

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING  
MONDAY - - - DECEMBER 19, 2022 - - - 7:00 P.M.

Chair LoPilato convened the meeting at 7:02 p.m.

ROLL CALL - Present: Commissioners Cambra, Chen, Montgomery, Tilos and Chair LoPilato – 5. [Note: The meeting was conducted via Zoom.]

Absent: None.

[Staff present: Chief Assistant City Attorney Elizabeth Mackenzie; City Clerk Lara Weisiger; Special Counsel Michael Roush]

NON-AGENDA PUBLIC COMMENT

None.

COMPLAINT HEARINGS

3-A. Hearing on Sunshine Ordinance Complaint Filed on November 14, 2022

Chair LoPilato outlined the hearing process; noted she does not have a conflict even though she and the Complainant Attorney's firms have litigated against each other.

Paul Justi, Legal Counsel for Complainant, gave an Opening Statement and Presentation of Facts.

Special Counsel, City/Respondent, gave an Opening Statement and Presentation of Facts.

Mr. Justi gave a Reply to the City/Respondent Opening Statement and Presentation of Facts.

In response to Chair LoPilato's inquiry regarding the witness list, Mr. Justi stated that John Brennan, Margaret Hall, Hale Foote and John Healy will testify that they were not allowed to speak even though they had their hands raised; Carmen Reid, Matt Reid, and John Brennan would also be testifying to the facts that correspondence was not posted for certain periods of time; new material include an exchange Mr. Brennan had with the City Clerk that was not included in the materials submitted; the list and identification of the issues are discrete; further stated that his clients may have comments regarding the process, particularly the concern that an issue is being revisited that has already been decided, which is the overarching theme.

The City Clerk stated the Commission could consider a suspension of the rules or take a vote to give more time for the presentation.

Chair LoPilato moved approval of modifying the Commission's procedural rules for the hearing to extend the Complainant's amount of time for presentation of evidence to allow a two-minute speaking slot for each of the witnesses identified by the Complainant's Counsel before moving into Commission questions.

Commissioner Cambra seconded the motion with an amendment to allow more time.

Chair LoPilato stated she would accept the amendment to the motion; the Commission is already granting a lot of latitude.

Commissioner Montgomery seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; Tilos: Aye; and Chair LoPilato: Aye. Ayes: 5

In response to Commissioner Cambra's inquiry, Chair LoPilato stated Mr. Justi identified five to eight witnesses; the witnesses will be sharing facts related to any of the five claims within the Complaint; if Commissioners have further questions, they are able to question the witnesses.

In response to the City Clerk's inquiry as to which speaking format should be used for the witnesses, Chair LoPilato stated her preference is to stick with the public comment format since that was what they were planning.

Witnesses John Healy, John Brennan, Hale Foote, Margaret Hall, and Carmen Reid provided testimony.

In response to Vice Chair Chen's inquiry, Mr. Justi stated the focus is on the decision to approve the specifics of the Grand Street Improvement Project; there were numerous workshops, discussions and Council meetings about different proposals for how to structure the plan; a vote was taken, which focused on whether there would be protected bike lanes that eliminate on street parking; an alternative was considered and approved that did not include the protected bike lanes with a physical barrier, which eliminates on street parking on Grand Street; that is really the focus of the October 4<sup>th</sup> decision that was made; his clients have taken exception to efforts to revisit the decision.

In response to Vice Chair Chen's inquiry, Special Counsel stated it was not an ordinance, it was simply a Council action; there was no first or second reading with respect to the matter; further stated action was taken on October 4<sup>th</sup>, but it was not introduction of an ordinance with a second reading two weeks later.

Vice Chair Chen inquired whether the vote was binding.

Mr. Justi stated the vote was clearly binding.

Special Counsel stated the vote was not binding; it was an action taken by Council, but

was not binding on any future Council; the matter could be revisited if new information came to light, which it did.

In response to Vice Chair Chen's inquiry regarding only three Councilmembers being present at the October 4<sup>th</sup> meeting, the City Clerk stated only three Councilmembers were present at the end of the discussion; the item started with a full Council, but ended with just three Councilmembers because two members left.

In response to Commissioner Cambra's inquiry regarding how to address the technology failure, Mr. Justi stated that the bedrock principle is public participation; everyone has had to make adjustments in light of COVID circumstances, including Zoom meetings; if there are these technical problems, particularly when raised in real time, or if a violation was caused by technical problems, that is not an excuse and does not mean the rules do not have to be followed; pointed out this did not happen in a vacuum; a history led up to the November 1<sup>st</sup> problem, which may or may not have been a technical problem; given the history, even if it is just a technical problem, it lends more gravity to the nature of the problem.

In response to Commissioner Cambra's same inquiry, Special Counsel stated that he is not aware there was a technical problem; the declaration from the City Clerk given to the Commission indicates raised hands did not come in until after the Mayor closed the public comment period; there is not anything to suggest it was rushed or hurried; the Mayor clearly asked: are there more speakers; the City Clerk is looking at her screen; there is no reason to think that the Clerk was making it up that there were no hands raised on the screen when she said there were no more speakers; he does not see where there is a technological issue; similarly, with respect to the correspondence, again the City Clerk is very clear that she updated the agenda each time that correspondence came in; the last correspondence came in about 3 pm; the City Clerk updated the agenda at 4:25 pm; it is not clear why certain members were not getting the information, but it was not because of a technological failing on the part of the City Clerk or the City itself; he does not accept that there were technological issues; the information was out there, and, therefore, there was no violation; he is not sure what remedy there would be since there does not seem to be any violation.

Commissioner Cambra stated perhaps the technological issue was not that something failed, but that it just took some time to get there; witnesses put up their hands at the right time, but there was a delay; Commissioners are the fact finders; he finds both sides to be extremely credible.

Special Counsel stated when the deliberations come to a point, there are no more public speakers; Council had heard from a number of people concerning the issue; there were nine pieces of correspondence concerning the issue; it is not as if the Council was not well informed about the issue; the Council followed its rules and procedures; it is unfortunate if folks raised their hands did not get through; however, that would not warrant the cure or correct for the Council to have to go back and redo the matter.

Mr. Justi stated through the miracle of technology, he is texting in real time with John Brennan, who advises that the Clerk never asked whether there were any more speakers; he agrees there needs to be finality, but that is not the principle that applied on October 4th; the procedure for how debate was cut off was different than it should have been; Mr. Brennan advises that the Clerk never did ask if there were any other speakers, it was: that was the last speaker and the door was closed.

In response to Commissioner Tilos's inquiry regarding the term stale PDF, Special Counsel stated perhaps the City Clerk can explain better how there could be a stale or old PDF.

The City Clerk stated one of the problems is that sometimes individuals are emailed an agenda or sometimes they download the agenda onto their computer; when a new agenda goes out with updated correspondence, someone still using an old version of a PDF would not get the newest links, which has happened before.

Commissioner Tilos stated that he can now see how some folks could have an old agenda in a PDF instead of going to the active website version which is updated.

Chair LoPilato inquired whether people are seeing the older versions of agendas, even if accessing it from the website, if they do not clear the cache in their browser.

