A resolution to recommend to the Alameda City Council concerning amendments to Alameda's Sunshine Ordinance, as follows:

That 2-93.2 - Complaint Procedures Regarding Alleged Violations of the Sunshine Ordinance, be amended to read as follows:

a. Complaints alleging a violation of Sec. 2-91 must be filed a no more than ten (10) calendar days after the initial appearance of the item on a meeting agenda.

b. Complaints alleging a violation of Sec 2-92 must be filed with fifteen (15) calendar days after the alleged violation.

c. Upon filing of an official complaint form (including submittal of all evidence) with the City Clerk's Office, the complainant and the City (as respondent) shall appear at a hearing. During this hearing the Commission will provide the parties with the opportunity to present evidence and make arguments.

d. The hearing on a complaint filed pursuant to subsection (a) above must be scheduled no later than twenty (20) business days thereafter. The Commission will render a formal written decision on the matter within five (5) business days of the conclusion of the hearing.

e. The hearing on a complaint filed pursuant to subsection (b) above must be scheduled no later than 30 business days thereafter. The Commission will render a formal written decision on the matter within fourteen (14) business days of the conclusion of the hearing.

f. No complaint will be accepted by the Commission against a member of the City Council or an officially declared candidate within forty-five (45) days of a City election.

g. In the case of a complaint filed pursuant to subsection (a) above, any further action on the agenda item shall be delayed until the complaint is resolved unless the City Attorney certifies in writing to City Council that delay will result in significant prejudice to the City and at least 4 Council Members approve proceeding forward with the item while the complaint is proceeding.

And that 2-93.8 – Penalties, be amended to read as follows:

a. If the Commission finds a violation of Section 2-91 (PUBLIC ACCESS TO MEETINGS), the Commission may recommend to the originating body steps necessary to cure or correct the violation, unless the body has already cured or corrected the violation, or the cure or correction would interfere with the conduct of an election.

b. If the Commission finds a violation of Section 2-92 (PUBLIC INFORMATION), the Commission may recommend to the City steps necessary to cure or correct the violation.

c. Upon receipt of a cure and correct recommendation from the Commission, City Council shall accept the recommendation unless at least 4 Council Members approve rejection or modification of the Commission recommendation.

d. A person who makes more than two (2) complaints in one (1) 12-month period that are determined by the Commission to be unfounded shall be prohibited from making a complaint for the next five (5) years.

Justifications for the Commission's Proposed Amendments (drafted by recent Commission Chair, Bryan Schwartz)

These Sunshine Ordinance amendments are designed to "give teeth" to the Ordinance, to prevent or at least dis-incentivize failures to provide public access or public information. Without a cure and correct clause that requires Council's action – *e.g.,* with merely a referral of a recommendation back to Council – the Ordinance will lack "teeth," in the opinion of the Commission.

The reservations raised by Council when it struck the null-and-void provision of the Sunshine Ordinance, as a usurpation of Council's legislative powers, do not exist with this resolution. Namely, the Commission is not legislating anything, or making any policy decision on a matter of substance to the residents of Alameda. The Commission is merely acting in its delegated authority to act as a watchdog for transparency in the City government and with the City's legislative process.

The very old California court cases cited as justification for striking the null-and-void provision – to the extent they remain persuasive at all in our current context, 50+ or 115+ years after they were decided, are inapposite to the present proposed amendments. The case of *Thompson v. Board of Trustees of the City of Alameda*, 144 Cal. 281, 282 (1904) (which has not been relied upon by any California appellate court in over 30 years) was cited for the proposition that a City board may not by ordinance provide that a citizen petition suspends its legislative and discretionary powers, because to do so would divest the board and succeeding boards of powers vested in it by the general law. Nothing in the proposed amendments, or in the Sunshine Ordinance as it would be amended, suspends the City Council's powers. On the contrary, the Sunshine Ordinance, as amended, would send legislation back to Council – for Council's determination promptly.

The facts of *Thompson* illuminate the distinction. In that case, where 600 voters – at the time, 1/10 of Alameda's electorate – filed a petition regarding proposed railway franchises, the City was supposedly required, under an existing ordinance, to submit the matter to a special election of all voters. (*Id.* at 282). The effect of the ordinance would divest the relevant City board of its rightful powers, because it would lead to a suspension of action for over a year (and which could be up to two years). (*Id.* at 282-283). The Court's decision was based upon the suspension of the entity's legislative and discretionary powers, which was improper – the Court expressly did not decide whether it was within the power of the City's board to provide for submission of

questions to the voters, because it did not need to decide this. Here, because there is no suspension of the City's powers, just sending a matter back to Council to cure and correct it (or not, depending upon Council's decision), and because – in any event – the further action would occur swiftly, under section 2-93.2, *Thompson* does not preclude Council's approval of the proposed amendments to give strength and effect to the Sunshine Ordinance.

Likewise, the other dated authority relied upon to strike the null-and-void provision*, Kugler v. Yocum*, 69 Cal. 2d 371, 376 (1968), does nothing to urge rejection of the cure-and-correct provision included in the presently proposed amendments. The case was cited for the notion that the nondelegation doctrine assures 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." The proposed amendments do not usurp "truly fundamental issues" – on the contrary, Council will retain all legislative decision-making authority, including ultimately the prerogative to decide whether to cure and correct a Sunshine Ordinance violation. The remand to Council for a final determination upon a vote, as encompassed in the amendments, provides the safeguards anticipated by *Kugler* to prevent any abuse by the Commission of its limited authority.

