

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
WEDNESDAY - - - NOVEMBER 14, 2018 - - - 7:00 P.M.

Chair Little convened the meeting at 7:00 p.m.

ROLL CALL - Present: Commissioners Dieter, Foreman, Henneberry,
Schwartz and Chair Little – 5.

Absent: None.

ORAL COMMUNICATIONS, NON-AGENDA

None.

AGENDA ITEMS

3-A. Minutes of the October 1, 2018 Meeting

Commissioner Dieter noted a change to Council Communication to clarify that she had two follow up items and the third item was reporting out; stated that she would also provide the Clerk correct typographical corrections.

Commissioner Henneberry moved approval of minutes with the changes.

Commissioner Dieter seconded the motion, which carried by unanimous voice vote – 5.

3-B. Hearing on Sunshine Ordinance Complaint Filed October 30, 2018

Serena Chen, Complainant, gave a brief presentation.

Commissioner Henneberry inquired whether there were copies of the original agendas, to which Commissioner Schwartz responded copies were included in the packet.

Commissioner Schwartz inquired whether Ms. Chen attended and spoke at the November 7th City Council meeting.

Ms. Chen responded in the affirmative; stated the basis of her complaint was that when a meeting is noticed and Council radically changes something on the agenda, it does not seem fair.

Commissioner Dieter inquired whether anything in the staff report indicated removing the cap.

Ms. Chen responded in the negative; stated that she was clear what the changes were going to be since she attended the July City Council meeting; when she saw the

October 16th agenda, it was a reflection of what was discussed in July and she decided not to attend.

Commissioner Foreman stated the staff report reinforces his understanding about the delivery-only dispensary.

Ms. Chen concurred with Commissioner Foreman; stated after she read the October 16th staff report, she was satisfied with the terms of the ordinance and felt confident of the vote; however, she has a problem with the number of dispensaries being doubled without any public notice.

Commissioner Schwartz inquired whether there was any consideration by the Council of Ms. Chen's views after her public comment at the November 7th meeting, to which Ms. Chen responded in the negative; stated the item was pulled from the Consent Calendar so she could speak; she had already sent a letter to Council regarding her concerns, but the issue was not addressed further.

Commissioner Foreman inquired whether Council discussed the item further and provided rationale or just voted on the matter at the November 7th meeting.

Ms. Chen responded that she did not feel her questioning caused a quandary; stated she respects Council and staff's professionalism but disagrees with the City's position.

Commissioner Henneberry stated that he understands Ms. Chen's complaint; inquired what, in her view, would resolve the issue.

Ms. Chen responded the resolution she has experienced before any other board is that if there are any changes to the language that has been proposed, staff is directed to come back to Council with changes for Council to introduce the ordinance, have a first reading and vote; there should be adequate notification for the public and an opportunity for people to be involved.

Commissioner Dieter inquired whether Ms. Chen's remedy would be that the matter be re-noticed and come back to the Council, to which Ms. Chen responded in the affirmative; stated that she understands marijuana has been legalized in the State, but cities are responsible for their own regulations.

Commissioner Dieter stated the Commission takes Ms. Chen's complaint seriously and will do their best to consider her points.

The Assistant City Attorney gave a brief presentation.

Commissioner Henneberry inquired what would have been the harm of waiting one more meeting and re-noticing the item.

The Assistant City Attorney responded he did not think there would be any harm; stated the Council asked whether or not the Ordinance would comply and if they could proceed; since the answer was affirmative, Council chose to move forward.

In response to Commissioner Schwartz inquiry on who answered affirmatively, the Assistant City Attorney stated the Acting City Attorney.

Commissioner Henneberry inquired whether the Acting City Attorney explained the basis of his opinion.

The Assistant City Attorney responded the Acting City Attorney explained that the attorneys had opined on the matter and communicated to Council that proceeding with a second reading was okay; the Acting City Attorney further stated the opinion has not changed.

Commissioner Henneberry stated the ordinance talked about delivery-only and was completely flipped on its head at the October 16th meeting by adding two full-service dispensaries with deliveries; inquired how doing so works with the strict and exact standards of agenda noticing.

The Assistant City Attorney responded staff's position is that the change was delivery-only to delivery-required; stated the agenda was noticed for an increase in the number of dispensaries; the agenda language did state delivery-only, the Council has authority to modify the ordinance in part because State law does not regulate the businesses any differently and does not have a distinction for delivery-only; the distinction is a local consideration, therefore, the Council has authority; conversely, the Council could decide not to make the distinction and still be compliant, which is precisely what the Council did in this instance.

