

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING  
MONDAY - - - MARCH 30, 2015 - - - 7:00 P.M.

Chair Aguilar convened the meeting at 7:06 p.m.

ROLL CALL - Present: Commissioners Dieter, Foreman, and Chair Aguilar – 3.

Absent: Commissioners Bonta, Tuazon - 2.

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

3-A. Minutes of the February 2, 2015 Meeting

Chair Aguilar stated there were a couple places in the meeting minutes said Vice Mayor which should say Commissioner and the Sunshine Ordinance should be capitalized, in a few places.

Vice Chair Foreman moved approval of the minutes as amended.

Commissioner Aguilar seconded the motion, which carried by unanimous voice vote - 3.

3-B. Potential Revisions to the Sunshine Ordinance

Assistant City Attorney Roush gave a brief presentation outlining the changes in the redlined version of the Sunshine Ordinance.

Vice Chair Foreman stated that he was the one who raised the issue; he is satisfied with the changes.

Commissioner Dieter thanked the Assistant City Attorney for the layout of the revisions; stated it is easier to follow.

The Assistant City Attorney continued the presentation.

Commissioner Dieter stated that she has problems with Section 2-91.17; the title is: "Public Comment by Members of Policy Bodies;" in general, the Section is not about public comment by policy bodies; it is about individuals, which led her to reread this clause again; she expressed concern at the last meeting and continues to have the same concern; the issue is not a sunshine issue; the role and limitations of boards and commissions is spelled out in the Charter; the last sentence which addresses appointed policy bodies should be deleted.

Vice Chair Foreman concurred; stated the Section should be deleted in its entirety; that he does not need to be told he has a constitutional right to speak out; he does not know why the Section would be in the Sunshine Ordinance; everyone has the right to speak out as individuals as long as speaking for themselves; boards and commissions have the right to speak out as a body even if disagreeing with Council; the only control Council should have is to relieve members of duties; the Section does not add anything.

Chair Aguilar stated the Section is not just indicating members have a constitutional right to speak out; inquired if Vice Chair Foreman wants to remove the entire Section, to which Vice Chair Foreman responded in the affirmative.

Chair Aguilar inquired if Commissioner Dieter want to remove the last sentence, to which Commissioner Dieter responded in the affirmative.

Vice Chair Foreman read the Section; stated if Council disagrees with a Commission on something the only right is what they have in the Charter, to relieve members of duties; that he does not have any idea what the second sentence accomplishes; in the next part simply restates what is in the Charter; he does not see a purpose served by any of it.

Commissioner Dieter stated that she does not mind having everybody know that they can speak out for themselves; she does not have a problem reminding folks that just because they are on a board or commission does not mean they do not have a voice in the community; what she does have a problem with is telling policy bodies that they cannot take a position that contradicts a policy or decision of the City Council, which is the opposite of the intent of Boards and Commissions that exist to advise Council; for instance, if the City Council decides not to implement bus rapid transit on the West End and the Transportation Commission strongly opposes the position, they should have a right to address or send a letter to the City Council; the whole purpose of Boards and Commissions is to advise even if it against what the City Council deems fit.

Vice Chair Foreman stated as a compromise, he would not have any problem with leaving in the first sentence through "Section 2-91-6(e)" and leaving out the next sentence: "Policy bodies shall not sanction, remove or deprive members of the rights;" he does not know what purpose the language serves; he does want to deprive the City Council from criticizing members any more than he wants to deprive any member from criticizing the City Council; he would take the sentence out altogether and leave in the part about the City Charter even though it is just restated; he would take out the sentence prohibiting formal action; stated the first sentence should stay in, the second sentence should be deleted, the third underlined sentence should stay in, and the final sentence should be deleted.

Commissioner Dieter stated she had no problem with the Vice Chair Foreman's recommendation.

Chair Aguilar stated that she is not sure why the second sentence is included; she hesitates because the ordinance has gone through a committee and was accepted by the City Council; she is a hesitant to just start deleting things; stated she does not know that she would necessarily take out the sentences.

In response to Commissioner Dieter's inquiry about the last sentence, Chair Aguilar stated the language is new.

