... *is a purely local question*" (*ibid.*, italics added)--that is, purely a question of state (not federal) law--a conclusion that directly refutes the city's claim that federal law requires a state to recognize the authority of a ministerial official to refuse to comply with a statute whenever the official believes it violates the federal Constitution. Moreover, in *Smith* itself the United States Supreme Court went on to hold that although the state court in that case had permitted the auditor to litigate the constitutionality of the state statute, the auditor did not have a sufficient personal interest in the litigation to support jurisdiction in the United States Supreme Court; thus the high court dismissed the auditor's appeal without reaching the question of the constitutionality of the underlying [***267] statute. n38 A few years later, the high [**494] court followed its decision in *Smith*, dismissing a similar appeal by a state auditor in *Braxton County Court v. West Virginia* (1908) 208 U.S. 192, 197 [52 L. Ed. 450, 28 S. Ct. 275].

n38 The court in *Smith* explained in this regard: "It is evident that the auditor had no personal interest in the litigation. He had certain duties as a public officer to perform. The performance of those duties was of no personal benefit to him. Their non-performance was equally so. ... He was testing the constitutionality of the law purely in the interest of third persons, viz., the taxpayers ... ." (*Smith v. Indiana, supra,* 191 U.S. at pp. 148-149.)

In light of the foregoing high court decisions, we conclude that the California rule set forth above does not conflict with any federal constitutional requirement.

VI

The city contends, however, that even if we conclude that its officials lacked the authority to refuse to enforce the marriage statutes, we still cannot issue the writ of mandate sought by petitioners without first determining whether California's current marriage statutes are constitutional, in light of the general proposition that courts will not issue a writ of mandate to require a public official to perform an unconstitutional act. As the Florida Supreme Court explained in a similar context, however, "[i]t is no answer to say that the courts will not require a ministerial officer to perform an unconstitutional act. That aspect of the case is not before us. We must first determine the power of the ministerial officer to refuse to perform a statutory duty because *in his opinion* the law is unconstitutional. When we decide that, we do not get to the question of the constitutionality of the act, and it will not be decided." (*State v. State Board of Equalizers, supra,* 94 So. 681, 684.) Accordingly, because we have concluded that the city officials have no authority to refuse to apply the current marriage statutes in the absence of a judicial determination that these statutes are unconstitutional, we conclude that the requested writ of mandate should issue. [*1113]

VII

(26) Finally, we must determine the appropriate scope of the relief to be ordered. As a general matter, the nature of the relief warranted in a mandate action is dependent upon the circumstances of the particular case,

and a court is not necessarily limited by the prayer sought in the mandate petition but may grant the relief it deems appropriate. (See *Johnson v. Fontana County F.P. Dist.* (1940) 15 Cal.2d 380, 391-392 [101 P.2d 1092]; *George M. v. Superior Court* (1988) 201 Cal. App. 3d 755, 760 [247 Cal. Rptr. 330]; *Sacramento City Police Dept. v. Superior Court* (1984) 156 Cal. App. 3d 1193, 1197, fn. 5 [203 Cal. Rptr. 169].)

(27) In the present case, we are faced with an unusual, perhaps unprecedented, set of circumstances. Here, local public officials have purported to authorize, perform, and register literally thousands of marriages in direct violation of explicit state statutes. The Attorney General, as well as a number of local taxpayers, have filed these original mandate proceedings in this court to halt the local officials' unauthorized conduct and to compel these officials to correct or undo the numerous unlawful actions they have taken in the immediate past. As explained above, we have determined that the city officials exceeded their authority in issuing marriage licenses to, solemnizing marriages of, and registering marriage certificates on behalf of, same-sex couples. Under these circumstances, we conclude [***268] that it is appropriate in this mandate proceeding not only to order the city officials to comply with the applicable statutes in the future, but also to direct the officials to take all necessary steps to remedy the continuing effect of their past unlawful actions, including correction of all relevant official records and notification of affected individuals of the invalidity of the officials' actions.

(28) In light of the clear terms of Family Code section 300 *defining* marriage as a "personal relationship arising out of a civil contract between a man and a woman" and the legislative history of this provision demonstrating that the purpose of this limitation was to "prohibit persons of the same sex from entering lawful marriage" (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, p. 1 [discussed, *ante*, p. 1076, fn. 11]), [**495] we believe it plainly follows that all same-sex marriages authorized, solemnized, or registered by the city officials must be considered void and of no legal effect from their inception. Although this precise issue has not previously been presented under California law, every court that has considered the question has determined that when state law limits marriage to a union between a man and a woman, a same-sex marriage performed in violation of state law is void and of no legal effect. (See, e.g., *Jones v. Hallahan, supra,* 501 S.W.2d 588, 589 [same-sex marriage "would not constitute a marriage" under Kentucky law]; *Anonymous v.* [*1114] *Anonymous* (N.Y.Sup.Ct. 1971) 67 Misc. 2d 982 [325 N.Y.S.2d 499, 501] [under New York law, same-sex "marriage ceremony was a nullity" and "no legal relationship could be created by it"]; *McConnell v. Nooner* (8th Cir. 1976) 547 F.2d 54, 55-56 ["purported" same-sex marriage of no legal effect under Minnesota law]; *Adams v. Howerton, supra,* 486 F. Supp. 1119, 1122 [purported same-sex marriage has "no legal effect" under Colorado or federal law].) The city has not cited any case in which a same-sex marriage, performed in contravention of a state statute that bans such marriages and that has not judicially been held unconstitutional, has been given any legal effect.

The city and several amici curiae representing same-sex couples who obtained marriage licenses from city officials--and had certificates of registry of marriage registered by such officials--raise a number of objections to our determining that the same-sex marriages that have been performed in California are void and of no legal effect, but we conclude that none of these objections is meritorious.

(29) First, the city and amici curiae contend that the Attorney General and the petitioners in *Lewis* lack standing to challenge the validity of the same-sex marriages that already have been performed, relying upon the provisions of Family Code section 2211, which sets forth the categories of individuals who may bring an action to nullify a "voidable" marriage--categories that generally are limited to one of the parties to the marriage or, where a party to the marriage is a minor or a person incapable of giving legal consent, the parent, guardian, or conservator of such party. **(30)** Past California decisions, however, make clear that the procedural requirements generally applicable in an action to nullify or annul a "voidable" marriage are inapplicable when a purported marriage is void from the beginning or is a legal nullity. As this court stated in *Estate of Gregorson* (1911) 160 Cal. 21, 26 [116 P. 60]: "A marriage prohibited as incestuous *or illegal* and declared to be 'void' or 'void from the beginning' is a legal nullity *and its validity may be asserted or shown in any proceeding in which the fact of marriage* [***269] *may be material*." (Italics added.) In our view, the present mandate action, which seeks to compel public officials to correct the effects of their unauthorized official conduct in issuing marriage licenses to or registering marriage certificates of thousands of same-sex couples, is such a proceeding, because the validity or invalidity of the same-sex marriages authorized and registered by such officials is central to the scope of the remedy that may and should be ordered in this case. n39

n39 Contrary to the assertion of Justice Werdegar's concurring and dissenting opinion (*post*, at p. 1136), the validity or invalidity of the existing same-sex marriages is material to this case not simply because the Attorney General has re-

quested this court to decide that issue, but because resolution of the issue is necessary in determining the scope of the remedy that properly should be ordered in this mandate action to correct, and undo the potentially disruptive consequences of, the unauthorized actions of the city officials.

[*1115]

(31) The city and amici curiae additionally contend that we cannot properly determine the validity or invalidity of the existing same-sex marriages in this proceeding because the parties to a marriage are [**496] indispensable parties to any legal action seeking to invalidate a marriage, and the thousands of same-sex couples whose marriages were authorized and registered by the local authorities are not formal parties to the present mandate proceeding. The city relies on cases involving actions that have been brought to annul a particular marriage on the basis of facts peculiar to that marriage, in which the courts have held the parties to the marriage to be indispensable parties. (See, e.g., *McClure v. Donovan* (1949) 33 Cal.2d 717, 725 [205 P.2d 17].) In the present instance, by contrast, the question of the validity or invalidity of a same-sex marriage does not depend upon any facts that are peculiar to any individual same-sex marriage, but rather is a purely legal question applicable to all existing same-sex marriages, and rests on the circumstance that the governing state statute limits marriage to a union between a man and a woman. Under ordinary principles of stare decisis, an appellate decision holding that, under current California statutes, a same-sex marriage performed in California is void from its inception effectively would resolve that legal issue with respect to all couples who had participated in same-sex marriages, even though such couples had not been parties to the original action. Because the validity or invalidity of same-sex marriages under current California law involves only a pure question of law, couples who are not formal parties to this action are in no different position than if this question of law had been presented and resolved in an action involving some other same-sex couple rather than in an action in which the legal arguments regarding the validity of such marriages have been vigorously asserted not only by the city officials who authorized and registered such marriages but also by various amici curiae representing similarly situated same-sex couples. Requiring a separate legal proceeding to be brought to invalidate each of the thousands of same-sex marriages, or requiring each of the thousands of same-sex couples to be named and served as parties in the present action, would add nothing of substance to this proceeding.

(32) The city and amici curiae further contend that it would violate the due process rights of the same-sex couples who obtained marriage licenses, and had their marriage certificates registered by the local officials, for this court to determine the validity of same-sex marriages without giving the couples notice and an opportunity to be heard. To begin with, there may be some question whether an individual who, [***270] through the deliberate unauthorized conduct of a public official, obtains a license, permit, or other status that clearly is not authorized by state law, possesses a constitutionally protected [*1116] property or liberty interest that gives rise to procedural due process guarantees. (Cf., e.g., *Snyder v. City of Minneapolis* (1989) 441 N.W.2d 781, 792; *Mellin v. Flood Brook Union School Dist.* (2001) 173 Vt. 202 [790 A.2d 408, 421]; *Gunkel v. City of Emporia, Kan.* (10th Cir. 1987) 835 F.2d 1302, 1304-1305 & fns. 7, 8.) In any event, these same-sex couples have not been denied the right to meaningfully participate in these proceedings. Although we have not permitted them to intervene formally in these actions as parties, our order denying intervention to a number of such couples explicitly was without prejudice to participation as amicus curiae, and numerous amicus curiae briefs have been filed on behalf of such couples directly addressing the question of the validity of the existing same-sex marriages. Accordingly, the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages have been heard and fully considered. Furthermore, under the procedure we adopt below (see, *post*, p. 1118), before the city takes corrective action with regard to the record of any particular same-sex marriage license or same-sex marriage certificate, each affected couple will receive individual notice and an opportunity to show that the holding of the present opinion is not applicable to the couple.

(33) The city and amici curiae next maintain that even if this court properly may address the validity of the existing same-sex marriages in this proceeding, under California law such marriages cannot be held void (or voidable, for that matter), because there is no California statute that explicitly provides that a marriage between two persons of the same sex or gender is void (or voidable). As we have seen, however, Family Code section 300 explicitly *defines* marriage as "a personal relation arising out of a civil contract between a man and a woman," and in view of the language and legislative history of this provision (see, *ante*, p. 1076, fn. 11), we believe that the Legislature has made clear its intent that a same-sex marriage performed in California is not a valid marriage under California law. Accordingly, we view Family Code section 300 [**497] itself as an explicit statutory provision establishing that the existing same-sex marriages at issue are void and invalid.

(34) The city and amici curiae also rely upon Family Code section 306, which provides in part that "[n]oncompliance with this part by a nonparty to the marriage does not invalidate the marriage," maintaining that this statute demonstrates that even if the county clerk erred in issuing marriage licenses to same-sex couples, such noncompliance by the county clerk (a nonparty to the marriage) does not invalidate the marriage. In our view, section 306--which is unofficially entitled "Procedural requirements; effect of noncompliance"--has no application here. The defect at issue clearly is not simply a procedural defect in the issuance of the license or in the solemnization or registration process. Indeed, it is not simply the invalidity or unauthorized nature of the *county clerk's* action in issuing a marriage license to a same-sex [*1117] couple that renders void any marriage between a same-sex couple. What renders such a purported marriage void is the circumstance that the current California statutes reflect a clear legislative decision to "prohibit persons of the same sex from entering lawful marriage." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 607 (1977-1978 Reg. Sess.) as amended May 23, 1977, discussed, *ante*, p. 1076, fn. 11.) [***271] It is that substantive legislative limitation on the institution of marriage, and not simply the circumstance that the actions of the county clerk or county recorder were unauthorized, that renders the existing same-sex marriages invalid and void from the beginning.

Finally, the city urges this court to postpone the determination of the validity of the same-sex marriages that already have been performed and registered until a court rules on the substantive constitutional [***272] challenges to the California marriage statutes that are now pending in superior court. From a practical perspective, we believe it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail. n40

> n40 Whether or not any same-sex couple "has filed a lawsuit seeking the legal benefits of their purported marriage" (conc. & dis. opn. of Werdegar, J., *post*, at p. 1134), there can be no question that the legal status of such couples has and will continue to generate numerous questions for such couples and third parties that must be resolved on an ongoing basis.

In any event, we believe such a delay in decision is unwarranted on more fundamental grounds. As we have explained, because Family Code section 300 clearly limits its marriage in California to a marriage between a man and a woman and flatly prohibits persons of the same sex from lawfully marrying in California, the governing authorities establish that the same-sex marriages that already have been performed are void and of no legal effect *from their inception.* (See, *ante*, p. 1113 and cases cited; see also *Estate of Gregorson, supra,* 160 Cal. 21, 26 ["A marriage prohibited as ... illegal and declared to be 'void' or 'void from the beginning' is a legal nullity ... ."].) In view of this well-established rule, we do not believe it would be responsible or appropriate for this court to fail at this time to inform the parties to the same-sex marriages and other persons whose legal rights and responsibilities may depend upon the validity or invalidity of these marriages that these marriages are invalid, notwithstanding the pendency of numerous lawsuits challenging the constitutionality of California's marriage statutes. Withholding or delaying a ruling on the current validity of the existing same-sex marriages might lead numerous persons to make fundamental changes in their lives or otherwise proceed on the basis of erroneous expectations, creating potentially irreparable harm. [*1118]

(35) Although the city and the amici curiae representing same-sex couples suggest that these couples would prefer to live with uncertainty rather than be told at this point that the marriages are invalid, in light of the explicit terms of Family Code section 300 and the warning included in the same-sex marriage license applications provided by the [**498] city (see, *ante*, p. 1071, fn. 5) these couples clearly were on notice that the validity of their marriages was dependent upon whether a court would find that the city officials had authority to allow same-sex marriages. Now that we have confirmed that the city officials lack this authority, we do not believe that these couples have a persuasive equitable claim to have the validity of the marriages left in doubt at this point in time, creating uncertainty and potential harm to others who may need to know whether the marriages are valid or not. Had the current constitutional challenges to the California marriage statutes followed the traditional and proper course (see, *ante*, pp. 1099-1100), no same-sex marriage would have been conducted in California prior to a judicial determination that the current California marriage statutes are unconstitutional. Accordingly, as part of the remedy for the city officials' unauthorized and unlawful actions, we believe it is appropriate to make clear that the same-sex marriages that already have purportedly come into being must be considered void from their inception. Of course, should the current California statutes limiting marriage to a man and a woman ultimately be repealed or be held unconstitutional, the affected couples then would be free to obtain lawfully authorized marriage licenses, have their marriages law-

fully solemnized, and lawfully register their marriage certificates. n41

n41 Contrary to the contention of Justice Werdegar's concurring and dissenting opinion (*post*, at p. 1133), should the existing marriage statutes ultimately be held unconstitutional, we do not believe that the principle of "basic fairness" or a claim for "full relief" justifies placing the same-sex couples who took advantage of the unauthorized actions of San Francisco officials in a different or better position than other same-sex couples who were denied marriage licenses in other counties throughout the state by public officials who properly fulfilled their duties in compliance with the governing state statutes.

Accordingly, to remedy the effects of the city officials' unauthorized actions, we shall direct the county clerk and the county recorder of the City and County of San Francisco to take the following corrective actions under the supervision of the California Director of Health Services, who, by statute, has general supervisory authority over the marriage license and marriage certificate process. (See, *ante*, pp. 1077-1078.) The county clerk and the county recorder are directed to (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to [*1119] demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex couples, and (5) make appropriate corrections to all relevant records.

VIII

As anyone familiar with the docket of the United States Supreme Court, of this court, or of virtually any appellate court in this nation is aware, many statutes currently in force may give rise to constitutional challenges, and not infrequently the constitutional questions presented involve issues upon which reasonable persons, including reasonable jurists, may disagree. If every public official who is under a statutory duty to perform a ministerial act were free to refuse to perform that act based solely on the official's view that the underlying statute is unconstitutional, any semblance of a uniform rule of law quickly would disappear, and constant and widespread judicial intervention would be required to permit the ordinary mechanisms of government to function. This, of course, is not the system of law with which we are familiar. Under long-established [***273] principles, a statute, once enacted, is presumed to be constitutional until it has been judicially determined to be unconstitutional. [**499]

An executive official, of course, is free to criticize existing statutes, to advocate their amendment or repeal, and to voice an opinion as to their constitutionality or unconstitutionality. As we have explained, however, an executive official who is charged with the ministerial duty of enforcing a statute generally has an obligation to execute that duty in the absence of a judicial determination that the statute is unconstitutional, regardless of the official's personal view of the constitutionality of the statute.

In this case, the city has suggested that a contrary rule--one under which a public official charged with a ministerial duty would be free to make up his or her own mind whether a statute is constitutional and whether it must be obeyed--is necessary to protect the rights of minorities. But history demonstrates that members of minority groups, as well as individuals who are unpopular or powerless, have the most to lose when the rule of law is abandoned--even for what appears, to the person departing from the law, to be a just end. n42 As observed at the outset of this opinion, granting every [*1120] public official the authority to disregard a ministerial statutory duty on the basis of the official's opinion that the statute is unconstitutional would be fundamentally inconsistent with our political system's commitment to John Adams's vision of a government where official action is determined not by the opinion of an individual officeholder -- but by the rule of law.

n42 The pronouncement of Sir Thomas More in the well-known passage from Robert Bolt's A Man For All Seasons comes to mind:

"Roper: So now you'd give the Devil benefit of law!

"More: Yes. What would you do? Cut a great road through the law to get to the Devil?

"Roper: I'd cut down every law in England to do that!

"More: Oh? And when the last law was down, and the Devil turned round on you--where

would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake." (Bolt, A Man for All Seasons (1962) p. 66.)

IX

For the reasons discussed above, a writ of mandate shall issue compelling respondents to comply with the requirements and limitations of the current marriage statutes in performing their ministerial duties under such statutes, and directing the county clerk and the county recorder of the City and County of San Francisco to take the following corrective actions under the supervision of the California Director of Health Services: (1) identify all same-sex couples to whom the officials issued marriage licenses, solemnized marriage ceremonies, or registered marriage certificates, (2) notify these couples that this court has determined that same-sex marriages that have been performed in California are void from their inception and a legal nullity, and that these officials have been directed to correct their records to reflect the invalidity of these marriage licenses and marriages, (3) provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages and thus that the official records of their marriage licenses and marriages should not be revised, (4) offer to refund, upon request, all marriage-related fees paid by or on behalf of same-sex [***274] couples, and (5) make appropriate corrections to all relevant records.

As the prevailing parties, petitioners shall recover their costs.

Baxter, J., Chin, J., Brown, J., and Moreno, J., concurred.

CONCUR BY: Moreno; Kennard (In Part); Werdegar (In Part)

CONCUR:

MORENO, J.--I concur. The majority opinion addresses primarily the limitations on the power of local officials to disobey statutes that may be, but have not yet been judicially established to be, unconstitutional. I write separately to focus on the related but distinct question of what courts should do when confronted with such disobedience on the part of local officials. As the majority opinion suggests, a court should not invariably refuse to decide constitutional questions arising from local governments' or local officials' refusal to obey purportedly unconstitutional statutes. Indeed, California courts [*1121] under these circumstances [**500] have, on a number of occasions, decided the underlying constitutional questions. In the present case, the majority declines to decide the constitutional validity of Family Code section 300, prohibiting same-sex marriage, but instead concludes that a writ of mandate against San Francisco's (the city's) local officials is justified because they exceeded their ministerial authority. As elaborated below, I agree that under these somewhat unusual circumstances, local officials' disobedience of the statute justifies this court's issuance of a writ of mandate against those officials before the underlying constitutional question has been adjudicated.

At the outset, I review the requirements for obtaining a writ of mandate. To obtain writ relief a petitioner must show: " '(1) A clear, present and usually ministerial duty on the part of the respondent ... ; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty ... .' " (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540 [28 Cal. Rptr. 2d 617, 869 P.2d 1142].) Also required is "the lack of any plain, speedy and adequate remedy in the usual course of law ... ." (*Flora Crane Service, Inc. v. Ross* (1964) 61 Cal.2d 199, 203 [37 Cal. Rptr. 425, 390 P.2d 193].) Although the writ of mandate generally must issue if the above requirements are clearly met (see *May v. Board of Directors* (1949) 34 Cal.2d 125, 133-134 [208 P.2d 661]), the writ of mandate is an equitable remedy that will not issue if it is contrary to "promoting the ends of justice." (*McDaniel v. City etc. of San Francisco* (1968) 259 Cal. App. 2d 356, 361 [66 Cal. Rptr. 384]; see also *Bartholomae Oil Corp. v. Superior Court* (1941) 18 Cal.2d 726, 730 [117 P.2d 674].)

The local officials in the present case have a clear ministerial duty to issue marriage licenses in conformance with state statute and have violated that duty. The Attorney General, and for that matter the petitioners in *Lewis v. Alfaro*, have a substantial right to ensure that marriage licenses conform to the statute. (See *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100-101 [162 P.2d 627].) But when a court is asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality, the above-stated principles dictate that a court at least has the discretion to refuse to issue the writ until the underlying constitutional question has been decided.

How should courts exercise that discretion? In California, generally speaking, courts faced with local governments' or local officials' refusal to obey assertedly

unconstitutional statutes have decided the constitutional question before determining whether a writ or other requested relief should issue. (See, e.g., *County of Riverside* [***275] *v. Superior Court* (2003) 30 Cal.4th 278 [132 Cal. Rptr. 2d 713, 66 P.3d 718] [county refused to obey as unconstitutional a state statute mandating binding arbitration for local agencies that reach [*1122] negotiating impasse with police and firefighters]; *Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1 [227 Cal. Rptr. 391, 719 P.2d 987] [county refused to act in accordance with a state revenue statute it had judged, correctly, to violate the U.S. Const.]; *Zee Toys, Inc. v. County of Los Angeles* (1978) 85 Cal. App. 3d 763, 777-781 [149 Cal. Rptr. 750] [same]; *Paso Robles etc. Hospital Dist. v. Negley* (1946) 29 Cal.2d 203 [173 P.2d 813] [local financial officer refused to issue bonds and defended a lawsuit in order to expeditiously settle the constitutional validity of the bond issue]; *Denman v. Broderick* (1896) 111 Cal. 96, 105 [43 P. 516] [local official refused to spend public funds required by a statute believed to be unconstitutional "special legislation"]; *City of Oakland v. Digre* (1988) 205 Cal. App. 3d 99 [252 Cal. Rptr. 99] [local official refused to enforce a parcel tax believed to be unconstitutional and required the city to demonstrate its constitutionality in court]; *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal. App. 3d 1, 14-15 [97 Cal. Rptr. 431] [county board of supervisors refused to issue permission for timber operations, although such refusal was not authorized under rules promulgated pursuant to state statute].) Indeed, any time a city determines that a state law is contrary to its own constitutional prerogative of self-governance and therefore refuses to obey the law, it is making a constitutional determination. (See, e.g., *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64 [81 Cal. Rptr. 465, 460 P.2d 137] [determining that state prevailing [**501] wage law for public works projects was not binding on cities].)

As the majority states, "the classic understanding of the separation of powers doctrine [is] that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality." (Maj. opn., *ante*, at p. 1068.) But "the separation of powers doctrine does not create an absolute or rigid division of functions." (*Ibid.*) As the above cases suggest, local officials sometimes exercise their authority to *preliminarily* determine that a statute that directly affects the local government's functioning is unconstitutional and, in some circumstances, refuse to obey that statute as a means of bringing the constitutional challenge. This preliminary determination is the exercise of an *executive* function. Local officials and agencies do not "arrogate to [the local executive] core functions of [the judicial] branch" in violation of the separation of powers (*Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 297 [105 Cal. Rptr. 2d 636, 20 P.3d 533]), but rather raise constitutional issues for the courts to ultimately decide.

In my view, there are at least three types of situations in which a local government's disobedience of a statute would be reasonable. In these situations, courts asked to grant a writ of mandate to compel the local agency to obey the statute should therefore address the underlying constitutional issue rather than simply conclude the local governmental entity exceeded its [*1123] ministerial authority. First, there are some cases in which the statute in question violates a "clearly established ... constitutional right" (*Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818 [73 L. Ed. 2d 396, 102 S. Ct. 2727]). An executive decision not to spend resources to comply with a clearly unconstitutional statute is a reasonable exercise of the local executive power and [***276] does not usurp a core judicial function. Indeed, refusing to enforce clearly unconstitutional statutes saves the resources of both the executive and the judiciary.

A second category of "disobedience" cases involves a local official or governmental entity disobeying a statute when there is a substantial question as to its constitutionality *and* the statute governs matters integral to a locality's limited power of self-governance. In these cases, a local entity or official is directly affected by the statute and in a unique position to challenge it. As the above cases illustrate, local entities and officials have challenged statutes to determine the validity of a bond, or the payment of a government salary for a position unconstitutionally created, or an exemption to a local tax that assertedly violates the commerce clause, or a statute that intrudes on local matters of city or county employee compensation. It is noteworthy that in virtually all the above cases, the local agency's or official's refusal to obey an assertedly unconstitutional statute had the effect of preserving the status quo, pending judicial resolution of the matter, thereby minimizing interference with the judicial function.

Perhaps in some of these cases localities could have proceeded by obtaining declaratory relief as to a statute's unconstitutionality, rather than by disobeying the statute. In other cases, an actual controversy necessary for declaratory relief may have been lacking. In any case, the fact that the local government agency did not proceed by means of declaratory relief provided no insurmountable obstacle to a court's deciding the underlying constitutional issue raised by the agency's disobedience. (See, e.g., *County of Riverside v. Superior Court, supra,* 30 Cal.4th 278, 283.) n1 Of course, if a court determines that interim relief to compel a government agency to obey a statute is appropriate, it may grant such relief

before the constitutional question is ultimately adjudicated.

n1 The above dictum does not apply when the Legislature has required that a governmental entity challenge an assertedly unconstitutional statute by means of declaratory relief. (See, e.g., Rev. & Tax. Code, § 538 [county assessor to challenge constitutionality of state revenue statute by requesting declaratory relief under Code of Civ. Proc. § 1060].)

A third possible category of cases in which city officials might legitimately disobey statutes [**502] of doubtful constitutionality are those in which the question of a statute's constitutionality is substantial, and irreparable harm may result to individuals to which the local government agency has some protective [*1124] obligation--be they employees, or students of a public college, or patrons of a public library, or patients in a public hospital, or in some cases simply residents of the city. Again, a court asked to grant a writ of mandate could conclude that a delay in granting the writ pending resolution of the underlying constitutional question is justified. To issue a writ enforcing a statute that may be unconstitutional, and that will work irreparable harm, would not "promot[e] the ends of justice" (*McDaniel v. City etc. of San Francisco, supra,* 259 Cal. App. 2d at pp. 360-361), and a court has the discretion to delay such issuance until the underlying constitutional question is resolved.

