LARA WEISIGER

From: Paula Rainey <pmrainey@icloud.com>
Sent: Tuesday, February 04, 2020 4:01 PM
To: Marilyn Ezzy Ashcraft
Cc: John Knox White; Malia Vella; Tony Daysog; Jim Oddie; City Clerk
Subject: Open Government Commisstion

*** **CAUTION:** This email message is coming from a non-City email address. Do not click links or open attachments unless you trust the sender and know the content is safe. Please contact the Help Desk with any questions. ***

Dear Mayor Ezzy Ashcraft:
I strongly oppose any effort to remove authority from the Alameda Open Government Commission.

Citizens have little confidence in government bodies already. It is unwise to cut the authority of the Open Government Commission to compel the City Council to adhere to the Sunshine Ordinance. This body serves an important safeguard function.

We need the Alameda Open Government Commission to continue to have the authority vested in it. We need to be sure that our city government works in the "Sunshine" all of the time.

I have copied my message to City Council members and the City Clerk.

Sincerely,
Paula Rainey

556 Palace Court
Alameda, CA 94501
510 522 8005

LARA WEISIGER

From: Serena Chen <serenatchen@gmail.com>
Sent: Tuesday, February 04, 2020 11:26 AM
To: John Knox White; Marilyn Ezzy Ashcraft; Malia Vella; Jim Oddie; Tony Daysog; LARA WEISIGER
Subject: "Null and void"

Dear Mayor Ashcraft and Members of the Council:

I believe that the Open Government Commission (OGC) should be able to declare that a vote taken in violation of Section 2-91 should not count -- whether the language says "null and void," is irrelevant. What is relevant is to respect the intent of the Sunshine Ordinance. When the public is not adequately noticed on an agenda item they are denied the right to comment. According to the Sunshine Ordinance, "*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."*

The City Attorney's office, to my knowledge, has not ever admitted that they may have violated the Sunshine Ordinance -- instead it has insisted on removing the one small penalty of voiding that vote. The Council can simply re-post the amendments and hold a proper first hearing.

I am not an attorney. I have however attended at least **400** city council, school board, board of supervisors, BART, and AC Transit board meetings in my 2+ decades of public advocacy -- representing thousands of hours of observing "sausage making." This includes every city council in Alameda County and many cities in neighboring counties. *Every single time* a council/board discussion moved into substantially changing the provisions being proposed, either the city attorney or another council member raised the issue of needing to re-write the language and consider the item at a subsequent meeting to allow for adequate public notice. Fairness and transparency requires that everyone to take a little more time to adopt legislation.

Every single elected official (about a dozen) I have discussed this matter with has agreed with me and the OGC, that the actions of the City Council violated the Sunshine Ordinance. It was one of them who insisted that I file a complaint -- something I have not ever had occasion to do. Little did I know that the Council would dig in its heels and claim it's own form of "executive immunity."

Council should respect the intent of an ordinance called the "Sunshine Ordinance" which created an "Open Government Commission," established to adjudicate possible violations. After watching hours of the congressional hearings on the impeachment of DJT, I am more convinced that ever about the importance of preserving our democratic rights, how those in power can threaten our democracy and that we need more "sunshine," "open government," and democracy, not less.

--

Serena

Serena Chen, 陳月眉

LARA WEISIGER

From: John Platt <johntplatt@gmail.com>
Sent: Tuesday, February 04, 2020 8:40 AM
To: Marilyn Ezzy Ashcraft; John Knox White; Tony Daysog; Jim Oddie; Malia Vella; City Clerk
Subject: Oversight committee

*** **CAUTION:** This email message is coming from a non-City email address. Do not click links or open attachments unless you trust the sender and know the content is safe. Please contact the Help Desk with any questions. ***

Dear Council,

I am not sure I will be able to attend tonight's session.

I strongly believe considering the fiasco and expense of the City Manager buy out that you should retain this oversight committee. The Council needs to rebuild the trust of the citizens of Alameda. You all appoint the members of the oversight committee and can easily remove them.However to kill this committee just makes the voters more skeptical of our city officials.

Please at a minimum, table this idea until after the election.We live in a time of unprecedented distrust in government. I believe the proposal to end the oversight committee will do nothing to win back the trust of Alameda's voters.

Thank you for listening. Sincerely yours,

John Platt

LARA WEISIGER

From: Leslie Frierman Grunditz <Leslie@grunditzart.com>
Sent: Monday, February 03, 2020 8:03 PM
To: Marilyn Ezzy Ashcraft; John Knox White; Tony Daysog; Malia Vella; Jim Oddie; LARA WEISIGER
Subject: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance

Dear Mayor Ashcraft, Vice Mayor Knox-White, and Council members Daysog, Vella and Oddie,

I am writing to express my agreement with a letter recently sent to you asking that you leave the safeguard in place that gives the Open Government Commisison the necessary power to enforce the Sunshine Ordinance / Brown Act.

I also support the position of the Alameda Citizens Task Force quoted below :

" We are writing in opposition to the above captioned proposed amendment of the Sunshine Ordinance. We strongly endorse the position presented to you by former attorney Paul S Foreman and attorney Bryan Schwartz, both of whom have served on the Open Government Commission (OGC), which also represents the position of every member of the OGC who is currently serving or who has served in past recent administrations and the Sunshine Task Force and City Council that promulgated the Ordinance in 2011."

I have also had personal experience with errors made by our City Council members that did result in a lawsuit. I too witnessed items left out of the public record and consideration when they came before both the City Council and Planning Board. It took 3 years to resolve the issue.