In response to Commissioner Dieter's further inquiry, Chair Aguilar responded the second sentence is being discussed.

Commissioner Dieter stated in order to reach a compromise she does not mind keeping the language in, as long as that last sentence about policy bodies is removed.

Vice Chair Foreman stated that he does not have a problem with said suggestion; the second sentence is meaningless to him; drafters work can be respected; however, he questions why is the ordinance being reviewed if so much respect is given that the Commission cannot improve it; he respects her view and would agree to keep everything except the new sentence.

Chair Aguilar inquired if the Assistant City Attorney added the last sentence for a reason.

The Assistant City Attorney responded in the affirmative; provided an example of the City Council adopting a particular policy and a Commission writing a letter to an outside agency that not necessarily contradicted what the Council had done, but certainly raised an issue; there was some concern expressed at the Council meeting about whether or not Commissions should do so; there is not an adopted Council policy concerning the matter; the Section would address the matter, which does not have to be in the Sunshine Ordinance; the City Council could adopt a standalone policy; the Sunshine Ordinance seems an appropriate place to put it, is not necessarily the only place it has to go; if the Commission feels the matter might be better addressed somewhere else then staff will take that recommendation.

Commissioner Dieter stated raising the matter with Council is a good idea; that she recalls the letter was to the Mayor, not an outside agency; the City Council can address the policy, but she would not want to make it part of the Sunshine Ordinance.

The Assistant City Attorney stated that he drafted the language so it would not apply to a Commission writing to the Council; it is directed to an outside agency or organization.

Chair Aguilar stated that is what it says.

Commissioner Dieter stated the language achieves prohibiting appointed policy bodies from writing letters to outside agencies or organizations that contradicts a Council policy

or position, but when broadened other formal actions and activities could be constituted as all different situations.

Vice Chair Foreman suggested taking the suggested position that it is an inappropriate revision to the Sunshine Ordinance.

The Assistant City Attorney stated Council could take up the matter as a separate item; inquired if the approach is acceptable, to which the Commissioners responded in the affirmative.

The Assistant City Attorney continued the presentation.

Vice Chair Foreman stated his position last time about Section 2-92.6 was that it should not be included; the more he reviews it, the stronger he feels that it should not be included; if it is going to be included, it should not be under Section 2-92.6 which has to do with records; it should be moved to Section 2-91.18; he did research on the City employee issue; the term City employee is better; public employee could be somebody who works for the County, federal government or State; a City employee, under case law, can speak out on a matter of public concern other than his/her duties; speaking pursuant to official duties does not allow first amendment protection; provided an example: a Police Officer talking about the new fire station, which is not part of his duties, has protection; however, if what the Officer says is knowingly or recklessly false or if it makes it impossible for him to carry out his duties, he is not protected; inquired whether the interpretation is generally right.

The Assistant City Attorney responded in the affirmative; stated the difficulty is trying to distinguish between is the person speaking within his or her official duties or if the matter is really of public concern; it is a very slippery slope.

Vice Chair Foreman stated it is a very slippery slope, which is why he thinks the Section should not be included; stated there should not be any reference to a City Board, Commission or Committee, which is already covered.

Chair Aguilar noted it does not [have any such reference].

Vice Chair Foreman read the first sentence; provided the argument he would use if he were representing an employee; stated the employee can say anything he/she wants to say and there is nothing the City can do about it; he knows that is not the intent; the information belongs in an employee handbook.

Commissioner Dieter stated the Section does piggyback on the other Section just discussed; roles and responsibilities of policy bodies or City employees do not seem appropriate for a Sunshine Ordinance because the whole purpose of the Sunshine Ordinance is to make government more transparent and give people access to their government; to include what people are not allowed to do it is a fine line; the clause

says: "so as long as an opinion does not materially misrepresent the position of the City;" inquired how the clause is tested.

Chair Aguilar responded there is case law.

Commissioner Dieter provided an example of the City Clerk and City Manager giving different information resulting in an employee being fired; stated understanding this part of the Sunshine Ordinance is a little difficult.