The present case is quite different from the above situations. First, as the majority demonstrates, the unconstitutionality of Family Code section 300 is not clearly established by either state or federal constitutional precedent, and certainly not from the language of the constitutional provisions themselves. Nor does this case [***277] pertain to a statute that interferes with a city's or county's limited power of self-governance that these entities are in a unique position to challenge. Rather, local officials in this case perform a ministerial function pursuant to the state marriage law. Unlike the cases cited above, in which the constitutionality of a statute is likely to go unchallenged if a local governmental entity does not do so, Family Code section 300 limits individual rights, and those individuals subject to that limitation are in the best position to challenge it.

Nor does the present case fit the third category of cases, in which a city refuses to enforce a law so as to protect its citizens from irreparable harm. The only harm caused here is a delay in the ability of same-sex couples to get married while the constitutional issue is being adjudicated. But that delay will occur whether or not we grant a writ of mandate against the city in this case. Put another way, local officials have no real power to marry same-sex couples, given the statutory prohibition against doing so. What *was* within their power, prior to our issuance of a stay, was to issue licenses of indeterminate legal status. The exercise of the court's mandate power to preclude local officials from continuing this course of action, and voiding the licenses already issued, brings no irreparable harm to the individuals who have received or might receive such licenses.

In sum, the city advances no plausible reason why it had to disobey the statute in question. Even so, it might have been appropriate to have delayed the issuance of a writ of mandate against it until the underlying constitutional question had been adjudicated if, for example, the city had issued a single "test case" same-sex marriage license. But it went far beyond a test case. It issued thousands of these marriage licenses. As such, the city went well beyond making a preliminary determination of the statute's unconstitutionality or performing an act that would bring the constitutional issue to the [*1125] courts. Rather, city officials drastically and repeatedly altered the status quo based on their constitutional determination, issuing a multitude of licenses that purported to have an independent legal effect, contrary to their ministerial duty and statutory obligation and prior to any judicial determination of the statute's unconstitutionality. By such dramatic overreaching, these officials trespassed on a core judicial function of deciding the constitutionality of statutes and endowed the issue of their authority to disobey the statute with a life of its own, independent of the underlying constitutional issue. I therefore agree with the majority that a writ of mandate is rightly issued against the city and its officials in this case.

I reiterate what is clear in the majority opinion. Our holding in this case in no way expresses or implies a view on the underlying issue of the constitutionality of a statute prohibiting same-sex marriage. That issue will be addressed in the context of litigation in which the issue is properly raised. (See *Goodridge v. Department of Pub. Health* (2003) 440 Mass. 309 [798 N.E.2d 941].)

DISSENT BY: Kennard (In Part); Werdegar (In Part)

DISSENT: KENNARD, J., [**503] Concurring and Dissenting. -- I concur in the judgment, except insofar as it declares void some 4,000 marriages performed in reliance on the gender-neutral marriage licenses n1 issued in the City [***278] and County of San Francisco. Although I agree with the majority that San Francisco public officials exceeded their authority when they issued those licenses, and that the licenses themselves are therefore invalid, I would refrain from determining here, in a proceeding from which the persons whose marriages are

at issue have been excluded, the validity of the marriages solemnized under those licenses. That determination should be made after the constitutionality of California laws restricting marriage to opposite-sex couples has been authoritatively resolved through judicial proceedings now pending in the courts of California.

n1 As the majority explains, the license application was altered "by eliminating the terms 'bride,' 'groom,' and 'unmarried man and unmarried woman,' and by replacing them with the terms 'first applicant,' 'second applicant,' and 'unmarried individuals.' " (Maj. opn., *ante*, at p. 1071.)

I

Like the majority, I conclude that officials in the City and County of San Francisco exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, and I agree with the majority that those officials may not justify their actions on the ground that state laws restricting marriage to opposite-sex couples violate the state or the federal Constitution. The cases discussed by the majority demonstrate, in my view, that a public official may refuse to enforce a statute on constitutional grounds only in these situations: [*1126] (1) when the statute's unconstitutionality is obvious beyond dispute in light of unambiguous constitutional language or controlling judicial decisions; (2) when refraining from enforcement is necessary to preserve the status quo and to prevent irreparable harm pending judicial determination of a legitimate and substantial constitutional question about the statute's validity; (3) when enforcing the statute could put the public official at risk for substantial personal liability; or (4) when refraining from enforcement is the only practical means to obtain a judicial determination of the constitutional question. (See Field, The Effect of an Unconstitutional Statute (1935, reprint ed. 1971) p. 119 et seq.; Note, *Right of Ministerial Officer to Raise Defense of Unconstitutionality in Mandamus Proceeding* (1931) 15 Minn. L.Rev. 340; Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes* (1927) 11 Minn. L.Rev. 585; Note, *Who Can Set Up Unconstitutionality--Whether Public Official Has Sufficient Interest* (1920) 34 Harv. L.Rev. 86.) Because none of these situations is present here, as I explain below, the public officials acted wrongly in refusing to enforce the opposite-sex restriction in California's marriage laws.

A. *Indisputably Unconstitutional Law*

In restricting marriages to couples consisting of one woman and one man, California's marriage laws are not plainly or obviously unconstitutional under either the state or the federal Constitution. Neither Constitution expressly prohibits limiting marriage to opposite-sex couples, and neither Constitution expressly grants any person a right to marry someone of the same sex. Nor does any judicial decision establish beyond reasonable dispute that restricting marriage to heterosexual couples violates any provision of the California Constitution or the United States Constitution.

Indeed, there is a decision of the United States Supreme Court, binding on all other courts and public officials, that a state law restricting marriage to opposite-sex couples does *not* violate the federal Constitution's guarantees of equal protection and due process of law. After the Minnesota Supreme Court held that Minnesota laws preventing marriages between persons of [***279] the same sex did not violate the equal protection or due process clauses of the United States Constitution (*Baker v. Nelson* (1971) 291 Minn. 310 [191 N.W.2d 185]), the decision was appealed to the United States Supreme Court, as federal law then permitted (see 28 U.S.C. former [**504] § 1257(2), 62 Stat. 929 as amended by 84 Stat. 590). The high court later dismissed that appeal "for want of substantial federal question." (*Baker v. Nelson* (1972) 409 U.S. 810 [34 L. Ed. 2d 65, 93 S. Ct. 37].)

As the United States Supreme Court has explained, a dismissal on the ground that an appeal presents no substantial federal question is a decision on [*1127] the merits of the case, establishing that the lower court's decision on the issues of federal law was correct. (*Mandel v. Bradley* (1977) 432 U.S. 173, 176 [53 L. Ed. 2d 199, 97 S. Ct. 2238]; *Hicks v. Miranda* (1975) 422 U.S. 332, 344 [45 L. Ed. 2d 223, 95 S. Ct. 2281].) Summary decisions of this kind "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." (*Mandel v. Bradley, supra,* at p. 176.) Thus, the high court's summary decision in *Baker v. Nelson, supra,* 409 U.S. 810, prevents lower courts and public officials from coming to the conclusion that a state law barring marriage between persons of the same sex violates the equal protection or due process guarantees of the United States Constitution.

The binding force of a summary decision on the merits continues until the high court instructs otherwise. (*Hicks v. Miranda, supra,* 422 U.S. at p. 344.) That court may release lower courts from the binding effect of one of its decisions on the merits either by expressly overruling that decision or through " 'doctrinal develop-

ments' " that are necessarily incompatible with that decision. (*Id.* at p. 344.) The United States Supreme Court has not expressly overruled *Baker v. Nelson, supra,* 409 U.S. 810, nor do any of its later decisions contain doctrinal developments that are necessarily incompatible with that decision.

The San Francisco public officials have argued that the United States Supreme Court's decision in *Lawrence v. Texas* (2003) 539 U.S. 558 [156 L. Ed. 2d 508, 123 S. Ct. 2472], holding unconstitutional a state law "making it a crime for two persons of the same sex to engage in certain intimate sexual conduct" (*id.* at p. 562), amounts to a doctrinal development that releases courts and public officials from any obligation to obey the high court's decision in *Baker v. Nelson, supra,* 409 U.S. 810. Although *Lawrence* represents a significant shift in the high court's view of constitutional protections for same-sex relationships, the majority in *Lawrence* carefully pointed out that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter" (*Lawrence v. Texas, supra,* at p. 568) and that the case "d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter" (*id.* at p. 578). Because there is a long history in this country of defining marriage as a relation between one man and one woman, and because marriage laws do involve formal government recognition of relationships, the high court's decision in *Lawrence* did not undermine the authority of *Baker v. Nelson* to such a degree that a lower federal or state court, much less a public official, could disregard it. Until the United States Supreme Court says otherwise, which it has not yet done, *Baker v. Nelson* defines federal constitutional law on the [***280] question whether a state may deny same-sex couples the right to marry. [*1128]

Because neither the federal nor the California Constitution contains any provision directly and expressly guaranteeing a right to marry another person of the same sex, and because no court has ever decided that either Constitution confers that right, this is not a situation in which a public official refused to enforce a law that was obviously and indisputably unconstitutional.

B. *Preserving the Status Quo to Prevent Serious Harm*

Nor was this a situation in which a public official, by temporarily refraining from enforcing a state law, merely preserved the status quo to prevent potentially irreparable harm pending judicial determination of a legitimate and substantial constitutional question about the law's validity. By issuing licenses authorizing same-sex marriages, the San Francisco public officials did not preserve [**505] a status quo, but instead they altered the status quo in that California law has always prohibited same-sex marriage.

In 1977, the Legislature amended Family Code section 300 to specify that marriage is a relation "between a man and a woman." (See maj. opn., *ante*, at p. 1076, fn. 11.) At the March 2000 election, the voters approved Proposition 22, which enacted Family Code section 308.5 declaring that "[o]nly marriage between a man and a woman is valid or recognized in California." n2 But those statutory measures did not change existing law. Since the earliest days of statehood, California has recognized only opposite-sex marriages. (See, e.g., *Mott v. Mott* (1890) 82 Cal. 413, 416 [22 P. 1140] [quoting legal dictionary's definition of marriage as a contract " 'by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife' "].) In issuing gender-neutral marriage licenses, therefore, San Francisco public officials could not have intended merely a temporary or interim preservation of an existing state of affairs pending a judicial determination of a newly enacted law's constitutionality. Instead, as their public statements indicated, they issued those licenses to effect a fundamental and permanent change in traditional marriage eligibility requirements, based on their own views about constitutional questions. In so doing, they exceeded their authority.

n2 Although California law has expressly restricted matrimony to heterosexual couples, it has also extended most of the financial and other benefits of marriage to same-sex couples through domestic partner legislation. (See, e.g., Fam. Code, § 297 et seq., Stats. 2003, ch. 421, operative Jan. 1, 2005.)

C. *Public Officials' Personal Liability*

This was not a situation in which public officials had reason to fear they might be held personally liable in damages for enforcing a constitutionally [*1129] invalid state law. In a federal civil rights action brought under 42 United States Code section 1983, a public official may not be held personally liable for enforcing a state law that violates a federal constitutional right unless the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing

violates that right." (*Anderson v. Creighton* (1987) 483 U.S. 635, 640 [97 L. Ed. 2d 523, 107 S. Ct. 3034]; accord, *Saucier v. Katz* (2001) 533 U.S. 194, 202 [150 L. Ed. 2d 272, 121 S. Ct. 2151]; *Wilson v. Layne* (1999) 526 U.S. 603, 614-615 [143 L. Ed. 2d 818, 119 S. Ct. 1692].) Because the United States [***281] Supreme Court has determined that a state law prohibiting same-sex marriage does not violate the federal Constitution (*Baker v. Nelson, supra,* 409 U.S. 810), no reasonable public official could conclude that denying marriage licenses to same-sex couples would violate a right that was clearly established under the federal Constitution. Accordingly, federal civil rights law could not impose personal liability on local officials in California for enforcing California's same-sex marriage prohibition. "[A]bsent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." (*Lemon v. Kurtzman* (1973) 411 U.S. 192, 208-209 [36 L. Ed. 2d 151, 93 S. Ct. 1463] (plur. opn. of Burger, C. J.).)

Nor was there any reasonable basis for local officials to anticipate personal liability under the California Constitution or California civil rights laws for denying marriage licenses to same-sex couples. Government Code section 820.6 provides immunity for public employees acting in good faith, without malice, under a statute that proves to be unconstitutional. Because same-sex marriage has never been legally authorized in California, the California Constitution does not expressly grant a right to same-sex marriage, and no judicial decision by any California court has ever suggested, much less held, that state laws limiting marriage to opposite-sex couples violate the California Constitution, Government Code section 820.6 would immunize any public official from personal liability for enforcing the same-sex marriage prohibition should that prohibition, at some [**506] later time, be held to violate the California Constitution.

D. *Necessity of Nonenforcement to Obtain Judicial Resolution*

Finally, this is not a situation in which a public official's nonenforcement of a law was the only practical way to obtain a judicial determination of that law's constitutionality. Just as the constitutionality of California's prohibition against interracial marriage was properly challenged by a mixed-race couple who were denied a marriage license (*Perez v. Sharp* (1948) 32 Cal.2d 711 [198 P.2d 17]), the constitutionality of California's prohibition against same-sex marriage could have been readily challenged at any time through a lawsuit brought by a same-sex couple who had been denied a marriage [*1130] license. Indeed, challenges of this sort are now pending in the superior court. (See maj. opn., *ante*, at p. 1117.)

E. *Policy Grounds for General Rule Prohibiting Nonenforcement on Constitutional Grounds*

As the majority points out (maj. opn., *ante*, at pp. 1067-1068, 1108-1109), confusion and chaos would ensue if local public officials in each of California's 58 counties could separately and independently decide not to enforce long-established laws with which they disagreed, based on idiosyncratic readings of broadly worded constitutional provisions. To ensure uniformity and consistency in the statewide application and enforcement of duly enacted and presumptively valid statutes, the authority of public officials to decline enforcement of state laws, in the absence of a judicial determination of invalidity, based on the officials' own constitutional determinations, is and must be carefully and narrowly limited. I agree with the majority that San Francisco public officials exceeded those limits when they declined to enforce state marriage laws by issuing gender-neutral marriage licenses to same-sex couples. [***282]

II

Although I agree with the majority that San Francisco officials exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, I do not agree with all the reasoning that the majority offers in support of that conclusion. In particular, I do not agree that a "line of decisions" had established, before the 1978 enactment of section 3.5 of article III of the California Constitution, that "only administrative agencies constitutionally authorized to exercise judicial power have the authority to determine the constitutional validity of statutes." (Maj. opn., *ante*, at p. 1096.)

The majority does not identify any pre-1978 decision holding that a nonconstitutional administrative agency, during quasi-judicial administrative proceedings, lacked authority to determine a statute's constitutionality. The majority asserts that this court so held in *State of California v. Superior Court* (*Veta*) (1974) 12 Cal.3d 237. (Maj. opn., *ante*, at p. 1092.) But this court there decided only that the doctrine of exhaustion of administrative remedies did not apply to a constitutional challenge to the statute from which the administrative agency derived its authority. (*State of California v. Superior Court* (*Veta*), *supra*, at p. 251.) In concluding that a liti-

gant was not *required* during quasi-judicial administrative proceedings to make a constitutional challenge to the statute that created the agency, this court explained that "[i]t would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its [*1131] preponderantly lay membership on the constitutionality of the statute establishing its status and functions." (*Ibid.*) This court did not state, or even imply, that an administrative agency *lacked authority* to resolve constitutional issues that a litigant might present.

I also see no need for, and do not join, the majority's observations on topics far removed from the issue presented here, such as the powers of the President of the United States [**507] (maj. opn., *ante*, at p. 1098, fn. 26) and the existence of certain legal defenses to war crimes charges (*id.* at p. 1101, fn. 30). These issues are not before this court.

III

Because I agree with the majority that San Francisco's public officials exceeded their authority when they issued gender-neutral marriage licenses to same-sex couples, I concur in the judgment insofar as it requires those officials to comply with state marriage laws, to identify the same-sex couples to whom gender-neutral marriage licenses were issued, to notify those couples that their marriage licenses are invalid, to offer refunds of marriage license fees collected, and to make appropriate corrections to all relevant records. But I would not require notification that the marriages themselves "are void from their inception and a legal nullity." (Maj. opn., *ante*, at p. 1118.)

Although a marriage license is a requirement for a valid marriage (Fam. Code, § § 300, 350), some defects in a marriage license do not invalidate the marriage. (See *id.,* § 306; see also, e.g., *Argonaut Ins. Co. v. Industrial Acc. Com.* (1962) 204 Cal. App. 2d 805, 809 [23 Cal. Rptr. 1] [applicant's use of false names on license application did not invalidate marriage].) Whether the issuance of a gender-neutral [***283] license to a same-sex couple, in violation of state laws restricting marriage to opposite-sex couples, is a defect that precludes any possibility of a valid marriage may well depend upon resolution of the constitutional validity of that statutory restriction. If the restriction is constitutional, then a marriage between persons of the same sex would be a legal impossibility, and no marriage would ever have existed. But if the restriction violates a fundamental constitutional right, the situation could be quite different. A court might then be required to determine the validity of same-sex marriages that had been performed *before* the laws prohibiting those marriages had been invalidated on constitutional grounds.

When a court has declared a law unconstitutional, questions about the effect of that determination on prior actions, events, and transactions "are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an [*1132] all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." (*Chicot County Dist. v. Bank* (1940) 308 U.S. 371, 374 [84 L. Ed. 329, 60 S. Ct. 317]; accord, *Lemon v. Kurtzman, supra,* 411 U.S. at p. 198.) This court has acknowledged that, in appropriate circumstances, an unconstitutional statute may be judicially reformed to retroactively extend its benefits to a class that the statute expressly but improperly excluded. (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 624-625 [47 Cal. Rptr. 2d 108, 905 P.2d 1248] (lead opn. of Lucas, C. J.), 685 (conc. & dis. opn. of Baxter, J.) [joining in pt. III of lead opn.].) Thus, it is possible, though by no means certain, that if the state marriage laws prohibiting same-sex marriage were held to violate the state Constitution, same-sex marriages performed before that determination could then be recognized as valid.

Although the United States Supreme Court has determined that there is no right to same-sex marriage under the federal Constitution (*Baker v. Nelson, supra,* 409 U.S. 810), courts in other states construing their own state Constitutions in recent years have reached differing conclusions on this question. (Compare *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309 [798 N.E.2d 941] [denying marriage licenses to same-sex couples violates Massachusetts Constitution] with *Standhardt v. Sup. Ct.* (2003) 206 Ariz. 276 [77 P.3d 451] [no right to same-sex marriage under Arizona Constitution].) Recognizing the difficulty and seriousness of the constitutional question, which is now presented in pending superior court actions, this court has declined to address it in this case. *Until that constitutional issue has been finally resolved under the California Constitution*, it is premature and unwise to assert, as the majority essentially does, that the thousands of same-sex weddings performed in [**508] San Francisco were empty and meaningless ceremonies in the eyes of the law.

For many, marriage is the most significant and most highly treasured experience in a lifetime. Individuals in loving same-sex relationships have waited years, sometimes several decades, for a chance to wed, yearning to obtain the public validation that only marriage can give. In recognition of that, this court should proceed most cautiously in resolving the ultimate question of the validity of the same-sex marriages performed in San Francisco, even though those marriages were performed un-

der licenses issued by San Francisco public officials without proper authority and in violation of state law. Because the licenses were issued without proper authorization, [***284] and in the absence of a judicial determination that the state laws prohibiting same-sex marriage are unconstitutional, employers and other third parties would be under no legal obligation to recognize the validity of any of the same-sex marriages at issue here. Should the pending lawsuits ultimately be resolved by a determination that the opposite-sex marriage restriction is [*1133] constitutionally invalid--an issue on which I express no opinion--it would then be the appropriate time to address the validity of previously solemnized same-sex marriages.

WERDEGAR, J., Concurring and Dissenting.--I agree with the majority that San Francisco officials violated the Family Code by licensing marriages between persons of the same sex. Accordingly, I concur in the decision to order those officials to comply with the existing marriage statutes unless and until they are determined to be unconstitutional. Because constitutional challenges are pending in the lower courts, to order city officials not to license additional same-sex marriages in the meantime is an appropriate way to preserve the status quo pending the outcome of that litigation. That, however, is the extent of my agreement with the majority.

I.

I do not join in the majority's decision to address the validity of the marriages already performed and to declare them void. My concern here is not for the future of same-sex marriage. That question is not before us and, like the majority, I intimate no view on it. My concern, rather, is for basic fairness in judicial process. The superior court is presently considering whether the state statutes that limit marriage to "a man and a woman" (e.g., Fam. Code, § 300) violate the state and federal Constitutions. The same-sex couples challenging those statutes claim the state has, without sufficient justification, denied the fundamental right to marry (e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374, 383 [54 L. Ed. 2d 618, 98 S. Ct. 673]; *Loving v. Virginia* (1967) 388 U.S. 1, 12 [18 L. Ed. 2d 1010, 87 S. Ct. 1817]; *Perez v. Sharp* (1948) 32 Cal.2d 711, 714-715 [198 P.2d 17]) to a class of persons defined by gender or sexual orientation. Should the relevant statutes be held unconstitutional, the relief to which the purportedly married couples would be entitled would normally include recognition of their marriages. By analogy, interracial marriages that were void under antimiscegeny statutes at the time they were solemnized were nevertheless recognized as valid after the high court rejected those laws in *Loving v. Virginia*. (E.g., *Dick v. Reaves* (Okla. 1967) 1967 OK 158 [434 P.2d 295, 298].) By postponing a ruling on this issue, we could preserve the status quo pending the outcome of the constitutional litigation. Instead, by declaring the marriages "void and of no legal effect from their inception" (maj. opn., *ante*, at p. 1113), the majority permanently deprives future courts of the ability to award full relief in the event the existing statutes are held unconstitutional. This premature decision can in no sense be thought to represent fair judicial process.

The majority asserts that "it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of [*1134] time given the potential confusion (for third parties, such as employers, insurers, or other governmental entities, as well as for the affected couples) that such an uncertain status inevitably would entail." (Maj. opn., *ante*, at p. 1117.) Nowhere in the opinion, [**509] however, does the majority note that any same-sex couple has filed a lawsuit seeking the legal benefits [***285] of their purported marriage. Nor is the absence of such lawsuits surprising, since any reasonable court would stay such actions pending the outcome of the ongoing constitutional litigation. n1

n1 The majority does note that "officials of the federal Social Security Administration had raised questions regarding that agency's processing of name-change applications resulting from California marriages" (maj. opn., *ante*, at p. 1072), but this is unlikely to be a serious problem because San Francisco used a nonstandard, easily recognizable form for licensing same-sex marriages (*id.*, at pp. 1070-1071, 1079).

The majority's decision to declare the existing marriages void is unfair for the additional reason that the affected couples have not been joined as parties or given notice and an opportunity to appear. On March 12, 2004, we denied all petitions to intervene filed by affected couples. That ruling made sense at the time it was announced because our prior order of March 11, 2004, which specified the issues to be briefed and argued, did not identify the validity of the existing marriages as an issue. Only on April 14, 2004, *after* having denied the petitions to intervene, did the court identify and solicit briefing on the issue of the marriages' validity. To declare marriages void after denying requests by the purported spouses to appear in court as parties and be heard on the matter is hard to justify, to say the least. n2

n2 Compare Code of Civil Procedure section 389, subdivision (a): "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if ... (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest ... ."

The majority counters that "the legal arguments of such couples with regard to the question of the validity of the existing same-sex marriages have been heard and fully considered." (Maj. opn., *ante*, at p. 1116.) But this is a claim a court may not in good conscience make unless it has given, to the persons whose rights it is purporting to adjudicate, notice and the opportunity to appear. This is the irreducible minimum of due process, even in cases involving numerous parties. (See *Mullane v. Central Hanover Tr. Co.* (1950) 339 U.S. 306, 314-315 [94 L. Ed. 865, 70 S. Ct. 652].) Amicus curiae briefs, which any member of the public may ask to file and which the court has no obligation to read, cannot seriously be thought to satisfy these requirements. The majority writes that "requiring each of the thousands of same-sex couples to be named and served as parties in the present action, would add nothing of substance to this proceeding." (Maj. opn., *ante*, at p. 1115.) Of [*1135] course, the same argument can be made in many class actions with respect to the absent members of the class, but due process still gives each class member the right to notice and the opportunity to appear. (*Mullane v. Central Hanover Tr. Co., supra,* 339 U.S. at pp. 314-315.) Here, notice has been given to none of the 4,000 affected couples; and even the 11 same-sex couples who affirmatively sought to intervene were denied the opportunity to appear. (Maj. opn., *ante*, at p. 1116.) What the majority has done, in effect, is to give petitioners the benefit of an action against a defendant class of same-sex couples free of the burden of procedural due process. If the majority truly desired to hear the views of the same-sex couples whose rights [***286] it is adjudicating, it would not proceed in absentia.

Aware of this problem, the majority offers a specious imitation of due process by ordering the city to notify the same-sex couples that this court has decided their marriages are void, and to "provide these couples an opportunity to demonstrate that their marriages are not same-sex marriages" before canceling their marriage records. (Maj. opn., *ante*, at pp. 1118-1119; see also *id.*, at p. 1117.) This procedure may prevent the city from mistakenly deleting the records of heterosexual marriages, but it cannot benefit any same-sex couple. Notice after the [**510] fact that one's rights have been adjudicated is not due process.

The majority attempts to justify the procedural shortcuts it is taking by invoking the rule that '[a] marriage prohibited as ... illegal and declared to be "void" or "void from the beginning" is a legal nullity and its validity may be asserted or shown in any proceeding in which the fact of marriage may be material.' " (*Estate of Gregorson* (1911) 160 Cal. 21, 26 [116 P. 60], quoted in maj. opn., *ante*, at p. 1114, italics omitted.) But that rule, until today, has permitted persons other than spouses to challenge the validity of a marriage *only as and when necessary to resolve another issue in the case*, for example, the legitimacy of an heir's claim to property or an assertion of marital privilege. In essence, the *Gregorson* rule simply recognizes that a litigant whose claim or defense depends on the validity or invalidity of a marriage may introduce evidence to prove the point. n3 We have never held that this type of collateral attack on a marriage has any binding effect on *nonparties* to the [*1136] action. A court's refusal in the course of a criminal trial to recognize a claim of marital privilege, for example, does not compel the State Office of Vital Records to destroy a record of the marriage. The majority asserts that the question of the existing marriages' validity or invalidity is material because it is "*central to the scope of the remedy that may and should be ordered in this case.*" (Maj. opn., *ante*, at p. 1114, italics added.) But this is just another way of saying the question is material because the Attorney General has asked us to decide it. With this reasoning, the majority assumes the conclusion and converts the *Gregorson* rule into a pretext for denying fundamental fairness.

n3 For example, *Estate of Elliott* (1913) 165 Cal. 339, 343 [132 P. 439] (decedent's daughter may challenge purported marriage of decedent to person seeking appointment as administrator); *Estate of Stark* (1941) 48 Cal. App. 2d 209, 215-216 [119 P.2d 961] (heirs may challenge marriage of decedent's parents to show that other purported heirs were illegitimate and, thus, lack standing to contest the will); *People v. Little* (1940) 41 Cal. App. 2d 797, 800-801 (the People in a criminal case may challenge defendant's marriage to an alleged coconspirator in order to avoid the rule that spouses cannot commit the crime of conspiracy); *People v. MacDonald* (1938) 24 Cal. App. 2d 702, 704-705 [76 P.2d 121] (the People in a criminal case may challenge defendant's marriage to a witness in order to defeat a claim of spousal privilege); *People v. Glab* (1936) 13 Cal. App. 2d 528, 535 [57 P.2d 588] (same).