The City Clerk responded in the affirmative, stated that does occur; she appreciates when the public informs her of any issues; she really appreciates the help and extra eyes; as soon as she hears that somebody is having a caching problem, she will re-publish the agenda, which sometimes will help clear caching issues; she will also gladly email it directly to them or send the new links; she always tries to make sure everyone gets the information; during the November 1<sup>st</sup> meeting after receiving an email, she providing the document directly to them and republished, which fixed the caching issue.

In response to Chair LoPilato's inquiry, Commissioner Tilos stated his question was answered, but he is open to hearing Mr. Justi's response if he would like to provide one.

Mr. Justi stated his clients went directly to the link; they were not emailed a PDF copy of the agenda or some other mechanism; they went directly to the link and were viewing as updated a version as was possible.

In response to Commissioner Montgomery's inquiry, Mr. Justi stated that he cannot say that every single one of his clients live in the Grand Street neighborhood; many of them are actual Grand Street residents; there's no secret that the plan adopted on October 4<sup>th</sup> preserved street parking for them, which is one of the reasons they are so involved; they have a direct interest and are impacted directly by the changed plan; one of his clients is also disabled and lives on Grand Street; this is going to affect her ability to have access and care providers and disabled transportation accessing her home; the overwhelming majority of his clients either live on Grand Street or are directly affected in some fashion.

Commissioner Montgomery inquired why an October 31<sup>st</sup> letter was sent to the City Council regarding a violation of the Brown Act or Sunshine ordinance rather than immediately opening a complaint.

Mr. Justi responded it was partly because of the ripeness issue; the October 31<sup>st</sup> letter was sent in anticipation of a November 1<sup>st</sup> vote, pointing out that the whole procedural history leading up to the vote was flawed and quite frankly illegal; once a vote was taken on November 1<sup>st</sup> is when the issue became ripe for adjudication; prior to that, it was no harm, no foul; if the October 31<sup>st</sup> letter got traction and the Council realized they should not be taking an actual vote on changing the project or could not go outside of either the Brown Act, the Sunshine Ordinance, or Rosenberg's Rules, what happened at the October 18<sup>th</sup> hearing would be a moot issue; once a vote was made and the project was fundamentally changed despite no public notice, the issue then became ripe; in response to the City's assertion about being time barred, the October 31<sup>st</sup> letter put the City on notice that his clients had complaints; it is his position that the City did have notice on a timely basis; once Council took the vote and the issue became ripe for adjudication, all of the complaints were brought within the 15 day limit.

Special Counsel stated with respect to the time bar, the fact is the allegation has to do with an agenda item on October 18<sup>th</sup>; the Complainants are saying the agenda item was not adequately described under the Sunshine Ordinance; if that was the case, regardless of whether the Council took action or did anything on November 1<sup>st</sup>, there was an obligation to file the complaint timely; notifying that you are going to file something, does not toll the Statute of Limitations; the Sunshine Ordinance has an obligation to meet the timeline; that timeline connects to the allegation that the October 18<sup>th</sup> agenda description was not adequate; the City's position is that it was adequate; the Council had discretion and it was permissible to ask for a matter to be brought back on a future agenda; leaving that issue aside, there is still the obligation that a complaint has to be filed within the 15-day period, not some broad generalization about the City being on notice.

Mr. Justi inquired whether he could respond to Special Counsel's comments, to which Commissioner Montgomery responded that unless Mr. Justi had something else to say that she has not heard yet, she feels both responses were adequate for her.

Chair LoPilato's inquired whether Mr. Justi's October 31<sup>st</sup> letter, which was attached as the first item under Complainants Response to Respondents Position Statement, was also an attachment to his letter of December 6<sup>th</sup> to Councilmembers and City staff.

Mr. Justi responded in the affirmative; stated it was submitted at that time; if the November 1<sup>st</sup> vote was never taken, the issue would have become moot; he raised the issue within 15 days of the meeting, but did not believe filing was necessary because it was not until November 1<sup>st</sup> when the improper vote was taken and the matter was improperly placed on the agenda, that the issue became ripe for adjudication; the Complaint was then raised, including what was considered to be a continuing violation from October 18<sup>th</sup>; until the November 1<sup>st</sup> vote was taken, the issue was premature vis a vis the October 18<sup>th</sup> agenda item.

In response to Chair LoPilato's inquiry regarding whether the Complaint was filed on November 14<sup>th</sup>, Mr. Justi stated that date is correct; he views it as belt and suspenders; maybe both were not needed; the City's position that it was time barred is incorrect for both of those reasons.

Chair LoPilato inquired where in the Sunshine Ordinance Mr. Justi sees the requirement for written correspondence to be posted contemporaneously with a general agenda topic.

Mr. Justi responded language in Section 2-91.5.e states: "all documents material to a matter anticipated for discussion or consideration, or the proposed action of agenda item must accompany the agenda" which is certainly one area; obviously public comment and public correspondence about a matter on the agenda would be material to the matter; Section 2.90.1 states: "an informed public is essential to democracy; it is the goal of the ordinance 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, and any correspondence to the City about a matter on the agenda;" the very goal of the Sunshine Ordinance is to provide easy and timely access to all public records; it is his clients' position that timely access means the public has a meaningful opportunity to review materials and formulate a response or position with respect to the information; the general overall goal and the specific section that the documents must accompany the agenda would capture the requirement to post that material.

Chair LoPilato stated neither of the Section are cited in the Complaint; attempting to play out tying the facts to Section 2-91.5: documents must accompany the agenda, questioned how Mr. Justi anticipates operating in instances where correspondence is submitted within hours of a meeting and if it is his position is that the City would be in violation of the ordinance if correspondence from members of the public was not contemporaneously updated; inquired if there is a time window that feels reasonable; stated that she is trying to understand the Complainant's position in a world where there is not a static amount of information coming in before an agenda is posted.

Mr. Justi responded based on the actual experience, there was a period of several hours where information was not accessible on the website; stated wherever the actual cutoff point is, several hours is well past it; for instance, this evening updated information was coming and appears to have been posted fairly contemporaneously with its receipt; the circumstances of this situation were that several hours passed when this information was not available; then, it became available, even though it had been in the City's possession for certainly long enough to be promptly uploaded and accessible to the public.

Chair LoPilato inquired whether the Complainants are asserting that Councilmembers did not have access to written correspondence or are focusing on the lack of publication.

Mr. Justi responded the lack of publication; stated without questioning individual Councilmembers, he is not sure what they were looking at; they may have had access to

hard copy of documents; he disagrees with a comment that: “the fundamental purpose of this section is to ensure that the decision-makers have received comments;” it is one of the purposes, but if that were the fundamental purpose, there would be no requirement of posting it; an equally fundamental purpose is that members of the public can review it; there is a logical flaw in the City Attorney's position that no Councilmember said that they did not have access to written comments; if something is not posted, how would someone know they do not have access to it; he does not know whether or not the Councilmembers had access to it; the fact that they have not said they did not have access does not really prove the point; the focus of the Complaint is on the fact that this was required to be readily accessible to the public on a timely basis and was not; he understood the material was up and then taken down, which goes to Chair LoPilato's point about how promptly it should be posted; certainly it should not be taken down; that is part of the Complaint and is not supposed to happen even given some latitude for updating in real time.

Chair LoPilato stated that her observation as a Commission checking on things is that the PDF is consolidated to include multiple items of correspondence; inquired whether that is a reason why a volume of material might be taken down and then reposted or if that is not the practice.