Vice Chair Foreman stated it is a balancing act, is very complicated and is based on the individual facts in each case, which is another reason it is a bad idea; he does not have a problem with including the Section for Commission members because they have an absolute unfettered first amendment right subject to only being relieved of their duties; however, employee do not have the same right and he does not want to mislead employees or put the City in a position of giving an employee more rights.

The Assistant City Attorney stated the Commission is really dealing with policy issues; dealing with policy bodies could be moved; the Section on employees can be removed entirely or moved to Section 2-91.

Vice Chair Foreman moved approval of recommending that this provision be deleted.

Commissioner Dieter inquired how does this clause make government more transparent, to which the Assistant City Attorney responded the City Clerk's recollection was that the Section was included so that employees understand they have the ability to have their voices heard in front of policy bodies without worrying about being disciplined; Commissioners should be to so as well as long as they do not materially misrepresent their body.

Commissioner Dieter inquired whether when the public sees a Board or Commission member speak, they are not doing anything wrong and it is their right, to which Vice Chair Foreman responded Board members are not being discussed; the discussion is about city employees.

The Assistant City Attorney stated there are two parts to Section 2-92.6: one deals with public employees and the other deals with members of a policy body; there are reasons for including both.

Vice Chair Foreman inquired whether the Assistant City Attorney deleted some of the Section, to which the Assistant City Attorney responded in the affirmative; stated he separated the two.

Chair Aguilar stated the first portion deals with city employees and the second portion deals with policy bodies.

Vice Chair Foreman inquired whether policy bodies are being discussed, to which the Assistant City Attorney responded before, the Section dealt with both employees and advisory policy bodies; stated that he was trying to be true to the previous work but separate the Sections because different standards apply to employees and policy body members.

Vice Chair Foreman stated if the Section is moved after the Section that covers boards, it is totally confusing; there is one Section on policy bodies and another Section on policy bodies and employees; the Section on policy bodies repeats the previous Section.

Commissioner Dieter stated the matter should be in an employee handbook; as somebody who has gathered signatures for petitions, she has often heard City employees say they cannot sign; there is a misconception that employees do not have the right to speak out; employees should be told what they can and cannot do when they are hired; she understands what Vice Chair Foreman is saying.

Commissioner Dieter stated that she would second the motion as long as the Commission is clear that City employees should be made aware what they can and cannot do when they are hired.

Vice Chair Foreman amended his motion to recommend that the Section be deleted from the Sunshine Ordinance and that the employee handbook include a Section which explains to employees under what circumstances they are allowed to speak out on matters.

Commissioner Dieter seconded the motion.

Chair Aguilar agreed with the motion.

The Assistant City Attorney noted the sentence dealing with appointed policy bodies has already been adequately covered in the previous Section.

On the call for the question, the motion carried by unanimous voice vote – 3. [Absent: Commissioners Bonta and Tuazon – 2.]

The Assistant City Attorney continued the presentation on the definition of meeting.

Vice Chair Foreman discussed the prior Commission unanimous vote on adopting the Brown Act language; stated even though the structure of the ordinance's definition of meeting is different than the structure of the Brown Act, it basically says the same thing; the only real substantive exception being the last sentence of 2-91.1(b)(4)(C), which is more restrictive as to what meetings would not be subject to the Brown Act.

The Assistant City Attorney responded the Section does not specifically track the Brown Act; if anything the Sunshine Ordinance is slightly more restrictive than the Brown Act.

Vice Chair Foreman inquired whether [the Sunshine Ordinance is more restrictive] simply on the issue on you a meeting cannot be held in a place charging admission, to which the Assistant City Attorney responded in the affirmative.

Vice Chair Foreman stated Section 2-91.1(b)(4)(C) is not in the Brown Act; in respect to what Chair Aguilar said about not wanting to turn the language inside out, he would say to use the existing language; at the same time, he is very concerned about using different language because using different language there is always the possibility that some word splitting lawyer is going to say there is a difference; suggested adding a parenthetical after “meeting shall mean anything of the following” which reads: “this definition is intended to be synonymous with meeting as defined in the Brown Act, except for Section 2-91.1(b)(4)(C) which is intended to be more restrictive than the Brown Act.” then it would be crystal clear that the same thing is meant.