II.

I also do not join in the majority's unnecessary, wide-ranging comments on the respective powers of the judicial and executive branches of government.

The ostensible occasion for the majority's comments--a threat to the rule of law (maj. opn., *ante*, at pp. 1068, 1119-1120) [***287] -- seems an extravagant characterization of recent events. On March 11, 2004, when we assumed jurisdiction and issued an interim order directing San Francisco officials to cease licensing same-sex marriages, those officials immediately stopped. Apparently the only reason they had not stopped earlier is that the lower courts had denied similar applications for interim relief. While city officials evidently understood their oaths of office as commanding obedience to the Constitution rather than to the marriage statutes they believed to be unconstitutional, those officials never so much as hinted that they would not respect the authority of the courts to decide the matter. Indeed, not only did our interim order meet with immediate, unreserved compliance by city officials, but the same order apparently sufficed to recall to duty any other public officials who might privately have been thinking to follow San Francisco's lead. In the meantime, not one of California's 58 counties or over 400 municipalities has licensed a same-sex marriage.

Under these circumstances, I see no justification for asserting a broad claim of power over the executive branch. Make no mistake, the majority does assert such a claim by holding that executive officers must follow statutory rather than constitutional law until a court gives them permission in advance to do otherwise. For the judiciary to assert such power over the executive branch is fundamentally misguided. As the high court [**511] has explained, "[i]n the performance of assigned constitutional duties *each branch of the Government must initially interpret the Constitution*, and the interpretation of its powers by any branch is due great respect from the others." (*United States v. Nixon* (1974) 418 U.S. 683, 703 [41 L. Ed. 2d 1039, 94 S. Ct. 3090], italics added.) To recognize that an executive officer has the practical freedom to act based on an interpretation of the Constitution that may ultimately prove to be wrong [*1137] does not mean the rule of law has collapsed. So long as the courts remain open to hear legal challenges to executive conduct, so long as the courts have power to enjoin such conduct pending final determination of its legality, and so long as the other branches acknowledge the courts' role as " 'ultimate interpreter of the Constitution' " (*id.*, at p. 704, quoting *Baker v. Carr* (1962) 369 U.S. 186, 211 [7 L. Ed. 2d 663, 82 S. Ct. 691]) in matters properly within their jurisdiction, no genuine threat to the rule of law exists. San Francisco's compliance with our interim order eloquently demonstrates this.

Furthermore, a rule requiring an executive officer to seek a court's permission before declining to comply with an apparently unconstitutional statute is fundamentally at odds with the separation of powers and, in many cases, unenforceable. The executive branch is necessarily active, managing events as they occur. The judicial branch is necessarily reactive, waiting until invited to serve as neutral referee. The executive branch does not await the courts' pleasure. A rule to the contrary, though perhaps enforceable against local officials in some cases, will be impossible to enforce against executive officers who exercise a greater share of the state's power, such as a Governor or an Attorney General. By happy tradition in this country, executive officers have generally acquiesced in the judicial branch's traditional claim of final authority to resolve constitutional disputes. (*Marbury v. Madison* (1803) 5 U.S. 137, 176 [2 L. Ed. 60]; see also *United States v. Nixon, supra,* 418 U.S. 683, 703.) But a court can never afford to forget that the judiciary "may truly be said to have neither Force nor [***288] Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." (Hamilton, The Federalist No. 78 (Willis ed. 1982) p. 394.) Accordingly, we are ill advised to announce categorical rules that will not stand the test of harder cases.

The majority acknowledges that "legislators and executive officials may take into account constitutional considerations in making discretionary decisions within their authorized sphere of action--such as whether to enact or veto proposed legislation or exercise prosecutorial discretion." (Maj. opn., *ante*, at p. 1068.) But the majority views executive officers exercising "ministerial" functions as statutory automatons, denied even the scope to obey their oaths of office to follow the Constitution. (*Ibid.*) Contrary to the majority, I do not find the purported distinction between discretionary and ministerial functions helpful in this context. Were not state officials performing ministerial functions when, strictly enforcing state segregation laws in the years following *Brown v. Board of Education* (1954) 347 U.S. 483 [98 L. Ed. 873, 74 S. Ct. 686], they refused to admit African-American pupils to all-White schools until the courts had applied *Brown*'s decision about a Kansas school system to each state's law? We formerly believed that school officials' oaths of office to obey the Constitution had sufficient gravity in such cases to permit them to obey the higher law, even *before* the courts had [*1138] spoken state by state. (*Southern Pac. Transportation Co. v.*

Public Utilities Com. (1976) 18 Cal.3d 308, 311, fn. 2 [3d par.] [134 Cal. Rptr. 189, 556 P.2d 289].) So, too, did the United States Supreme Court. (*Cooper v. Aaron* (1958) 358 U.S. 1, 18-20.) Today, in contrast, the majority equivocates on this point (see maj. opn., *ante*, at pp. 1102-1104) and writes that "a public official 'faithfully upholds the Constitution by complying with the mandates of the Legislature, leaving to courts the decision whether those mandates are invalid' " (*id.*, at p. 1100, quoting *Southern Pac. Transportation Co. v. Public Utilities Com., supra,* at p. 319 (conc. & dis. opn. of Mosk, J.)). But [**512] as history demonstrates, however convenient the majority's view may be in dealing with subordinate officers within a governmental hierarchy, that view is not entirely correct.

The majority's strong view of judicial power over the executive branch leads it to suggest, albeit without actually so holding, that a state may properly condition on advance judicial approval its executive officers' duty to obey even the *federal* Constitution. The majority writes, for example, that "[t]he city has not cited any case holding that the federal Constitution prohibits a state from defining the authority of a state's executive officials in a manner that requires such officials to comply with a clearly applicable statute unless and until such a statute is judicially determined to be unconstitutional" (maj. opn., *ante*, at p. 1110), and that " 'the power of a public officer to question the constitutionality of a statute as an excuse for refusing to enforce it ... *is a purely local question*' [citation]--that is, purely a question of state (not federal) law" (*id.*, at pp. 1111-1112, quoting *Smith v. Indiana* (1903) 191 U.S. 138, 148 [48 L. Ed. 125, 24 S. Ct. 51], italics in maj. opn.). n4

n4 In *Smith v. Indiana, supra,* 191 U.S. 138, the high court held only that it would not necessarily recognize a state official's *standing* to challenge a state law on federal grounds. (See *id.*, at pp. 148-150.) Even on this narrow point, *Smith* has not been consistently followed. (See *Board of Education v. Allen* (1968) 392 U.S. 236, 241, fn. 5 [20 L. Ed. 2d 1060, 88 S. Ct. 1923] [local school officials permitted to challenge under the federal Constitution a state statute requiring them to purchase and loan textbooks to parochial school pupils]; *Coleman v. Miller* (1939) 307 U.S. 433, 438 & fn. 3 [83 L. Ed. 1385, 59 S. Ct. 972] [state legislators permitted to challenge under the federal Constitution state's procedures for recording votes on constitutional amendments]; cf. *id*., at p. 466 (separate opn. of Frankfurter, J., citing *Smith*); *Akron Board of Ed. v. State Board of Ed. of Ohio* (6th Cir. 1974) 490 F.2d 1285, 1290-1291, cert. den. *sub nom. State Board of Education of Ohio v. Akron Board of Education* (1974) 417 U.S. 932 [41 L. Ed. 2d 236, 94 S. Ct. 2644] [local school officials permitted to challenge under the federal Constitution state officials' decision to transfer White students from desegregated schools to all-White schools]; cf. *Akron Board of Ed. v. State Board of Ed. of Ohio, supra,* 490 F.2d at p. 1296 (conc. & dis. opn. of Pratt, J., citing *Smith*).)

[***289]

Given that respondent city officials have complied with our interim order to cease issuing same-sex marriage licenses, and that the constitutionality of the existing marriage statutes is presently under review, I consider the majority's determination to speculate about the limits of a state official's duty to obey [*1139] the federal Constitution unnecessary and regrettable. A court should not trifle with the doctrine invoked by recalcitrant state officials, in the years following *Brown v. Board of Education, supra,* 347 U.S. 483, to rationalize their delay in complying with the Fourteenth Amendment. The high court definitively repudiated this erroneous doctrine in *Cooper v. Aaron, supra,* 358 U.S. 1, 18: "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." The United States Constitution, itself, immediately commands the unqualified obedience of state officials in article VI, section 3, which declares that "all executive and judicial officers, both of the United States *and of the several states*, shall be bound by oath or affirmation, to support this Constitution ... ." (Italics added; see also *Cooper v. Aaron, supra,* 358 U.S. at pp. 19-20.)

We, as a court, should not claim more power than we need to do our job effectively. In particular, strong claims of judicial power over the executive branch are best left unmade and, if they must be made, are best reserved for cases presenting a real threat to the separation of powers--a threat that provides manifest necessity for the claim, a genuine test of the claim's validity, and a suitable incentive for caution in its articulation. None of these conditions, all of which are necessary to ensure sound decisions in hard cases, is present here.

III.

In conclusion, I agree with the majority's decision to order city officials not to license additional same-sex marriages pending resolution of the constitutional challenges to the [**513] existing marriage statutes. To say more at this time is neither necessary nor wise.

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2007 WL 1153859

Matthew v. City of Alameda

Court of Appeal, First District, Division 1, California. | April 19, 2007 | Not Reported in Cal.Rptr.3d | 2007 WL 1153859 *(Approx. 5 pages)*

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Court of Appeal, First District, Division 1, California.

Matthew MURPHY, Plaintiff and Appellant,

v.

CITY OF ALAMEDA et al., Defendants and Respondents.

No. A113144.
(Alameda County Super. Ct. No. RG-04-160042).
April 19, 2007.

Attorneys and Law Firms

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Opinion

STEIN, J.

*1 Plaintiff Matthew Murphy (Murphy) appeals from an order of the Alameda County Superior Court granting summary judgment in favor of defendants City of Alameda (City), City Council of the City of Alameda (City Council), and Planning Board of the City of Alameda. He asserts the trial court erred in concluding that a city ordinance authorizing the construction of work/live studios does not violate a city charter provision that prohibits the construction of multiple dwelling units. We conclude there was no error, and therefore, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 1973, Alameda voters approved a ballot initiative entitled "Measure A," which became part of the city charter. It provided: "There shall be no multiple dwelling units built in the City of Alameda. [¶] ... Exception being the Alameda Housing Authority replacement of existing low cost housing units and the proposed Senior Citizens low cost housing complex...." A few months later, the City Council enacted Ordinance 1693, which provided definitions of terms not defined in Measure A, and set forth how the measure would be implemented. Ordinance 1693 defined "dwelling" as "a building or portion thereof designed exclusively for residential occupancy" and "dwelling unit" as a "group of rooms, including one kitchen, a bath and sleeping quarters, designed for and not occupied by more than one family." It defined "multiple dwelling units" as a "residential building, whether a single structure or consisting of attached or semiattached structures, designed, intended or used to house, or for occupancy by, three or more families, or living groups, living independently of each other, located in districts or zones authorized therefor...."

In December 1998, the City Council adopted Ordinance 2784, authorizing the construction of work/live studios, which were defined as "a commercial or industrial unit with incidental residential accommodations occupying one or more rooms or floors in a building primarily designed and used for industrial or commercial occupancy...." Ordinance 2784 limited the construction of work/live studios to existing buildings in commercial and industrial zoning districts, and provided that no portion of any work/live studio was to be considered a "dwelling" as defined by Ordinance 1693.

Murphy challenged Ordinance 2784 on the ground that it violated Measure A. He filed a lawsuit against the City, seeking a declaration that Ordinance 2784 was "facially inoperative and void," as

well as an injunction preventing the City from implementing the ordinance. The trial court granted summary judgment in favor of defendants, holding Ordinance 2784 did not violate Measure A. Murphy filed a timely notice of appeal.

DISCUSSION

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The appellate court reviews the grant of summary judgment de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.)

A. Ordinance 2784 does not violate the "plain meaning" of Measure A.

***2** Citing dictionary definitions of the words "dwelling," "dwelling house" and "residence," Murphy asserts that Ordinance 2784 violates the "plain meaning" of Measure A because it allows the construction of multiple work/live studios, which are, by definition, "dwellings," where people reside. His claim is without merit.

A charter constitutes a city's local constitution, and city ordinances stand in the same relationship to a charter as do statutes to the state constitution. (*Porter v. City of Riverside* (1968) 261 Cal.App.2d 832, 836, 837 (*Porter*).) Thus, the same presumptions favoring the constitutionality of statutes apply to ordinances. (*Id.* at p. 837.) " 'In considering the scope or nature of appellate review in a case [concerning the validity of an ordinance] we must keep in mind the fact that the courts are examining the act of a coordinate branch of the government-the legislative-in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a factfinding body.' " (*Ratkovich v. City of San Bruno* (1966) 245 Cal.App.2d 870, 879 (*Ratkovich*).) "Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties." (*Ibid.*)

Further, unless expressly limited by its charter, a city council has plenary authority to interpret and implement charter provisions and may exercise all powers not in conflict with the California Constitution. (*Miller v. City of Sacramento* (1977) 66 Cal.App.3d 863, 867-868 (*Miller*); *Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 467-468.) The City Council's action "will be upheld by the courts unless beyond its powers, 'or in its judgment or discretion is being fraudulently or corruptly exercised.' " (*Porter, supra,* 261 Cal.App.2d at p. 836.) Thus, a party making a facial challenge to an ordinance, requesting that it be voided, must demonstrate that its provisions " 'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions .' " (*Personal Watercraft Coalition v. Marin County Bd. of Supervisors* (2002) 100 Cal.App.4th 129, 137-138 (*Personal Watercraft Coalition*).) "If reasonable minds might differ as to the reasonableness of the ordinance [citations] or if the reasonableness of the ordinance is fairly debatable [citations], the ordinance must be upheld." (*Ratkovich, supra,* 245 Cal.App.2d at p. 878.)

Alameda's charter provides that its legislative powers are vested in the City Council, and because there is no provision in the charter limiting the authority of the City Council, the City Council had full power to enact ordinances interpreting and implementing Measure A. (See *Miller, supra,* 66 Cal.App.3d at pp. 867-868.) This was especially appropriate here, where the measure consisted of just one sentence and one phrase for a total of 47 words, prohibiting the construction of multiple dwelling units in the City. Measure A was not clear as to meaning or applicability and was silent on the matter most critical to the determination of this case-the definition of "multiple dwelling units."

***3** The City Council acknowledged this problem and enacted Ordinance 1693 in which it stated: "The provisions hereof are designed to better achieve the objectives and will of the electorate, expressed at the March 13, 1973, General Municipal Election [at which Measure A was passed], ... by clarifying existing uncertainties and ambiguities as to the meaning of the phrase, 'multiple dwelling units'...." The limitations period to challenge Ordinance 1693 has long passed, as Murphy concedes, and he does not dispute that this ordinance is valid.

The City Council also had plenary power to enact Ordinance 2784, and it acted within its powers when it determined that the definition of "dwelling" did not extend to work/live studios. The City Council's conclusion that Measure A prohibited the construction of multiple dwelling units only in certain districts or zones was also valid in light of the fact that it had previously defined the term "multiple dwelling units" as a "residential building ... *located in districts or zones authorized therefor.* ..." Because the prohibition against multiple dwelling units applied only to certain districts or zones, the City Council acted reasonably in limiting the construction of work/live studios to commercial and industrial areas of the City.

Where a charter provision is ambiguous or susceptible of two or more meanings, the city council, not the court, has the authority to decide issues of interpretation and applicability. (*Porter, supra,* 261 Cal.App.2d at p. 836.) We therefore will not substitute the definitions and interpretations the City Council made in resolving the ambiguities of Measure A with Murphy's dictionary definitions that do not take into consideration the specific needs and circumstances of the City. [1] In light of the great deference we are to give to the City Council's actions, and the strong presumption of constitutionality

applied to ordinances, we conclude that Murphy has not met his burden of establishing that Ordinance 2784 is in "total and fatal conflict with applicable constitutional prohibitions." (See *Personal Watercraft Coalition, supra,* 100 Cal.App.4th at p. 138.) We therefore affirm the trial court's order.

B. Extrinsic evidence does not support Murphy's position that Ordinance 2784 violates Measure A.

Murphy asserts that "[e]ven if the Court were to believe that it needed to go behind the plain meaning of the language of Measure A," extrinsic evidence supports his claim that Ordinance 2784 violates Measure A. We disagree.

1. Ordinance 1693

Murphy asserts that Ordinance 1693 constitutes extrinsic evidence supporting his claim that Ordinance 2784 violates Measure A because (1) the definitions of "dwelling" and "dwelling unit" set forth in Ordinance 1693 support his position that work/live studios are "dwellings"; (2) Ordinance 1693 states that Measure A's prohibition against multiple dwelling units applies to the *entire city,* and not just to residential areas; and that (3) even if the prohibition applies only to residential areas, the construction of multiple work/live studios in otherwise commercial or industrial buildings converts these places into "residential" buildings, where multiple dwelling units are not allowed.

***4** We reject Murphy's argument that the definitions of "dwelling" and "dwelling unit" set forth in Ordinance 1693 support his position that Ordinance 2784 violates Measure A. The definition of a "dwelling" as "a building or portion thereof designed exclusively for residential occupancy" is not reasonably interpreted to include an individual unit within a building that is designed for residential occupancy and other uses. Further, the fact that a work/live studio contains all of the accoutrements of a "dwelling unit," such as a kitchen and a bath, does not necessarily bring work/live studios within the definition of a "dwelling unit." In any event, the City Council, in defining the term "multiple dwelling units" as residential buildings "located in districts or zones authorized therefor," made clear that the prohibition against multiple dwelling units applied only to certain districts or zones. Thus, the construction of work/live studios outside of those districts or zones is, by definition, not prohibited.

Next, as Murphy points out, Ordinance 1693 states "[t]here shall be no multiple dwelling units built in the City of Alameda." It also states the City will not issue any building permits for the construction of multiple dwelling units "within the City." However, these are restatements of what Measure A states, and do not necessarily reflect the City Council's intent to interpret the measure in a way that would make the prohibition against multiple dwelling units applicable to the entire city, or to the work/live studios that are at issue here. To the contrary, as noted above, the City Council made it clear when defining the term "multiple dwelling units" in Ordinance 1693 that the prohibition applied only to certain districts or zones.

We also reject Murphy's assertion that the construction of work/live studios, which are "dwellings," in otherwise commercial or industrial areas converts these places into residential areas to which the prohibition against multiple dwelling units applies. Because the City Council has defined "multiple dwelling units" as residential buildings "located in districts or zones authorized therefor," the fact that buildings outside of those districts contain work/live studios does not convert the buildings into residential buildings, and the districts or zones in which they are located into residential districts or zones.

2. Voter Testimony

Murphy relies on extrinsic evidence in the form of voter testimony in asserting that the construction of multiple work/live studios violates Measure A. He claims the voters intended and understood the phrase "dwelling unit" to encompass any space in which people resided, and expected the prohibition would apply to the entire city. This argument is without merit.

Because different voters make their decisions for various subjective reasons, often not shared or even known by others, courts generally do not rely on the subjective intent of voters, or even the drafters, of an initiative proposal. (See *Carman v. Alvord* (1982) 31 Cal.3d 318, 331, fn. 10 [drafter's after-the-fact explanation of intent does not explain how voters understood the provision].) Expressions of individual motivation made "after-the-fact ... may deserve some consideration [citation]; but by no means does it govern our determination how the voters understood the ambiguous provisions." (*Ibid.*)

***5** Here, the recollections of several individual residents as to what their intent was when they supported Measure A in 1973 do not prove the meaning of undefined terms of Measure A, nor do they reflect the intent of the electorate generally. Their testimony also cannot replace the City Council's interpretations as to the meaning of Measure A. Thus, we reject Murphy's claim that voter testimony supports his position that Ordinance 2784 violates Measure A.

3. Other City Ordinances

Murphy relies on rent control ordinances from other cities that classify work/live studios as "residential" in asserting that work/live studios are "dwellings" and that the construction of work/live

studios thus violates Measure A. We conclude the trial court properly excluded these documents from evidence on the basis they were irrelevant, as there is nothing in the record indicating the City Council used or relied on these ordinances when enacting Ordinance 2784, and neither Measure A nor the ordinances makes any reference to any of the other city ordinances. We therefore need not address the issue of whether these city ordinances support Murphy's position.

C. Health and Safety Code section 17958.11 does not support Murphy's position, and in fact, specifically authorizes the City to convert commercial and industrial buildings into work/live studios.

Murphy asserts that Health and Safety Code section 17958.11, enacted after Measure A was passed, supports his position that Ordinance 2784 violates Measure A because the statute refers to work/live studios as a "residential occupancy." To the contrary, the statute supports the City's position, as it specifically *authorizes* the conversion of commercial and industrial buildings into work/live studios. It provides: "Any city or county may adopt alternative building regulations for the conversion of commercial or industrial buildings, or portions thereof, to joint living and work quarters." (Health & Saf.Code, § 17958.11, subd. (a).)

Noting that many manufacturing and commercial buildings in urban areas had lost their tenants to more modern premises, the Legislature in enacting Health and Safety Code section 17958.11 declared: "[T]he untenanted portions of such buildings constitute a potential resource capable, when appropriately altered, of accommodating joint living and work quarters which would be physically and economically suitable particularly for use by artists, artisans, and similarly-situated individuals." (Health & Saf.Code, § 17958.11, subd. (b).) Although it referred to these joint living and work quarters as residential spaces, it also made clear that the residential use of these units was "accessory to the primary use of such a space as a place of work," and that these units were to be constructed only in commercial or industrial districts. (Health & Saf.Code, § 17958.11, subd. (c).) Thus, the statute not only authorizes the City to enact an ordinance such as Ordinance 2784, but it also provides support for the City's position that its City Council acted reasonably in distinguishing between residential units constructed as "dwellings" in residential zones, and work/live studios designed primarily for commercial or industrial uses in nonresidential zones. The statute does not support Murphy's position that Ordinance 2784 violates Measure A.

DISPOSITION

***6** The trial court's order is affirmed. Defendants shall recover their costs on appeal.

We concur: MARCHIANO, P.J., and SWAGER, J.

All Citations

Not Reported in Cal.Rptr.3d, 2007 WL 1153859

Footnotes

1 We also conclude that the dictionary definitions of the words "dwelling," "dwelling house" and "residence" submitted by Murphy do not show there is a conflict between Ordinance 2784 and Measure A.

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Salmon Trollers Marketing Assn. v. Fullerton (1981)

[Civ. No. 50021. Court of Appeals of California, First Appellate District, Division Four. October 6, 1981.]
SALMON TROLLERS MARKETING ASSOCIATION, INC., et al., Plaintiffs and Respondents, v. E. C. FULLERTON, as Director, etc., Defendant and Appellant.

(Opinion by McCullum, J., with Caldecott, P. J., and Poche, J., concurring.)

COUNSEL

George Deukmejian, Attorney General, R. H. Connett, Assistant Attorney General, and Denis D. Smaage, Deputy Attorney General, for Defendant and Appellant.

James L. Larson for Plaintiffs and Respondents.

OPINION

McCULLUM, J.

This is an appeal by the Director of Fish and Game of the State of California, E. C. Fullerton (Director), from a judgment granting a writ of mandate and an injunction, issued by the Superior Court of Mendocino County in favor of Salmon Trollers Marketing Association, Inc., which consists of commercial salmon fishermen licensed to fish in the territorial waters of California. The Director had closed the commercial salmon fishing season for short terms during 1980, by emergency regulations adopted upon the authority of Fish and Game Code, section 7652. The trial court invalidated the emergency closures on the ground that section 7652 was an unconstitutional delegation of legislative power to the Director.

For the reasons set forth, we find that section 7652 of the California Fish and Game Code is valid and constitutional as enacted and applied. Therefore we reverse.

In April 1976, Congress enacted the Fishery Conservation and Management Act of 1976 (16 U.S.C. § 1801 et seq.) to conserve and manage fishery resources in a "fishery conservation zone" extending from 3 miles offshore to 200 miles offshore. The Secretary of Commerce was authorized to adopt regulations based on "fishery management plans" to be developed by regional "fishery management councils." The regional council for the area off the coast of Washington, Oregon, and California is the Pacific Fishery Management Council composed of 13 members of whom 3 (including the Director) are from California. fn. 1 California's **[124 Cal. App. 3d 296]** "state ... boundaries" include, along its Pacific shore, a zone extending three miles seaward. (People v. Weeren (1980) 26 Cal. 3d 654, 660-666 [163 Cal. Rptr. 255, 607 P.2d 1279].)

In September 1976, the California Legislature added to the Fish and Game Code a new article, beginning with section 7650, entitled "Federal Regulation." (Stats. 1976, ch. 1160.) fn. 2 **[124 Cal. App. 3d 297]**

In 1977, 1978, and 1979 the Department of Commerce regulated the salmon fishery in the Pacific Coast fishery conservation zone on the basis of a fishery management plan adopted and thereafter from time to time amended by the Pacific Fishery Management Council. (45 Fed.Reg. 29250(May 1, 1980).) The 1979 regulations imposed "more restrictive management measures" in light of a perceived salmon shortage. For 1980 the Pacific Fishery Management Council proposed even more restrictive amendments on the basis of findings that "many of the [salmon] stocks continue to be depressed as they were in 1979 and that their future productivity will be in serious jeopardy if ocean harvests are not reduced." On April 29, 1980, the Department of Commerce enacted the more restrictive regulations on an emergency basis in light of "the critical needs for reductions in the ocean harvests of these salmon stocks." (Id, at pp. 29252-29253.)

At all relevant times California's statutory commercial salmon seasons have been May 15 to September 30 for silver salmon and April 15 to September 30 for all other types of salmon. (Fish & G. Code, §§ 8210.2, 8210.3.) The effect of the federal emergency regulations was to close the commercial salmon season in the fishery conservation zone off the California coast between June 1 and June 30, 1980, south of Cape Vizcaino and between June 1 and July 15, 1980, north of that point. (45 Fed.Reg. 29250, 29251, 29253 (May 1, 1980).)

On May 28, 1980, Director responded to the federal regulations by filing emergency regulations prefaced by a statement of "specific facts constituting the need for immediate action" (Gov. Code, § 11346.1) which recited in part: "Drought conditions in 1976 and 1977 reduced the survival of juvenile salmon produced in those years. Adult salmon populations available to the 1980 fisheries will be depressed. In order to assure adequate numbers of spawning fish, fishing effort in 1980 must be reduced. Specific regulations to achieve the required resource protection are contained in the "Proposed Plan for Managing the 1980 Salmon Fisheries off the Coasts of California, Oregon and Washington," prepared by the Pacific Fishery Management Council. [¶] Pursuant to Section 7652 of the Fish and Game Code, the following **[124 Cal. App. 3d 298]** commercial salmon fishing regulation changes for the 1980 season are necessary to conform California laws to those adopted by the Pacific Fishery Management Council and approved by the Secretary of Commerce."