The *Kugler* decision, read more fully, supports enactment of the amendments proposed, and the empowering of the Commission with the "teeth" requested by Council. In *Kugler,* the Supreme Court noted 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 ....'" (*Id.* at 375-376 (internal citations omitted)). The Sunshine Ordinance sets the rules and standards previously established by the legislature, enabling the Commission to apply it, adjudicate violations, and send them to Council to cure and correct, upon a vote of Council. *Kugler* also restates the doctrine holding, "'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." (*Id.* at 376. As such, it is well within Council's power to delegate to the Commission the power to adjudicate Ordinance violations and remand to Council to cure and correct those violations, upon a Council vote. As *Kugler* provides, "'[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." (*Id.* (internal citations omitted)). In *Kugler,* the City of Alhambra's legislative entity gave general policy guidance (mandating the parity of firefighter wages with Los Angeles') and the "filling in of the facts in application and execution of the policy [did] not constitute legislative delegation," when the non-legislative body was delegated the authority to set the formula to create the parity required. (*Id.* at 377).

The amendments proposed fall within the jurisprudence of *Kugler* by maintaining all fundamental decisions for Council and establishing "an effective mechanism to assure the proper implementation of its policy decisions." (*Id.* at 377). As such, Council should not hesitate to approved the proposed amendments, relying on, and not in spite of, *Kugler.*

Finally, the super-majorities (four Council members) required under 2-93.2(g) and 2-93.8(c), to avoid delaying an action and to reject a cure-and-correct referral, respectively, do not run afoul of the City Charter in any way whatsoever. The Charter states: "Sec. 3-4. The vote of three members of the Council, *except as otherwise provided*, shall be necessary for any act of or by the Council." (emph. added). The phrase "except as otherwise provided" anticipates the requirement of a super-majority for certain Council actions under particular resolutions and ordinances. By way of distinction, elsewhere in the charter the "otherwise provided" is tagged to the Charter itself or to some other particular legislative act - *e.g.,*12-1(c): "as otherwise *in this article expressly* provided" (emph. added); 19-3: "Except as otherwise provided *in this Charter or in any ordinance enacted by the affirmative vote of four members of the Council*" (emph. added); 20-2: "Except as otherwise provided *in this Charter or in any ordinance enacted by the affirmative vote of four members of the Council*" (emph. added). Here, "as otherwise provided" is not so limited – as such, Council may "otherwise provide" regarding a Sunshine Ordinance cure-and-correct referral from the Open Government Commission, if Council by a simple majority ratifies the proposed amendments to the Ordinance described herein.

Moreover, numerous other resolutions and ordinances have provisions that reference a 4/5 super-majority, without requiring additional Charter authority. Such further supports the conclusion that "otherwise provided" includes, as here, where provided by ordinance. For example – and this list is not intended to be exhaustive (with emphases added of the super-majority provisions):

The Council's own meeting rules of order – adopted by resolution – require 4 votes to suspend any rule. In particular, under City of Alameda Resolution 15382, the City Council adopted Rosenberg's Rules of Order to govern the proceedings of City Council meetings, with the exception that, "*A supermajority of the City Council (4 members) may suspend the rules for a specific purpose*."

Further examples include:

CHAPTER XXVI - ACQUISITION, IMPROVEMENT AND CLOSING PROCEDURE

2-61.4 - Award of Contract.
The City Manager or his or her designee is authorized to award informal contracts pursuant to this subsection to the lowest, responsive, responsible bidder.

If all bids received are in excess of the informal bid limits stipulated in PCC Section 22034(d), as amended from time to time, the City Council may, *by passage of a resolution by a four-fifths (*

4/5) vote, award the contract to the lowest, responsive, responsible bidder if it determines the cost estimate of the City was reasonable.

26-7.3 - Purchase and Sale of Delinquent Property.
a. The City may bid and purchase any real or personal property offered for sale for the nonpayment of any improvement assessment levied and assessed under any of the provisions of this part, or of any installment thereof, or penalties or costs or interests thereon, or any suit brought to foreclose such assessment.

b. Whenever any property shall have been acquired by the City at any such sale, then such property, or any lien thereon or interest therein created by such assessment, may be released, assigned, sold or otherwise disposed of by City as it shall determine; provided, however, that no such release, assignment, sale, or other disposition of any such lien or interest, or of any such property, shall be made unless there shall be first paid to City a sum of money equal to, and not less than the amount paid therefor by City, together with all accrued penalties, costs, interest, and necessary expenses incurred; provided, further, that if any lien or interest, or property, cannot, as determined by Council, be sold for the amounts or charges computed as herein provided, then *the Council may by four-fifths (4/5) vote, of all its members*, sell any such lien or interest or property for the best price obtainable according to its judgment.

26-8.1 - Force Account.
The Council may, *by resolution adopted by a four-fifth (4/5) vote of all its members*, determine and declare that in its opinion the work in question may be more economically and satisfactorily performed by day labor, and/or the materials and supplies purchased at a lower price in the open market, and to order that the same be done by force account, in the manner herein stated, without further observance of the provisions hereof with reference to the award of contract, or execution of contract or bonds.

26-11.4 - Majority Protest.
The Council, *by the affirmative vote of four-fifths (4/5) of its members*, may find that the public necessity requires the acquisition or improvement, and overrule protests by the owners of more than half (½) the area to be assessed.

26-17.6 - Jurisdiction.
The resolution determining the *necessity shall be adopted by the affirmative vote of four (4) members of the Council*, and its finding and determination shall be final and conclusive.