

Open Government Commission June 1, 2020.

Item 3-B 2020-7988

Re: Exhibit 3 - Foreman Proposal

Commissioners,

I believe that the requirement stating that a complaint must be filed no later than ten days after the item first appears on the agenda or, depending on the complaint, fifteen days, may not be practical and may inappropriately preclude the discussion by the Commission of issues that deserve official scrutiny by your body.

Consider that some items that would generate a complaint may have resulted from Council action taken on a non-agenda item. In addition, depending on the nature of the issue it may take time for the public to become aware of a questionable action and to conclude that a complaint would be appropriate. I would suggest that a time limit be imposed only in those cases that are actually time critical such as when an ordinance would become enforceable soon after it has been enacted.

While I understand that some issues may be time critical I would argue that I have observed numerous times when an item was discussed by the Council and action taken without the public having been given a realistic opportunity to be aware of and to participate in the discussion of the item.

I believe that a rigid schedule of filing dates may facilitate bureaucratic enforcement, more importantly and unfortunately, in my opinion, I believe that it makes attempts for the public to participate in the City's governing processes more onerous, and certainly more frustrating.

I am writing to encourage the Commission to consider and adopt a flexible timetable for the filing of complaints.

Respectfully,

Jay Garfinkle

510-521-5071

From: ps4man@comcast.net
To: bryan@bryanschwarzlaw.com; "[Catherine Pauling](#)"; heatherlittle9691@gmail.com; "[Rasheed Shabazz](#)"; "[Ruben Tilos](#)"
Cc: [IRMA Glidden](#); [Lara Weisiger](#); [Michael Roush](#); [John Le](#); [Ashley Zieba](#); [Eric Levitt](#)
Subject: [EXTERNAL] OGC June 1 Agenda Item 3-B, Response to Staff Report
Date: Monday, June 1, 2020 10:05:40 AM

Dear OGC Members, City Manager and Staff:

What concerns me most about the staff report is that the City Attorneys have chosen to devote their entire report to discrediting my good faith attempt to simply put an option on the table for discussion. Despite the charge of City Council to, "work collaboratively with the Commission to find an effective replacement concerning the null-and-void remedy", not one word of the report is dedicated to the task charged to them

I take issue with the assertion that my proposed amendments to 2-93.2 "fall outside of the of the Council's charge". When I began to consider revision of 2-93.8. I quickly realized the need for an enforcement procedure that minimizes the risk of invalidating a Council action. Thus, I drafted 2-93.2 (a) to require that the complaint be filed ,"no more than ten (10) days after the initial appearance of the item on a meeting agenda." This avoids the Complainant withholding the complaint until after an Ordinance has been adopted at a second reading. In order to assure resolving complaints before challenged Council actions become effective, 2-93.2 (d) provides an admittedly fast track for the resolution of 2-91 complaints. I recognize that this puts stress on the City Attorney, but I believe it to be warranted by the need to quickly adjudicate these matters.

Staff asserts that 2-93.2(g) in delaying the effective date of Council action is creating a presumption that the complaint is invalid. It does not. It simply buys time for consideration of the complaint before the Council action takes effect, thus avoiding serious issues of prejudice to the City or third parties who act in reliance on the legislation. When the delay itself will cause significant prejudice to the City or third parties, a procedure is provided for the City Attorney to so certify and ask Council to approve proceeding forward with the item while the complaint is proceeding. Staff is critical of my requirement of a super majority for said approval. My draft is a suggested option, not written in stone, If a simple majority makes more sense, so be it.

Subsection(h) could have been written more clearly, but I think the intent is clear that with regard to complaints filed under 2-91, the OGC Chairman should have the discretion to require independent counsel. In my four years on the OGC, there were at least two instances where three City Attorneys were involved in the same complaint, the attorney who approved the challenged City action, the attorney defending the action before the Commission, and the attorney representing the Commission. It makes a mockery of the process. The City Attorney should be fulfilling his Charter role as legal advisor to the City by advising Council that his representation of the Commission in these matters is unethical, unprofessional, and deprives the Commission of the objective, unbiased advice needed to properly hear complaints. Mr. Roush, during my term, assured us that he would recommend independent council. Evidently, he has had a change of mind.

My proposed changes to 2-93 were my attempt to give some significant enforcement power to the Commission while still avoiding the City Attorney's concern about the usurping of Council's

legislative authority. I struck the penalties because they are ridiculous. It is the taxpayers who would be paying them.

As a former member of the OGC I value its role of independent oversight that was the clear intent of the City Council that created the Commission. It is time for the Commissioners to decide whether they can continue to serve with a very diminished role.

Sincerely,

Paul S Foreman