The California emergency regulations themselves sought to effect the same closures within California's three-mile limit as the federal emergency regulations had established outside the three-mile limit. (Cal.Admin.Code, tit. 14, former § 182 (replaced July 11, 1980: Cal.Admin.Reg. 80, No. 28).)

On June 20, 1980, plaintiff Salmon Trollers Marketing Association (hereinafter Salmon Trollers) sought injunctive and declaratory relief and a peremptory writ of mandate. After hearing, the superior court granted a peremptory writ of mandate and an injunction ordering the Director to annul and rescind the regulations and enjoining the Director from enforcing them.

The Director contends on appeal that the issuance of the emergency regulations and closure of the salmon fishing season was constitutional and valid pursuant to the enactment of Fish and Game Code sections 7650 to 7653. Respondent Salmon Trollers contends that section 7652 constitutes an unlawful delegation of legislative power and fails to afford substantive due process to Salmon Trollers.

By their own terms the California emergency regulations expired by the end of September 1980. The Salmon Trollers moved to dismiss this appeal as moot. The Director opposed the motion on the ground that the question of the validity of section 7652 will recur and is of substantial public interest. [1] "It is now established law that where ... issues on appeal affect the general public interest and the future rights of the parties, and there is reasonable probability that the same questions will again be litigated and appealed, an appellate court may, although the appeal be subject to dismissal, nevertheless adjudicate the issues involved." (People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 468 [89 Cal. Rptr. 290].) This court denied Salmon Trollers' motion to dismiss.

[2a] Salmon Trollers contends that section 7652 violated the constitutional doctrine of separation of powers in California Constitution, article III, section 3, in that it purported to delegate legislative functions **[124 Cal. App. 3d 299]** to an executive agency. fn. 3 The validity of a legislative body's delegation of powers to another agency was recently reviewed by this court in Groch v. City of Berkeley (1981) 118 Cal. App. 3d 518 [173 Cal. Rptr. 534] and the general principles set forth in that case are applicable to the case at bench. [3] "A legislative body such as a city council may properly delegate powers to an administrative body such as the board of adjustments if (1) the legislative body retains control over the power to make fundamental policy decisions, and (2) the procedure established for the exercise of delegated power adequately safeguards those affected. [Citation.] ... [¶] ... 'Once the legislative body has determined the issue of policy ... the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation.'" (Groch v. City of Berkeley, supra, 118 Cal. App. 3d 518, 522-523, citingKuglar v. Yocum (1968) 69 Cal. 2d 371, 377 [71 Cal. Rptr. 687, 445 P.2d 303].) These principles have often been spelled out in more detail. (E.g.,Kuglar v. Yocum, supra;Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-819 [114 Cal. Rptr. 577, 523 P.2d 617]; City of Santa Ana v. City of Garden Grove (1979) 100 Cal. App. 3d 521, 529 [160 Cal. Rptr. 907].) The basic precept is "the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy and that it must determine crucial issues whenever it has the time, information and competence to deal with them." (Clean Air Constituency v. California State Air Resources Board, supra, 11 Cal. 3d 801, 817.) The concept of the Legislature as the ultimate policymaker is basic to the separation of powers. (Cal. Const., art. III, § 3, art. IV, § 1.)

[4] A legislative act is presumed to be constitutional. "Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity." (5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 43, p. 3281.)

[5] "The doctrine prohibiting delegation of legislative power rests on the premise that the Legislature may not abdicate its responsibility to resolve the 'truly fundamental issues' by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policies. (Kugler v. Yocum [1968] 69 Cal. 2d 371, 376-377 **[124 Cal. App. 3d 300]** ....) Where the Legislature has made the fundamental policy decisions and delegated to some other body the task of implementing those policies under adequate safeguards, there is no violation of the doctrine of nondelegability of legislative power." (City of Santa Ana v. City of Garden Grove, supra, 100 Cal. App. 3d 521, 529; see also People ex rel.Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 507 [96 Cal. Rptr. 553, 487 P.2d 1193];Kugler v. Yocum, supra, at pp. 375-377.)

Because the Legislature by its very nature must frequently delegate authority to administrative officers, courts are understandably reluctant to interfere with such delegations. Rather, delegation by the Legislature is viewed as a positive and beneficial way to implement legislation. (See First Industrial Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 549 [159 P.2d 921].)

[2b] Reviewing sections 7650-7653, it is clear that adequate standards are set forth to guide the Director as he implements the basic policy decision already made by the Legislature. It is legislative judgment that the state shall fully cooperate and assist in the formulation of fishery management plans adopted by the council. A basic policy determination has also been made to support the fishery management plan once adopted by the council. This support is to be carried out by the Director, when necessary, by suspending inconsistent statutes or regulations temporarily and adopting consistent regulations effective up to 180 days only. In the meantime, the Legislature clearly intends to consider conforming California statutory law to fishery management plans adopted by the council (Fish & G. Code, § 7653), based on the Director's report to the Legislature as to which statutes should be amended, repealed or adopted. (Fish & G. Code, § 7653.) A lasting and underlying policy decision is that the Legislature has determined to continue state jurisdiction over its fisheries within three miles offshore by avoiding conflict with the federal fishery plan. (Fish & G. Code, § 7652.) These are fundamental policy determinations made by the Legislature and not by the Director of Fish and Game.

The Director is given the task of carrying out this policy by formulating fishery plans in cooperation with the Pacific Fishery Management Council. The Director is also instructed to temporarily conform state statutes if necessary to avoid a substantial adverse impact on the Pacific Fishery Management Council's plan. These are tasks of a type usually left in the hands of administrators. Formulating a fishery management **[124 Cal. App. 3d 301]** plan requires expertise, biological data collection and evaluation, and consultation with the commercial fishing industry. The Legislature may properly delegate these duties to an administrator. A determination that a particular state statute will or will not have substantial adverse effect on a federal fishery plan requires biological expertise, experience in the peculiar problems of fishery law enforcement, and an understanding of marketing practices. The Legislature has set out the basic policy guidelines. The standards are clear.

Sufficient safeguards are specified in the statute: The Director's authority to adopt regulations which conform to the federal fishery plan is limited to 180 days and the Director must immediately report such adoption to the Legislature and identify those statutes or other regulations which need modification, repeal or adoption. Reservation of this authority by the Legislature to itself is a significant "safeguard adequate to prevent ... abuse" of the delegated authority. (Kugler v. Yocum, supra, 69 Cal. 2d 371, 376.)

In Kugler an ordinance of the City of Alhambra, which sets the salaries of firemen to be not less than those for the City of Los Angeles and the County of Los Angeles, was challenged. The Supreme Court upheld the ordinance against a challenge of invalid delegation of legislative power, stating: "The criteria set up by the proposed enactment reasonably relate to the fulfillment of the legislative purposes. If an external private or governmental body will be involved in the application of the legislative scheme, it must be an agency that the Legislature can expect will reasonably perform its function. If, for instance, the statute provides that salaries are to be adjusted to future changes in the cost of living, the legislation must designate a body, such as the United States Department of Labor, which may be expected to reasonably perform the function of ascertaining the cost of living ...." (Kugler v. Yocum, supra, at p. 382; italics added.) Here, to the extent that decisions of the Federal Pacific Fishery Management Council will necessarily influence the Director's decisions, it is clear that the Pacific Fishery Management Council can be expected reasonably to perform its function.

[6] As a general rule regulations enacted by an agency exercising delegated powers "must conform to the legislative will if we are to preserve an orderly system of government" (Morris v. Williams (1967) 67 Cal. 2d 733, 737 [63 Cal. Rptr. 689, 433 P.2d 697]) and hence, for example, may not validly conflict with the enabling statute (Gov. Code, § 11342.2). But several California cases make clear that if it is the "legislative **[124 Cal. App. 3d 302]** will" that an agency have power to render legislative acts inoperative in one sense or another, such delegation will be valid so long as the usual conditions of valid delegation--retention of control over "fundamental policy decisions" and appropriate standards and safeguards for exercise of the delegated power--are met. Given a clear legislative articulation of fundamental policy and appropriate standards and safeguards it has been held that the Legislature

may validly delegate authority to determine whether and where a statutory regulatory plan should go into effect (Ray v. Parker (1940) 15 Cal. 2d 275, 284-286 [101 P.2d 665]; Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 620, 641-644 [91 P.2d 577]; Dept. Pub. Health v. Board of Supervisors (1959) 171 Cal. App. 2d 99, 104-105 [339 P.2d 884]) or to delay the effective date of statutory provisions enacted by the Legislature on an urgency basis to protect the public health (Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-819 [114 Cal. Rptr. 577, 523 P.2d 617]).

The trial court in its memorandum of decision also declared section 7652 to be "too broad" in that it granted power to the Director to suspend or affect other codes (e.g., Water, Civil Procedure, Public Resources, Penal), in addition to the Fish and Game Code. First, the only test here is whether a basic policy decision has been made by the Legislature. If in fact the Legislature has made a determination that statutes other than those pertaining to fishing may be suspended it clearly has the power to do so. Second, whether the Legislature did intend to address statutes outside of the Fish and Game Code is a matter of statutory interpretation, but in any event that question is not ripe for adjudication. The facts of this case do not involve a suspension of a statute in some other code not pertaining to fishing. "The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court." (People ex rel.Lynch v. Superior Court (1970) 1 Cal. 3d 910, 912 [83 Cal. Rptr. 670, 464 P.2d 126].) "Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests, we have consistently refused to give." (United States v. Fruehauf (1961) 365 U.S. 146, 157 [5 L. Ed. 2d 476, 483, 81 S. Ct. 547].)

Salmon Trollers contends that the procedure set forth in section 7710 of the Fish and Game Code was controlling in this case. Section 7710 **[124 Cal. App. 3d 303]** was enacted in 1974, two years prior to the adoption of the Federal Fishery Conservation and Management Act of 1976, and two years prior to the California legislation in response to the federal act, which is here challenged. The fact that the Director has other regulatory powers under other statutes does not affect the validity of the statutory scheme set forth in article 1.5, sections 7650-7653, Fish and Game Code.

[7] Salmon Trollers suggests that sections 7650-7653 are invalid because they contain no provision for public hearing. But clearly the Director's rule-making function is subject to the broad provisions of the Government Code chapter establishing an Office of Administrative Law. (Gov. Code, §§ 11340-11351; cf. Gov. Code, §§ 11342, 11343, 11346.1.) The record shows that an adequate declaration of emergency was made and that time restraints required immediate action in order to comply with the legislative mandate of section 7652. No hearing is required prior to the adoption of emergency regulations. (Gov. Code, § 11346.1.) The requirement of a later confirmation hearing became moot when the Director was compelled to withdraw the regulation by the trial court's writ of mandate.

The court below did not make a determination whether an emergency existed and based its ruling solely on its determination that section 7652 was unconstitutional. Thus, whether an emergency existed is not an issue on this appeal. Furthermore, no purpose would be served at this time by remanding the cause to the trial court for determination of whether a sufficient factual basis existed in 1980 for the exercise of emergency powers. The 1980 emergency regulations have by their own terms now expired and any future regulation would be based on facts existing at the time of its adoption.

In support of its substantive due process argument, Salmon Trollers contends that "[t]he director's construction of Section 7652 as mandating the enactment of whatever federal regulatory fishery management scheme might thereafter be enacted, however unwise or unsupported by evidence sufficient to meet the requirements of section 7710 of the Fish and Game Code, combined with his use of emergency powers herein, deprived petitioners of substantive due process in exposing them to arbitrary administrative action carried out under an unlawful delegation of legislative power."

What the Director might or might not have thought or done in arriving at the conclusion that he should suspend the salmon season is not **[124 Cal. App. 3d 304]** before this court. The question is whether the statute on its face afforded sufficient standards and safeguards. [8] "Substantive due process ... deals with protection from arbitrary legislative action, even though the person whom it is sought to deprive of his right to life, liberty or property is afforded the fairest of procedural safeguards. In substantive law such deprivation is supportable only if the conduct from which the deprivation flows is prescribed by reasonable legislation reasonably applied, i.e., the law must not be unreasonable, arbitrary or capricious but must have a real and substantial relation to the object sought to be attained." (Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 21 [94 Cal. Rptr. 904]; cf. 5 Witkin, Summary of Cal. Law (8th ed. 1974) Constitutional Law, § 279, pp. 3569-3570.) It is said that "[i]ndefiniteness in statutory terminology may be tested as an invalid delegation of power as well as a denial of due process." (Wotton v. Bush (1953) 41 Cal. 2d 460, 468 [261 P.2d 256].) But here the

standard of definiteness would be the same under either test; if section 7652 is constitutional under a delegation analysis it also affords substantive due process.

Salmon Trollers' contention that under section 7652, as contrasted to section 7710, they were denied a public hearing at which they might have presented evidence to demonstrate that there was no emergency and that no closure was required misconceives the issue. Section 7652 adequately incorporates the administrative rule-making provisions of the Government Code, which in turn gave Salmon Trollers various ways to be heard. Salmon Trollers chose judicial review and obtained a hearing but then elected not to submit evidence. They had an adequate opportunity to be heard under section 7652 and the extent of the hearing was determined by their election. They should not now complain.

We conclude that Fish and Game Code section 7652 offends neither the separation of powers clause nor the due process clause.

The judgment is reversed.

Caldecott, P. J., and Poche, J., concurred.

FN 1. Included in the federal act is the following provision with respect to state jurisdiction: "(a) In general.--Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State. [¶] (b) Exception.--(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, that--[¶] (A) the fishing in a fishery, which is covered by a fishery management plan implemented under this chapter, is engaged in predominately within the fishery conservation zone and beyond such zone; and [¶] (B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan; [¶] the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan. [¶] (2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation." (16 U.S.C. § 1856.)

FN 2. The article reads in full as follows: "7650. As used in this article: [¶] (a) 'Act' means the Federal Fishery Conservation and Management Act of 1976 (16 U.S.C. 1801 et seq.). [¶] (b) 'Council' means the Pacific Fishery Management Council established pursuant to the act. [¶] (c) 'Secretary' means the Secretary of Commerce of the federal government. [¶] 7651. The director shall formulate such fishery management plan or plans as are necessary to meet the needs of the council in preparing a fishery management plan, or amendment thereto. [¶] 7652. Upon the approval of the secretary of a fishery management plan, or amendment thereto, prepared by the council pursuant to the act or a plan prepared by the secretary, the director may do the following to conform state law or regulations of the commission to the fishery management plan, or amendment thereto, of the council or the secretary to avoid a substantial and adverse effect on such plan by such state law or such regulations as necessary to continue state jurisdiction pursuant to Section 1856 of the act: [¶] (a) Adopt regulations that would make inoperative for up to 180 days any statute or regulation of the commission including, but not limited to, statutes or regulations regulating bag limits, methods of take, and seasons for taking of fish for commercial purposes. [¶] Any regulation adopted by the director pursuant to this subdivision shall specify the particular statute or regulation of the commission to be inoperative. [¶] (b) Adopt regulations effective for up to 180 days governing phases of the taking of fish for commercial purposes which are not presently regulated by statute or regulation of the commission. [¶] (c) Adopt regulations effective for up to 180 days governing phases of the taking of fish for commercial purposes which are presently regulated by statute or regulation of the commission, only if such statutes or regulations are made inoperative first pursuant to subdivision (a) for the effective period of the regulations adopted by the director. [¶] 7653. Upon the adoption of any regulations pursuant to Section 7652, the director shall report to the Legislature which statutes or regulations of the commission need to be amended or repealed, and any regulations adopted by the director that need to be enacted as statutes, to conform state law to any fishery management plan, or amendment thereto, that has been approved by the secretary to avoid any substantial and adverse effect on such plan, or its amendments, by such state law." (Fish & G. Code, §§ 7650-7653.)

FN 3. Article III, section 3, provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

Whitmire v. City of Eureka

[Civ. No. 30052. Court of Appeals of California, First Appellate District, Division Two. November 30, 1972.]
WAYNE R. WHITMIRE et al., Plaintiffs, Cross-defendants and Appellants, v. CITY OF EUREKA, Defendant, Cross-complainant and Respondent

(Opinion by Kane, J., with Taylor, P. J., and Rouse, J., concurring.)

COUNSEL

Robert W. Hill for Plaintiffs, Cross-defendants and Appellants.

Melvin S. Johnsen, City Attorney, for Defendant, Cross-complainant and Respondent. **[29 Cal. App. 3d 30]**

OPINION

KANE, J.

This case is yet another installment in the herky-jerky development of a viable comprehensive retirement system for firemen and policemen employed by the City of Eureka.

Historical Background

In order to isolate and explain our resolution of the fundamental issue here involved it is necessary to briefly outline the legislative and judicial history pertaining to the Firemen's and Policemen's Retirement Fund System of the City of Eureka ("System").

The System was first established in 1943 by Ordinance No. 2262 enacted by the voters of the city. Under the provisions of this ordinance, a commission ("Commission") consisting of the president of the city council, the city treasurer, the chief engineer of the fire department, the chief of the police department, and one member elected from each of the departments, i.e., police and fire, was created "for the purpose of supervising the funds" and was charged with the duty of providing "for the collection and disbursement of the Fund and to designate the Beneficiaries thereof, as hereinafter provided, and to establish rules and regulations not inconsistent therewith."

Section 16 of the ordinance, which is pertinent in this appeal, provided as follows: "This Ordinance, in order to effect improvements and efficiently carry into effect the purposes hereof and supply provisions hereof that may not be herein contained to cause the purposes to be carried into effect, may be amended in the following manner, to wit:

"That any proposed improvement or amendment shall be voted upon by secret ballot in the Fire Department and Police Department, separately, and the results thereof certified to the City Council. That in the event such proposed amendment shall have passed by a majority vote by each said Fire and Police Department, then if the Council, by a majority vote, shall pass such proposed amendment, the same shall become effective and binding." fn. 1

In 1960, pursuant to a request from the Commission, the city engaged the services of professional actuaries to conduct an investigation and evaluation of the retirement fund. The result of this survey showed that as of March 31, 1960 the System had an unfunded liability of $1,241,395.

A second actuarial study estimated the unfunded liability to be $2,742,899 **[29 Cal. App. 3d 31]** as of October 31, 1964. This prompted the city council to establish a "Citizens Committee to Study the Firemen's and Policemen's Retirement Fund System." In its report dated August 11, 1965 the committee expressed its opinion and recommendations as follows: "It is the unanimous opinion of the Committee that the present Firemen's and Policemen's Retirement Fund System is economically unsound. Continuation of the plan will lead to financial disaster.

"It is the unanimous recommendation of the Committee that the Council immediately take all necessary steps to cause the repeal of the present plan and thereafter to institute a substitute plan, either the plan offered by the State Retirement Fund System or a private insurance plan.

"The Committee has been advised that the vested rights of Eureka's firemen and policemen in the present plan will not be affected by the abolishment of the plan. The purpose of a new plan would be to meet the financial threat to the City created by the hiring of firemen and policemen in the future."

Following receipt of the citizens' committee report, a special referendum election for January 18, 1966 was called on the proposition to repeal Ordinance No. 2262 as to new employees only. The proposed repeal was defeated.

The next significant developments were two court decisions -- Estes v. City of Richmond (1967) 249 Cal. App. 2d 538 [57 Cal. Rptr. 536], and Bellus v. City of Eureka (1968) 69 Cal. 2d 336 [71 Cal. Rptr. 135, 444 P.2d 711].

Estes upheld the validity of a city ordinance placing future firemen and policemen under the state retirement system rather than under the system established by the city charter.

In Bellus the Supreme Court concluded that payment of retirement benefits is a general obligation of the city and is not limited to matching the contributions of members of the fund.

In November 1968, a third actuarial study was authorized by the city council. The report covering this study estimated the unfunded liability as of June 30, 1968 to be $3,373,841.

Following receipt of this report the city adopted the two ordinances which are the subjects of this action and cross-action for declaratory relief.

Appellants Whitmire, a member of the city's police department, and Figas, a member of the city's fire department, filed this action challenging the validity of Ordinance 135-C.S. adopted November 19, 1969, which, among other things, restructured the composition of the Commission. **[29 Cal. App. 3d 32]**

Respondent city cross-complained for declaratory relief seeking a judicial determination that Ordinances 135-C.S. and 128-C.S. fn. 2 are valid, constitutional legislative enactments and that the city has the unrestricted power and authority to amend and modify the provisions of Ordinance No. 2262.

In the court below each side moved for summary judgment. The trial court, after denying the motion of appellants and granting the city's motion, entered a judgment dismissing appellants' action and decreed the relief sought by the city in its cross-complaint. fn. 3

Delegation of Legislative Power

The crucial issue here involves consideration of the doctrine prohibiting delegation of legislative power.

The issue is framed, on one side, by appellants' argument that section 16 of Ordinance No. 2262 is the exclusive means by which amendments to the ordinance may be enacted and, on the other side, by the city's contention that unless construed as a permissive alternative procedure for amending the ordinance, section 16 is invalid and unconstitutional as an unlawful delegation of legislative power to private individuals.

For the reasons which follow, we find the city's position to be unassailable and accordingly affirm the court below.

[1] The application in California of the doctrine prohibiting delegation of legislative power was reviewed in detail by the Supreme Court in Kugler v. Yocum (1968) 69 Cal. 2d 371, at pages 375-377 [71 Cal. Rptr. 687, 445 P.2d 303]. The court noted at the outset that the doctrine is well established in California, and that it precludes delegation of the legislative power of a city (at p. 375). The court explained that the purpose behind the doctrine is that "'truly fundamental issues'" should be resolved by the legislative body, and that any grant of authority must be accompanied by "'safeguards adequate to prevent its abuse'" (at p. 376). Lacking the required safeguards, such a grant of authority is an unconstitutional delegation of legislative power.

[2] As the city points out, none of the recognized exceptions or limitations **[29 Cal. App. 3d 33]** to the application of the doctrine as set forth by the Supreme Court in Kugler are evident in section 16. Section 16 does not limit itself to a delegation of power to determine a fact or state of facts upon which the operation of the ordinance depends; rather, it delegates to a small number of private persons in the employ of the city the original control of the enactment of laws relating to the administration of the fiscal

affairs of the city and provision for maintenance of its fire and police departments and to payment of compensation for services. In effect, if section 16 is interpreted as the exclusive procedure for amending the System, any proposed action by the city council regarding the retirement fund is subject to approval or veto by the two departments' members. Since the power to approve or veto actions of a legislative body is, of course, part of the legislative process, this grant of authority must be accompanied by "'safeguards adequate to prevent its abuse'" (Kugler v. Yocum, supra, at p. 376). None exist under appellants' "exclusive remedy" interpretation, and therefore this section must be declared an unconstitutional delegation of legislative power if interpreted in that manner.

In addition, section 20 of Ordinance No. 2262 appears to negate appellants' argument. That section provides that the provisions of the ordinance shall be interpreted in conformity with the charter; and, in the event of conflict, the charter prevails. Under section 300 of the charter, the legislative power of the city is vested in the city council, subject to some exceptions not applicable here. If section 16 is interpreted as giving private individuals (members of the fire and police departments) an ultimate right to veto or approve city council actions regarding the retirement system, it would remove from the council some of its vested legislative power under the charter. Section 16, utilizing appellants' interpretation, would therefore be in conflict with the city charter and, as we have pointed out, under section 20 of the ordinance, the charter must prevail. Since the complete legislative power of the city is vested in the council by the charter, it becomes apparent that appellants' contention cannot stand.

The logic behind this conclusion is evident in light of the situation presently before us. As a result of the decision in Bellus v. City of Eureka, supra, it has been determined that Ordinance No. 2262 created a general tax liability of the City of Eureka and that consequently, any deficit in the fund must be made up from general tax revenue. Upon receiving the June 30, 1968, actuarial report which estimated the unfunded liability to be over three and a quarter million dollars, the city council recognized even more strongly that it had the responsibility to take steps whereby the taxpayers of the city could be relieved from the ever-increasing financial burden resulting from the retirement fund liability. In order to accomplish this objective **[29 Cal. App. 3d 34]** while still protecting the vested rights of those individuals already within the retirement system, the council enacted the two ordinances in question without first submitting them to vote by the respective members of the fire and police departments.

It is patently obvious that appellants' contention, if valid, would amount to a clear grant of veto power to the members of the two interested departments. This, in the words of the court in Kugler, would be a "total abdication" of the council's vested legislative power and therefore unconstitutional.

[3] Appellants' contention that the vested rights of members of the System have been tampered with through the enactment of these two ordinances is also invalid. As the city points out, an examination of Ordinances 128-C.S. and 135-C.S. discloses that only administrative and procedural changes are involved. Future employees do not have a vested right in any particular pension plan (Estes v. City of Richmond, supra, pp. 544-545). And, although active and retired members have a vested right to a pension, they do not have a vested right to control the administration of the plan which provides for the payment of pensions. This is especially true under a plan, such as Eureka's, which is a general obligation of the city.

In light of the foregoing discussion, we uphold the trial court's determination that Ordinances Nos. 128-C.S. and 135-C.S. are valid legislative enactments and that the Council of the City of Eureka has the unrestricted power to amend and modify Ordinance No. 2262 with respect to any matter which does not affect the substantive vested rights of those who are receiving or entitled to receive benefits under the Firemen's and Policemen's Retirement System of the City of Eureka at the time of any such amendment or modification.

The purported appeal from the judgment (order) denying motion for summary judgment is dismissed. The judgment is affirmed.

Taylor, P. J., and Rouse, J., concurred.

FN 1. Although the language of this section was amended when codified in 1963 as section 2-5.417 of the Eureka Municipal Code, appellants concede that the "differences in language do not vary express purposes of this section."

FN 2. Ordinance 128-C.S., adopted July 25, 1967, provides that firemen and policemen hired after its effective date are excluded from membership in the retirement system.

FN 3. In their notice of appeal, appellants purport to appeal from "the judgment denying plaintiffs and cross-defendant's Motion for Summary Judgment."

No such judgment was -- nor could one be -- entered since an order denying a motion for summary judgment is nonappealable (4 Witkin, Cal. Procedure (2d ed. 1971) p. 2842). The ruling, of course, is reviewable on appeal from the ultimate judgment.

LWV LEAGUE OF WOMEN VOTERS

December 15, 2018

Mayor Spencer, Vice Mayor Vella and Council Members Ashcraft, Matarrese, Oddie
Council Members Elect Daysog, Knox White

The League of Women Voters of Alameda strongly supports the Open Government Commission's unanimous vote on November 14th alleging that the title and description of item 6-G from the October 16, 2018 City Council meeting was insufficient to give the public enough information to understand what was happening at the meeting. The Commission's proposed remedy is for the Council to rehear the item.

The League was a strong advocate for the formation of the Sunshine Task Force in 2010 and participated in many of its meetings to develop the Sunshine Ordinance. In 2012 The Ordinance was approved by the City Council and reviewed by City Staff and the City Attorney's office. It was described as 'an affirmation of good government and continued commitment to open and democratic procedures….[and] An effort to expand our citizens knowledge, participation and trust.' The Council entrusted the Open Government Commission as the body to hear violations of the Ordinance.

The City is now asking the OGC to reconsider its decision, potentially stripping the Commission of any authority to levy penalties for violating the Sunshine Ordinance. Prior to its adoption in 2012 the Ordinance went through extensive reviews by the City Attorney's Office, the public and the Council. We are not clear on what has changed (other than staff in the City Attorney's office) that makes this part of the Ordinance invalid.

In our view, transparency and proper noticing of meeting agendas in clear language are essential to open and democratic procedures and citizen participation as stated in the description of the Ordinance. If the City still supports these principles, the appropriate remedy is re-noticing the Ordinance.