I too believe the ability of the Open Government Commisison to review decisions and ordinances passed by the Council is a tremendous safety net for our City. The OGC doesn't pass legislation- they review the propriety of the process and then send decisions BACK to Council if their actions violated the Sunshine Ordinance/ Brown Act .

Our City staff are dedicated and work hard- but mistakes happen. Our City Council are volunteers, making critical decisions about many, many issues. The current power the Open Government Commission has protects the City and our Council members. If the OGC catches an error, as they have done, all the Council has to do is republish all relevant materials and re hear the item. They can then pass the measure, ordinance, or take action on an issue correctly, and move forward-- legally.

Sincerely,

Leslie Frierman Grunditz
long time Alameda resident

LARA WEISIGER

From: Heather Little <heatherlittle9691@gmail.com>
Sent: Monday, February 03, 2020 8:07 PM
To: LARA WEISIGER
Subject: Fwd: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance

Sorry about that, here you go!

Thanks, Heather

Begin forwarded message:

> **From:** Heather Little <heatherlittle9691@gmail.com>
> **Date:** January 29, 2020 at 11:44:53 AM PST
> **To:** Marilyn Ezzy Ashcraft <MEzzyAshcraft@alamedaca.gov>, John Knox White <jknoxwhite@alamedaca.gov>, Tony Daysog <tdaysog@alamedaca.gov>, Jim Oddie <JOddie@alamedaca.gov>, mvella@alamedaca.gov, Yibin Shen <yshen@alamedacityattorney.org>
> **Subject: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance**
>
> Dear City Attorney Shen, Mayor Ashcraft and Council Members,
>
> I am writing in opposition to the proposed amendment of the Sunshine Ordinance that will be considered on Tuesday, February 4th. I am including Mr. Shen in this outreach as he is representing the city attorney's office during next week's meeting.
>
> As you are aware, the OGC took up the city attorney's recommendations for the updated Sunshine Ordinance during our last meeting in December, all of which were accepted, save the language affording the ability to make "null and void" those decisions it determines to be in conflict with proper notification for the public.
>
> Not having the legal expertise or background to argue with Mike Roush and the other city attorneys about the legality of our actions, I appreciate the letter submitted by Paul Foreman, who did the research to help substantiate our decision.
>
> The OGC meetings to discuss this matter and issue a ruling demonstrated true bipartisanship to reach our original decision. Essentially, it was a mandate for a "do over", nothing more. But to those members of our community who felt excluded from the council's original decision making process that led to the original complaint, it was an important action that we were compelled to uphold.

In Tuesday's council meeting, it seems that you are prepared to decline OGC's recommendation to keep the original language of the Sunshine Ordinance, as it relates to this matter, and remove any "teeth" the commission has. I would ask that you reconsider this decision.

As I have stated during the OGC meetings, and in conversation with others in our community, removing the commission's ability to hold a body accountable, an action that I still believe was the right one, will only leave complainants with the option of suing the city, should we have another similar circumstance. This is not an equitable option for the city, or for the community that you represent and the OGC looks out for.

There were myriad opportunities for city to put this situation to rights, but failing that, I still believe the OGC did its job. Were the ordinances delayed? Yes. But was the public fully aware and able to provide input into the decision to still move forward with the original plan? Also yes. This was good government, from a constituent's point of view.

Unfortunately, I am out of town next week at a summit, so will only be at the council meeting in spirit. I appreciate your taking the time to read this submission and adding it to the public record.

Thanks,
Heather

LARA WEISIGER

From: Susan Gavrich <sue_gavrich@moneywell.com>
Sent: Monday, February 03, 2020 3:07 PM
To: LARA WEISIGER
Subject: FW: Item # 6-E Feb. 4 City Council Agenda - Sunshine Ordinance

I forgot to copy you!

Sue Gavrich

Susan Gavrich, CFP
MoneyWell
1517 Fountain St.
Alameda, CA 94501

510.864.9990
510.864.9991 fax
sue_gavrich@moneywell.com

Move forward with confidence.

From: Susan Gavrich
Sent: Monday, February 3, 2020 3:05 PM
To: mezzyashcraft@alamedaca.gov; jknoxwhite@alamedaca.gov; tdaysog@alamedaca.gov; mvella@alamedaca.gov; joddie@alamedaca.gov
Cc: Bob (Bob@SeasonalStrategy.com)
Subject: Item # 6-E Feb. 4 City Council Agenda - Sunshine Ordinance

Dear Mayor Ashcraft, Vice Mayor Knox-White, and Council members Daysog, Vella and Oddie,

I am writing to ask that you leave the safeguard in place that gives the Open Government Commission the necessary power to enforce the Sunshine Ordinance / Brown Act.

I support the position of the Alameda Citizens Task Force quoted below :

"We are writing in opposition to the above captioned proposed amendment of the Sunshine Ordinance. We strongly endorse the position presented to you by former attorney Paul S. Foreman and attorney Bryan Schwartz, both of whom have served on the Open Government Commission (OGC), which also represents the position of every member of the OGC who is currently serving or who has served in past recent administrations and the Sunshine Task Force and City Council that promulgated the Ordinance in 2011."

I believe the ability of the Open Government Commission to review decisions and ordinances passed by the Council is a tremendous safety net for our City. The OGC doesn't pass legislation - they review the propriety of the process and then send decisions BACK to Council if their actions violated the Sunshine Ordinance/ Brown Act.