Special Counsel responded that is his understanding as to why something would be taken down and put back up.

The City Clerk stated usually, the document is simply replaced; the only reason why it is ever taken down and backup is if someone informs her that they have had a problem; in that instance, she will actually remove the document and add it back again; she never leaves it down for a period of time, it stays posted continuously, except for a brief moment when it is being swapped.

Chair LoPilato inquired whether the October 18<sup>th</sup> agenda item was pulled from the Consent Calendar for discussion, to which Special Counsel responded in the affirmative.

Chair LoPilato inquired whether individuals in the Complainant group who signed on to the Complaint did not participate in the October 18<sup>th</sup> meeting.

Mr. Justi responded that he is not sure; stated that he is interfacing with a core group of people, but he has not surveyed every one of his clients to ascertain whether or not they participated; whether or not they participated does not excuse a failure to adequately describe the agenda item; the rules are very specific, the law is very clear.

Chair LoPilato inquired whether the practice is to forward written correspondence to Councilmembers if they were not previously copied or is the only way that a Councilmember might receive notice of an item of public correspondence is by viewing it on the posted agenda.

The City Clerk responded if correspondence comes in on the day of the meeting close to the meeting time, or even if she sees an email during the meeting, she will immediately

forward it to the Council; the practice correspondence is posted regularly as it comes in; Councilmembers can view it and typically re-download the agenda if to get the updated correspondence.

In response to Commissioner Tilos's inquiry regarding how correspondence is updated on the agenda, the City Clerk stated the most recent correspondence is always put first, so the newest is always going to be at the top.

Commissioner Tilos stated Commissioners receive emails with updated correspondence throughout the day; it is possible that the public who is not getting these emails are checking online and not refreshing their browser, so they may have been looking at an old PDF.

The City Clerk concurred with Commissioner Tilos; stated even tonight she had two people tell her that one piece of the correspondence from Councilmember Herrera Spencer was not showing up; she sends people who are having any connectivity issues to the agenda database meeting details tab directly to the staff report itself; all of the exhibits are there, even if there are technical issues looking at it another way; because this issue occurred tonight she updated the event on the Open Government page to provide a direct link to this item.

Commissioner Tilos stated Commissioner Cambra's comment that both sides are right is correct; it was there, but perhaps they did not see it; that is a true statement; the unfortunate piece that is happening is that people are seeing different versions, but both are true.

In response to Commissioner Cambra's inquiry regarding the citation number, Mr. Justi stated a general proposition in Section 2.90.1 refers to providing easy and timely access to all public records; Section 2-91.5.e requires all documents material to a matter must accompany the agenda.

Commissioner Cambra inquired whether Section 2-91.6.c applies, to which Mr. Justi responded in the affirmative; stated said section squarely hits it.

Chair LoPilato stated since Section 2-91.6 is in play, inquired whether the Complainant's position is that the City Council agenda meets the requirement of Section 2-91.6.a or is there a separate notice to residents that was not seen in evidence.

Mr. Justi stated that he unfortunately does not have the answer; stated that he received some updated information; Grand Street Neighbors is the advocacy group; all of them are either on Grand Street or within two blocks of Grand Street; the question could be directed to John Brennan; he may know if a separate notification was sent out, because it specifically affected those residents.

Chair LoPilato stated barring any objection from other Commissioners, she would love to hear from Mr. Brennan whether a notice went out so the Commission can know if Section



2-91.6 applies to this claim.

With no objection from the Commission, Chair LoPilato inquired whether residents on Grand Street received a public notice via mailed, posting or publication, particularly for the November 1<sup>st</sup> item; further inquired whether Mr. Brennan is bringing the claim related to the notice or bringing the claim related to the City Council agenda.

Mr. Brennan asked for clarification of Chair LoPilato's question.

Chair LoPilato inquired whether Mr. Brennan received any type of public notice as a resident of the area or as a member of the Grand Street Neighbors group about the Grand Street project separate from the Council agendas, to which Mr. Brennan responded in the negative.

Chair LoPilato stated claims being brought tonight about the failure to post written comments in the November 1<sup>st</sup> agenda is on the basis of the fact that there was a publicly noticed City Council meeting; the general agenda went out and then the written correspondence was not uploaded in a prompt manner.

Mr. Brennan stated that he knew about the November 1<sup>st</sup> meeting from what the Mayor said at a candidate forum; before the meeting, he submitted correspondence as did several other people; by late afternoon, the correspondence was not there; it only reappeared once it was raised in public comment at the meeting; within a few minutes everyone was able to access the material.

Commissioner Cambra inquired whether the October 31<sup>st</sup> letter regarding the time bar on the October 18<sup>th</sup> violation was from residents and was attached to the Complaint, to which Mr. Justi responded in the affirmative; stated the letter was sent before he was retained; when he saw City Attorney's position that there was a time bar on that, he went back and looked at the record; it is his client's primary position that prior to the actual vote, the October 18<sup>th</sup> agenda item issue was not ripe for adjudication; if the City wants to take the position that it was ripe prior to that, the October 31<sup>st</sup> letter specifically complained about the October 18<sup>th</sup> agenda item.

In response to Commissioner Cambra's inquiry, Special Counsel stated that he first saw the letter when it was attached to the November 14<sup>th</sup> Complaint; he does not know who in the City may have seen it prior to that time, but it certainly was not filed with the City Clerk as an Open Government Commission (OGC) Complaint, which is what is required under the Ordinance, which is why the City believes it is time barred; there is a reason the Ordinance sets up certain parameters in terms of what needs to occur in a timely way; one reason is to give people an opportunity to cure; he does not know what would have happened if a complaint had been filed in a timely way, but it was not; therefore, it is time barred, which is a clear cut situation.

Commissioner Cambra stated that the City's position is that unless it is on an official complaint, then it is not properly filed.

Special Counsel stated that is what the Ordinance provides.

Commissioner Cambra read Complaint Procedure Section B.1; requested comments from both attorneys.

Mr. Justi stated prior to the November 1<sup>st</sup> vote, there was nothing to cure; a decision was made to have a re-vote on November 1<sup>st</sup>; if Council reiterated the prior vote and the plan adopted October 4<sup>th</sup> continued, there would have been nothing for the Complainants to do at that point because the issue would be moot and not ripe for any kind of adjudication, which is the fundamental argument and why his clients think it is timely even if only the November 14<sup>th</sup> Complaint is considered; once he saw the City Attorney's position that the complaint was not filed on time, one of the responses to that his clients sent a letter to the Mayor, Councilmembers and City Clerk on October 31<sup>st</sup>; it seems the City Attorney's office is just looking for an opportunity to close out the Complaint, which is inconsistent with the fundamental purpose of the Sunshine Ordinance; once there was a vote and something was done wrong that needed to be cured, that is when he sent out the more formal Sunshine Complaint stating the November 1<sup>st</sup> vote is what ripened the October 18<sup>th</sup> violation into something that needed to be addressed and cured.

Commissioner Cambra inquired whether the time of the violation was when the Mayor made a motion on October 18<sup>th</sup> regardless of what the Council did two weeks later at the November 1<sup>st</sup> meeting.

Mr. Justi responded it was a violation in theory, but the question is: what is the remedy.

Commissioner Cambra stated there is a big difference between in theory and in practice.