We urge the City Council to uphold the Open Government Commission's decision and its right to levy penalties upon violations of the Sunshine Ordinance.

Georgia Gates Derr, LWV Alameda President
Susan Hauser, LWV Alameda V.P. Administration
Karen Butter, LWV Alameda Action Co-chair
Felice Zensius, LWV Alameda Action Co-chair

CC: Open Government Commissioners Dieter, Foreman, Henneberry, Little and Schwartz
Interim City Manager Rudat
Interim City Attorney Roush

LARA WEISIGER

From: Amanda Naprawa <Amanda.Naprawa@phi.org>
Sent: Monday, December 17, 2018 4:30 PM
To: LARA WEISIGER
Subject: Open Government Commission -- Please forward to Commissioners

Dear Commissioners:

I am a public health attorney with the Public Health Institute in Oakland, California working on the Getting it Right from the Start project. We are a grant-funded project doing research and outreach to local governments on best practices in cannabis legalization. While we support cannabis legalization, our focus is ensuring that the same public health mistakes made in alcohol and tobacco marketing and licensing, and the grave outcomes, do not take place again with cannabis.

On November 14, 2018, the Open Government Commission ruled in favor of a citizen complaint alleging that the city council had violated the Sunshine Ordinance by failing to give adequate notice on council's intention to double the number of full-service retail cannabis dispensaries in Alameda. This was a fair and reasonable decision and supported the intention and purpose of an open government and citizen involvement. I understand that the city attorney has requested a rehearing on your decision and that this will take place this evening.

I strongly urge you to hold to your original conclusion that city council violated the sunshine ordinance. Input from concerned citizens should always be considered and this can only occur when citizens are fully aware of pending council decisions. This is especially so when the decisions being made can have drastic impacts on public health and youth safety. We know from years of tobacco and alcohol research, as well as growing research on cannabis, that greater access to retail outlets by youth leads to greater usage by youth. As the teen body and mind is still growing and forming, cannabis use may have significant impacts on development. If Alameda plans to increase the number of full-service dispensaries in the community, such a decision must be made with public input.

Thank you for your consideration.

Amanda Z. Naprawa, JD, MPH
Policy Associate
Getting it Right From The Start
Public Health Institute
555 12th Street
Suite 215
Oakland, CA 94607
C: 614-905-2543

December 17, 2018

After reading through the documents submitted in preparation for the Open Government Commission (OGC) December 17th meeting and reflecting on the process I have come to the following conclusions to be included in the public record:

- The Sunshine Ordinance was put in place as an affirmation of good government; and a continued commitment to open and democratic procedures. It is an effort to expand our citizens' knowledge, participation and trust.
- The OGC was created to uphold the mandate of the Sunshine Ordinance, a supplement to the Brown Act, safeguarding transparency in our governmental processes. It ensures that the public, whom we serve, clearly understands the processes through which our city is governed including providing guidelines for timely access to information, including public records, and opportunities to address the various legislative bodies **prior to decisions being made**.
- The Sunshine Ordinance also allows the OGC to issue penalties if the commission finds a violation has occurred, and per Section 2-93.8, the commission may order the action of a body ***null and void*** and/or may issue an order ***to cure or correct***. When the Sunshine Ordinance was passed by City Council, the null and void enforcement language was presumed to be consistent with local and state laws.
- At the November 14th meeting, the OGC was asked to consider a complaint brought forth by Serena Chen, in which she raised the concern that city council had not sufficiently noticed the council's decision to increase the cap for full-service cannabis dispensaries from two to four.
- The OGC considered the complaint well, and the vote reflected the Commission's ability to set aside personal feelings about a particular vote/policy, resulting in the OGC coming to a unanimous decision and demonstrating its ability to ensure the process is sound/transparent to the public, regardless of how closely they follow an issue or not. Ultimately, the OGC chose to ask for a re-noticing of the agenda item, the least punitive option offered to the commission by the city attorney and confirmed by the same attorney to be a legal option for the commission to mandate.
- Regarding the City Attorney's analysis, the following is where I see flaws:
    - The memo the OGC received asks the commission to come to a more "harmonious" decision because council disagrees with the original decision made. This is a concerning statement given the OGC is meant to provide independent analysis and is not beholden to the wishful thinking and desires of others involved in any given circumstance.
    - The fact that the OGC has "never taken this action" is not a valid argument against making this decision.

Submitted by Chair Little
Re: 3-A
12/17/18

    - I disagree with making a parallel between the OGC's decision to justify a re-noticing of an agenda item and nullifying legislative action, as suggested by the city attorney.
    - Finally, it is my opinion that the legal argument being presented by the City Attorney invalidates the express terms of the Sunshine Ordinance's enforcement provisions found in Alameda Municipal Code section 2-93.8(a) which specifically gives the commission the authority to null and void an action.
- The city attorney appears to be advocating for limiting the scope of the OGC and hamstringing the commission by invalidating the OGC's authority and creating a more narrow definition of "reasonable notice". If the OGC cannot "penalilze" the city staff by saying an agenda item has to be re-noticed because it appears that they took a short cut through the public process, then what is the point of having an oversight body?
- If staff had noticed the item immediately after the OGC meeting last month, it would have allowed the existing City Council the opportunity to adjudicate the first and the second reading.
- The City Attorney waited until after the 30 day adoption period before bringing this forward, meaning the law will now be in effect before the OGC hears the item on December 17th. This has created a more complicated matter than if he had followed the OGC order from the November 14th meeting. Additionally, the city staff may have usurped the issue without any additional city council input. Both of these actions may have been done to potentially limit exposure to future litigation, but have also pointed to limiting the authority of the OGC in the process.
- I believe moving forward with this meeting sets a terrible precedent and undermines the purpose of the OGC.

City of Alameda

Staff Report

File Number:2018-6037

Open Government Commission

Agenda Date: 2/4/2019

File Type: Regular Agenda Item

Agenda Number: 3-B

Minutes of the November 14, 2018 and December 17, 2018 Meetings

UNAPPROVED
MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
WEDNESDAY - - - NOVEMBER 14, 2018 - - - 7:00 P.M.

Chair Little convened the meeting at 7:00 p.m.

ROLL CALL - Present: Commissioners Dieter, Foreman, Henneberry, Schwartz and Chair Little - 5.

Absent: None.

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

3-A. Minutes of the October 1, 2018 Meeting

Commissioner Dieter noted a change to Council Communication to clarify that she had two follow up items and the third item was reporting out; stated that she would also provide the Clerk correct typographical corrections.

Commissioner Henneberry moved approval of minutes with the changes.

Commissioner Dieter seconded the motion, which carried by unanimous voice vote - 5.

3-B. Hearing on Sunshine Ordinance Complaint Filed October 30, 2018

Serena Chen, Complainant, gave a brief presentation.

Commissioner Henneberry inquired whether there were copies of the original agendas, to which Commissioner Schwartz responded copies were included in the packet.

Commissioner Schwartz inquired whether Ms. Chen attended and spoke at the November 7th City Council meeting.

Ms. Chen responded in the affirmative; stated the basis of her complaint was that when a meeting is noticed and Council radically changes something on the agenda, it does not seem fair.

Commissioner Dieter inquired whether anything in the staff report indicated removing the cap.

Ms. Chen responded in the negative; stated that she was clear what the changes were going to be since she attended the July City Council meeting; when she saw the October 16th agenda, it was a reflection of what was discussed in July and she decided not to attend.

Commissioner Foreman stated the staff report reinforces his understanding about the delivery-only dispensary.

Ms. Chen concurred with Commissioner Foreman; stated after she read the October 16th staff report, she was satisfied with the terms of the ordinance and felt confident of the vote; however, she has a problem with the number of dispensaries being doubled without any public notice.

Commissioner Schwartz inquired whether there was any consideration by the Council of Ms. Chen's views after her public comment at the November 7th meeting, to which Ms. Chen responded in the negative; stated the item was pulled from the Consent Calendar so she could speak; she had already sent a letter to Council regarding her concerns, but the issue was not addressed further.

Commissioner Foreman inquired whether Council discussed the item further and provided rationale or just voted on the matter at the November 7th meeting.

Ms. Chen responded that she did not feel her questioning caused a quandary; stated she respects Council and staff's professionalism but disagrees with the City's position.

Commissioner Henneberry stated that he understands Ms. Chen's complaint; inquired what, in her view, would resolve the issue.

Ms. Chen responded the resolution she has experienced before any other board is that if there are any changes to the language that has been proposed, staff is directed to come back to Council with changes for Council to introduce the ordinance, have a first reading and vote; there should be adequate notification for the public and an opportunity for people to be involved.

Commissioner Dieter inquired whether Ms. Chen's remedy would be that the matter be re-noticed and come back to the Council, to which Ms. Chen responded in the affirmative; stated that she understands marijuana has been legalized in the State, but cities are responsible for their own

regulations.

Commissioner Dieter stated the Commission takes Ms. Chen's complaint seriously and will do their best to consider her points.

The Assistant City Attorney gave a brief presentation.

Commissioner Henneberry inquired what would have been the harm of waiting one more meeting and re-noticing the item.

The Assistant City Attorney responded he did not think there would be any harm; stated the Council asked whether or not the Ordinance would comply and if they could proceed; since the answer was affirmative, Council chose to move forward.

In response to Commissioner Schwartz inquiry on who answered affirmatively, the Assistant City Attorney stated the Acting City Attorney.

Commissioner Henneberry inquired whether the Acting City Attorney explained the basis of his opinion.

The Assistant City Attorney responded the Acting City Attorney explained that the attorneys had opined on the matter and communicated to Council that proceeding with a second reading was okay; the Acting City Attorney further stated the opinion has not changed.

Commissioner Henneberry stated the ordinance talked about delivery-only and was completely flipped on its head at the October 16th meeting by adding two full-service dispensaries with deliveries; inquired how doing so works with the strict and exact standards of agenda noticing.

The Assistant City Attorney responded staff's position is that the change was delivery-only to delivery -required; stated the agenda was noticed for an increase in the number of dispensaries; the agenda language did state delivery-only, the Council has authority to modify the ordinance in part because State law does not regulate the businesses any differently and does not have a distinction for delivery -only; the distinction is a local consideration, therefore, the Council has authority; conversely, the Council could decide not to make the distinction and still be compliant, which is precisely what the Council did in this instance.

Commissioner Foreman stated that he did not see the term "delivery-required" in either the regulatory or zoning ordinance that came before Council on October 16th.

The Assistant City Attorney stated Commissioner Foreman is correct; Council was amending the ordinances to allow the change to happen and directed staff to do so.

Commissioner Foreman stated the change was not only delivery-only to delivery- required, it was also changed from “closed to the public” to “open to the public.”

The Assistant City Attorney agreed with Commissioner Foreman’s statement; stated the ordinance language from November 7th defined the change.

Commissioner Schwartz inquired whether the Assistant City Attorney would agree with Ms. Chen that the difference between delivery-only and delivery-required is a facility that is just a warehouse versus a facility that has public interaction.

The Assistant City Attorney responded not exactly; stated the difference between the two is that although they are functionally the same, one does not allow public access; he would not characterize a delivery-only dispensary as a warehouse as it would still have to go through all of the State and local legal requirements.

Chair Little stated there was better public notice for the November 7th meeting; inquired whether it is normal circumstance to allow a significant distinction or change in the agenda item between the first reading and second reading.

The Assistant City Attorney responded legal counsel’s position is that re-setting the first reading due to changes is not an accurate statement of the law, as Ms. Chen asserts; stated it is typical and permissible for Council to give staff direction to make changes and come back; what is not permissible is making substantive modifications at the second reading; in this case, however, resetting does not apply when an agenda is published but Council decides to move in a different direction; Ms. Chen is arguing the meaningful description as opposed to when a Council needs to reset the first reading and start over; the separate issues are conflated because of the remedy Ms. Chen is seeking; the issue before the Commission tonight is to determine whether or not the agenda description is a meaningful description.

Chair Little stated it is difficult to know for certain the direction of Council conversation; therefore, it is impossible to predict by way of an agenda description to name everything and cover all of the minutia details that may come up; the intention of the discussion was to have a meaningful conversation about delivery-only dispensaries; the conversation did take place, but then deviated and language was changed; inquired whether public awareness of the change took place in time for the Council to then vote on the item and allow for public comment on November 7th.

The Assistant City Attorney responded in the affirmative; stated Chair Little’s statement of events is accurate.

Commissioner Dieter requested clarification regarding whether a first reading and a second reading can be entirely different as long as nothing substantive has changed; if so, the first reading needs to be reset.

The Assistant City Attorney stated Commissioner Dieter's statement is accurate; in this case, the change happened before the Council did its first reading.

In response to Commissioner Dieter's inquiry, the Assistant City Attorney stated the Council suspended the first reading until they actually got their comments in on how they wanted it modified; said practice is actually central to what Council does with respect to ordinances; the Council would be hamstringed if they did not have said ability.

The Assistant City Attorney read an unpublished court of appeals case analogous to the issue; stated the notice was sufficient to provide a member of the public to know that there would be an increase in the number of dispensaries, whether it is delivery-only or delivery-required.

Commissioner Dieter stated that she understands that the Assistant City Attorney is in a position of defending the City and that he believes there were no substantive changes; the Commission's role is to defend the public to what a reasonable person would understand; she would consider the changes substantive because a cap on retail businesses was removed; the changes were not included in the staff report or agenda title.

The Assistant City Attorney clarified that the legal standard Commissioner Dieter refers to does not apply to the general agenda description because the changes happened before the first reading and before Council introduced the ordinance.

Commissioner Foreman stated that he understands substantive or non-substantive is not the issue; inquired whether the City's position would be the same if Council changed the retail cap to eight, as long as they corrected it by the second reading.

The Assistant City Attorney responded he does not like to opine on hypotheticals, but responded in the affirmative; stated the standard that applies is the notion that there is a description for the members of the public to decide whether or not they should appear.

Commissioner Schwartz inquired whether there was a basis to dispute Ms. Chen's claims that community advocates might have attended the meeting had they been aware of the changes.

The Assistant City Attorney responded that it would be speculative to speak to that; stated that he has attended every meeting regarding the cannabis issue and is surprised by the amount of support versus the amount of opposition to the issue.

Commissioner Schwartz inquired whether the Assistant City Attorney was aware of a vocal minority of public health advocates who are opposed to the additional public dispensaries, to which the Assistant City Attorney responded Ms. Chen and one other speaker are the only ones he is aware of that attended and spoke at the November 7th meeting.

Commissioner Dieter stated the public did not know that more retail businesses were going to be open; at the beginning of the process, there was a lot of concern about the amount of retail, but the public was relieved and reassured by the City Council that there would be a cap; the Council directed staff to bring back a report which included the cap; the cap was then removed; Ms. Chen's complaint is not about what happened at the November 7th meeting, it is about the first notice and whether members of the public were alerted to changes made before the second notice.

Chair Little clarified that the ordinance clearly states "add two cannabis retail businesses."

The Assistant City Attorney concurred with Chair Little; stated regarding Commissioner Dieter's comments, that he cannot speculate on whether or not the public was concerned about the issue.

Commissioner Dieter stated that she looked at the July meeting and no one on the Council suggested adding the two retail businesses; Council requested staff bring back a staff report with a cap; the staff report brought at the October meeting reiterated and reaffirmed what Council directed regarding the cap; inquired why the first clause adding two retail business was even included.

The Assistant City Attorney responded the report in July provided a status report on the cannabis request for proposals issued in April; Councilmember Ezzy Ashcraft and Vice Mayor Vella suggested adding "delivery only" at that meeting.

In response to Commissioner Dieter, the Assistant City Attorney stated the subsequent staff report did not include only the Council direction; additional items were included.

Commissioner Dieter inquired what prompted the first clause to add two cannabis businesses.

The Assistant City Attorney responded he does not recall; stated that he just remembers it was mentioned.

Commissioner Dieter stated as a member of the public reading the ordinance, she would interpret the additional two cannabis businesses as delivery-only businesses since there is nothing in the staff report to suggest otherwise.

The Assistant City Attorney stated the staff report was designed to report on outcomes, as opposed to creating a recommendation; staff was seeking direction from Council.

Commissioner Dieter inquired whether there would have been any harm to postpone the second reading until after the complaint was heard.

The Assistant City Attorney responded there is a current application that is pending and changes in the ordinance may impact the applicant.

Commissioner Dieter inquired what happens now if the Commission determines there was a violation of the Sunshine Ordinance.

The Assistant City Attorney staffing the Commission responded pursuant to the Sunshine Ordinance, if the Open Government Commission determines there is a violation of Section 2.91, the Commission may order the action of the body null and void and/or may issue an order to cure or correct, and may also impose a fine on the City for a subsequent similar violation.

Commissioner Dieter stated it did not make sense to her that the ordinance proceeded to a second reading when a complaint was filed with no opportunity for remedy.

In response to Chair Little's inquiry, the Assistant City Attorney stated staff reached out to Ms. Chen after his email to her stating that she could still provide comment; Ms. Chen's response to the email was that providing comment would not resolve her complaint.

Chair Little stated that she understands the item was pulled; inquired how doing so plays into the process.

The Assistant City Attorney responded the item was pulled for discussion but the second reading did take place; stated a further amendment is going forward to clarify definitions.

Commissioner Dieter stated the complaint is about the October 16th meeting, not about anything that happened after.

Commissioner Foreman inquired whether a motion should be put on the floor, to which the City Clerk responded the Commission is not required to follow Rosenberg's Rules even though the Council does.

Chair Little stated the Commission pushed following Rosenberg's Rules; called for a motion.

Commissioner Schwartz inquired whether the Commission should deliberate before making a motion, to which Commissioner Dieter responded in the negative.

Commissioner Schwartz moved approval of sustaining the complaint and that Council be ordered to re-notice the meeting so that community advocates can be heard on the issue of two additional dispensaries.

Commissioner Dieter seconded the motion.

Under discussion, Commissioner Foreman stated there are two cannabis ordinances; the zoning ordinance was not impacted by the complaint; suggested an amendment.

The Assistant City Attorney concurred with Commissioner Foreman, stated the changes were confined to the business ordinance which contains the definition of “delivery-only.”

Commissioner Schwartz stated that he does not think the ordinance needs to be amended as long as it is clear when re-noticed that the conversion of delivery-only to delivery-required deserves a public hearing; commended the speakers for thorough presentations; stated that he agrees with Ms. Chen that the November 7th final vote did not give the impression that there would be any meaningful debate; to the extent that there are people in the community that want to be heard on this, it should be heard; it would not have hurt the City to wait two more weeks; further stated he is also sensitive to efficiency in government and does not want endless meetings, but the issue is important enough to support sustaining the complaint.

Commissioner Henneberry concurred with Commissioner Schwartz; stated that he supports the motion.

Commissioner Foreman concurred with Commissioner Schwartz; stated that he thinks both the City and Ms. Chen are right, it is just a matter of degree; he supports the motion.

Commissioner Dieter stated the issue is also about setting a precedent about what is important in the City; when a member of the public files a complaint under the Sunshine Ordinance, the process should not just move forward; it is only right that the complaint should be heard before a second reading; what the Commission has to do now creates a longer delay; nothing may change in the end; there could have been a two week delay instead of another first reading and second reading; it is important to do the right thing.

The Assistant City Attorney for the Commission stated there was not a time savings as a practical matter; the issue would have been delayed and would have to be re-noticed anyway in the event of the Commission sustaining the complaint.

Commissioner Dieter stated the City moving forward even though a complaint was filed looks bad to the public.

The Assistant City Attorney for the Commission stated just because a complaint is filed does not mean the decision made at the October 16th meeting was not in order; the opinion did not changed by November 7th; the Commission could have reached a different conclusion; there was not a compelling reason to change the opinion at the November 7th meeting.

Chair Little stated the 267 pages of information was confusing; assumptions cannot be made about the decision; comparing what was originally proposed to the eventual outcome of adding the two businesses has a greater weight; she supports the motion.

On the call for the question, the motion carried by unanimous voice votes - 5.

COMMISSIONER COMMUNICATIONS

Commissioner Dieter stated that she has enjoyed being on the Commission; sitting at the dais is harder than it looks; commends the people who volunteer to sit on the Commission.

The Assistant City Attorney for the Commission noted that he will draft a written decision for the Commission to review and edit so a final version can be completed.

ADJOURNMENT

There being no further business, Chair Dieter adjourned the meeting at 8:23 p.m.

Respectfully submitted,
Lara Weisiger, City Clerk

The agenda for this meeting was posted in accordance with the Sunshine Ordinance.
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MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
MONDAY - - - DECEMBER 17, 2018 - - - 7:00 P.M.

Chair Little convened the meeting at 7:00 p.m.

ROLL CALL - Present: Commissioners Dieter, Foreman, Henneberry and Chair Little - 4.

Absent: Commissioner Schwartz - 1.

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

Before addressing the agenda item, Chair Little stated that she does not think the Commission's role as oversight on the Council and City Attorney's actions is appropriately addressed to the Open Government Commission (OGC); if the City Attorney would like to address inadequacies that were written into the law and presented at the last meeting, the issues would be better discussed by the City Council; she would like to propose a motion to table the conversation until after the City Council has been engaged on how the City would like to address the oversight and transparency implications of staff's request.

Commissioner Foreman called a point of order on whether or not it is appropriate for the Commission to consider the matter; stated that he believes it is out of order; the Sunshine Ordinance states the Commission had to make a decision within 30 days of the filing of the complaint; the decision was rendered on November 14th; the fact that the City Attorney has not prepared a written confirmation of that decision does not change the fact that the decision was made; the decision was made two days before the cannabis ordinance would have become effective; thus, the ordinance is null and void; there is no basis to proceed; as a consequence, the only thing left to do is write the written report required by law which should have been done by November 28th; what needs to be done tonight is to ask the City Attorney to assist the Commission with writing the opinion which confirms what has already been done; the matter should be done tonight because he and Commissioner Dieter will be termed out by tomorrow.

Commissioner Foreman moved approval of dismissing the reconsideration on the basis that it is out of order and requesting the City Attorney to assist the Commission in writing an order tonight confirming the November 14th decision.

In response to Commissioner Henneberry's inquiry, Chair Little stated that she would like to table the issue until the City Council decides about the OGC's authority; she believes that the Commission's decision made last month was under the purview of the Commission, but counsel is saying it is not; she believes the City Council needs to make the decision.

Commissioner Henneberry seconded Commissioner Foreman's motion.

Under discussion, Commissioner Dieter stated that she is uncomfortable with ignoring the people who showed up tonight to speak; the Commission should at least hear speakers; she is also uncomfortable with tabling the item because the implication is it will come back under the same conditions; she would like to continue with the agenda item and allow the citizens to speak; the outcome may be the same, but at least a motion would be made after public comment.

Commissioner Foreman stated the vote on the motion could be done after public comment.

Commissioner Dieter concurred.

In response to Commissioner Dieter's inquiry, Commissioner Foreman stated that he does not want to hear the staff report because it is out of order; he is not opposed to public comment and is adamantly opposed to tabling the matter because it would mean surrendering the Commission's authority.

Commissioner Henneberry stated that he does not see a point in public comment if the staff report is not going to be heard; if the issue has to go back to Council, there will be many opportunities for public comment and there was public comment at the last meeting.

Commissioner Foreman stated if the motion passes, it does not remove the possibility that the City Attorney's office may advise City Council that the Commission did not have the authority and City Council may agree with the determination; while the issue may end tonight at the Commission level, it may not be over.

Chair Little stated as the Sunshine Ordinance is written, she interprets that the Commission had every right to make the November 14th decision; the Commission was advised by the City Attorney that the decision was one the Commission could make; she was surprised to have to the issue return for another meeting; she is unclear why the Commission was told they could make a decision, then three weeks later, the authority is rescinded.

Commissioner Foreman concurred with Commissioner Henneberry; stated as much as he would like to hear public comment, it is out of order; the Commission could move forward after the vote if it does not carry.

Commissioner Henneberry called the question.

Commissioner Dieter requested Commissioner Foreman to restate his motion.

The City Clerk restated Commissioner Foreman's motion to have the City Attorney write an order confirming the Commission's November 14th decision.

Commissioner Foreman stated his motion included dismissing the reconsideration of the matter.

Chair Little inquired whether the motion should also include having the item re-noticed by City Council, to which Commissioner Foreman responded in the affirmative.

Commissioner Foreman stated that he thinks staff report Attachment B would suffice with some changes.

The Interim City Attorney stated Attachment B could be easily word-smithed to carry out what the Commission would like with respect to the matter; further stated that he is not going to agree with Commissioner Foreman's position that the ordinances in question are null and void; the decision will have the effect of providing direction to the Council to have said result come about; as indicated in his memo to the Commission, he does not think the Commission has the legal authority to render a legally adopted ordinance null and void.

Chair Little stated the Commission was told that the timing of their deliberations and delaying the second reading of the ordinances in order for the Commission hearing to take place first did not matter; inquired whether the issue came about because the Commission deliberated on the issue after the second reading of the ordinances.

The Interim City Attorney responded the matter proceeded on November 7th; at the October 16th meeting, the City Attorney advised the City Council that it was appropriate to introduce the ordinance with the amendment in question and that it did comply with the Sunshine Ordinance; Council relied on said advice and made the decision to proceed on November 7th notwithstanding the fact that a complaint had been filed on October 30th ; Council adopted the ordinances on November 7th which went into effect on December 6th; it is his understanding that the Commission would like to have the ordinances re-noticed, and the two ordinances would be repealed.

Commissioner Dieter made a friendly amendment to the motion that the Commission affirm its November 7th decision.

Commissioner Foreman stated that is basically his motion; Commissioner Dieter may just be objecting to the first sentence regarding dismissing the matter as out of order; he thinks it is important for the Commission to make the assertion; he is not present to argue whether or not the City Attorney's position of delegation of power is correct; he is here to argue that the Commission's jurisdiction on the matter ended on November 14th.

Commissioner Dieter stated that she is ready to move forward with the vote because she is not persuaded by the City's legal analysis that no grounds exist to revisit the matter; she also believes the Commission does not have the authority to determine whether the ordinance is valid.

On the call for the question, the motion carried by the following voice vote: Ayes: Commissioners Little, Foreman, Dieter, Henneberry - 4. Absent - 1 (Commissioner Schwartz).

In response to Commissioner Foreman's inquiry about drafting the report, the Interim City Attorney stated amending Attachment B of his analysis would be the easiest.

Commissioner Dieter stated that she has two amendments to propose; inquired whether it was important to treat the decision like a legal opinion.

The Interim City Attorney responded he followed the format the Commission has used before; stated the Commission could do something different.

Commissioner Dieter stated if the format is maintained, the entire paragraph on page 8 that starts with "Turning now to the question..." through the three provisions, should be deleted.

In response to the Interim City Attorney's inquiry about what to do on the next page if the paragraph is deleted, Commissioner Dieter stated the third sentence stating "In order to carry out the decision..." could be deleted.

Chair Little clarified that if the paragraph and three provisions on page 8 are deleted, along with the third sentence on page 9, the Commission would end up with the same decision made on November

14th.

Commissioner Dieter concurred with Chair Little.

Commissioner Foreman stated the Commission has to state the direction; suggested the sentence to read, “In order to carry out the decision, the Commission directs that the ordinances passed on October 16, 2018 are hereby null and void...” and that “the City Council may re-introduce the two ordinances following a properly noticed public hearing...”

Commissioner Henneberry suggested allowing the City Council to do whatever they need to do; the complaint was sustained, the Council should re-notice and re-hear the ordinances.