Our City staff are dedicated and work hard but mistakes happen. Our City Council are volunteers, making critical decisions about many, many issues. The current power the Open Government Commission has protects the City and our Council members. If the OGC catches an error, as they have done, all the Council has to do is republish all relevant materials and re hear the item. They can then pass the measure, ordinance, or take action on an issue correctly, and move forward -- legally.

Sincerely,

Sue Gavrich
1517 Fountain St.
Alameda, CA 94501

LARA WEISIGER

From: Patricia Lamborn <patricia.lamborn@aol.com>
Sent: Monday, February 03, 2020 1:26 PM
To: Marilyn Ezzy Ashcraft; John Knox White; Tony Daysog; Malia Vella; Jim Oddie
Cc: LARA WEISIGER
Subject: Item # 6-E Feb. 4 City Council Agenda- Sunshine Ordinance

Re: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance

Dear Mayor Ashcraft, Vice Mayor Knox-White, and Council members Daysog, Vella and Oddie,

I am writing to ask that you leave the safeguard in place that gives the Open Government Commisison the necessary power to enforce the Sunshine Ordinance / Brown Act.

I support the position of the Alameda Citizens Task Force quoted below :

" We are writing in opposition to the above captioned proposed amendment of the Sunshine Ordinance. We strongly endorse the position presented to you by former attorney Paul S Foreman and attorney Bryan Schwartz, both of whom have served on the Open Government Commission (OGC), which also represents the position of every member of the OGC who is currently serving or who has served in past recent administrations and the Sunshine Task Force and City Council that promulgated the Ordinance in 2011."

I have had personal experience with errors made by our City Council members that did result in a lawsuit. I witnessed items left out of the public record and consideration when they came before both the City Council and Planning Board. It took 3 years to resolve the issue.

I believe the ability of the Open Government Commisison to review decisions and ordinances passed by the Council is a tremendous safety net for our City. The OGC doesn't pass legislation- they review the propriety of the process and then send decisions BACK to Council if their actions violated the Sunshine Ordinance/ Brown Act .

Our City staff are dedicated and work hard- but mistakes happen. Our City Council are volunteers, making critical decisions about many, many issues. The current power the Open Government Commission has protects the City and our Council members. If the OGC catches an error, as they have done, all the Council has to do is republish all relevant materials and re hear the item. They can then pass the measure, ordinance, or take action on an issue correctly, and move forward--legally.

Sincerely,
Patricia Lamborn
Alameda resident

LARA WEISIGER

From:	Alameda Citizens Task Force <announcements@alamedacitizenstaskforce.org>
Sent:	Monday, February 03, 2020 11:14 AM
To:	Marilyn Ezzy Ashcraft; John Knox White; Malia Vella; Jim Oddie; tdaysog@alamedaca.com
Cc:	Eric Levitt; LARA WEISIGER; Yibin Shen
Subject:	Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance

ACT

Alameda Citizens Task Force

Vigilance, Truth, Civility

Dear Mayor Ashcraft, Council Members John Knox White, Melia Vella, Jim Oddie, and Tony Daysog:

We are writing in opposition to the above captioned proposed amendment of the Sunshine Ordinance. We strongly endorse the position presented to you by former attorney Paul S Foreman and attorney Bryan Schwartz, both of whom have served on the Open Government Commission (OGC), which also represents the position of every member of the OGC who is currently serving or who has served in past recent administrations and the Sunshine Task Force and City Council that promulgated the Ordinance in 2011.

City Attorney Shen's opinion that the current enforcement provisions of the Ordinance constitute an unlawful delegation of Council's legislative authority is contradicted by no less than five attorneys, Mr. Foreman, Mr. Schwartz, Mr. Creason, and Mr. Sullwold. See https://alamedamgr.wordpress.com/2020/02/01/city-attorney-called-for-interference/#more-12782 We count as the fifth attorney, Donna Mooney, who was the City Attorney who would have approved the Ordinance in 2011. Thus, Council is in the unfortunate situation of having conflicting opinions from its former and current City Attorney with no apparent change in case or statutory law since the adoption of the Ordinance.

Notwithstanding our strong disagreement with the City Attorney we recognize that you may be reluctant to reject his legal opinion even though believing, as a matter of policy, that citizens should have an inexpensive process for challenging a breach of the process requirements of the Ordinance and that Council policing itself is inappropriate. There are options for modification of the Ordinance that can avoid outright rejection of the City Attorney's advice while still addressing these salutary policy objectives. We suggest a few below:

1. Simply delete the null and void option. There would be few, if any, instances where the “cure and correct” option would not serve the purpose. While a "null and void" order temporarily repeals the underlying Council action, thus raising Mr. Shen's concern about delegation of legislative authority, a "cure and correct" order

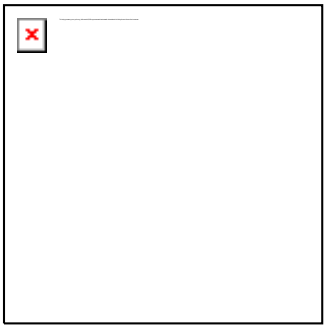
could be limited to only requiring Council to reconsider said action by presenting the same for a re-vote after correcting the flawed agenda notice that preceded the initial action. If a complainant believed that a "null and void" order was required he could proceed under the remedies provided in the Brown Act.

2. If you believe that option 1 above still infringes on Council's legislative authority you could supplement option 1 with a provision requiring that upon receipt of a cure and correct order from the OGC, Council must implement the Order unless a motion is made at said meeting to either amend or vacate the order and receives 4 affirmative votes.