Mr. Justi stated the difference is what can be done about it; until the November 1<sup>st</sup> vote occurred, there was nothing that could be said to cure it; if he had done so, he would have anticipated that the City Attorney's office would have said it was premature and whether any substantive change might occur is unknown; the last thing anyone wants is everybody running around with hypothetical situations that may or may not be a problem; the October 18<sup>th</sup> decision should not have been made, but no harm had accrued that provided a legal remedy.

Special Counsel stated Section B-1 is a guideline, but is not embodied in the Ordinance; the Ordinance does not state that the City Clerk has to decide whether a letter is really a Sunshine Ordinance Complaint; the Ordinance is very clear and specific in terms of what has to occur, which did not happen here; the agenda title on October 18<sup>th</sup> was ripe, because the allegation is that the agenda failed to describe that the Council would direct the project to return to Council at a future date; the essence of the Complaint has nothing to do with it not being ripe until November 1<sup>st</sup>; if there was a violation, the violation occurred on October 18<sup>th</sup> when the agenda failed to describe what the Council did on that date.

Chair LoPilato stated the Commission received a fairly late submission from Councilmember Herrera Spencer at 5:30 pm today; a point was made about the November 1<sup>st</sup> minutes indicating that about seven minutes after the public comment period had closed, Councilmember Herrera Spencer made a comment that hands were raised; people also said a Councilmember made a comment hands were raised; requested to hear both Mr. Justi and Special Counsel's perspective on the state of the record as to whether any of the Councilmembers who had visibility into the participant panel at the time the public comment closed gave any indication that hands were raised at that moment public comment was closed.

Mr. Justi stated that he thinks what Councilmember Herrera Spencer said in her memo is that she did notice there were hands raised at the time, which is consistent with what his clients are saying; if this were a public meeting and even though the magic words got spoken that it is the end of the public comment, presumably one would say a mistake was made; if hands were observed by Councilmember Herrera Spencer it proves the point.

Special Counsel stated that the City has a different perspective on the issue; after public comment was closed, apparently people contacted Councilmember Herrera Spencer about the fact that they raised their hands, which is when she raised the issue; there was no indication that Councilmember Herrera Spencer made the observation at the time the Mayor said public comment was closing; in fact, there is evidence from Councilmember Knox White to the contrary; he was looking at the screen and his correspondence to this Commission was that there were no hands raised at that time, which is consistent with the sworn declaration of the City Clerk; there is uncontradicted sworn testimony from the City Clerk that there were no hands raised; there would be no reason that she would make up something and there was no hurry about it; the normal process was followed; there was no observation by either the Mayor, Councilmember Knox White or the City Clerk that hands were raised; therefore, public comment was closed; it has been the Council's practice, as indicated in the City Clerk's declaration, that once the public comment is closed, it does not open back up again.

Commissioner Cambra stated it is unclear when the hands actually went up; the time delay is going up for debate; he agrees with Special Counsel that there has to be an end to these things and they cannot go on; somebody who wants to comment six or seven minutes in would disrupt the entire meeting; there is testimony that the four people hit the raise hand button prior to the item being closed; he understands and believes that actually happened; there is kind of a spirit of the Sunshine Ordinance that he would like all of the Commissioners to take into account when making this determination.

\*\*\*

Chair LoPilato moved approval of allowing Commissioner Cambra two additional minutes for the entirety of his question and Special Counsel's response.

Commissioner Tilos seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; Tilos: Aye; and Chair LoPilato: Aye. Ayes: 5.

\*\*\*

Commissioner Cambra read Section 2-22.4.g referencing the duties of the Commission; inquired whether the Section gives a little more enforceability and weight for the procedures.

Special Counsel responded the Section certainly gives more enforceability, but the requirement being embodied within the Ordinance itself is more appropriate, as opposed to the more generalized direction found in Section 2-22.4.g; having general administrative authority is good, but with respect to something as critical as when complaints have to be filed, it is better when a clear, bright line rule is embodied in the Ordinance itself, rather than in some administrative direction.

Mr. Justi gave a Closing Statement.

Special Counsel gave a Closing Statement.

\*\*\*

Chair LoPilato called a recess at 9:18 p.m. and reconvened the meeting at 9:25 p.m.

\*\*\*

#### SPEAKERS:

Therese Hall, Alameda, stated it is easy to tell how many people are in line to speak at in-person meetings; the Zoom queue is not visible to the public; she was on the phone with her sister who let her know that she had raised her hand; almost immediately she heard the City Clerk notify the Mayor that that the last speaker had spoken and the public comment period was closed; she is irate that she was not able to speak; Councilmember Herrera Spencer notified Council that members of the public had their hands raised, but no action was taken; it is especially critical now that meetings are held on Zoom, that the City ensure all speakers are heard and time is given for people to virtually raise their hands; Council has consistently voted down the return to in-person meetings leading her to believe that there is an intentional misrepresentation of the issues being brought before the public on the meeting agendas; she believes this to have happened regarding the Grand Street project on the November 1st Council Meeting; urged the Commission to take action; stated elected officials and City servants all have a duty to act legally, ethically and in a manner that is above reproach.

Carol Gottstein, Alameda, stated that she has lived on Grand Street since the 1960s; she has attended almost all of the meetings since she heard about the project; she submitted written correspondence; she received a mail notification announcing the Grand Street pavement resurfacing in November 2021; the notification said nothing about removing existing accessible parking in front of houses, which is a life-changing event for her; she did not file correspondence for the October 18<sup>th</sup> meeting because the item was a capital improvement project for \$76,000; she did not think it would broaden the scope of the entire project; she submitted correspondence on November 3<sup>rd</sup> documenting the

problems she had accessing written correspondence for the November 1<sup>st</sup> meeting.

Stand up AC discussed the Mayor Ezzy Ashcraft sitting on the Association of Bay Area Governments (ABAG) and should be recusing herself due to conflicts of interest; stated information on Zoom Meetings is veiled from the public; the public should have access to the participant list; not being able to see other participants and raised hands is a first amendment violation of the freedom to assemble; expressed concern about Councilmembers keeping cameras off.

Californian B stated that she agrees with the previous speaker; she attended the October 4<sup>th</sup>, 18<sup>th</sup>, and November 1<sup>st</sup> City Council meetings; she did not speak, but agrees with the serious problem explained by Mr. Justi that there was a violation of the rules of procedure; expressed concern that there is either an error due to ignorance of the rules of procedure or contempt for the process; discussed problems resulting from technical issues.

Karen Miller, Alameda, stated that she is speaking on the violation of Rosenberg's Rules; read an excerpt regarding reconsideration of a motion; stated Mayor Ezzy Ashcraft violated the rules at the October 18<sup>th</sup> meeting, since she did not make a motion to reconsider; the Mayor asked Council to consider a second motion to give brief direction to staff to review the project in light of new information and bring it back on November 1<sup>st</sup>; if an item can be brought back to a body again and again, it would defeat the purpose of finality; requested the Grand Street Project be sent back to Council for reconsideration.

John Healy, Alameda, stated that he swears upon penalty of perjury that he had his hand up to speak at the November 1<sup>st</sup> meeting; he did not get to have his say in the matter, which is why the issues is being discussed today; he wrote an email to the City Clerk saying that he had not been heard; the easy remedy was just to let folks be heard; urged Commissioners not to make a decision until they review the video recording and the timeline; stated there was nothing new; the matter had already been voted on and was over; the Mayor could not raise the issue, but did so specifically for political issues.