Chair Little stated that she does not want to allow room for the Council to make the decision; the Commission should make it clear that the Council must to re-notice and re-introduce the ordinances.

Commissioner Henneberry inquired whether that direction was already in the original message to Council, to which Chair Little responded in the affirmative.

Commissioner Henneberry stated instead of rewriting the language, the Commission should just append what the decision was to the end of the report.

Chair Little concurred with Commissioner Henneberry; stated that is what the Commission is trying to do.

The Interim City Attorney stated without waiving his previous arguments, suggested including the amendments as the three provisions rather than deleting them altogether.

Chair Little stated that she would like the language to read, “the Council must re-notice...” and delete the word “consider” as she does not want Council to be able to consider the decision, and rather just be directed to do it.

The Interim City Attorney stated the Commission does not have the authority to direct the Council's action.

Commissioner Foreman stated the Commission has made the ordinances null and void; the Council can choose to re-notice the ordinances if desired; he does not think the Commission should force Council to reconsider.

Commissioner Henneberry stated the Commission's job is done upon Council being informed of the mistake.

The Interim City Attorney reiterated the language revisions to include deleting the word

"circumscribed" in the fourth sentence, and having the Commission "directing" rather than "recommending" the following: 1) Ordinances 3227 and 3228 are null and void; and 2) the City Council may consider re-introducing the two ordinances in question following a properly noticed public hearing.

Commissioner Foreman stated the provision regarding the agenda title is not needed and can be deleted.

The Interim City Attorney affirmed Commissioner Foreman's statement.

Commissioner Foreman stated that he would like to make a change to a paragraph on page 8; the last sentence should just read: "the Commission finds that there was a violation of Section 2-91.5, and the complaint is thereby sustained."

Commissioner Dieter stated that she does not think a full legal opinion is necessary in the future because it could be biased since it promotes a certain viewpoint.

The Interim City Attorney read the amended language and the Commission concurred with the changes.

Commissioner Foreman stated that he was concerned about the Commission being represented by the City Attorney's office in the enforcement proceedings; especially with the particular issue; on October 16th, the Acting City Attorney rendered the opinion that the notice on the agenda was appropriate; then, on November 14th, the Assistant City Attorney argued before the Commission in support of the Acting City Attorney; the Interim City Attorney is in the middle, should be advising the Commission and has a conflict; further stated the City should consider hiring independent, private counsel to represent the Commission when a complaint is heard.

In response to Commissioner Dieter's inquiry regarding who has authority to request a re-hearing, the Interim City Attorney stated the request could come from a number of different sources; in this case, because the City Attorney's office did not do an accurate job of laying out what the Commission could do, it was incumbent upon the City to provide the information to the Commission and the Council so that the issue could be fully vetted and addressed.

The Commission agreed to hear the public comments.

3-A. Hearing on the Sunshine Ordinance Complaint Filed October 30, 2018 and the November 14, 2018 Open Government Commission Hearing and Decision, Including Scope of Legal Authority of the Open Government Commission to Impose Certain Penalties under the Sunshine Ordinance and Potential Next Steps.

Stated he is satisfied with the outcome of tonight's meeting and does not feel the Commission's

decision encroaches on the Council's legislative authority: Richard Bangert, Alameda.

Read the League's letter supporting the Commission's decision: Karen Butter, League of Women Voters.

Thanked the Commission for reaffirming his faith in government: Bill Smith, Alameda.

Commissioner Foreman stated what the Commission did tonight is not an exercise or delegation of legislative power; it is a quasi-judicial function and the same penalty that would have been suffered under the Brown Act.

In response to Chair Little's inquiry regarding calling the question, the City Clerk stated she already called the question and the previous decision was upheld: 4 to 1 with Commissioner Schwartz absent.

3-B. Hearing on Sunshine Ordinance Complaint Filed December 4, 2018. [Withdrawn without prejudice]

COMMISSIONER COMMUNICATIONS

Chair Little thanked Commissioners Foreman and Dieter for their service; stated having them participate in tonight's meeting was important.

ADJOURNMENT

There being no further business, Chair Dieter adjourned the meeting at 7:49 p.m.

Respectfully submitted,
Lara Weisiger, City Clerk

The agenda for this meeting was posted in accordance with the Sunshine Ordinance.

City of Alameda

Meeting Agenda

Open Government Commission

Monday, February 4, 2019	**7:00 PM**	**City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda, CA 94501**

1 ROLL CALL

2 ORAL COMMUNICATIONS, NON-AGENDA (Public Comment)

3 REGULAR AGENDA ITEMS

3-A 2019-6525 Select Chair and Vice Chair

3-B 2018-6037 Minutes of the November 14, 2018 and December 17, 2018 Meetings

3-C 2019-6437 Accept the Annual Public Report

Attachments: Annual Report

3-D 2019-6526 Hearing on Sunshine Ordinance Complaint Filed January 25, 2019

Attachments: Attachment 1
Attachment 2
Attachment 3
Attachment 4
Correspondence - Updated 2-4

4 COMMISSION COMMUNICATIONS

5 ADJOURNMENT

****NOTE****

- Translators or sign language interpreters will be available on request. Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 72 hours prior to the Meeting to request a translator or interpreter.
- Equipment for the hearing impaired is available for public use. For assistance, please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 either prior to, or at, the Council Meeting.
- Accessible seating for persons with disabilities, including those using wheelchairs, is available.
- Minutes of the meeting available in enlarged print.
- Video tapes of the meeting are available upon request.
- Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 48 hours prior to the meeting to request agenda materials in an alternative format, or any other reasonable accommodation that may be necessary to participate in and enjoy the benefits of the meeting.
- This meeting will be broadcast live on the City's website www.alamedaca.gov/agendas.
- Documents related to this agenda are available for public inspection and copying at of the Office of the City Clerk, 2263 Santa Clara Avenue, Room 380, during normal business hours.

• KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE: Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City of Alameda exist to conduct the citizen of Alameda's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.

• In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

Hearing on Sunshine Ordinance Complaint Filed January 25, 2019

To: Honorable Members of the Open Government Commission

From: Michael H. Roush, Interim City Attorney

Background

This complaint concerns amendments to Ordinance Nos. 3201 ("Regulatory Ordinance") and 3206 ("Land Use Ordinance"). On October 16, 2018, the City Council introduced two ordinances (Ordinance Nos. 3227 and 3228) to amend the Regulatory Ordinance and the Land Use Ordinance.

On October 30, 3018, Ms. Serena Chen filed an Open Government Commission ("Commission") complaint ("Chen I") concerning the agenda description for the item on the Council's October 16th agenda.

On November 14, 2018, the Commission conducted a hearing on Chen I, sustained it and, as a remedy, held that the Ordinances were deemed null and void. Further, the Commission held that the Council may consider re-noticing the ordinances following a public hearing.

Prior to the deadline for publication of the Commission's decision in Chen I, the City Attorney's Office noticed a subsequent hearing to be heard on December 17, 2018, for various reasons, including to reconsider the matter and receive additional advice concerning the Commission's legal authority under the Sunshine Ordinance. Specifically, the City Attorney's Office had advised the Commission that the Sunshine Ordinance had not been violated and that the Commission did not have the legislative authority to render a legally adopted ordinance null and void.

The Commission declined to rehear the matter and instead gave direction to staff concerning revisions to the proposed decision attached to the agenda report to finalize their decision. The final decision is attached to this agenda report. See Attachment 2 (Final Decision in Chen I, dated December 17, 2018).

On January 15, 2019, given the Commission's decision and advice of the City Attorney's Office, staff agendized the introduction of two ordinances that tracked the language of Ordinance Nos. 3227 and 3228.

On January 25, 2019, Ms. Chen filed the current complaint ("Chen II"). See Attachment 1 (Complaint in Chen II, filed January 25, 2019). Ms. Chen alleges two violations. First, she contends a violation of subdivision (b) of section 2-93.2(b) of the Sunshine Ordinance occurred because staff "did not include the formal written decision of the Open Government Commission as an exhibit. . . [to the January 15, 2019 agenda item 6-B]." Second, she contends a violation of subdivision (b) of section 2-91.5 of the Sunshine Ordinance occurred because the agenda description allegedly "did not adequately inform the general public that, if the item was defeated, the council's vote would be meaningless."

Discussion

In relevant part, subdivision (b) of section 2-93.2 of the Sunshine Ordinance provides:

> Upon filing of an official complaint form (including submittal of all evidence) with the City Clerk's Office, the complainant and the City (as respondent) shall appear at a hearing scheduled no later than thirty (30) business days. During this hearing the Commission will provide the parties with the chance to present evidence and make arguments. **The Commission will render a formal written decision on the matter within fourteen (14) business days of the conclusion of the hearing**. (Emphasis added.).

The Commission did not order the Council reintroduce Ordinance Nos. 3227 and 3228. The Commission's decision only stated that the Council "may consider" doing so. *See* pg. 6 of Attachment 2. Additionally, the Commission did not direct that its final decision be included as an exhibit to a future agenda packet where the Council may "consider re-introducing the two Ordinances." *See id*.

Subdivision (b) of section 2-93.2 of the Sunshine Ordinance provides that each agenda item must include a "meaningful description". The agenda description for this item was prepared in response to the Commission's decision in which the

Commission noted that "members of the public may have been confused as to whether or not they should appear to be heard or seek more information" because the agenda description did not explicitly state that the Council would be considering an increase the number of full-service (open to the public) cannabis dispensaries. The January 15, 2019 agenda description addresses this concern. The purpose of this meeting was to carry out the intent of the Commission's decision while recognizing the legal opinion of the City Attorney's Office by repealing Ordinance Nos. 3227 and 3228 and reintroducing them in substance with an amended agenda description that would more explicitly reflect the proposed action by the Council. *See*Attachment 3 (City Council Agenda, January 15, 2019).

The Commission's written decision is not material to the Council's proposed action to repeal and reintroduce Ordinance No. 3227 and 3228 to afford members of the public an additional opportunity to comment. Moreover, any actions taken (or not) to inform members of the public that the "Council's vote would be meaningless" is entirely irrelevant to the consideration of that item.

On January 28, 2019, the final decision (Attachment 2) was provided to Ms. Chen with an apology for not providing it earlier, but Ms. Chen still wanted to proceed with the hearing.

The final decision was provided to Ms. Chen, but she decided to proceed with her complaint.

Recommendation

The Commission should issue its written decision (attached) finding there were no violations of the Sunshine Ordinance.

Respectfully submitted,
Michael H. Roush, Interim City Attorney

Attachments:

1. Complaint - Chen II, filed January 25, 2019
2. Final Decision - Chen I, dated December 17, 2018
3. City Council Agenda, January 15, 2019

4. Draft Commission Decision

City of Alameda

OPEN GOVERNMENT COMMISSION
2263 Santa Clara Avenue, Suite 380
Alameda, CA 94501
(510) 747-4800

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission: City Manager & City Attorney Offices

Name of individual contacted at Department or Commission:_____

❒Alleged violation of public records access.
☑Alleged violation of public meeting. Date of meeting: Jan. 15, 2019

Sunshine Ordinance Sections: **2-91.5, 2-93.2**

VIOLATIONS

Section 2-93.2(b) - The **January 15, 2019 agenda item 6-B** did not include the formal written decision of the Open Government Commission as an exhibit, revealing that it had not been issued.

Section 2-91.5(b) - The January 15 agenda description did not adequately inform the general public that, if the item was defeated, the council's vote would be meaningless. This did not satisfy the commission's order.

BACKGROUND

On Nov. 14, 2018, the Open Government Commission (Commission) unanimously ruled to sustain **my complaint** that a violation of Sunshine Ordinance Section 2-91.5 had occurred by failing to adequately inform the public 12 days in advance of their vote to double the number of full-service retail marijuana dispensaries. The Commission ordered that the Council's Oct. 16 decision be set aside and the matter re-noticed. A written decision was to follow within 14 business days, as required by Sunshine Ordinance 2-93.2. No written decision was issued.

On Dec. 3, 2018, the City, however, requested another hearing on the case before the Commission. The hearing was held on Monday, Dec. 17, just one day prior to the deadline for the Commission to render a formal written decision as per Section 2-93.2 (b). The Commission declined to hear the item again and instead edited and signed the city's proposed written decision for submission. A hand-edited version is attached. I have not received a formal typed

version of this document, nor was a revised document included in the packet to council at the Jan. 15, 2019 Council hearing.

According to the January 15 staff report, the re-agendizing of the amendments passed on Oct. 16, 2018 was the city manager's response to the Sunshine Ordinance violation. The agenda title and report portrayed that the decision would be binding. The city attorney (at the direction of the city manager) asserted that the adopted ordinance would remain in place regardless of the vote. The council did not pass the amendments, which included the addition of two more full service marijuana dispensaries.

It became clear at this point that, staff had not followed the Commission's decision, which had stipulated that the amendments be made "null and void" before the amendments would be re-heard.

PRAYER FOR RELIEF

1) Order the city to pay a fine pursuant to Sunshine Ordinance 2-93.8 for not following the Commission's direction, and 2) issue an amended ruling, which would include this background, that directs the city once again to set aside and re-notice the first reading of the amendments.

Specifically, section 2-93.8 provides: "If the Commission finds a violation of section 2-92, the Commission may order the City to comply. The Commission may impose a two hundred fifty ($250.00) dollar fine on the City for a subsequent similar violation, and a five hundred ($500.00) dollar fine for a third similar violation, that occurs within the same 12-month period. [¶] Fines shall be used for records retention technology, and/or Sunshine Ordinance training and education."

Council must respect the intent of the Commission to properly re-hear the Oct. 16 amendments. **Section 2-93.7** clearly states that the "Sunshine Ordinance supersedes other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply."

A complaint must be filed no more than fifteen (15) days after an alleged violation of the Sunshine Ordinance.

Name: Serena Chen Address:931 Independence Dr., Alameda 94501

Telephone No: 510-435-5889 E-mail Address: serenatchen@gmail.com

Date:1/25/2019

Signature

BEFORE THE OPEN GOVERNMENT COMMISSION

OF THE CITY OF ALAMEDA

In re: The Complaint of Serena Chen Serena Chen, Complainant The City of Alameda, Respondent	Case No. 18-02 DECISION OF THE OPEN GOVERNMENT COMMISSSION OF THE CITY OF ALAMEDA

Originally, the above entitled matter came on for hearing by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code on November 14, 2018, at which time the Commission rendered a decision to sustain the complaint. (All further references to Section numbers are to the Alameda Municipal Code.) At the request of the City Attorney's Office, the Commission held a special meeting on December 17, 2018 to consider a memorandum from the City Attorney's Office and to provide the parties an opportunity to respond.

Facts

In compliance with the Sunshine Ordinance, the City Clerk on October 4, 2018

ATTACHMENT B

published the agenda and supporting materials for the City Council's meeting on October 16, 2018. In relevant part, the title for Agenda item 6-G provided that there would be a public hearing to consider the introduction of an ordinance to amend the Municipal Code in a number of respects concerning cannabis businesses, for example, by adding cannabis retail businesses as conditionally permitted uses in certain zoning districts, by adding two "delivery-only" Cannabis Retail Businesses as a conditionally permitted use in the C-M, Commercial-Manufacturing Zoning District, eliminating the dispersion requirements for "delivery-only" cannabis businesses. The agenda for this item is attached as Exhibit 1.

The City Council conducted a public hearing on these items on October 16, 2018. During the public hearing, Council resolved to include in the amendments a modification to the amendment allowing two "delivery-only" dispensaries, such that these cannabis businesses would be required to offer delivery of cannabis ("delivery required") and would also be open to the public, in recognition that the State and local requirements for either ("delivery-only" versus "delivery required") would be the same. Following the close of the public hearing the City Council introduced on first reading an ordinance amending various sections of the

Municipal Code concerning cannabis businesses, including that two "delivery required" dispensaries, which would be open to public, be allowed. In response to a question about whether the ordinance could be introduced that evening with the inclusion of the two "delivery required" dispensaries as conditionally permitted uses, the City Attorney advised yes.

On October 30, 2018, Serena Chen timely filed a Sunshine Ordinance Complaint against the Alameda City Council concerning an alleged violation of a public meeting on October 16, 2018, citing a violation of Section 2-91.5, Agenda Requirements. The complaint states the City Council voted to add two additional cannabis dispensary permits without prior notification. More specifically, the complaint states nowhere in the agenda title or text of the staff report concerning cannabis businesses was there any mention that the number of "full-service marijuana dispensaries" would be increased.

The complaint cites to Section 2-90.1 of the Municipal Code that provides that one of the goals of the Sunshine Ordinance is to ensure that Alameda residents have the opportunity to address the Council prior to a decision being made. The complaint also cites to Section 2-91.5 of the Municipal Code that provides agenda

items are to be contain a meaningful description of each item of business to be transacted and that the description of such items be sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information about the item. A copy of the complaint is attached as Exhibit 2.

In response to the complaint, the City Attorney's Office emailed Ms. Chen that the ordinance addressed in her complaint was not final ("are being amended"), but would be on the Council's November 7, 2018 agenda for "second reading". She was invited to attend and be heard concerning the ordinance amendments, or to submit comments in writing if she could not attend, in addition to being furnished with materials to do so. A copy of the Council's November 7, 2018 agenda is attached as Exhibit 3.

On November 7, 2018, Ms. Chen appeared, as did other members of the public, at the City Council meeting and addressed the Council concerning the amendments, in addition to emailing written comments prior to the meeting. After discussion, Council adopted the ordinances as presented in the November 7 agenda.

On November 14, 2018, the Commission conducted a hearing on the complaint. After hearing from the complainant and the City, the Commission sustained the complaint and ordered that the Ordinances in question be re-noticed for a first reading and that the Ordinances were null and void.

Thereafter, the City Attorney's Office provided a legal memorandum to the Commission that set forth in more detail why there had not been a violation of the Sunshine Ordinance. Even assuming there was a violation, the City Attorney concluded that the Commission did not have legal authority to render Ordinances adopted by the City Council as null and void. Rather, if the Commission continued to conclude that there had been a violation of the Sunshine Ordinance, it should recommend to the City Council that the Ordinances be considered for re-introduction following a public hearing and that the adopted Ordinances be repealed.

At the request of the City Attorney's Office, the complaint was returned to the Commission on December 17, 2018 for further consideration in light of the City Attorney's memorandum.

Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the Open Government Commission, created under the Sunshine Ordinance, hears the complaint and renders a formal written decision. The complainant and the City then shall appear at a hearing. During the hearing, the Open Government Commission considers the evidence and the arguments of the parties before making its decision. Section 2-93.2 (b). The Commission conducted the hearing on November 14, 2018 and considered the evidence and arguments of Ms. Chen and the City. The Commission conducted a further hearing on the complaint on December 17, 2018 for the limited purpose of considering the City Attorney's legal memorandum and providing Ms. Chen an opportunity to respond to the legal memorandum.

Discussion

One of the goals of the Sunshine Ordinance is that residents have the opportunity to address the City Council prior to decisions being made. Section 2-90.1, AMC. Here, Ms. Chen had, and took, the opportunity on November 7, 2018, to address

the City Council about her concerns about the amendments to the cannabis ordinances prior to the City Council making a final decision on the amendments. Notwithstanding that, for the following reasons, the Commission finds a violation not only of Section 2-90.1 AMC, but also of Section 2-91.5 AMC.

Concerning the agenda title on October 16, 2018, the title included numerous proposed changes to the cannabis ordinances including the possibility of cannabis retail businesses being conditionally permitted in certain zoning districts, increasing the number of cannabis retail businesses and eliminating the dispersion requirements for certain cannabis businesses. Despite the breadth of these revisions, a person of average intelligence and education who had concerns about the number of full-service cannabis dispensaries could have considered attending the meeting on October 16 (or sought more information). More specifically as to Ms. Chen's complaint, although it is arguable that the agenda description was meaningful in that it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services, the City Council's action fell outside the ambit of that brief, concise description. At a minimum, the difference between the agenda description posted for the October 16, 2018 regular meeting ("delivery only" dispensaries, closed to the public) and

the actual action taken by the Council ("delivery required," open to the public) is substantial enough that members of the public may have been confused as to whether or not they should appear to be heard or seek more information. In the end, the Commission ~~recognizes that this complaint poses a very close question, but on balance~~ we find that the complaint that there was a violation of Section 2-91.5, AMC ~~should be sustained~~. and the complaint is thereby sustained

Turning now to the question of the appropriate penalty and how to give force and effect to Section 2-93.8 that provides that the Commission may order an action taken in violation of Section 2-91.5 "null and void" in light of the Commission's ~~circumscribed~~ authority to set aside Council legislative action, the Commission directs ~~recommends~~ the following:

2 1. City Council ~~should~~ may consider re-introducing the two Ordinances in question properly following a noticed public hearing.

~~2. The agenda title for those items should track the agenda title that appeared on the Council's November 7, 2018 agenda concerning the Ordinances because that agenda title satisfies Sections 2-90.1 and Section 2-91.5 concerning the items.~~

1. ~~3. City Council should consider repealing~~ Ordinance Nos. 3227 and 3228 **are null and void.**

Decision

There was a violation of Section 2-90.1 and Section 2-91.5 of the Alameda Municipal Code as set forth in Ms. Chen's complaint of October 30, 2018. The complaint, therefore, is **SUSTAINED**. ~~In order to carry out this decision, the Commission recommends items 1, 2 and 3 above be agendized for future consideration by the Council.~~

Signatures are on the following page.

City of Alameda

OPEN GOVERNMENT COMMISSION
2263 Santa Clara Avenue, Suite 380
Alameda, CA 94501
(510) 747-4800

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission: City Manager & City Attorney Offices

Name of individual contacted at Department or Commission:_____

❒Alleged violation of public records access.
☑Alleged violation of public meeting. Date of meeting: Jan. 15, 2019

Sunshine Ordinance Sections: **2-91.5, 2-93.2**

VIOLATIONS

Section 2-93.2(b) - The **January 15, 2019 agenda item 6-B** did not include the formal written decision of the Open Government Commission as an exhibit, revealing that it had not been issued.

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It became clear at this point that, staff had not followed the Commission's decision, which had stipulated that the amendments be made "null and void" before the amendments would be re-heard.

PRAYER FOR RELIEF

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Council must respect the intent of the Commission to properly re-hear the Oct. 16 amendments. **Section 2-93.7** clearly states that the "Sunshine Ordinance supersedes other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply."

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Name: Serena Chen Address:931 Independence Dr., Alameda 94501

Telephone No: 510-435-5889 E-mail Address: serenatchen@gmail.com

Date:1/25/2019

Signature

BEFORE THE OPEN GOVERNMENT COMMISSION

OF THE CITY OF ALAMEDA

In re: The Complaint of Serena Chen Serena Chen, Complainant The City of Alameda, Respondent	Case No. 18-02 DECISION OF THE OPEN GOVERNMENT COMMISSSION OF THE CITY OF ALAMEDA

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Facts

In compliance with the Sunshine Ordinance, the City Clerk on October 4, 2018

ATTACHMENT B

published the agenda and supporting materials for the City Council's meeting on October 16, 2018. In relevant part, the title for Agenda item 6-G provided that there would be a public hearing to consider the introduction of an ordinance to amend the Municipal Code in a number of respects concerning cannabis businesses, for example, by adding cannabis retail businesses as conditionally permitted uses in certain zoning districts, by adding two "delivery-only" Cannabis Retail Businesses as a conditionally permitted use in the C-M, Commercial-Manufacturing Zoning District, eliminating the dispersion requirements for "delivery-only" cannabis businesses. The agenda for this item is attached as Exhibit 1.

The City Council conducted a public hearing on these items on October 16, 2018. During the public hearing, Council resolved to include in the amendments a modification to the amendment allowing two "delivery-only" dispensaries, such that these cannabis businesses would be required to offer delivery of cannabis ("delivery required") and would also be open to the public, in recognition that the State and local requirements for either ("delivery-only" versus "delivery required") would be the same. Following the close of the public hearing the City Council introduced on first reading an ordinance amending various sections of the

Municipal Code concerning cannabis businesses, including that two "delivery required" dispensaries, which would be open to public, be allowed. In response to a question about whether the ordinance could be introduced that evening with the inclusion of the two "delivery required" dispensaries as conditionally permitted uses, the City Attorney advised yes.

On October 30, 2018, Serena Chen timely filed a Sunshine Ordinance Complaint against the Alameda City Council concerning an alleged violation of a public meeting on October 16, 2018, citing a violation of Section 2-91.5, Agenda Requirements. The complaint states the City Council voted to add two additional cannabis dispensary permits without prior notification. More specifically, the complaint states nowhere in the agenda title or text of the staff report concerning cannabis businesses was there any mention that the number of "full-service marijuana dispensaries" would be increased.

The complaint cites to Section 2-90.1 of the Municipal Code that provides that one of the goals of the Sunshine Ordinance is to ensure that Alameda residents have the opportunity to address the Council prior to a decision being made. The complaint also cites to Section 2-91.5 of the Municipal Code that provides agenda

items are to be contain a meaningful description of each item of business to be transacted and that the description of such items be sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information about the item. A copy of the complaint is attached as Exhibit 2.

In response to the complaint, the City Attorney's Office emailed Ms. Chen that the ordinance addressed in her complaint was not final ("are being amended"), but would be on the Council's November 7, 2018 agenda for "second reading". She was invited to attend and be heard concerning the ordinance amendments, or to submit comments in writing if she could not attend, in addition to being furnished with materials to do so. A copy of the Council's November 7, 2018 agenda is attached as Exhibit 3.

On November 7, 2018, Ms. Chen appeared, as did other members of the public, at the City Council meeting and addressed the Council concerning the amendments, in addition to emailing written comments prior to the meeting. After discussion, Council adopted the ordinances as presented in the November 7 agenda.

On November 14, 2018, the Commission conducted a hearing on the complaint. After hearing from the complainant and the City, the Commission sustained the complaint and ordered that the Ordinances in question be re-noticed for a first reading and that the Ordinances were null and void.

Thereafter, the City Attorney's Office provided a legal memorandum to the Commission that set forth in more detail why there had not been a violation of the Sunshine Ordinance. Even assuming there was a violation, the City Attorney concluded that the Commission did not have legal authority to render Ordinances adopted by the City Council as null and void. Rather, if the Commission continued to conclude that there had been a violation of the Sunshine Ordinance, it should recommend to the City Council that the Ordinances be considered for re-introduction following a public hearing and that the adopted Ordinances be repealed.

At the request of the City Attorney's Office, the complaint was returned to the Commission on December 17, 2018 for further consideration in light of the City Attorney's memorandum.

Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the Open Government Commission, created under the Sunshine Ordinance, hears the complaint and renders a formal written decision. The complainant and the City then shall appear at a hearing. During the hearing, the Open Government Commission considers the evidence and the arguments of the parties before making its decision. Section 2-93.2 (b). The Commission conducted the hearing on November 14, 2018 and considered the evidence and arguments of Ms. Chen and the City. The Commission conducted a further hearing on the complaint on December 17, 2018 for the limited purpose of considering the City Attorney's legal memorandum and providing Ms. Chen an opportunity to respond to the legal memorandum.

Discussion

One of the goals of the Sunshine Ordinance is that residents have the opportunity to address the City Council prior to decisions being made. Section 2-90.1, AMC. Here, Ms. Chen had, and took, the opportunity on November 7, 2018, to address

the City Council about her concerns about the amendments to the cannabis ordinances prior to the City Council making a final decision on the amendments. Notwithstanding that, for the following reasons, the Commission finds a violation not only of Section 2-90.1 AMC, but also of Section 2-91.5 AMC.

