

BEFORE THE OPEN GOVERNMENT COMMISSION  
OF THE CITY OF ALAMEDA

In re:  
The Complaint of Reyla Graber

Reyla Graber,  
Complainant

The City of Alameda,  
Respondent

Case No. 18-03

DECISION OF THE  
OPEN GOVERNMENT COMMISSION  
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 Planning Department published the following notices related to a proposed hotel located at 2900 Harbor Bay Parkway (PLN 18-0381) ("Project"):

1. On September 28, 2018, the Department published the agenda and supporting materials, including public comment letters, for the Planning Board's October 8 meeting, which included a Planning Board Study Session to review and comment on the Project. The October 8 agenda and public comment letters are attached as Exhibit 1.

2. On November 19, the Department published the agenda and supporting materials for the Planning Board's November 26 meeting, which included Agenda item 7-A, a public hearing to consider Design Review and Development Plan Amendment for the Project.
3. That same day, the applicant requested a two week delay to give community members more time to review the proposal and conduct a neighborhood meeting with the applicant on November 27, 2018. Staff granted the request, and rescheduled the Project for consideration by the Planning Board to December 10.
4. On November 29, staff published the agenda and supporting materials for the Planning Board's December 10 meeting, which included Agenda item 7-B, a public hearing to consider Design Review and Development Plan Amendment for the Project.

On December 4, complainant Reyla Graber timely filed a Sunshine Ordinance Complaint against the Planning Board concerning the agenda materials for a public meeting on December 10, citing a violation of Section 2-91.5, Agenda Requirements. Section 2-91.5 provides that all documents material to an agenda item must be included as part of the agenda packet. The complaint states the Planning Department should have included a letter dated September 25, 2018 from the San Francisco Bay Conservation and Development Commission ("BCDC") to the Project applicant ("BCDC Letter") in the supporting materials for the December 10 Planning Board meeting. A copy of the complaint, which includes a copy of the BCDC Letter, is attached as Exhibit 2.

In accordance with past practice, the Planning Department attached written correspondence related to the Project to the October 8 agenda materials, when the Planning Board conducted a Study Session for the Project. The packet of written correspondence included the BCDC Letter the complainant claims should have been part of the administrative record for the Project (and has been part of the administrative record since October 8). The BCDC Letter states that the Project is “generally consistent” with BCDC’s applicable development standards for the site, and describes the process by which BCDC staff would process an approval for the Project, if the City of Alameda approves the Project. On October 8, no questions were raised by Planning Board members regarding the BCDC Letter, and no final action was taken by the Planning Board on the Project.

Although the BCDC Letter was included in the October 8 agenda materials, it was not “material” within the meaning of Section 2-91.5 for the following reasons:

1. The BCDC Letter relates to the review of the project by BCDC, a separate regulatory agency that does not take any action on a project until after the local agency takes action. If the City approves the Project, BCDC may approve or deny a BCDC permit for the Project; if the City denies the Project, the Project will not be considered by BCDC.
2. The Planning Board is responsible for reviewing the Design Review and Development Plan amendment for conformance with the City of Alameda General Plan, Alameda Municipal Code, and any City adopted site development requirements, and must make certain findings to approve the Design Review (Section 30-37.5) and Development Plan amendment (Section 30-4.20(g)). The Alameda Municipal Code does not require BCDC approval

prior to Planning Board approval because BCDC never takes action on a project before the local agency takes action.

3. The Planning Board is not responsible for reviewing projects for conformance with the requirements of outside regulatory agencies that may also have permitting authority over a project, including BCDC, Bay Area Air Quality Management District, San Francisco Bay Regional Water Quality Control Board, Department of Toxic Substances Control, Federal Aviation Administration, and Airport Land Use Commission.
4. Consistent with common practice, the Department's recommended conditions of approval require the applicant to acquire all necessary and required permits from other agencies, including BCDC, prior to issuance of Building Permit, if the City of Alameda Planning Board approves the Project.

The supporting materials for the December 10 Planning Board meeting included over 90 letters and emails both in favor of and in opposition to the Project. However, the Planning Department did not initially include the BCDC Letter in an effort to limit the large amount of material documents (over 250 pages, 163 of which were public comment) in a manner that was useful to the Planning Board. Note that on December 6, the Planning Department published a revised agenda for the December 10 meeting with additional public comment received as of that date, including the BCDC Letter previously included in the October 8 agenda materials.

In response to the Sunshine Ordinance Complaint, in which the complainant requested removal of the Project from the December 10 Planning Board agenda, the City Attorney's Office contacted Ms. Graber by telephone and e-mail and

informed her that the City of Alameda would not delay the public hearing a second time so that agenda materials could be reissued with the BCDC Letter. The complainant was invited to attend the December 10 public hearing and to submit verbal and/or written comments to express her concerns about the Project. The City Attorney's Office also informed the complainant that, in response to her request, the Planning Department would be including the BCDC Letter in the supporting materials for the December 10 Planning Board meeting in a revised agenda packet distributed by e-mail on December 6, and asked her if this resolved the Sunshine Ordinance Complaint. The complainant stated it did not. A copy of the e-mail is attached as Exhibit 3.

## 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 December 17, 2018 and considered the evidence and arguments of Ms. Graber and the City.

## Discussion

One of the goals of the Sunshine Ordinance is to ensure that the public and the decision making bodies have all the relevant materials necessary for good decision

making. An equally important goal of the Sunshine Ordinance is to ensure effective public participation through consistent and timely public hearings.

In this case, the Planning Department determined that a second delay to the public hearing would not be beneficial to effective public participation and might serve as a deterrent to participation by residents and neighbors, who might be confused by repeated delays and repeated notices.

Based on the facts before the Commission, Ms. Graber's complaint is unfounded and should not be sustained. First, the document at issue (Exhibit 2) was previously provided to the Planning Board on September 28 for the Board's October 8 Study Session on the Project. Second, although it was not initially re-appended as part of the agenda packet for December 10 Planning Board meeting, that document is not material within the meaning of the Sunshine Ordinance, and in particular, it is not germane to the item before the Planning Board: Design Review and Development Plan amendment under City guidelines. Finally, the document is already part of the administrative record and was re-appended to the agenda packet for the December 10 Planning Board meeting.

For those reasons, there was no violation of Section 2-91.5.

## Decision

The Planning Board did not violate Section 2-91.5 of the Alameda Municipal Code as set forth in Ms. Graber's complaint of December 4, 2018. The complaint, therefore, is determined to be unfounded.

*Signatures are on the following page.*

Dated: December 17, 2018

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Heather Little, Chair

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Paul Foreman, Member

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Mike Henneberry, Member

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Irene Deiter, Member

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Bryan Schwartz, Member