Zac Bowling, Alameda, discussed public comment; people want to try to raise their hand at the last possible second and risk losing the race; he has lost the race; boards need to be able to get through meetings; he is a heavy Zoom user and has never heard disappearing hands being an issue; he even searched the Zoom forums for support, but there similar bugs were not reported; there is nothing contrary to the actions of the City Clerk and the testimony of Councilmember Knox White claiming there were no hands raised; discussed technology issues regarding disappearing PDFs; stated folks run into the issue of having an offline version of a cached document linking to attachments that are stale; there is no way to physically solve the problem; all of the agenda items store a globally unique ID (GUID); discussed GUIDs.

Barrett Parker stated correspondence posted prior to a public meeting is vital to bring up new ideas, and not be repetitive when speaking; it molds where public opinion is and allows peers to talk; written correspondence was submitted; the points brought up by Special Counsel needed to have a real-time response; passion with which somebody

presents points is also extremely important in Zoom because speakers are not in front of Council; regarding the raising of the hands, the City Clerk usually asks if there are any other speakers, which did not happen, it was quick and seemed like everything was being rushed; in the future, the City Clerk or whomever should always ask if there are any other speakers.

Matt Reid, Alameda, stated that he does not have firsthand evidence, but witnessed his wife suffer the process that she described in her evidence; what happened at the meeting was highly political; it was an electioneering move on behalf of the Mayor seeking reelection; the purpose of having a new meeting was predicated on new information, yet the Planning Director explained there was not any new information; there is no process of posting correspondence, so folks are left in a state of confusion; the time bar argument is irrelevant; clearly, no one knew what was going to happen until it actually happened; the Complainants had an inkling, but the time bar does not apply; urged the Commission to find in favor of the Complaint.

Jay Garfinkle, Alameda, stated Special Counsel glossed over fact that there was no new information; without new information, the City Council's own Rosenberg's Rules preclude bringing up the same issue at a future point; discussed Special Counsel, the City Attorney's role, the Mayor living on the street and conflict of interest; urged the Commission to do everything in its power to enhance the openness of government; stated there is no justification for reviewing the vote.

John Brennan, Alameda, stated that he wanted to clarify a question raised earlier about the October 31<sup>st</sup> letter sent to the City that contained the assertion that the October 18<sup>th</sup> agenda was a violation of the Sunshine Ordinance; per the procedures the City has put in place for filing complaints, he never received a complaint form from the City in response to the letter; his group subsequently filed the Complaint, which is in front of the Commission tonight; the essence of the Sunshine Ordinance and Brown Act is open government; open government depends on consistent, reliable, transparent expectations as to how the City Council will consider its business; Rosenberg's Rules exist solely to ensure the public can depend on transparency, reliability, and predictability of how the City will act and when it makes decisions; there are ways for the City Council to consider new information on issues already decided on, which is voting to suspend the rules; new information does not give the right under Rosenberg's Rules to reconsider and have a simple majority vote; the overall picture is the public has to be able to depend on the transparency, reliability, consistency, and trustworthiness of the process in order to have an open government.

Carmen Reid, Alameda, stated that she attended both the October 4<sup>th</sup> and November 1<sup>st</sup> and agrees with the Complaint that the public notices for October 18<sup>th</sup> and November 1<sup>st</sup> did not meaningfully describe the action that was to be voted on; the Grand Street item on October 18<sup>th</sup> simply mentioned a repaving project; as noted and supported by many speakers, the intent was to bring back the item from October 4<sup>th</sup> for a revote; according to Alameda Municipal Code, not only does a revote need to occur during the same meeting, it also requires that there needs to be new information in order to be considered;

in this case, the Mayor had all the information; a revote also requires a two-thirds vote; there is substantial evidence that members of the public had their hands raised to speak; public participation is an essential component for assuring transparency in government and denying the public their right to meaningfully participate goes against constitutional values; urged the Commission to take a moment to review the issue of missing correspondence; stated it is not a connectivity issue; the correspondence was not posted properly and was unavailable for public viewing, which adversely affects meaningful participation; the lack of access is in clear violation of the Sunshine Ordinance that strives to provide open and transparent participation in local government; urged the Commission to address the legitimate concerns of members of the community and sustain the Complaint.

Cyndy Johnsen, BikeWalk Alameda, stated that she wanted to reiterate and underscore that the Complaint is from a relatively small group of Grand Street neighbors who did not like a Council vote that was made after lots and lots of community input and deliberation; they are trying to find any way to derail it; urged the Commission to deny the Complaint because it is a misuse of the processes and the Commission, and a tactic that really should not be encouraged going forward.

Councilmember Trish Spencer stated that she wanted to speak to the technical problems; she submitted correspondence this evening at 5:08 p.m. which is not visible; but there is a way to retrieve it by viewing the meeting details in the agenda database; there is a link and she is able to see her correspondence; this is another example of technical difficulties that arise; during the November 1<sup>st</sup> meeting, she said there were hands up that had not been called; she wondered if they had dropped off somehow or were not visible on other's screens; participants can be seen on the Council side, but not the Attendee side; on the Attendee side, how many speakers there are is not known; these concerns are not the same as in person meetings; in person, the public could see speakers lined up and names are called in order; speakers could come up to the Clerk to indicate a speaker slip was submitted or they were not called; sometimes the slip would end up in the wrong agenda item pile, but it was something that could be cured when in person.

Margaret Hall, Alameda, stated that she would be more than happy to do a sworn declaration as to her experience of not being called and also about the correspondence; correspondence is a critical part of the public experience; when the public is looking at an issue, they form opinions from other people's correspondence; time is not wasted by going over the same steps or reading verbatim the same ideas; urged the Commission to be really thoughtful when reviewing the information; stated that she is hopeful things start changing around City Hall through this process.

\*\*\*

Chair LoPilato called a recess at 10:10 p.m. and reconvened the meeting at 10:15 p.m.

\*\*\*

In response to Chair LoPilato's inquiry the Chief Assistant City Attorney stated the only reference she is able to find in the Municipal Code relating to the Rules of Order is Section

2-1.7, which provides that Rules of Order of City Council meeting shall be set by City Council resolution; it is under said authority that the City Council drew from in deciding to govern itself; the City Council governs its meetings using Rosenberg's Rules of Order; the Section does not fall within the Sunshine Ordinance; concurred with Chair LoPilato's suggestion that there is good reason and good grounds to conclude the issue is outside of the Commission's jurisdiction.

Commissioner Cambra stated the Commission does not address the substantive issues; the Commission is only looking at procedural aspects of what happened; mentioned burden of proof.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney stated the Sunshine Ordinance in itself does not provide a great deal of guidance on how to make evidentiary or factual decisions; in a case like this, common sense is a good guide; read a short excerpt from jury instructions; stated the instructions are not set forth in the Sunshine Ordinance and the Commission is not required to do follow the instructions: burden of proof means the parties must persuade you by the evidence presented in the hearing; another jury instruction talks about how evidence is weighed and witnesses testimony; the Commission may consider, among other factors, the following: how well the witness described what had happened; how well the witness remembered; did the witness have any reason to say something that was not true; what was the witness's attitude towards the case; stated people often forget things and make mistakes; Commissioners can choose to believe a witness told the truth about one thing and choose to disregard everything else the witness said, or could choose that the witness told the truth about one thing and was not truthful about another; Commissioners are well within legal rights to use common sense in weighing the two different factual accounts; the Commission could grapple with the two different versions regarding the speaker issue and the posting of correspondence and ultimately just go with the assessment of the witness's credibility and motivations.