In summary, we believe that the current enforcement provisions in our Sunshine Ordinance are lawful and salutary and urge you to leave them in place. However we recognize that you may be concerned with rejecting the opinion of our City Attorney and submit the options above, with a preference for option 1 over option 2.

Sincerely,

ACT Steering Committee



City Attorney called for interference

This being Super Bowl weekend, we give you the following case: Kansas City has the ball on the 49er 1-yard line. It's fourth down. The Chiefs call a bootleg around right end, and Patrick Mahomes …

alamedamgr.wordpress.com

LARA WEISIGER

From: Julie Hoffman <jahoffman94403@gmail.com>
Sent: Friday, January 31, 2020 2:30 PM
To: Jim Oddie; Tony Daysog; Marilyn Ezzy Ashcraft; Malia Vella; John Knox White
Cc: City Attorney; City Clerk
Subject: Oppose Change to Sunshine Oridinance

*** **CAUTION:** This email message is coming from a non-City email address. Do not click links or open attachments unless you trust the sender and know the content is safe. Please contact the Help Desk with any questions. ***

Dear Alameda Councilmembers:

I am a resident of the City of Alameda and oppose the proposed amendment to the City's Sunshine Ordinance being considered at the Council meeting scheduled for, Tuesday, February 4. The Open Government Commission should retain its current oversight responsibilities.

Respectfully,

Julie Hoffman
104 Cypress Street
Alameda, CA 94501
Jahoffman94403@gmail.com

February 1, 2020

Honorable Mayor Ashcraft, Vice Mayor Knox White and Councilmembers:

The League or Women Voters of Alameda was a strong advocate for the development of the Open Government Commission (the Commission) and participated in its development through the Sunshine Task Force in 2010. In 2012, the Sunshine 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] [a]n effort to expand our citizens knowledge, participation and trust." The Council entrusted the Commission as the body to hear and decide complaints of the Ordinance.

You are now being asked to reconsider your decision and remove the main enforcement mechanism from the Commission. We request that you oppose doing so. We agree with the Open Government Commission's December 18, 2019, decision, which unanimously opposed the proposed amendment to the penalties section. The Commission stated that the enforcement role is essential to our democracy and the main purpose for the Commission's existence.

The City Attorney states that the City Council cannot delegate or grant legislative authority to the Commission, implying that the enforcement provision is legislative. It is not legislative. We note that the City Charter places no limits on the powers and duties that the Council "may confer upon any board or officer." With this Sunshine Ordinance, the Council conferred both regulatory and enforcement authority upon the Commission. This enforcement authority did not abdicate any of the City Council's legislative power. The Commission simply evaluates and rules on process issues, not the merits of the Council's legislative action.

To avoid the Commission having to utilize the "null and void" remedy, we suggest the City Council refrain from taking final legislative action on matters when a Sunshine Ordinance complaint has been filed concerning meeting proceedings. Staying proceedings under review communicates to residents that the City takes complaints seriously.

The enforcement provisions in the Sunshine Ordinance are a good-faith effort to promulgate the spirit of the State's Brown Act in an expedited and timely manner. Eliminating the current enforcement provisions would leave the City Council being able to rule on its own conduct, which would undermine trust in our city government. A neutral arbiter is essential. Furthermore, by stripping the local complaint enforcement remedy, only those with the financial resources to hire an attorney would be able to effectively challenge a violation of the Sunshine Ordinance.

In summary:
1. The enforcement provision is not legislative. Therefore, the City Attorney is in error when claiming that this provision is a prohibited delegation of legislative authority to the Open Government Commission.

2. We recommend that after a complaint about improper process is filed, suspend further action until the commission has had time to investigate and adjudicate BEFORE holding the next, and certainly the final, hearing on the legislation.

3. The Open Government Commission is more likely to be viewed by the public as a neutral arbiter of Council adherence to legislative procedures than the Council itself. The Commission has also proven to be a more accessible arbiter than a court system that requires expensive attorneys.

We urge the City Council to reject the proposed amendments to the penalty section of the Sunshine Ordinance.

Susan Hauser, LWV Alameda President
Karen Butter, LWV Alameda Action Chair

LARA WEISIGER

From: Bryan Schwartz <bryan@bryanschwartzlaw.com>
Sent: Friday, January 31, 2020 12:06 PM
To: LARA WEISIGER
Subject: Fwd: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance

additional correspondence - for transparency's sake

---------- Forwarded message ---------
From: **Bryan Schwartz** <bryan@bryanschwartzlaw.com>
Date: Fri, Jan 31, 2020 at 12:03 PM
Subject: Re: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance
To: John Knox White <JknoxWhite@alamedaca.gov>

Thanks for the email, John, and nice to e-meet you. The Open Government Commission doesn't make an ordinance "go away." It didn't in the lone instances that null-and-void was used. The ordinance got passed. It just required a re-do that was with a sound process. What the Council does on the re-do is up to the Council – it can do exactly the same thing. Council just has to respect the process so people who want to be heard can have a reasonable opportunity to be heard.

The process in question is not just an invention of Alameda or the charge of our little Commission – the process also involves Due Process, which arises from the U.S. and California Constitutions. Procedural Due Process fundamentally involves two key components – notice and an opportunity to be heard. The Open Government Commission protects our City value of transparency but it also helps the City avoid Due Process violations that – beyond being inconsistent with our values – could cost the City dearly. I am not suggesting that passing the particular ordinances that were nullified briefly would have led to a valid lawsuit about Due Process violations, but certainly Due Process concerns – notice and the opportunity to be heard – are at the core of what our Commission protects.