The Assistant City Attorney stated the language can be added if it is the direction of the Commission.

Chair Aguilar inquired if it is meant to be synonymous; stated it is very similar

Vice Chair Foreman responded the Assistant City Attorney stated it is synonymous.

The Assistant City Attorney stated the Brown Act covers more things that are not considered meetings; there are a couple of additional items; the fact that the Sunshine Ordinance does not cover everything does not mean the City does not have to observe both the Brown Act and the Sunshine Ordinance, whichever is more restrictive; all the exceptions to meetings are not covered; it is okay to indicate that there is a particular Subsection that, while it intended to paraphrase what is in the Brown Act, is more restrictive; a parenthetical can be added.

Vice Chair Foreman moved that the parenthetical be added at the beginning of the definition of the term meeting.

Commissioner Dieter seconded the motion, which carried by unanimous voice vote - 3

The Assistant City Attorney continued the presentation

Vice Chair Foreman stated he has the same issue with regard to policy body which is in the same Section.

The Assistant City Attorney stated that he assumes Vice Chair would want to add a parenthetical that policy bodies shall mean legislative bodies.

The Vice Chair stated that he would add a parenthetical that the definition of the term policy body tends to be synonymous with the term legislative body in the Brown Act; the purpose is that policy body is thought to be more descriptive.

Chair Aguilar stated she does not have the Brown Act in front of her so she does not know if legislative body and policy body are synonymous.

The Assistant City Attorney responded they are; stated that he is surmising that if the term legislative body had been used, people might be confused that it is just the City Council and not advisory bodies, so policy bodies was used instead; if agreeable to the Commission, a definition of policy bodies could be added because he is not sure if it is defined.

Vice Chair Foreman stated it is defined.

Chair Aguilar stated it is Subsection 2-91.1(b)(3).

Vice Chair Foreman stated all it would say is the term is intended to be synonymous with the term legislative body as defined in the Brown Act; stated using policy bodies was a good idea; all bodies are not legislative bodies; policy bodies is smarter.

Vice Chair Foreman moved approval of the change stated.

Commissioner Dieter seconded the motion, which carried by unanimous voice vote - 3

The Assistant City Attorney inquired whether the Commission wants to make a motion to adopt all the changes, including the changes made tonight; stated an overall motion should be made to take forward to the Council.

Commissioner Dieter moved approval of recommending to City Council the adoption of the changes that have been approved tonight and previously.

Vice Chair Foreman seconded the motion, which carried by unanimous voice vote - 3

### COMMISSION COMMUNICATIONS

Commissioner Dieter stated the Commission is supposed to report to the City Council at least once a year in writing on any practical or policy problems encountered; read the Section of the Ordinance; inquired how the Commission plans on doing so; stated perhaps staff wants to bring back a proposal on how to accomplish doing so; the Commission only meets twice a year; she is not sure if it is possible for the Commission to write an annual report; the Sunshine Ordinance says that the Open Government Commission shall review public notices to ensure that they conform to the requirements of this article and work to improve publicly accessible information; under said clause, the Commission is not only supposed to be a reactive body, but is supposed to be proactive to make sure that government is achieving its goal of transparency; it is up to the Commission to monitor said sorts of things and come back and report if anything could be improved upon; the City Council deserves to know the Commission is doing right and where improvements can be made, which requires the Commissioners to work



independently outside of meetings; perhaps the City Attorney can help out; inquired if Commissioners should raise issues under Communications or do as agenda items; further inquired does it have to be formal or can it be informal; stated it is something for the Commissioners to think about; if the Commission really want to do its job well, Commissioners have to do something while not here sitting at the dais.

In response to Vice Chair Foreman inquiry, Commissioner Dieter stated the Commissioners would look at City Council and Planning Board agendas and see if titles do not meet the muster of what people can understand.

Vice Chair Foreman stated that he understands the suggestion; questioned how do to do so as a Commission; do members take turns reviewing agendas or review them as a group; stated he does not know how to do it; stated the next Council meeting could be assigned to a Commissioner.