Commissioner Tilos stated that he was extremely concerned when callers said they could not find or access the correspondence; Commissioners receive updated correspondence via email; he tested various methods to access the correspondence, including through the City's website and by using the Microsoft browser and was able to access the correspondence; he also Googled and went in through the City's website and was able to find and access the correspondence with no problem; he believes everyone is telling the truth, but there must be something wrong with the system if callers say they cannot see it.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney read Sunshine Ordinance Sections 2-91.6.c, 2-91.5.e and 2-90.1.

Vice Chair Chen stated as someone who writes letters to City Councils, she tries to write them in advance as much as possible; the whole intent of correspondence, as stated in the Ordinance, is to inform the decision makers and also because the author cannot attend the meeting; she has no anticipation that the public can see that letter



instantaneously; it is unreasonable; during the pandemic, most people do not even see the correspondence before the meeting; way back in the old days, the public would have to check the correspondence in a big binder in the lobby; suggested setting up a rule that correspondence has to be received by noon the day of the meeting to be posted on a timely basis; stated fixing the way correspondence is posted is important; she tried to reach the correspondence the way a lot of the speakers were doing and got the blank page; she then listened to the City Clerk's instructions and she was able to see it right away; if folks look for the correspondence in the most logical way, it will not come up, which is not acceptable; urged finding a way to fix the technology so that people do not have that frustration and are able to access it.

Commissioner Montgomery stated that she is fairly computer knowledgeable, but still got a blank page when trying to access the correspondence via the City webpage on two different devices; there were other ways she could see the correspondence, but regardless of whether it was posted in a timely fashion, folks were not able to see it, which is an issue.

In response to Commissioner Cambra's inquiry, Chair LoPilato stated it is an interesting dilemma; she does not see anything in Section 2-91.6 that requires persistent contemporaneous updating of correspondence to the webpage; the Sunshine Ordinance Section cited in the Complaint only indicates what a notice shall state; there is also no evidence on whether a notice went out or what was on that notice; she is trying to bring it back to the act of what happened, which was the posting or non-posting of the correspondence in a way that was visible to the public in a certain time period; she does not see a violation of any of the three Subsections that were cited; the challenges accessing the materials in different ways is a problem; she does not know if there is a way to fix the technology in any cost effective way; the Commission could recommend some type of public webinar explaining exactly how to access the materials, even if the Commission finds no violation.

Commissioner Cambra inquired whether the public notice sent to residents is separate and apart from a Council Meeting notice under Section 2-91.6.

Chair LoPilato responded in the affirmative; stated it probably would be because there is a whole separate statutory section on agenda requirements and the plain text seems to indicate that as well; it would make sense that there is a heightened burden to ensure notice is being given to residents directly impacted.

In response to Commissioner Montgomery's inquiry regarding submitting correspondence 15 minutes before the start of a meeting, the City Clerk stated Council closed sessions usually start at 5:00 pm; since she is in the closed session along with the Councilmembers, anything that comes in after 5:00 pm does not get attached because the meeting is already in progress; if she happens sees an email that was sent only to her, she will forward it to Council during the meeting; however, she has no idea whether the Council opens it or sees it after she forwards it.

Commissioner Cambra inquired whether Section 2-91.6.a applies to the situation, to which Chair LoPilato responded in the negative; stated that she would agree it could be part of the Commission's findings that the Section does not apply and the facts at hand do not support a violation of the Section.

Chair LoPilato stated Section 2-91.5.e is another Section the Commission needs to grapple with, which may be a difficult undertaking.

Commissioner Cambra concurred with Chair LoPilato; stated that he just wants to be able to say the Commission found these facts and that they support a violation of a specific section.

In response to Commissioner Montgomery's inquiry, Chair LoPilato stated it is unclear whether notice was given to the residents about the meetings; it sounded like there was not; if the Commission finds the facts at issue are not within Section 2-91.6.a, the Commission does not need to proceed with an analysis under that Subsection.

The Chief Assistant City Attorney clarified she referenced Subsection a to provide context; the Complainant only refers to Subsection c as constituting the potential violation; her opinion is that Subsection a provides enough context for the Commission to conclude the requirements in Subsection c are only for notices sent to residents within a certain geographic area; if there was no evidence that the residents received such notices and were entitled to have their comments be part of the official record, there would be good reason for the Commission not to conclude there was a violation.

Commissioner Cambra inquired whether Section 2-91.6.c applies to a specific type of notice, to which the Chief Assistant City Attorney responded in the affirmative.

Chair LoPilato stated Section 2-91.5.e creates a right to know whether a neighbor three doors down likes or does not like something and whether that is material to consideration of the matter; there has been a lot of talk about the importance of being able to see the correspondence, but she does not think it should rise to the level of imposing a practical burden on the City to be updating files every few minutes.

The Chief Assistant City Attorney stated the requirements in Section 2-91.5 are all applicable to the agenda when it is published on its publication date, which is 12 days before the meeting; if the Commission decides that communications or correspondence from residents would fall into the category in Subsection e, it is not clear whether Section 2-91.5 has an ongoing disclosure or posting requirement; she does not recall the Complainants bringing up any sort of argument as it applies to Section 2-91.5.

Commissioner Cambra inquired whether it is the practice to update correspondence even after that agenda is posted.

The Chief Assistant City Attorney responded that is her understanding of the evidence the City put forward tonight.

In response to Commissioner Cambra's inquiry regarding how the City Council receives the Council agenda, the City Clerk reiterated Council gets the agenda in the iLegislate app on their iPads; Councilmembers can refresh and download the latest version of the agenda before the meeting to make sure they have the most current information; if something comes in during the meeting, she forwards the email but does not know if they see it.

Chair LoPilato stated Council is often copied to ensure they see it, which would also be a topic she would recommend adding to a webinar as a tips and tricks.

\*\*\*

Chair LoPilato moved approval of hearing the remaining items if the hearing is concluded before 11:30 p.m.

Commissioner Montgomery seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; Tilos: Aye; and Chair LoPilato: Aye. Ayes: 5.

\*\*\*

Commissioner Cambra stated that he feels comfortable that the area of applicable law is 2-91.5.e and the Commission can make an evaluation based on that Section.

Chair LoPilato concurred with Commissioner Cambra; stated the written findings should address the fact that the Commission considered 2-91.6, as was cited in the Complaint, and determined it did not apply to the facts at hand, at which point the Commission went on to consider 2-91.5.e; the question is: was the City required under Sunshine Ordinance Section 2-91.5.e to publicly post all correspondence for the agenda item before the November 1, 2022 meeting, and if so, did the City fail to do so.

Commissioner Tilos stated that there is no guidance on when correspondence is received within hours, minutes or during a meeting; there is no cut-off; he is leaning towards deciding that the City does not have to post all correspondence; clearly, the City tries to post everything; the other issue that convolutes and grays the waters here is that he believes the City did post the correspondence and it just was not accessible or easily accessible to a few people, which is concerning as well.