The arguments that having a commission safeguard our City's values and Due Process with null-and-void authority somehow violates the City Council's legislative power mandate are just a red herring. The City Attorney made its argument and the cases (mostly semi-ancient) that the City Attorney's office cites do not seem to support the position it is taking, requiring stripping the Sunshine Ordinance of its core provision, in my view. No one argues that the Open Government Commission can or is seeking to dictate what types of legislation the Council can pass, or not pass, or whom City Council can appoint or not, or any other fundamental restrictions on Council's authority, and that is a major difference from the authorities the City Attorney offers.

The *Thompson v. Board of Trustees of City of Alameda* case – from 1904 – is quaint because it arose in Alameda and made it to the state Supreme Court well over a century ago when "a petition was filed with the board [of trustees of the City] signed by six hundred, or more than ten per cent, of the legal voters of the city"

concerning "proposed railway franchises over certain streets." (*Thompson v. Bd. of Trustees of City of Alameda*, 144 Cal. 281, 282 (1904)). The board intended to ignore the petition and the ordinance that seemingly required the board to pay attention to such a petition. "[T]he effect of the ordinance would be in this and other cases where petitions may be filed, to suspend the legislative and discretionary powers of the board…until the next general or municipal election—that is to say, for a period that might be two years, and in the present case in fact is over a year." *Id.* Under these circumstances, it was improper for the board of trustees to "divest itself…of powers vested in it by the general law for the benefit of its constituents." *Id.*

What we learn from *Thompson* is that – even over a century ago – Alameda was a heavily, civically-engaged community, but we do not learn that having a null-and-void provision is *per se* unlawful. We are not taking legislative power out of Council's hands for years, or at all – Council always maintains complete legislative power *as long as* Council follows proper procedures, and fundamental Due Process, in reaching an outcome. The delay of a meeting or two (a month or two) in re-doing an agenda item correctly cannot justifiably be called "divesting" Council of its authority.

In *Briare v. Mathews*, 202 Cal. 1, 5 (1927), also cited by the City Attorney, the Court considered the following question: "Can the council by ordinance limit the power over the police department, given it in the charter, to such an extent that an appointment legal by the terms of the charter is rendered invalid and void by its failure to comply with the standards fixed by the ordinance?" The context was a sexist and age-ist (and for that matter, height-ist) ordinance which provided that police "patrolmen" were "required to be between the ages of 25 and 35 years and not less than 5 feet 9 inches in height." *Id.* at 4. A policewoman named Madeline Fotheringham and another officer were appointed to police positions and the plaintiff, Mr. Briare, sued to recover money for the city that had been paid to them as police officers, because they did not meet the requirements of the ordinance, having been over 35 years old when appointed. The Court found that the hiring authority that backed their appointments (the city council, empowered by the charter with responsibility for the police department) trumped the authority of the ordinance that would have precluded them from working. Again, the *Briare* case did not involve Due Process, but hiring authority, and our situation does not involve stripping City Council of its hiring authority, or for that matter, its authority to pass ordinances – it only involves asking for a re-do that respects the City's established process. In other words, no one is contesting, as in *Briare*, Council's authority, substantively, to make certain hiring decisions – if Council made the decisions without following proper procedures, Council might be asked to re-do them, but with no input (let alone a veto) on the what the final outcome should be.

I discussed *Salmon Trollers* in my prior message, and it supports our position, not the City Attorney's.

Finally, the last case the City Attorney cites, *People v. Johnson*, 129 Cal.App.2d 1, 10 (1954), is no help to the City Attorney's effort to take the heart out of the Sunshine Ordinance. This case about public nuisances was an action "to enjoin violation of county zoning ordinance prohibiting keeping and maintenance of more than five hogs in limited manufacturing district or zone." *Id.* at 3. (Hogs, short/old cops, and Alameda railway franchises – where did they find these cases?!). A hog dealer in San Bernardino County bought eight acres for $1,750, and he was planning on putting cattle and hogs on the property – up to 40 hogs – but he was enjoined from keeping more than five, being a nuisance under the zoning ordinance. The neighborhood also had a new schoolhouse. He sued saying, among other things, that "no legislative body can, by its mere assertion, make that a nuisance which is not in fact a nuisance." *Id.* at 4. Putting aside that 40 hogs certainly seem like a nuisance to me, the court's key holding in deciding was that "the ordinance, as enacted under such legislative authority [*i.e.*, the power to zone inherent to counties' police power, and certain sections of the Government Code], is a valid exercise of the county's legislative power, as authorized by the section of the Constitution enacted." *Id.* at 5-6. The constitutional power referenced was related to police power to enact zoning ordinances. The *Johnson* court relied upon an even earlier case called *Mathews* which was about keeping goats within city limits, and that it was proper to regulate keeping animals. *Id.* at 7-8. Ultimately the Court held, "that when an ordinance is passed relating to a matter which is within the legislative power of the municipality, all presumptions are in favor of its

validity, and when it is attacked the burden is upon the party alleging its invalidity to establish that fact." This reason supports and does not detract from the conclusion the City was empowered to give null-and-void authority to the Commission to enforce the Sunshine Ordinance, and in particular, to monitor the rights associated with notice and an opportunity to respond. All presumptions are made in favor of the Sunshine Ordinance's validity. *Johnson* is about nuisances created by pigs and goats and certainly does not stand for any proposition regarding non-delegation by City Council.