Chair Aguilar inquired in perpetuity, to which Commissioner Dieter responded the Ordinance says the Open Government Commission shall review public notices.

Vice Chair Foreman stated that he can see doing it reactivity when a complaint is received from someone who says an item was not properly noticed.

Chair Aguilar stated that is what has been done in the past; when there is a complaint, the Commission addresses it; that she does not know if there has been any formal complaints; one came up and was withdrawn; the Commission has to think about what the Section means because the Commission only meets twice a year; both the bylaws and the Sunshine Ordinance require meeting twice a year.

Commissioner Dieter stated that she did not set up meeting twice a year so she does not know how that happened; the requirement is in the Sunshine Ordinance so the Commission needs to know how to accomplish it; that she tends to look at City Council agendas anyway so for her it is no big deal; however, when all the Commissioners signed on, this is what the Ordinance includes as a duty.

Vice Chair Foreman stated Commissioners can informally review agendas; inquired what a Commissioner would do if an agenda is reviewed and there is a problem.

Commissioner Dieter stated that she does not know; inquired if the matter should be brought back under Communications.

The Assistant City Attorney stated if Commissioners see items which do not provide the kind of information that would be most helpful to the public to understand what is being discussed, the item could be noted to find whether there is a pattern; the Chair could work with the City Clerk and the matter could added as an agenda item; the item could be addressed by the Commission to determine whether or not there is a need to make a recommendation to the Council that there needs to be some direction to clean up the matter; the City Attorney's office strives to make sure that what is on the agenda

translates to the public; Commissioner could review agenda and making notes if there is an issue that needs to be addressed.

Chair Aguilar stated Commissioners should save examples and inform her and the City Clerk to have the matter agendized for the next meeting.

Vice Chair Foreman inquired get what agendized, to which Chair Aguilar responded the issue; whatever the issue is that comes up.

The Assistant City Attorney provided an example of half a dozen items occurring between now and December; when Commissioners discover items, they should notify the Chair and the City Clerk to create a running tab and get a scope of the problem.

Chair Aguilar stated the Commission would see whether there is just one item or several, if it global or something particular; the discussion is just hypothetical.

Commissioner Dieter stated the Ordinance says to work to improve publically accessible information; inquired whether that is another thing or part of this.

Chair Aguilar responded it would be a part of the matter.

Commissioner Dieter stated she talked to the Assistant City Attorney; on the website, when a meeting is canceled giving the reason would be nice, such as lack of a quorum or lack of business; for example, that would be helpful to the public; another issue is it is hard to find Rent Review Advisory Committee agendas on the City website.

Vice Chair Foreman stated maybe said matters ought to be included in the annual report.

Commissioner Dieter stated the Commission has to meet to create the annual report.

Vice Chair Foreman stated the annual report is a good idea.

The Assistant City Attorney stated the Ordinance amendments could be included as part of the annual report; if other items come to Commissioners' attention that should be included in the report, the City Clerk and City Attorney know; a report will be drafted for the Commission to review and make changes or additions; something can be presented in October that can then be put into final form and sent to the City Council.

Vice Chair Foreman inquired if the Commissioners would individually do so, to which the Assistant City Attorney responded in the affirmative; stated the Commission can decide whether or not items should be included in the annual report.

Commissioner Dieter stated the suggestion sounds like a great plan.

The Assistant City Attorney stated staff can put something together and the Commission can review it to decide what to include.

Commissioner Dieter stated there are two clauses in the Sunshine Ordinance that she does not know if it has ever been adhered to or enforced: 1) the City Attorney shall semi-annually make a determination about whether any closed session minutes should continue to be exempt from disclosure based on whether the disclosure would be detrimental to the City; 2) the City Attorney's office shall prepare and present on the City Council Consent Calendar a list of documents which have determined to be public after previously being determined to be unavailable; the Commission should hear whether or not documents have been declassified at the next meeting.

The Assistant City Attorney stated that he would find out and bring back a report.

### ADJOURNMENT

There being no further business, Chair Aguilar adjourned the meeting at 9:25 p.m.

Respectfully submitted,

Irma Glidden  
Assistant City Clerk

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