Chair LoPilato stated that the Commission can make some recommendations around that regardless of the findings

Commissioner Tilos moved approval of finding that the City was not required to update the agenda with ongoing correspondence after the initial posting of the agenda under Section 2-91.5.e.

Chair LoPilato seconded the motion, which carried by the following roll call vote: Commissioners Cambra: No; Chen: Aye; Montgomery: No; Tilos: Aye; and Chair LoPilato:

Aye. Ayes: 3, Noes: 2.

The City Clerk stated that the technological problem has not always occurred; it is a recent problem for which she has submitted a support ticket; she is trying to address it so that it does not continue; she posted a work-around directly to the meeting link in the event tonight to try to help people; she is not sure what is going on, but it is an issue she definitely does not want to continue; the Commission can provide whatever direction they want, but even without the direction, she is already working on resolving it.

Claim 2:

Commissioner Tilos stated that he thinks there is agreement that maybe it was a technology issue; the City Council did not see hands raised; if hands were raised, they did not see it; he does not think it is a violation; he believes both sides are telling the truth; if the Commission believes the truths on both sides, he does not think there is a violation; he understands the frustration, but does not believe there was a violation.

Vice Chair Chen stated maybe the baby could be cut in half and no finding could be made on this claim.

In response to Commissioner Montgomery's inquiry, Chair LoPilato outlined the options; stated that she does not think the Commission is barred from making no finding on a specific claim.

Commissioner Cambra inquired whether there could be a finding of substantial compliance.

The Chief Assistant City Attorney responded the Sunshine Ordinance does not provide guidance if there is an intent or a lack of intent and whether it is relevant; one option may be to make a finding that there just was not enough evidence for the Commission to conclude the City failed to call the four speakers; while the evidence indicated speakers were attempting to raise their hands, a technological issue may have been one of the barriers; this still allows the Commission to make a finding on the claim.

Chair LoPilato stated that she thinks the Commission can make a factual finding that there is credible evidence that members of the community believed they raised their hands before the public comment period window closed; many conceded they may have raised their hands late in the process; the Commission also found there was credible evidence that on the City side, hands may not have been visible at the close of the public comment period; on that basis the Commission, makes the finding of no violation.

Commissioner Cambra stated if the Commission sustains, it could be sustained without a cure and correct, which means it does not have to go to Council; member of the public did not get a chance to speak.

Chair LoPilato stated that she cannot go in said direction, because she does not think there is a right to speak in the Sunshine Ordinance if one does not comply with

procedures; there is credible evidence on the City's end that there was possibly no procedural violation, that the hands were not raised; she is not comfortable sustaining it, but there may be a majority without her.

Commissioner Montgomery moved approval of making the factual finding that there was credible evidence that the members of the public believed they raised their hand, and many conceded they raised it late; there was also credible evidence on the City's side that the hands were not visible, therefore, the Commission would make a finding of no violation based on the technical glitch, causing two sides to conflict.

Commissioner Tilos seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; Tilos: Aye; and Chair LoPilato: Aye. Ayes: 5

Claim 3:

Chair LoPilato outlined Claim 3.

Commissioner Tilos stated that he is going to say the City did not violate the Sunshine Ordinance; the informational webpage is an advertising type page which the Sunshine Ordinance does not cover.

Commissioner Montgomery concurred with Commissioner Tilos; stated the Grand Street webpage is more of an informational webpage and not actually part of the City Council agenda and has nothing to do with the actual meeting or the Sunshine Ordinance requirements.

Commissioner Cambra stated if a project is noticed in a specific way, it needs to continue to be noticed at least as extensively as is required for meetings on the project; he interpreted this a little bit differently; placing a regular project on a City Council agenda is all that needs to be done; however, the informational webpage talks about anticipation of a potential project, not a regular project; as long as the project was noticed on the Council agenda, it qualifies; the City does not have to do an informational website.

Vice Chair Chen stated that she agrees there is no reason that a notice should go on an informational page; if someone wants to know whether a project is on the agenda, just look at the agenda.

Commissioner Cambra moved approval of denying Complaint violation Claim 3 on notices and posting of information.

Vice Chair Chen seconded the motion, which carried by the following roll call vote: Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; Tilos: Aye; and Chair LoPilato: Aye. Ayes: 5

Claim 4:

Chair LoPilato outlined Claim 4.

Commissioner Montgomery stated that she had some thoughts about this as it pertains to the October 31<sup>st</sup> email; just sending an email does not start the Complaint process.

The City Clerk stated the October 31<sup>st</sup> title line indicated it was regarding an agenda item; anything that comes in like that is automatically attached to the agenda item; she interpreted it as correspondence for the November 1<sup>st</sup> meeting and that it was setting up the discussion for 11/1; she did not take it as a Sunshine Ordinance Complaint.

Chair LoPilato stated the title of the October 31<sup>st</sup> letter reads: "Objection to Agenda Item 7-F on the City Council's November 1, 2022 Regular Agenda, seeking to affect reconsideration of the City Council's October 4, 2022 final vote in support of the alternative plan for Grand Street;" there is a reference to the October 18<sup>th</sup> meeting within the letter, which is what the Complainant is raising; it is helpful to have how the issue was framed in the record.

In response to Commissioner Cambra's inquiry, Chair LoPilato stated the question is ultimately: is the October 31<sup>st</sup> letter a free standing letter which should have triggered the Complaint process such that the claim would not be time barred; she found it did not address the issue of notice from the October 18<sup>th</sup> agenda and seems to continue the thrust towards the goal of actually just overturning the substantive decision; the time-barred question is based on the fact that a complaint was not filed until November 14<sup>th</sup> and yet the October 31<sup>st</sup> letter exists.

Commissioner Montgomery stated that she feels the issue is time-barred because the actual email was not looked at as a start of a complaint; it was looked at as part of correspondence for the next meeting.

Commissioner Cambra stated that he believes it is sufficient to invoke the process; Section C is very clear; he does not think there is any question that the letter itself raises the issue; questioned whether the 10 pages of the letter were read to get to that point.

Chair LoPilato stated Commissioner Cambra is raising a good point about the specific sentence in the Complaint procedure about free stating letters; regardless of which way the claim goes, it may warrant revisiting the sentence or clarifying the language about when obligations are triggered.

Commissioner Cambra read the portion of the letter; inquired whether other Commissioners think it was sufficient to raise the issue.

Chair LoPilato stated Section 2-93.2.a is the Sunshine Ordinance Section addressing procedures; the Complaint is against the entire City Council and lists the Mayor first, as who was contacted; she does not interpret that to mean it is a complaint against an individual candidate, so a complaint still would be able to proceed; it is possibly an interesting wrinkle in the Sunshine Ordinance that there may have been an almost impossibility of filing a complaint prior to the election.

Commissioner Tilos stated that he did remember that and the City is right up at an election; there are three of the five members are for election.

Chair LoPilato stated arguably the Complaint could have been rejected based on the sentence; it is broader and is about the City Council agenda processes.

In response to Chair LoPilato's inquiry, the Chief Assistant City Attorney stated the Commission could reach a decision on the first three claims that have been decided already; if at least 3 of the 5 Commissioners who have heard all the evidence for the remaining two, cannot decide, it would have to restart; the Commission would have to have at least three individuals and the decision would have to be unanimous; if two Commissioners are not going to be here, the other three could conceivably come back at another time.