Municipal law is not my area of specialty typically – I am a civil rights lawyer focusing chiefly on workers' rights in class and individual actions. That said, I do know how to read case law, and I don't see how the City Attorney's authorities support, let alone require, the drastic remedy sought of amending the Sunshine Act to take out its teeth.

Bryan Schwartz

--
Bryan Schwartz
Pronouns: He/Him/His
Bryan Schwartz Law
180 Grand Avenue, Suite 1380
Oakland, California 94612
Tel. (510) 444-9300
Fax (510) 444-9301
Email: Bryan@BryanSchwartzLaw.com
Website: www.BryanSchwartzLaw.com

From: John Knox White <JknoxWhite@alamedaca.gov>
Sent: Thursday, January 30, 2020 4:59 PM
To: Bryan Schwartz <bryan@bryanschwartzlaw.com>; heatherlittle9691@gmail.com
Subject: RE: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance

Thank you for the letter. (major caveat, I'm not an attorney). I'm not meaning to argue and am happy to meet to discuss this issue further, I wanted to express my understanding and view of the issue.

I believe I am likely the furthest to the "support Null and Void" side of the spectrum and still believe in its intent. That said, I'm not convinced (but remain open to convincing) that this email clears up the issues identified in the City Attorney's report. As I read it, I believe the "adequate safeguards" language is not the same in both the usages below.

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Vice Mayor, Alameda

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Sent: Thursday, January 30, 2020 8:59 AM
To: Marilyn Ezzy Ashcraft <MEzzyAshcraft@alamedaca.gov>; John Knox White <JknoxWhite@alamedaca.gov>; Tony Daysog <TDaysog@alamedaca.gov>; Jim Oddie <JOddie@alamedaca.gov>; Malia Vella <MVella@alamedaca.gov>
Cc: LARA WEISIGER <LWEISIGER@alamedaca.gov>; Yibin Shen <yshen@alamedacityattorney.org>
Subject: RE: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance

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LARA WEISIGER

From:	Bryan Schwartz <bryan@bryanschwartzlaw.com>
Sent:	Thursday, January 30, 2020 8:59 AM
To:	Marilyn Ezzy Ashcraft; John Knox White; Tony Daysog; Jim Oddie; Malia Vella
Cc:	LARA WEISIGER; Yibin Shen
Subject:	RE: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance
Attachments:	excerpts of Open Govt Commission Meeting Dec. 2019 re amendment to Sunshine Ordinance.pdf

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Acing Chair Schwartz moved approval of nominating Commissioner Tilos as the Vice Chair.

Commissioner Little stated the selection is a rotating process; she has already been Chair and Vice Chair; she feels it is a good way for appointed members to gain experience; she supports Commissioner Tilos as Vice Chair.

Commissioner Tilos stated he is humbled by the nomination and would like to fill the role as Vice Chair; he would like to continue the rotational process so that Commissioner Shabazz could also have a turn at the Vice Chair/Chair roles.

Commissioner Little seconded the motion, which carried by the following voice vote: Ayes: Commissioners Little, Tilos and Acting Chair Schwartz - 3. Abstention: Commissioner Shabazz - 1.

Commissioner Shabazz inquired whether the rotational selection process is a formal process that has been codified, to which the Chief Assistant City Attorney responded in the negative; stated the selection process is informal; selecting the Chair and Vice Chair is at the Commission's discretion.

Commissioner Little stated participation in previous meetings would be a factor for her in the nomination process; she would bypass a Commissioner who was absent for a majority of the meetings.

Commissioner Shabazz stated that he is fine with the informal process but would like to consider making it more formal in the future; discussed the example of the School Board changing its process.

Commissioner Tilos concurred with Commissioner Shabazz; stated the School Board situation had the necessary votes to change the process.

3-E. Consider Further Revisions to the Sunshine Ordinance by Amending Various Provisions of Article VIII (Sunshine Ordinance) of Chapter II (Administration), Including Provisions Related to Public Access to Public Meetings and Public Records, and Sunshine Ordinance Enforcement.

Commissioner Shabazz stated he is interested in how revising the ordinance is coming forward now.

Acting Chair Schwartz stated the ordinance has been around for a decade and is being cleaned up; it felt like revising the ordinance was in response to the Commission nullifying two City Council actions and the fact that the City Attorney's office seemed to dispute whether the Commission has the authority to do so; it seems that the City Attorney's office wants change to the ordinance to take the authority away from the Commission; all of the other modifications to the ordinance seemed like gravy poured over the real issue.

Section 2-93.8

The Assistant City Attorney stated the use of the Null and Void remedy was historic in a sense that it

had not been used prior; when it was used, Councilmembers wanted the City Attorney's office to look into revising the Sunshine Ordinance; from said direction, the City Attorney's office drafted the ordinance amendments which are before the Commission tonight.

Acting Chair Schwartz inquired whether the Council requested the revisions because they were upset that the Commission nullified their actions.

The Assistant City Attorney responded in the negative, stated that he would not characterize it that way; it is typical for ordinances to adopt provisions that are not triggered, but it cannot be ignored that the remedy was used; his understanding is that the Council wanted a review of the entire Sunshine Ordinance.

Commissioner Little stated that she finds it timely that the one and only time the Commission used the remedy, the authority is being proposed to be removed at the very next opportunity; the change would remove any teeth the Commission has.

Commissioner Tilos stated it feels like the Commission is being undercut; the Commission did have the authority at one point, exercised that authority, then the Council requested to revise the ordinance to take away the power; the timing does not feel right.