Concerning the agenda title on October 16, 2018, the title included numerous proposed changes to the cannabis ordinances including the possibility of cannabis retail businesses being conditionally permitted in certain zoning districts, increasing the number of cannabis retail businesses and eliminating the dispersion requirements for certain cannabis businesses. Despite the breadth of these revisions, a person of average intelligence and education who had concerns about the number of full-service cannabis dispensaries could have considered attending the meeting on October 16 (or sought more information). More specifically as to Ms. Chen's complaint, although it is arguable that the agenda description was meaningful in that it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services, the City Council's action fell outside the ambit of that brief, concise description. At a minimum, the difference between the agenda description posted for the October 16, 2018 regular meeting ("delivery only" dispensaries, closed to the public) and

the actual action taken by the Council ("delivery required," open to the public) is substantial enough that members of the public may have been confused as to whether or not they should appear to be heard or seek more information. In the end, the Commission ~~recognizes that this complaint poses a very close question, but on balance~~ we find that the complaint that there was a violation of Section 2-91.5, AMC ~~should be sustained~~. and the complaint is thereby sustained

Turning now to the question of the appropriate penalty and how to give force and effect to Section 2-93.8 that provides that the Commission may order an action taken in violation of Section 2-91.5 "null and void" in light of the Commission's ~~circumscribed~~ authority to set aside Council legislative action, the Commission directs ~~recommends~~ the following:

2 1. City Council ~~should~~ may consider re-introducing the two Ordinances in question properly following a noticed public hearing.

~~2. The agenda title for those items should track the agenda title that appeared on the Council's November 7, 2018 agenda concerning the Ordinances because that agenda title satisfies Sections 2-90.1 and Section 2-91.5 concerning the items.~~

1. ~~3. City Council should consider repealing~~ Ordinance Nos. 3227 and 3228 **are null and void.**

Decision

There was a violation of Section 2-90.1 and Section 2-91.5 of the Alameda Municipal Code as set forth in Ms. Chen's complaint of October 30, 2018. The complaint, therefore, is **SUSTAINED**. ~~In order to carry out this decision, the Commission recommends items 1, 2 and 3 above be agendized for future consideration by the Council.~~

Signatures are on the following page.

City of Alameda

Meeting Agenda

City Council

Tuesday, January 15, 2019 | **7:00 PM** | **City Hall, 2263 Santa Clara Avenue, Council Chambers, 3rd Floor, Alameda CA 94501**

REVISED SPECIAL MEETING - CLOSED SESSION - 5:15 P.M.

The agenda was revised on January 8, 2019 at 5:00 p.m. to have the meeting start at 5:15 p.m.

1 Roll Call - City Council

2 Public Comment on Closed Session Items - Anyone wishing to address the Council on closed session items may speak for 3 minutes per item

3 Adjournment to Closed Session to consider:

3-A 2019-6358 CONFERENCE WITH LABOR NEGOTIATORS (Government Code section 54957.6)
CITY NEGOTIATORS: David L. Rudat, Interim City Manager, and Nancy Bronstein, Human Resources Director
EMPLOYEE ORGANIZATIONS: International Brotherhood of Electrical Workers, Local 1245 (IBEW), Electric Utility Professional Association of Alameda (EUPA), Alameda City Employees Association (ACEA), Alameda Police Officers Association Non-Sworn Unit (PANS), Alameda Management and Confidential Employees Association (MCEA); Executive Management Employees (EXME) and Electric Utility Professionals of Alameda (AMPU)
UNDER NEGOTIATION: Salaries and Terms of Employment

3-B 2019-6365 PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Attorney

3-C 2019-6366 PUBLIC EMPLOYEE APPOINTMENT/HIRING
Pursuant to Government Code § 54957
Title/description of positions to be filled: City Manager

3-D 2019-6417 CONFERENCE WITH REAL PROPERTY NEGOTIATORS (Government Code section 54956.8)
PROPERTY: A 30 acre portion of Site B, Alameda Point
CITY NEGOTIATOR: David L. Rudat, Interim City Manager
POTENTIAL BUYER: Abbott Bros. Development, Inc.

ISSUE UNDER NEGOTIATION: Real Property Negotiations Price and Terms of Payment

4 Announcement of Action Taken in Closed Session, if any

5 Adjournment - City Council

REGULAR CITY COUNCIL MEETING - 7:00 P.M.

Pledge of Allegiance

1 Roll Call - City Council

2 Agenda Changes

3 Proclamations, Special Orders of the Day and Announcements - Limited to 15 minutes

4 Oral Communications, Non-Agenda (Public Comment) - A limited number of speakers may address the Council regarding any matter not on the agenda; limited to 15 minutes; additional public comment addressed under Section 8

5 Consent Calendar - Items are routine and will be approved by one motion unless removal is requested by the Council or the public

5-A 2019-6399 Minutes of the Special and Regular City Council Meetings Held on December 18, 2018. (City Clerk)

5-B 2019-6402 Bills for Ratification. (Finance)

Attachments: Bills for Ratification

5-C 2019-6382 Recommendation to Authorize the Interim City Manager to Execute a First Amendment to the Professional Services Agreement with Hinderliter de Llamas Associates (HdL) to Include the Review and Examination of Measure F Transactions and Use Tax Records Collected by the California Department of Tax and Fee Administration and to Increase Compensation Under the Agreement by $25,000; and

Adoption of Resolution Authorizing Hinderliter de Llamas Associates (HdL) Access to the City's Sales and Transactions and Use Tax Records. (Finance 2410)

Attachments: Exhibit 1 - Agreement
Exhibit 2 - First Amendment
Resolution

5-D 2019-6369 Adoption of Resolution Authorizing the Interim City Manager to Execute Agreements and All Related Documents with the California Department of Tax and Fee Administration for Implementation of the City's Half-Cent Transactions and Use Tax (Measure F) Approved by the Voters at the November 6, 2018 General Election. (Finance 2410)

Attachments: Exhibit 1 - Agreement for Preparation
Exhibit 2 - Agreement for State Administration
Resolution

5-E 2019-6347 Adoption of Resolution Authorizing the City of Alameda to Participate in the United States Department of Housing and Urban Development (HUD) Public Offering as Part of the Section 108 Loan Guarantee Assistance Program to Refinance an Existing Note in the Original Principal Amount of $4,000,000, Related to Financing of the Civic Center Parking Garage (Series 2006-A);

Adoption of Resolution Authorizing the City of Alameda to Participate in the United States Department of Housing and Urban Development (HUD) Public Offering as Part of the Section 108 Loan Guarantee Assistance Program to Refinance an Existing Note in the Original Principal Amount of $3,000,000, Related to Financing of the Civic Center Parking Garage (Series 2008-A); and

Recommendation to Authorize the Interim City Manager to Negotiate and Execute Related Documents, Agreements, and Modifications Related to the Refinancing. (Community Development 274)

Attachments: Resolution - Series 2006-A
Resolution - Series 2008-A

5-F 2019-6352 Adoption of Resolution Authorizing the Interim City Manager to Execute a Cooperation Agreement and Any Amendments Thereto between Eden Housing, Inc., a California Corporation, and the City of Alameda for Compliance with the Requirements of a Grant Application Under the Affordable Housing and Sustainable Communities Funding Program for: A) the 70-Unit Family Affordable Housing Project on Block 8 within Site A at Alameda Point and B) Transportation Projects (a Segment of Main Street (West Side) between Pacific and Atlantic Avenues or a Segment of Central Avenue, and Lighting Along the Cross-Alameda Trail). (Base Reuse 819099)

Attachments: Exhibit 1 - Cooperation Agreement
Presentation
Resolution

5-G 2019-6353 Adoption of Resolution Declaring Results of Special Election in

Community Facilities District No. 17-1 (Alameda Point Public Services District), Determining That Alteration of the Rate and Method of Apportionment of Special Taxes for the District is Lawfully Authorized, and Directing Recording of an Amendment to Notice of Special Tax Lien. (Base Reuse 819099)

Attachments: Resolution

5-H 2019-6354 Adoption of Resolution Approving a Memorandum of Understanding (MOU) Between the Alameda Police Officers Association Non-Sworn Unit (PANS) and the City of Alameda for a Forty-Two Month Term Commencing December 27, 2018 and Ending June 30, 2022. (Human Resources 2510)

Attachments: Exhibit 1 - MOU (Redline)
Exhibit 2 - MOU
Resolution

5-I 2019-6359 Adoption of Resolution Approving a Memorandum of Understanding Between the Alameda City Employees Association and the City of Alameda for a Forty-Two Month Term Commencing December 28, 2018 and Ending June 30, 2022. (Human Resources 2510)

Attachments: Exhibit 1 - MOU (Redline)
Exhibit 1 - REVISED MOU (Redline)
Exhibit 2 - MOU
Exhibit 2 - REVISED MOU
Resolution

5-J 2019-6361 Adoption of Resolution Approving a Memorandum of Understanding (MOU) Between the Management and Confidential Employees Association (MCEA) and the City of Alameda for a Forty-Two Month Term Commencing December 27, 2018 and Ending June 30, 2022. (Human Resources 2510)

Attachments: Exhibit 1 - MOU (Redline)
Exhibit 2 - MOU
Resolution

6 Regular Agenda Items

6-A 2019-6345 Recommendation to Provide Direction on the City's Proposal for the Homeless Emergency Aid Program (HEAP) and Authorize the Interim City Manager to Work with the Social Service Human Relations Board to Finalize and Implement the City's HEAP Programs and Services. (Economic Development 001)

Attachments: Presentation

6-B 2019-6384 Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by (1) Amending Section 30-10 (Cannabis) to (a) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business, and C-M, Commercial-Manufacturing Zoning Districts, (b) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis, and (c) Amend Certain Portions of the Zoning Code to Remove the Dispersion Requirement; and (2) Repeal Ordinance No. 3228; and

Introduction of Ordinance: (1) Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industry) to (a) Eliminate the Cap on Testing Laboratories, (b) Allow for Two Additional Cannabis Businesses to Operate as "Dispensary/Delivery" (Delivery Required, Open to the Public) within the Zoning Districts for Cannabis Retail, (c) Amend the Dispersion Requirement to Require No More Than Two Cannabis Retail Businesses to Operate on Either Side of Grand Street, (d) Create a Two-Tier Buffer Zone from Sensitive Uses for Cannabis Businesses, (e) Amend Certain Portions of the Regulatory Ordinance to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis, (f) Modify Requirements for Off-Island Delivery, and (g) Make Other Clarifying or Conforming Amendments Thereto; and (2) Repealing Ordinance No. 3227. (Community Development 209)

Attachments:
Exhibit 1 - Map of Zones
Exhibit 2 - Letter
Exhibit 3 - Ordinance Land Use (Redline)
Exhibit 4 - Ordinance Regulatory (Redline)
Correspondence - Updated 1-15
Ordinance - Land Use
Ordinance - Regulatory

7 City Manager Communications - Communications from City Manager

8 Oral Communications, Non-Agenda (Public Comment) - Speakers may address the Council regarding any matter not on the agenda

9 Council Referrals - Matters placed on the agenda by a Councilmember may be acted upon or scheduled as a future agenda item

10 Council Communications - Councilmembers can address any matter not on the agenda, including reporting on conferences or meetings

11 Adjournment - City Council

SPECIAL MEETING - 7:01 P.M. (Following Regular Meeting)

The special meeting agenda was added on January 8, 2019 at 5:00 p.m.

1 Roll Call - City Council

2 Agenda Items

2-A 2019-6396 Recommendation to Review the Ballot Arguments and Address Rebuttals for the Two April 9, 2019 Special Election Measures: 1) a Proposed Initiative Measure to Change the Designation for an Approximately 3.65 Acre Site on McKay Avenue, by Amending the General Plan Designation from Office to Open Space, and by Amending the Zoning Ordinance from Administrative-Professional District to Open Space District; and 2) the Caring Alameda Act. (City Clerk 2220)

Attachments: Exhibit 1 - Ballot Argument Against Initiative
Exhibit 2 - Ballot Argument In Favor of Caring Alameda Act
Exhibit 3 - Declaration of Argument Authors

2-B **2019-6424** Recommendation to Consider Directing the City Attorney to Initiate Litigation to Obtain a Judicial Declaration Whether Enforcement of the McKay Open Space Initiative will Require the City of Alameda to Compensate the Owner for the Value of the McKay Avenue Property in the event that the McKay Open Space Initiative Becomes Effective. (City Manager 2100)

3 Adjournment - City Council

• Meeting Rules of Order are available at https://alamedaca.gov/node/5822
• Time frames listed for agenda items are only estimates. Discussions on each item could take more or less time. Anyone interested in speaking is encouraged to arrive early rather than relying on the estimates.
• Translators and sign language interpreters will be available on request. Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 72 hours prior to the meeting to request a translator or interpreter.
• Equipment for the hearing impaired is available for public use. For assistance, please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 either prior to, or at, the Council meeting.
• Accessible seating for persons with disabilities, including those using wheelchairs, is available.
• Minutes of the meeting available in enlarged print.
• Video tapes of the meeting are available upon request.
• Please contact the City Clerk at 510-747-4800 or TDD number 510-522-7538 at least 48 hours prior to the meeting to request agenda materials in an alternative format, or any other reasonable accommodation that may be necessary to participate in and enjoy the benefits of the meeting.
• This meeting will be broadcast live on the City's website www.alamedaca.gov/agendas.
• Documents related to this agenda are available for public inspection and copying at of the Office of the City Clerk, 2263 Santa Clara Avenue, Room 380, during normal business hours.
• KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE: Government's duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City of Alameda exist to conduct the citizen of Alameda's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.
• FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE OPEN GOVERNMENT COMMISSION: the address is 2263 Santa Clara Avenue, Room 380, Alameda, CA, 94501; phone number is 510-747-4800; fax number is 510-865-4048, e-mail address is lweisiger@alamedaca.gov and contact is Lara Weisiger, City Clerk.
• In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical based products. Please help the City accommodate these individuals.

Public Hearing to Consider Introduction of Ordinance Amending the Alameda Municipal Code by (1) Amending Section 30-10 (Cannabis) to (a) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business, and C-M, Commercial-Manufacturing Zoning Districts, (b) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis, and (c) Amend Certain Portions of the Zoning Code to Remove the Dispersion Requirement; and (2) Repeal Ordinance No. 3228; and

Introduction of Ordinance: (1) Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industry) to (a) Eliminate the Cap on Testing Laboratories, (b) Allow for Two Additional Cannabis Businesses to Operate as "Dispensary/Delivery" (Delivery Required, Open to the Public) within the Zoning Districts for Cannabis Retail, (c) Amend the Dispersion Requirement to Require No More Than Two Cannabis Retail Businesses to Operate on Either Side of Grand Street, (d) Create a Two-Tier Buffer Zone from Sensitive Uses for Cannabis Businesses, (e) Amend Certain Portions of the Regulatory Ordinance to Enable Cannabis Retail Businesses to Dispense Non-Medicinal or "Adult Use" Cannabis, (f) Modify Requirements for Off-Island Delivery, and (g) Make Other Clarifying or Conforming Amendments Thereto; and (2) Repealing Ordinance No. 3227. (Community Development 209)

To: Honorable Mayor and Members of the City Council

From: David L. Rudat, Interim City Manager

EXECUTIVE SUMMARY

On November 7, 2018, City Council adopted Ordinance Nos. 3227 and 3228 concerning cannabis businesses in Alameda. Those Ordinances are now in effect. A complaint, however, was filed under the City's Sunshine Ordinance that the agenda title for these ordinances when the City Council considered their introduction did not reflect certain provisions in the ordinance that was introduced on October 16, 2018, and then adopted on November 7, 2018. The Open Government Commission conducted a hearing on the complaint, sustained it and, as a remedy, held that the Ordinances were deemed null and void and that the Council may consider re-noticing the ordinances following a public hearing.

The City Attorney's Office had advised the Commission and the Council that the Sunshine Ordinance had not been violated and that the Commission did not have the legislative authority to render a legally adopted ordinance null and void.

Given the decision of the Commission and the opinion of the City Attorney, the City Manager and staff are recommending that the two ordinances be re-introduced and adopted, and that Ordinances Nos 3227 and 3228 be subsequently repealed when the new ordinances are adopted and become effective.

Rather than risk future confusion over the legal status of Ordinance Nos. 3227 and 3228 (and the likely accompanying use of limited city resources), and to further sustain public confidence in its public officials and legal processes concerning the adoption and enforcement of its laws, staff's proposed solution as the most expeditious and balanced one, with the least amount of risk, that would best serve interests of the community as a whole.

Accordingly, in an abundance of caution only, the City Manager and staff are recommending that the two ordinances be re-considered and that Ordinance Nos. 3227 and 3228 be repealed.

BACKGROUND

In late 2017, the City Council directed staff to undertake a Cannabis Regulatory Fee Study to ensure that the cost of regulating cannabis business activity in the City is borne by the cannabis businesses.

In late 2017, the City Council adopted two ordinances that covered all aspects of regulating the operations of cannabis businesses in Alameda. One ordinance regulates land use issues and requires a use permit for cannabis business activities (Zoning Ordinance). The other ordinance regulates cannabis business activity and requires an operator's permit for cannabis businesses (Regulatory Ordinance). These ordinances were effective on January 18, 2018.

Pursuant to the regulatory ordinance, the maximum number of permits to be issued by cannabis business category is capped. The Council approved a Request for Proposals (RFP) process (including an evaluation rubric and a review panel) to select the businesses in each category that would be eligible to move forward with applying for and obtaining the requisite approvals, with the exception of testing labs, which were permitted to apply for a permit on a first-come/first-served basis.

These categories include:

- One nursery cultivation (including distributor's) permit;
- Four manufacturing permits (including distributor's) permit; and
- Two medicinal retail dispensary permits (including delivery permits)

The first RFP was issued in April 2018. Five proposals were received for retail dispensaries. No proposals were received for any other uses. Three of the proposals for retail dispensaries were deemed non-responsive as they were all located within the 1,000-foot buffer zone for sensitive uses. Two proposals were evaluated by the review panel and one proposer was awarded the right to move forward with its application for an operator's permit. The proposer who was not selected appealed the panel's determination. A hearing officer issued an opinion denying the appeal on September 24, 2018. The proposer who was selected is moving forward with its permit application.

At its May 18, 2018 goal-setting work session, the City Council directed staff to report on a number of issues related to the Regulatory Ordinance. Staff prepared the requested analysis in a semi-annual report for Council consideration at its July 24, 2018 meeting. At that meeting, Council directed staff to prepare the required ordinances to amend the Zoning Ordinance and the Regulatory Ordinance to:

- Eliminate the cap on the number of testing laboratories allowed in Alameda, but maintain the cap of two for dispensaries open to the public;
- Similar to testing laboratories, allow nursery cultivation and cannabis manufacturing businesses to apply for permits on a first-come/first-served basis;
- Maintain the buffer zone of 1,000 feet from public and private K-12 schools and reduce the buffer zone to 600 feet for all other sensitive uses for dispensaries and cultivation uses;
- Expand existing zoning to conditionally permit cannabis dispensaries in the C-1, Neighborhood Business and C-M, Commercial-Manufacturing zoning districts;
- Maintain the existing dispersion requirement for dispensaries;
- Confirm continued use of the RFP process, including the scoring rubric and review panel to allocate the limited right to apply for a cannabis business permit;
- Amend ordinance language to clarify that certain uses do not qualify as a "school," including providing a definition for tutoring centers;
- Allow adult use (recreational) cannabis to be sold in Alameda;
- Clarify that off-island cannabis delivery businesses need only apply for a business license and pay applicable fees; and
- Recommend any clean-up amendments to the Regulatory Ordinance.

On October 16, 2018, the Council made revisions to an ordinance prepared by staff based on Council direction, which included a revision to convert the two additional "delivery-only" dispensaries to "delivery-required" (open to the public) dispensaries. After making those revisions, the Council introduced on first reading two ordinances amending Ordinance No. 3227 (Regulatory Ordinance) and Ordinance No. 3228 (Land Use Ordinance). Following the first reading, on October 30, 2018, a member of the public filed a complaint with the Open Government Commission ("OGC") concerning the agenda title for the two ordinances that the Council introduced on October 16. On November 7, 2018, the Council took final action to adopt the two ordinances on second reading, after taking further public comment, including comment from the OGC complainant. The matter was heard by the OGC on November 14, 2018. After deliberation, the OGC sustained the complaint and, in light thereof, deemed the two ordinances null and void and that the ordinances be re-noticed to allow members of the public to be heard.

Thereafter, the City Attorney's Office provided a legal memorandum to the Commission that set forth in more detail why there had not been a violation of the Sunshine Ordinance but, assuming the Commission found a violation that the Commission did not have the

legal authority to render Ordinances adopted by the City Council null and void. Rather, if the Commission continued to conclude that there had been a violation of the Sunshine Ordinance, it should recommend to the City Council that the Ordinances be considered for re-introduction following a public hearing and that the adopted Ordinances be repealed.

At the request of the City Attorney's Office, the complaint was returned to the Commission on December 17, 2018, for further consideration in light of the City Attorney's memorandum. Nevertheless, the Commission sustained the complaint, ordered Ordinance Nos. 3227 and 3228 null and void, and noted that the Council may reintroduce the two ordinances after a properly noticed public hearing.

In order to carry out the intent of the Commission's decision, and to avoid any potential litigation concerning the legal status of the two ordinances, this item has been scheduled for a public hearing on the Council's January 15, 2019 agenda.

DISCUSSION

Zoning Code Amendments

At its July 24, 2018 meeting, City Council directed staff to amend the Zoning Code to:

Expand Zoning Districts where Retail Cannabis Dispensaries can be Conditionally Permitted

The City Council directed staff to amend the Zoning Code to expand the zoning districts where retail cannabis dispensaries can be conditionally permitted to include the C-1 Neighborhood Business and C-M Commercial Manufacturing districts (Exhibit 1 is a map of C-1 and C-M zones). The purpose of the C-1 district is to "serve residential areas with convenient shopping and service facilities." The C-1 districts are primarily located along the Lincoln Avenue and Central/Encinal Avenue at locations that once served as railroad stations. Today, these areas are populated with small businesses engaged in retail, food, and office businesses.

The C-M, Commercial Manufacturing Zoning District, is intended for a broad variety of general commercial facilities and light manufacturing uses such as food distribution, research labs, and warehouses. The Harbor Bay Business Park, Wind River Campus, and Ballena Bay are the primary business locations zoned C-M. Two other locations zoned C-M include Stewart Court off of Constitution Avenue and the City block containing Fire Station 3 and the Emergency Operations Center on Grand Street. Permitting cannabis retail sales conditionally in the C-M District could be complementary to the general commercial facilities and light manufacturing uses permitted in that District.

As a conditionally permitted use in both the C-1 and C-M Districts, the City has the ability to consider and impose conditions on any aspect of the cannabis business to address potential negative impacts.

Conditionally Permit "Dispensary/Delivery" (Delivery Required; Open to the Public) in the C-M and C-1 Zones

At its October 16, 2018 meeting, the Council modified its original direction to permit two additional "delivery-only" dispensaries to add two additional "delivery-required" dispensaries, which would be open to the public. These businesses would be no different (functionally and from a regulatory perspective) from full-service retail dispensaries, except that they would be required to offer cannabis delivery from the licensed premises. For example, they would be open to the public. Allowing delivery-required dispensaries as a conditionally permitted use in the C-1 and C-M districts would be consistent with the underlying intent for that zone. With all cannabis businesses, the City has the ability to impose conditions of approval to address potential impacts through the use permit process.

At its July 24, 2018 meeting, Council requested that staff contact business park representatives to receive input on locating dispensaries in the C-M zone. Staff received the attached letter from Harbor Bay Business Park opposing the proposed zoning amendment (Exhibit 2).

Allow Retail and "Dispensary/Delivery" (Delivery-Required; Open to the Public) to Sell Cannabis for Adult Use (recreational use)

At its July 24, 2018 meeting, Council considered lifting the ban on adult-use sales based on a number of factors, including the filing of valid notice of intent to circulate a citizen-initiated petition to legalize adult use cannabis. Although lifting the ban on the sale of adult use cannabis would not raise new concerns from a land use and zoning perspective, an amendment to the Zoning Code is required should the Council decide to allow sale for adult use, as the Code only allows the sale or delivery of medicinal cannabis. Accordingly, as requested by the Council, staff has prepared ordinance amendments to facilitate a discussion and comment on allowing the sale of adult use cannabis in Alameda.

On September 24, 2018, the Planning Board held a public hearing to consider the zoning changes described above. The Planning Board recommended that the City Council adopt an ordinance making those changes as well as several other changes including:

- Removing the one (1) mile dispersion requirement from the Zoning Ordinance and including it wherever the Council saw fit (e.g., Regulatory Ordinance);
- Requiring that delivery-only dispensaries meet the same parking requirements as manufacturing uses rather than retail uses; and
- Reviewing the guidelines for distances used by the California Department of Alcohol Beverage Control ("ABC") to determine if cannabis buffer zones should be consistent with ABC's.

The ordinances as drafted include some but not all of the changes recommended by the Planning Board. Following the Planning Board meeting, staff had further revised the draft

ordinance based on the Planning Board's discussion to include two definitions, one for Cannabis Retail and one for Cannabis Retail - Delivery Only, rather than a single definition. Two definitions are appropriate as these businesses are conditionally permitted in different zones, are subject to different parking requirements, etc. However, in light of the Council's direction at the October 16, 2018 meeting, these amendments were removed from the Land Use Ordinance.

Based on the Planning Board's recommendation, the Council's direction concerning dispensaries and the decision of the Open Government Commission, staff recommends that the City Council introduce a new ordinance amending Ordinances No. 3206 (Land Use Ordinance attached as Exhibit 3), which tracks the language of Ordinance No. 3228, as described above, and repealing Ordinance No. 3228.

Regulatory Ordinance Amendments

Staff prepared a draft ordinance amending the Regulatory Ordinance based on Council direction received on July 24, 2018, and direction received from the Council on October 16, 2018. The following is a summary of the key amendments to the Regulatory Ordinance considered on October 16, 2018.

Dispersion Requirement

As noted above, the Planning Board recommended that the dispersion requirement be removed from the Zoning Code. The Planning Board felt that the dispersion requirement was not a land use issue. The dispersion requirement prohibits retail dispensaries to be located within one mile of each other. In light of the Planning Board's recommendation, the proposed ordinances reflect the recommended change. Therefore, the dispersion requirement has been deleted from the Zoning Ordinance and added to the Regulatory Ordinance. A modified dispersion requirement (overconcentration) would still apply to "Dispensary/Delivery" (Delivery-Required, Open to the Public) dispensaries. The proposed ordinance would permit two dispensaries east of Grand Street and two dispensaries west of Grand Street and does not make a distinction between the types of retail dispensary.

Two-Tier Buffer Zone

The draft ordinance retains the 1,000-foot buffer zone from public and private K-12 schools and reduces the buffer zone to 600 feet for other sensitive uses including youth centers and tutoring centers, for retail dispensaries (both types) and nursery cultivation. The draft Regulatory Ordinance also provides that, for retail dispensaries, which are subject to the RFP process, the buffer zone will be established based on existing sensitive uses prior to the time of submittal of the Letter of Intent, or at the time of application, in the case of businesses that apply on a first-come-first-served basis. This change will ensure that businesses can proceed with the process and expend resources and funding without the risk that a sensitive use subsequently move in within the

applicable buffer zone and then displace the cannabis business, rendering its proposed location ineligible.