\*\*\*\*

Commissioner Montgomery moved approval of finishing all the remaining items [claims] and accepted the friendly amendment to give everybody two more minutes.

Commissioner Tilos seconded the motion which carried by the following roll call vote: Commissioners Cambra: No; Chen: Aye; Montgomery: Aye; Tilos: Aye; and Chair LoPilato: Aye. Ayes: 4; Noes: 1.

\*\*\*\*

Vice Chair Chen moved approval of denying Claim 4 on the fact that it is time-barred on procedural grounds.

Commissioner Montgomery seconded the motion which carried by the following roll call vote: Commissioners Cambra: No; Chen: Aye; Montgomery: Aye; Tilos: No; and Chair LoPilato: Aye. Ayes: 3; Noes: 2

Vice Chair Chen stated that she feels Claim 5 is the meatier one and Claim 4 seemed like a back-up.

Chair LoPilato stated she finds Claim 4 to be time barred on the basis that the letter submitted October 31, 2022 did not constitute a complaint filed within the 15 day window as the Sunshine Ordinance requires; suggested the title of the October 31<sup>st</sup> letter be included in the written finding.

Commissioner Montgomery and Vice Chair Chen concurred with Chair LoPilato's statement.

In response to Commissioner Cambra's inquiry regarding internal procedures, Chair LoPilato stated internal procedures do not give to the Commission the ability to alter the statute of limitations, which is very clearly set out in Section 2-93.2 and state a person may file a complaint against any violation no more than 15 days after the alleged violation;

there have been discussion regarding ambiguous timelines and equitable tolling with respect to Public Records Act requests; when it comes to meetings, there needs to be a firm standing on the timeline.

Commissioner Montgomery stated that the letter did not substantiate a complaint because of the verbiage; nowhere did the letter say it was an official OGC complaint under the Sunshine Ordinance.

In response to Chair LoPilato's inquiry, the City Clerk and the Chief Assistant City Attorney affirmed they have enough basis to list under the claim for the 3-2 finding.

Claim 5:

Chair LoPilato outlined the claim.

The Chief Assistant City Attorney read the Code Sections cited in the Complaint and the title of the Agenda Item 7-F.

Commissioner Tilos stated that he does not have a motion yet, but is leaning towards the description does not inform him that a new vote was going to happen; he interpreted it as revisiting some new information; he did not get the gist the Council was going to overturn the decision at the meeting.

In response to Commissioner Cambra's inquiry, the Chief Assistant City Attorney read Subsection b of 2-91.5; stated that she believes what Commissioner Cambra is getting at is whether a description needs to refer to certain documents; she would say yes; as an example, if the Council is being asked to authorize the City Manager to enter into a lease, the description should refer to the lease; in the current situation and set of facts, the items that were referenced in the description would be construction documents and the project final concept.

Commissioner Cambra inquired whether under the new information, the proposed final concept plan link being considered was attached, to which the Chief Assistant City Attorney responded in the affirmative.

Chair LoPilato inquired whether the staff report could be considered part of the meaningful description, to which the Chief Assistant City Attorney responded generally, the title is what is reviewed.

In response to further inquiry, the City Clerk stated the Commission has not really delved into whether or not the staff report should be considered; it is all part of the public record; however, a person might just read the agenda and not read the staff report.

Commissioner Montgomery stated that she is very confused about the issue; inquired whether considering new information means there will be a new vote.

Chair LoPilato stated if she saw something related to a project she cared about, she would



check the staff report to see what actions might be taken, as well as staff reports from the initial agenda posting; alternatives listed in the staff report include consider the new information and approve the recommended concept, or consider the new information and take no action; the staff report very clearly lays out the paths that could have been taken; if the staff report is included, the notice is definitely sufficient; the title would also put her on notice to check the staff report.

Vice Chair Chen stated that she just checked the staff report and read the alternatives, which included Council may consider the new information and approve the recommended concept or consider the new information and take no action to modify the Council's October 4<sup>th</sup> decision.

Commissioner Montgomery stated the average citizen may not automatically go to the staff report for information.

Commissioner Cambra stated that the law keeps does not require someone to go to the staff report; he has three specific pieces of information that he uses; questioned whether the notice sufficiently let someone know the Council would possibly vote on a proposed final concept.

The Chief Assistant City Attorney stated the Commission should focus on the standard in the Sunshine Ordinance, which says 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, and that he or she may have reason to attend the meeting or seek more information on the item; the Section also requires the description be brief and concise.

Commissioner Tilos reiterated Vice Chair Chen's comments, stated inexperienced people may have difficulty going through the extra layers and may see the wording of new information and may not get the piece where it is saying the item may be re-voted; he did not get that from the description.

Commissioner Tilos moved approval of sustaining Claim 5 of the Complaint on the basis that it did not have meaningful description.

Commissioner Montgomery seconded the motion.

In response to Commissioner Cambra's inquiry regarding agenda item links, the Chief Assistant City Attorney stated that she does not believe the actual content of the linked items is considered and the documents should be referenced themselves; if a linked document is critical to the agenda item having a meaningful description, then the name or the reference to that document should be included in the agenda description.

Vice Chair Chen stated that she thinks the way the agenda item is written is disingenuous.

On the call for the question, the motion carried by the following roll call vote:

Commissioners Cambra: Aye; Chen: Aye; Montgomery: Aye; Tilos: Aye; and Chair LoPilato: No. Ayes: 4; Noes: 1.

In response to Chair LoPilato's inquiry about approving minutes, the City Clerk stated new Commissioners are able to approve minutes by watching the video and confirming it is an accurate representation.

#### REGULAR AGENDA ITEMS

4-A Minutes of the October 17, 2022 Meeting

Not heard.

4-B. Subcommittee Update Regarding Annual Report

Not heard.

#### STAFF UPDATE

None.

#### COMMISSION AGENDA REQUESTS

None.

#### COMMISSIONER COMMUNICATIONS

Chair LoPilato announced that she is opting to not continue her service on the Commission; the Mayor is transitioning to a new term and will have an excellent new appointee; it has been a real honor to serve and she is really proud of the work the Commission did and the grit shown; she looks forward to watching from the sidelines and cheering on the Commission.

Commissioner Montgomery also expressed her appreciation; stated it has been a mind and heart opening experience.

Vice Chair Chen stated that she is sorry that she never met Commissioner Montgomery and Chair LoPilato in three dimensions, she really appreciates Commissioner Montgomery just jumping in and not missing a beat; she already shared her sentiments on how much she cares about Chair LoPilato.

Commissioner Tilos thanked all the Commissioners for their service and expressed gratitude for working with them.

Commissioner Cambra stated it has been a pleasure working with all the Commissioners; expressed how valuable it was to have Chair LoPilato as part of the team to put it all

together to make their job that much easier.

Chair LoPilato thanked everyone including the City Clerk and the Chief Assistant City Attorney.

Vice Chair Chen thanked all the people who came and testified; stated it makes her feel good that the City is moving in a positive direction.

### ADJOURNMENT

Chair LoPilato adjourned the meeting at 12:28 a.m.

Respectfully submitted,

Lara Weisiger  
City Clerk

The agenda for this meeting was posted in accordance with the Sunshine Ordinance.