The Assistant City Attorney stated if there is something about an ordinance that merits change, it should be addressed immediately as soon as it arises so changes are not triggered when another issue arises; he recognizes the Commission's perspective on the timing; the City Attorney's office views it differently; the situation was a little unprecedented; there was a Council request to advise the Open Government Commission on what the body could and could not do; the City Attorney's office was very frank about thinking it through deliberately; the proposed edits before the Commission tonight start the process.

Acting Chair Schwartz stated that he feels very strongly that the City Council's actions were nullified by the Commission, which is such an incredibly strong showing of democracy in the City; it is a positive thing and the City Council respected the decision and re-agendized the issues; the Commission did not weigh in on the underlying merits of the politics involved in legislation; it was strictly about the process and whether it was as open as it needed to be under the Sunshine Ordinance; it was clear to the entire Commission that it was not an open process, so the Commission nullified the Council action; then, the City proposes to remove the Commission's authority immediately after; contrary to what the Assistant City Attorney stated about the issue being an example of triggering a problem in the ordinance, it shows that the ordinance worked exactly right; the Sunshine Ordinance is the whole reason it is worth it for him to be on the Commission; he does not have issues with the other modifications, but taking away the Commission's authority is a very substantive change and there is no way for the ordinance to be re-worded that he would support taking away the Commission's teeth.

Commissioner Little stated the Commission's decision, and ultimately the Council agreeing to the decision, merely delayed the process and forced the hand of the Council to adhere to proper procedure for public noticing; the delay even went beyond an election creating new people sitting at the dais; none of that had to happen had the City responded in a timely fashion; the issue was about procedure; if the authority of the Commission to ensure proper procedure is taken away, there is no point in having an Open Government Commission or a Sunshine Ordinance.

Commissioner Tilos concurred with Commissioner Little, stated the Commission needs the authority in order to be an effective body.

Chair Schwartz moved approval of rejecting the changes to Section 2-93.8.

Commissioner Tilos seconded the motion.

Under discussion, the Chief Assistant City Attorney clarified that the Commission would like Section 2 -93.8 to remain as it is written.

The Assistant City Attorney inquired whether the Commission's recommendation is that not only are the changes rejected, there are no alternative proposed changes to Section 2-93.8, to which Acting Chair Schwartz responded in the affirmative.

On the call for the question, the motion carried by unanimous voice vote - 4.

Commissioner Shabazz stated he would like the Commission to use how making changes to the Sunshine Ordinance makes government more accessible as a framework to evaluate the changes.

Section 2-91.1

Commissioner Shabazz inquired whether an ad hoc Charter Review Committee appointed by the Mayor would be considered a passive meeting body as defined in the Sunshine Ordinance.

The Assistant City Attorney responded in the negative; stated it is a typical ad hoc meeting body and not a passive meeting body; an example of a traditional ad hoc committee is similar to a ballot argument ad hoc committee where two members of the Council convene to come up with a revised ballot argument.

The Chief Assistant City Attorney stated it is defined in the ordinance that a passive meeting body shall not include an ad hoc committee appointed for a single purpose; concurred with the Assistant City Attorney that the Charter Review Committee would not be considered a passive meeting body.

In response to Commissioner Shabazz inquiry, the Assistant City Attorney stated a meeting body that includes City employees and outside agency staff would not be considered a passive meeting body and would be an exception.

There was no Commission discussion of Section 2-91.5

Section 2-91.12
Commissioner Shabazz inquired what is the impetus for the section [regarding Closed Sessions] being amended, to which the Assistant City Attorney responded a Councilmember requested the change.

Commissioner Shabazz stated it would be helpful for elected officials to clarify Closed Session votes on matters, whether it is for their own political purposes, but also for people to understand their intention; it would make sense in making government further accessible.

Section 2-91.15
In response to Commissioner Shabazz's inquiry, the City Clerk stated the Council adopted new Rules of Order eliminating the ceding of time, which was also approved by the Open Government Commission and a Council subcommittee.

Commissioner Little stated the change in policy was a result of trying to streamline the Council meetings; there were complaints that the same members of the public and Council were talking about the same issues repeatedly.

Acting Chair Schwartz stated it does not create greater public access when decisions on important issues that people come to hear about are not getting heard until late in the evening or postponed to another meeting because people are talking too long.

Section 2-92.2
Commissioner Shabazz inquired who are the designated custodian of records.

The City Clerk responded any person within the City can accept a public records request from anybody; stated the custodian of records is the staff person responsible for tracking requests within the department; each department designates one person so requests can be filtered directly to the department's custodian of records.

Section 2-92.4
Commissioner Shabazz inquired what are the benefits of posting an Environmental Impact Report (EIR) and other environmental documents on an external consultant's website as opposed to just posting it on the City's website.

The Assistant City Attorney responded the practice is not common, but sometimes the documents are very large, especially when building an administrative record, and hosting the documents on the City's website can be cumbersome.

Acting Chair Schwartz inquired whether a link is posted on the City's website in the event the consultant hosts the documents, to which the Assistant City Attorney responded he is not absolutely certain, but believes posting a link is a standard practice.

Acting Chair Schwartz requested confirmation of the accessibility to the documents be included in the changes.

There was no Commission discussion of Section 2-92.9

Section 2-93.2
In response to Acting Chair Schwartz's inquiry regarding forfeiture of a hearing date, the City Clerk stated that she reaches out to all the contact information provided by the requestor; it becomes a problem when there is a timeline to schedule a hearing and she is not getting any response from the complaintant.