The original Regulatory Ordinance included a definition of schools and youth centers, which are primarily recreational in nature, but did not provide a definition for uses that has an academic focus. As such, academic uses were construed as schools as a matter of application. For example, academic after-school programs and tutoring facilities fell within the plain meaning of a "school". Moreover, the Ordinance did not address the applicable buffer for academic uses, as an ancillary use, within buildings that were not intended for such use (e.g., private homes, churches, etc.). Therefore, staff is recommending two changes. First, an amendment that clarifies that ancillary academic uses are not a "school" for purposes of the buffer, therefore the 600-foot radius would apply. Second, the following definition for tutoring centers has been added:

> "'Tutoring Center' means any enterprise, whether or not for profit, that operates in a commercial building or structure the principal use of which is to offer instruction of any kind to support academic instruction of K-12 students."

The buffer zone of 600 feet from sensitive uses remains the same for all other cannabis business activities.

Remove Cap on Testing Labs

One of the earliest changes to the Regulatory Ordinance proposed by Council was to remove the cap on testing labs and that change is provided for in the draft ordinance. In addition, based on direction given, an implementing regulation was issued that allows nursery cultivation and manufacturing uses to apply for an operator's permit on a first-come, first-served basis, similar to testing labs. As a result, testing labs, nursery cultivation and manufacturing businesses can all apply for an operator's permit without going through a RFP process. To date, no applications have been received for any of these business uses.

Allow for Delivery-Required Dispensaries

On July 24, 2018, Council directed staff to expand the categories of permitted cannabis businesses to include up to two delivery-only dispensaries. These brick and mortar businesses would have been regulated similar to retail cannabis dispensaries with two major features: (a) they would be closed to the public, and (b) would only be permitted in the C-M zone. To obtain the right to apply for an operator's permit, a prospective business would compete through a RFP process.

However, at its October 16 meeting, the Council gave direction and instead of "delivery-only" proposed that these businesses be required to offer delivery services from the licensed premises, which would be open to the public. As such, these "delivery-required" dispensaries would be permitted in the C-1 and C-M zones. The ordinance as drafted

allows for two “delivery-required” dispensaries. As noted above, these uses are no different from full-service dispensaries, except that they must offer delivery services and be open to the public.

Adult Use of Cannabis

As was reported at the July 24, 2018 meeting, a valid notice of intent to circulate a petition to legalize adult use cannabis was submitted to the City Clerk’s office on May 21, 2018. The petitioners have six months to gather signatures. If enough valid signatures are collected the Council can direct preparation of a report to evaluate the impacts of the petition and adopt an ordinance or place the measure on the ballot.

Given the anticipated high level of support for such an initiative (68% of Alameda voters supported the State ballot initiative to allow recreational use and sale of cannabis products) and the costs associated with conducting an election, should enough valid signatures be collected to put an adult use measure on the ballot, a majority of Council members expressed a willingness to allow the sale of cannabis products for adult use.

As noted above, both the draft Zoning Ordinance and Regulatory Ordinance allow for the sale of cannabis products for adult use. These ordinances already provide for the nursery cultivation and manufacturing of cannabis products for adult use.

Additional Clean-Up Amendments

Additional ordinance clean-up amendments are proposed to (1) “Permit Applications” section, which requires the applicant to provide a deed if the applicant will own the property; (2) “Cannabis Business Owner,” “Review of Applications; Appeal of Denials and Suspensions,” and “Labor Peace Agreement” language to comport with the State law; and, (3) reflect City department realignments.

Other substantive amendments include:

- False Statements/Representations. It shall be unlawful to make false statements in an application;
- Withdrawal of Application. Application withdrawals must be requested in writing and approved by the City. The City shall have continuing jurisdiction to deny a license even if it is withdrawn; and
- Implementing Regulations. The Planning, Building, and Transportation Department’s authority to adopt implementing regulations was expanded to encompass all cannabis ordinances, not only the Regulatory Ordinance.

As with the Land Use Ordinance, noted above, in light of the Council direction on October 16, 2018 concerning dispensaries and the Open Government Commission’s decision, staff recommends that the City Council introduce a new ordinance amending Ordinance No. 3201 (Regulatory Ordinance attached as Exhibit 4), which tracks the language of Ordinance No. 3227, as described above, and repealing Ordinance No.3227.

Request for Proposals Process

Staff had requested that the Council confirm continued use of the RFP process to facilitate administration of the cap. The Council decided to continue using the RFP process. The action currently before the Council would have no impact on that part of the Council's decision on October 16, 2018, which remains undisturbed.

FINANCIAL IMPACT

As noted on a previous staff report, there is no financial impact to the General Fund by introducing ordinances to amend the Zoning Code and Article XVI of the Municipal Code as described above. The City's Master Fee Schedule was amended in July 2018 to include fees to be charged in conjunction with administering the City's cannabis business regulatory program to ensure full cost recovery.

MUNICIPAL CODE/POLICY DOCUMENT CROSS REFERENCE

This report and its recommended actions have been prepared in conformance with the Alameda Municipal Code.

ENVIRONMENTAL REVIEW

California Environmental Quality Act ("CEQA") review is not required for this action pursuant to Business and Professions Code section 26055(h) as the City of Alameda requires discretionary review and approval of subsequent applications to engage in commercial cannabis activity. As a separate and independent basis, this action is exempt from CEQA pursuant to section 15061(b)(3) of the State CEQA Guidelines because it can be seen with certainty that there is no possibility that this action may have a significant effect on the environment.

RECOMMENDATION

It is recommended that the City Council:

Hold a Public Hearing to Consider the Introduction of an Ordinance (1) Amending the Alameda Municipal Code by Amending Section 30-10 (Cannabis) to (a) Add Cannabis Retail Businesses as Conditionally Permitted Uses in the C-1, Neighborhood Business, and C-M, Commercial-Manufacturing Zoning Districts, (b) Amend Certain Portions of the Zoning Code to Enable Cannabis Retail Businesses to Dispense Non-medicinal or "Adult Use" Cannabis, and (c) Amend Certain Portions of the Zoning Code to Remove the Dispersion Requirement; and (2) Repealing Ordinance No. 3228; and

Introduce an Ordinance: (1) Amending the Alameda Municipal Code by Amending Article XVI (Cannabis Businesses) of Chapter VI (Businesses, Occupations and Industry) to (a) Eliminate the Cap on Testing Laboratories, (b) Allow for Two Additional Cannabis

Businesses to Operate as “Dispensary/Delivery” (Delivery Required, Open to the Public) Within the Zoning Districts for Cannabis Retail, (c) Amend the Dispersion Requirement to Require No More Than Two Cannabis Retail Businesses to Operate on Either Side of Grand Street, (d) Create a Two-Tier Buffer Zone from Sensitive Uses for Cannabis Businesses, (e) Amend Certain Portions of the Regulatory Ordinance to Enable Cannabis Retail Businesses to Dispense Non-medicinal or “Adult Use” Cannabis, (f) Modify Requirements for Off-Island Delivery, and (g) Make Other Clarifying or Conforming Amendments thereto; and (2) Repealing Ordinance No. 3227.

Respectfully submitted,
Dave Rudat, Interim City Manager

By,
Michael H. Roush, Interim City Attorney

Financial Impact section reviewed,
Elena Adair, Finance Director

Exhibits:
1. Map of Zones
2. Letter
3. Ordinance Land Use (Redline)
4. Ordinance Regulatory (Redline)

BEFORE THE OPEN GOVERNMENT COMMISSION

OF THE CITY OF ALAMEDA

In re: The Complaint of Serena Chen Serena Chen, Complainant The City of Alameda, Respondent	Case No. 19-01 DECISION OF THE OPEN GOVERNMENT COMMISSSION OF THE CITY OF ALAMEDA

The above entitled matter came on for hearing by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code on February 4, 2019, at which time the Commission rendered a decision not to sustain the complaint. (All further references to Section numbers are to the Alameda Municipal Code.)

Facts

This complaint concerns amendments to Ordinance Nos. 3201 ("Regulatory Ordinance") and 3206 ("Land Use Ordinance"). On October 16, 2018, the City Council introduced two ordinances (Ordinance Nos. 3227 and 3228) to amend the Regulatory Ordinance and the Land Use Ordinance.

On October 30, 3018, Ms. Serena Chen filed an Open Government Commission ("Commission") complaint ("Chen I") concerning the agenda description for the item on the Council's October 16th agenda.

On November 14, 2018, the Commission conducted a hearing on Chen I, sustained it and, as a remedy, held that the Ordinances were deemed null and void. Further,

the Commission held that the Council may consider re-noticing the ordinances following a public hearing.

Prior to the deadline for publication of the Commission's decision in Chen I, the City Attorney's Office noticed a subsequent hearing to be heard on December 17, 2018, for various reasons, including to reconsider the matter and receive additional advice concerning the Commission's legal authority under the Sunshine Ordinance. Specifically, the City Attorney's Office had advised the Commission that the Sunshine Ordinance had not been violated and that the Commission did not have the legislative authority to render a legally adopted ordinance null and void.

The Commission declined to rehear the matter and instead gave direction to staff concerning revisions to the proposed decision attached to the agenda report to finalize their decision. The final decision is attached to this agenda report.

On January 15, 2019, given the Commission's decision and advice of the City Attorney's Office, staff agendized the introduction of two ordinances that tracked the language of Ordinance Nos. 3227 and 3228.

On January 25, 2019, Ms. Chen filed the current complaint ("Chen II"). Ms. Chen alleges two violations. First, she contends a violation of subdivision (b) of section 2-93.2(b) of the Sunshine Ordinance occurred because staff "did not include the formal written decision of the Open Government Commission as an exhibit. . . [to the January 15, 2019 agenda item 6-B]." Second, she contends a violation of subdivision (b) of section 2-91.5 of the Sunshine Ordinance occurred because the agenda description allegedly "did not adequately inform the general public that, if the item was defeated, the council's vote would be meaningless."

Discussion

In relevant part, subdivision (b) of section 2-93.2 of the Sunshine Ordinance provides:

> Upon filing of an official complaint form (including submittal of all evidence) with the City Clerk's Office, the complainant and the City (as respondent) shall appear at a hearing scheduled no later than thirty (30) business days. During this hearing the Commission will provide

the parties with the chance to present evidence and make arguments. **The Commission will render a formal written decision on the matter within fourteen (14) business days of the conclusion of the hearing**. (Emphasis added.).

The Commission did not order the Council reintroduce Ordinance Nos. 3227 and 3228. The Commission's decision only stated that the Council "may consider" doing so. Additionally, the Commission did not direct that its final decision be included as an exhibit to a future agenda packet where the Council may "consider re-introducing the two Ordinances."

Subdivision (b) of section 2-93.2 of the Sunshine Ordinance provides that each agenda item must include a "meaningful description". The agenda description for this item was prepared in response to the Commission's decision in which the Commission noted that "members of the public may have been confused as to whether or not they should appear to be heard or seek more information" because the agenda description did not explicitly state that the Council would be considering an increase the number of full-service (open to the public) cannabis dispensaries. The January 15, 2019 agenda description addresses this concern. The purpose of this meeting was to carry out the intent of the Commission's decision while recognizing the legal opinion of the City Attorney's Office by repealing Ordinance Nos. 3227 and 3228 and reintroducing them in substance with an amended agenda description that would more explicitly reflect the proposed action by the Council.

The Commission's written decision is not material to the Council's proposed action to repeal and reintroduce Ordinance No. 3227 and 3228 to afford members of the public an additional opportunity to comment. Moreover, any actions taken (or not) to inform members of the public that the "Council's vote would be meaningless" is entirely irrelevant to the consideration of that item.

Decision

There was not a violation of sections 2-93.2(b) and 2-91.5 of the Alameda Municipal Code. The complaint, therefore, is determined to be unfounded.

Signatures are on the following page.

Dated: February 4, 2019

Heather Little, Chair

Mike Henneberry, Member

Bryan Schwartz, Member

Rasheed Shabazz, Member

Ruben Tilos, Member

From: Heather Little [mailto:heatherlittle9691@gmail.com]
Sent: Monday, February 04, 2019 4:05 PM
To: LARA WEISIGER <LWEISIGER@alamedaca.gov>
Subject: Document for inclusion in tonight's OGC meeting

Good afternoon Lara,
Please include the following correspondence for tonight's meeting of the OGC:

The recent complaints brought forward by Serena Chen have raised underlying process issues that has put the validity of the Open Government Commission and its ability to make decisions into question. In order to best remedy this situation, I would like to propose that City Council, at its earliest convenience have a conversation to address the following:

1) hear the OGC December finding and make a determination to decide if OGCs "null and void" decision stands or not.

2) review Sunshine Ordinance with new city attorney to review the null and void clause of the Sunshine Ordinance. And if it is determined that it is unconstitutional, what other method of oversight process can be provided. Ie, if OGC makes a determination that should impact a decision by the CC, the CC should take the next opportunity to review and make their decision about next steps.

3) authorize separate legal council for OGC so that there is no future conflict of interest.

I believe that until these three actions are addressed, the recent and future decisions of the OGC will be able to be questioned. Thank you for your consideration.

Thanks,
Heather

LARA WEISIGER

From: Paul Foreman <ps4man@comcast.net>
Sent: Sunday, February 03, 2019 8:10 PM
To: Ruben Tilos; heatherlittle9691@gmail.com; Rasheed Shabazz; 'Bryan Schwartz'; michaelhenneberry5@gmail.com
Cc: LARA WEISIGER; id94501@gmail.com; Michael Roush; Ashley Zieba; Serena Chen; Jim Oddie; John Knox White; Marilyn Ezzy Ashcraft; Malia Vella; Tony Daysog
Subject: Item 3D, Feb. 4 Meeting of Open Government Commission

Dear Commissioners:

I am writing in support of the Complaint of Serena Chen filed with you on Jan. 25, 2019.

For the benefit of new Commissioners Tilos and Shabazz and because of the confusing nature of the Mr. Roush's staff report to this body it is necessary to review the history of this matter from the inception of the problem.

The History:

On October 16, 2018, the City Council introduced two ordinances (Ordinance Nos. 3227 and 3228) to amend the Cannabis Regulatory Ordinance and the Land Use Ordinance (Ordinance Nos. 3201 1nd 3206). The Agenda description of the proposed action spoke only of authorizing "delivery only" dispensaries. However, at the Oct. 16 meeting the proposed Ordinances were amended to authorize full service retail dispensaries, which, unlike "delivery only" dispensaries would allow the public to visit and purchase product on site. Before voting on the proposed Ordinances, Council inquired of Assistant City Attorney Cohen as to whether this was a material change which prevented a vote on the same at this meeting. He assured them that it was not a material change. The Ordinances received an affirmative vote on first reading.

On Oct. 30, 2018 Serena Chen filed a Sunshine Ordinance Complaint alleging that the change of language was material and that, therefore, the Oct. 16 vote was unlawful and required the matter to be re-agendized for first reading at a subsequent Council meeting. Notwithstanding this pending Complaint and before it was heard by the OGC, City Council proceeded to a second reading and passed the Ordinances on Nov. 7, 2018. The OGC heard the matter on Nov. 14, 2018. Notwithstanding the advice of Assistant City Attorney Roush, acting as counsel for the OGC, that the Complaint should be dismissed, the OGC unanimously determined that the change of language in the Ordinances from what was proposed in the Oct. 16 Agenda notice was material, and , pursuant to the authority of AMC Sec. 2-93.8, ordered that the Ordinances were null and void and should be reintroduced at a subsequent meeting. Mr. Roush was directed to write a formal opinion and order reflecting this decision within 14 days, as required by law. He indicated that he would do so.

However, no Order was published, and on Dec. 3, 2018 the OGC received notice that Mr. Roush had scheduled the matter for rehearing, asserting that he had determined that his previous advice to the OGC that a "null and void" order was authorized by law was in error. He concluded that, notwithstanding the clear language of the Sunshine Ordinance, it was in conflict with the City Charter and California law because it constituted a legislative function that could only be exercised by Council. Mr. Roush presented the OGC with two alternative orders, one that dismissed the Complaint and one that simply "advised" Council to repeal the Ordinances and re-introduce them.

The OGC met on Dec. 16. In the interim, the OGC received an extensive legal brief from Cross Creason, an Alameda resident attorney, that defended the legality of Sec. 2-93.8 and the OGC's decision pursuant thereto. The Commission refused to reconsider the matter and directed Mr. Roush to immediately draft an Order confirming the Commission's Nov. 14 decision, with one change. At the suggestion of myself, the decision did not require the re-introduction of the null and void ordinances. That was left to the proper discretion of Council. The immediacy was required by the fact that

my term of office and that of Commissioner Dieter would expire the very next day, Dec. 18. Accordingly the decision was written and signed the evening of Dec. 17. At that point, I assumed the matter was ended. However, my conclusion proved to be wrong.

The Current Complaint:

The City did not implement the OGC Order, but apparently purports to treat it as advisory only. The Jan. 15, 2019 City Council Agenda Item 6B devoted a paragraph to each of the two ordinances which provided for consideration of both repeal of each ordinance and passage of replacement ordinances. However, 6B omits the critical factor included in the draft ordinances attached to the Agenda. Both draft ordinances provide that Ordinances No. 3227 and 3228 are repealed in their entirety," if and when this Ordinance becomes effective and operative." (Boldface mine)

The omission of this critical language from 6B causes the Agenda item to be understood by a person of average intelligence and education that this is a reconsideration of these ordinances which gives the Council the discretion to both repeal Ordinances 3227 and 3228 and decline to enact the replacement ordinances. Thus it appears as a true re-do of the issue in which opponents of Ordinances 3227 and 3228 can attempt to convince Council to repeal and not replace the ordinances. **In actuality the entire procedure was a sham. The provisions of Ordinances 3227 and 3228 were going to remain on the books no matter what the vote, the only issue would be whether they would carry their old or new numbers and enactment dates.** Thus, 6B clearly violates the mandate of AMC Sec. 2-91.5.

In addition, the failure to attach the Commission's Dec. 17 Order also violated Sec. 2-91.5 by failing to attach, "any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda". Mr. Roush's statement in his report appended to your Feb. 4 agenda asserts that the attachment was not necessary because the Commission did not order him to do so. This a specious argument. The Order was clearly material and necessary for the public to be aware of why 6B was on the Agenda.

Mr. Roush's assertion in the same report that 6B was intended to respect the advisory role of the OGC, while still preserving his position that the "null and void" OGC order is unlawful, is disingenuous. This sham procedure completely ignores and disrespects the proper role of the OGC and the Sunshine Ordinance itself.

The remedy for this improper notice is to again assert the Commissions' authority under AMC Sec. 2.93.8 a and order the City to "cure and correct" by redoing Item 6B of the Jan. 15 Agenda by listing the matter as two separate agenda items. The first item would provide for consideration by Council of the repeal of Ordinances 3227 and 3228. The second item would provide Council with another opportunity to re-enact these Ordinances under a new number and new enactment date.

This would allow for the City Attorney to preserve his position that the "null and void" provision of our Sunshine Ordinance is unlawful, while at the same time respecting the underlying intent of the Commission Order of Dec. 17, 2018. More importantly, it would finally give those Alameda citizens who oppose full service cannabis dispensaries the opportunity to meaningfully oppose them. If the repeal vote fails, it will be a rejection of the Commission's advice, but it will at least be a recognition by Council that it must consider and vote on the same.

With regard to Complainant's prayer for a $250 fine to be levied against the city, she accidently cites the wrong sub-section of AMC 2.93.8. Subsection b pertains to violations of the public records provisions of the Ordinance. It is subsection a that pertains to the matter at hand and only permits a fine on a second violation.

Sincerely,

Paul S Foreman

LWV LEAGUE OF WOMEN VOTERS

January 31, 2018

TO: The Honorable Mayor Ezzy Ashcraft, Vice Mayor Knox White, and Council Members Daysog, Oddie and Vella

CC: Open Government Commissioners, Acting City Attorney Roush, Acting City Manager Rudat

The League of Women Voters of Alameda was a strong advocate for the formation of the Sunshine Task Force in 2010 and participated in many of its meetings to develop the Sunshine Ordinance. In 2012, The Ordinance was approved by the City Council and reviewed by City Staff and the City Attorney's office. The Council entrusted the Open Government Commission as the body to hear violations of the Ordinance.

The League of Women Voters of Alameda has followed closely the recent complaint filed with the Open Government Commission concerning the agenda description for Ordinance 3227 and 3228. At its November 14 meeting, the Commission deemed the ordinance null and void and as a remedy held that the Council should consider re-hearing the items. At the December meeting of the Commission the City Attorney's office held that the Sunshine Ordinance had not been violated and the Commission did not have the authority to render the ordinance null and void. The Commission disagreed and upheld its November 14 decision.

On January 15, 2019 the City Council agendized the ordinances without including the written decision of the Sunshine Commission.

There were several issues with the process followed in this complaint and the advice the Commission received from the City Attorney's Office. At issue is that the City Attorney's Office is serving both the Council and the OGC. In our view, this is a clear conflict of interest. To allow the OGC to continue its commitment to open and democratic procedures and ensure citizen participation and trust we strongly urge the Council to support an independent counsel for the OGC, in the few instances where it is necessary. The City Attorney's Office is not able to properly provide this advice to the Open Government Commission because representation is directly adverse to City Council in the same matter.

We strongly support independent counsel for the Open Government Commission and ask for a timely response from the Acting City Attorney, Michael Roush.

s/Georgia Gates Derr, LWV Alameda President
s/Susan Hauser, LWV Alameda V.P. Administration
s/Karen Butter, LWV Alameda Action Co-chair
s/Felice Zensius, LWV Alameda Action Co-chair

BEFORE THE OPEN GOVERNMENT COMMISSION

OF THE CITY OF ALAMEDA

In re: The Complaint of Serena Chen Serena Chen, Complainant The City of Alameda, Respondent	Case No. 19-01 DECISION OF THE OPEN GOVERNMENT COMMISSSION OF THE CITY OF ALAMEDA

The above entitled matter came on for hearing by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code on February 4, 2019, at which time the Commission rendered a decision to sustain the complaint. (All further references to Section numbers are to the Alameda Municipal Code.)

Facts

This complaint concerns amendments to Ordinance Nos. 3201 ("Regulatory Ordinance") and 3206 ("Land Use Ordinance"). On October 16, 2018, the City Council introduced two ordinances (Ordinance Nos. 3227 and 3228) to amend the Regulatory Ordinance and the Land Use Ordinance.

On October 30, 3018, Ms. Serena Chen filed an Open Government Commission ("Commission") complaint ("Chen I") concerning the agenda description for the item on the Council's October 16th agenda.

On November 14, 2018, the Commission conducted a hearing on Chen I, sustained it and, as a remedy, held that the Ordinances were deemed null and void. Further, the Commission held that the Council may consider re-noticing the ordinances following a public hearing.

Prior to the deadline for publication of the Commission's decision in Chen I, the City Attorney's Office noticed a subsequent hearing to be heard on December 17, 2018, for various reasons, including to reconsider the matter and receive additional advice concerning the Commission's legal authority under the Sunshine Ordinance. Specifically, the City Attorney's Office had advised the Commission of the Interim City Attorney's opinion (disputed by the Commission) that the Sunshine Ordinance had not been violated and his further opinion (also disputed by the Commission) that the Commission did not have the legislative authority to render a legally adopted ordinance null and void.

The Commission declined to rehear the matter and instead gave direction to staff concerning revisions to the proposed decision attached to the agenda report to finalize their decision.

On January 15, 2019, given the Commission's decision and advice of the City Attorney's Office, staff agendized the introduction of two ordinances that tracked the language of Ordinance Nos. 3227 and 3228.

On January 25, 2019, Ms. Chen filed the current complaint ("Chen II"). Ms. Chen alleges two violations. First, she contends a violation of subdivision (b) of section 2-93.2(b) of the Sunshine Ordinance occurred because staff "did not include the formal written decision of the Open Government Commission as an exhibit. . . [to the January 15, 2019 agenda item 6-B]." Second, she contends a violation of subdivision (b) of section 2-91.5 of the Sunshine Ordinance occurred because the agenda description allegedly "did not adequately inform the general public that, if the item was defeated, the council's vote would be meaningless."

Decision

There was a violation of sections 2-93.2(b) and 2-91.5 of the Alameda Municipal Code because the Commission's written decision in Case no 18-02 was not part of the City Council agenda materials for its January 15, 2019 meeting and because the agenda title for item 6-B on the Council's January 15, 2019 agenda would not have informed a person of average intelligence and education that if the City Council took no action on the item, that the ordinances in question (previously decreed null and void by this Commission) would remain in full force and effect. In other words, a reasonable person would have been confused about the potential impact of approving, or not approving, item 6-B. The Sunshine Ordinance requires greater transparency to the citizenry than what occurred in this case.

The provisions of Ordinance Nos. 3227 and 3228 should be re-introduced, with the Commission's decisions concerning this item included in the agenda materials, and with the agenda title providing clarity concerning the outcome if such provisions are or are not re-introduced.

Dated: February 5, 2019

Heather Little, Chair

[NOT PRESENT]
Mike Henneberry, Member

Bryan Schwartz, Member

Rasheed Shabazz, Member

Ruben Tilos, Member

revisions to the proposed decision attached to the agenda report to finalize their decision.

On January 15, 2019, given the Commission's decision and advice of the City Attorney's Office, staff agendized the introduction of two ordinances that tracked the language of Ordinance Nos. 3227 and 3228.

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Decision

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Dated: February 5, 2019

Heather Little, Chair

[NOT PRESENT]
Mike Henneberry, Member

Bryan Schwartz, Member

Rasheed Shabazz, Member

Ruben Tilos, Member

On January 15, 2019, given the Commission's decision and advice of the City Attorney's Office, staff agendized the introduction of two ordinances that tracked the language of Ordinance Nos. 3227 and 3228.

On January 25, 2019, Ms. Chen filed the current complaint ("Chen II"). Ms. Chen alleges two violations. First, she contends a violation of subdivision (b) of section 2-93.2(b) of the Sunshine Ordinance occurred because staff "did not include the formal written decision of the Open Government Commission as an exhibit. . . [to the January 15, 2019 agenda item 6-B]." Second, she contends a violation of subdivision (b) of section 2-91.5 of the Sunshine Ordinance occurred because the agenda description allegedly "did not adequately inform the general public that, if the item was defeated, the council's vote would be meaningless."

Decision

There was a violation of sections 2-93.2(b) and 2-91.5 of the Alameda Municipal Code because the Commission's written decision in Case no 18-02 was not part of the City Council agenda materials for its January 15, 2019 meeting and because the agenda title for item 6-B on the Council's January 15, 2019 agenda would not have informed a person of average intelligence and education that if the City Council took no action on the item, that the ordinances in question (previously decreed null and void by this Commission) would remain in full force and effect. In other words, a reasonable person would have been confused about the potential impact of approving, or not approving, item 6-B. The Sunshine Ordinance requires greater transparency to the citizenry than what occurred in this case.

The provisions of Ordinance Nos. 3227 and 3228 should be re-introduced, with the Commission's decisions concerning this item included in the agenda materials, and with the agenda title providing clarity concerning the outcome if such provisions are or are not re-introduced.

Dated: February 5, 2019

Heather Little, Chair

[NOT PRESENT]
Mike Henneberry, Member

Bryan Schwartz, Member

Rasheed Shabazz, Member

Ruben Tilos, Member