Acting Chair Schwartz stated it might be helpful to add a sentence to emphasize the point, such as: "every reasonable attempt will be made to reach the individual through all available contact information and all attempts will be documented."

In response to Commissioner Shabazz's inquiry about re-submitting a complaint, the City Clerk responded the timelines in the Sunshine Ordinance would not allow a re-submission.

There was no Commission discussion of Section 2-93.7.

The City Clerk summarized the changes the Commission agreed to; stated there were slight revisions to 2-92.4 requiring a link be posted and 2-93.2 requiring outreach; the changes have been noted and staff will work to draft the language.

Chair Schwartz moved approval of adopting the recommendations with the two amendments.

Commissioner Little seconded the motion.

On the call for the question, the motion carried by unanimous voice vote - 4.

COMMISSION COMMUNICATIONS

Commissioner Shabazz expressed his appreciation for all the work of staff regarding his complaint as a member of the public; stated he would like to use his role as a Commissioner to make the Public Records Act more available to Alamedans and welcomes suggestions from other Commissioners and staff on ways to do that.

The Chief Assistant City Attorney stated staff could agendize the issue at the February meeting.

LARA WEISIGER

From: ps4man@comcast.net
Sent: Tuesday, January 28, 2020 1:58 PM
To: Yibin Shen; Marilyn Ezzy Ashcraft; John Knox White; Malia Vella; Jim Oddie; Tony Daysog
Cc: Eric Levitt; LARA WEISIGER
Subject: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance
Attachments: OGCLegalMemo.pdf

Dear City Attorney Shen, Mayor Ashcraft and Council Members:

I am writing in opposition to the above captioned proposed amendment of the Sunshine Ordinance. I am including Mr. Shen as a primary addressee because Council's decision will greatly rely on his legal opinion.

The City Attorney's recommendation to repeal the current enforcement provisions of the Sunshine Ordinance is based entirely on his opinion that they unlawfully delegate legislative authority. The only legal authority that he cites for his position in his staff report are Thompson v. Bd. of Trustees of City of Alameda (1904) 144 Cal. 281 and Salmon Trollers Mktg. Assn. v. Fullerton (1981) 124 Cal. App. 3d 291, 302. Thompson, merely stands for the principal that fundamental legislative authority cannot be delegated, See https://www.courtlistener.com/opinion/3308379/thompson-v-board-of-trustees/ Salmon Trollers, See https://law.justia.com/cases/california/court-of-appeal/3d/124/291.html stands for exactly the opposite proposition for which it is cited! It approves the delegation of legislative authority 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."

I commend to your reading the attached legal memorandum written by local attorney Cross Creason, and first submitted by me to Council via email on Feb. 12, 2019, specifically all the text starting with the middle of page 2, (Section 1 Delegation of Legislative Power). You will see Salmon Trollers, and several other cases that approve the delegation of legislative authority along with his assertion that the Ordinance easily passes muster under the test set forth in these cases..

However, my view is that the enforcement provisions of the Ordinance are not quasi-legislative, but are quasi-judicial. My conclusion is based upon the enforcement provision of the Brown Act which states in part:

54960.1. (a) The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section.

Thus, the Brown Act gives a complainant substantially the same remedy through the medium of a lawsuit and court order as Sec. 2-93.8 of our Sunshine Ordinance. If the City Attorney is correct in asserting that Sec. 2-93.8 is an unlawful delegation of legislative power, then this Brown Act provision is equally unlawful. A court has no more right to legislate than an administrative agency. However such action by a court is not legislation or repeal of legislation, it is enforcement of a statutory process for enacting legislation. It would be ludicrous to expect a legislative body to police its own due process requirements. That is the traditional role of courts.

Regardless of whether the enforcement provisions are quasi-legislative or quasi-judicial, the City Council in 2011 realized that it would be meaningless to allow City Council police its own legislative process. The original draft of the Ordinance presented to Council by the City Attorney on Oct. 18, 2011 contained a provision that allowed for an appeal of an OGC decision to Council. That provision was fully discussed, roundly rejected and deleted from the Ordinance ***without objection from the City Attorney***. (See the bottom of page 4 through page 6 of the minutes of the Oct. 18, 2011 meeting and pages 11-12 of the Nov. 1, 2011 meeting when the Ordinance was adopted unanimously.) It is important to understand that a "null and void" order from the Commission does not truly repeal the Council action, it merely remands it for a redo which was what occurred with regard to the Cannabis Ordinance in 2019. Those "null and void" ordinances were restored to full effect.

I am hoping that the above will convince the City Attorney that there is nothing unlawful about the current enforcement provisions of the Sunshine Ordinance. However, this still leaves Council with the discretion to determine if the current provisions are good or bad policy. It is notable that the Commission has only once - in its eight-plus years existence - deemed it necessary to exercise its null and void power. This is not a case of an over-used or abused power. There has not been even a whiff that the Commission has done anything in its public, on-the-record meetings other to than faithfully carry out the function assigned it by the City Council in the Sunshine Ordinance.

Obviously, repealing these provisions and rendering them advisory only still leaves a complainant with the remedy of going to court under the Brown Act. In my view the current enforcement provisions of our Sunshine Ordinance have the salutary effect of providing an alternative dispute resolution procedure to both the City and the complainant. Without it a complainant's only remedy is hiring a $400/hour attorney to litigate the matter for the limited purpose of a remand for a redo. This strikes me as a mockery of 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". AMC Sec. 2-91 I implore you to retain it.

Paul S Foreman

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.