Commissioner Foreman stated that he did not see the term "delivery-required" in either the regulatory or zoning ordinance that came before Council on October 16th.

The Assistant City Attorney stated Commissioner Foreman is correct; Council was amending the ordinances to allow the change to happen and directed staff to do so.

Commissioner Foreman stated the change was not only delivery-only to delivery-required, it was also changed from "closed to the public" to "open to the public."

The Assistant City Attorney agreed with Commissioner Foreman's statement; stated the ordinance language from November 7th defined the change.

Commissioner Schwartz inquired whether the Assistant City Attorney would agree with Ms. Chen that the difference between delivery-only and delivery-required is a facility that is just a warehouse versus a facility that has public interaction.

The Assistant City Attorney responded not exactly; stated the difference between the two is that although they are functionally the same, one does not allow public access; he would not characterize a delivery-only dispensary as a warehouse as it would still have to go through all of the State and local legal requirements.

Chair Little stated there was better public notice for the November 7th meeting; inquired whether it is normal circumstance to allow a significant distinction or change in the agenda item between the first reading and second reading.

The Assistant City Attorney responded legal counsel's position is that re-setting the first reading due to changes is not an accurate statement of the law, as Ms. Chen asserts; stated it is typical and permissible for Council to give staff direction to make changes and come back; what is not permissible is making substantive modifications at the second reading; in this case, however, resetting does not apply when an agenda is published but Council decides to move in a different direction; Ms. Chen is arguing the meaningful description as opposed to when a Council needs to reset the first reading and start over; the separate issues are conflated because of the remedy Ms. Chen is seeking; the issue before the Commission tonight is to determine whether or not the agenda description is a meaningful description.

Chair Little stated it is difficult to know for certain the direction of Council conversation; therefore, it is impossible to predict by way of an agenda description to name everything and cover all of the minutia details that may come up; the intention of the discussion was to have a meaningful conversation about delivery-only dispensaries; the conversation did take place, but then deviated and language was changed; inquired whether public awareness of the change took place in time for the Council to then vote on the item and allow for public comment on November 7th.

The Assistant City Attorney responded in the affirmative; stated Chair Little's statement of events is accurate.

Commissioner Dieter requested clarification regarding whether a first reading and a second reading can be entirely different as long as nothing substantive has changed; if so, the first reading needs to be reset.

The Assistant City Attorney stated Commissioner Dieter's statement is accurate; in this case, the change happened before the Council did its first reading.

In response to Commissioner Dieter's inquiry, the Assistant City Attorney stated the Council suspended the first reading until they actually got their comments in on how they wanted it modified; said practice is actually central to what Council does with respect to ordinances; the Council would be hamstrung if they did not have said ability.

The Assistant City Attorney read an unpublished court of appeals case analogous to the issue; stated the notice was sufficient to provide a member of the public to know that

there would be an increase in the number of dispensaries, whether it is delivery-only or delivery-required.

Commissioner Dieter stated that she understands that the Assistant City Attorney is in a position of defending the City and that he believes there were no substantive changes; the Commission's role is to defend the public to what a reasonable person would understand; she would consider the changes substantive because a cap on retail businesses was removed; the changes were not included in the staff report or agenda title.

The Assistant City Attorney clarified that the legal standard Commissioner Dieter refers to does not apply to the general agenda description because the changes happened before the first reading and before Council introduced the ordinance.

Commissioner Foreman stated that he understands substantive or non-substantive is not the issue; inquired whether the City's position would be the same if Council changed the retail cap to eight, as long as they corrected it by the second reading.

The Assistant City Attorney responded he does not like to opine on hypotheticals, but responded in the affirmative; stated the standard that applies is the notion that there is a description for the members of the public to decide whether or not they should appear.

Commissioner Schwartz inquired whether there was a basis to dispute Ms. Chen's claims that community advocates might have attended the meeting had they been aware of the changes.

The Assistant City Attorney responded that it would be speculative to speak to that; stated that he has attended every meeting regarding the cannabis issue and is surprised by the amount of support versus the amount of opposition to the issue.

Commissioner Schwartz inquired whether the Assistant City Attorney was aware of a vocal minority of public health advocates who are opposed to the additional public dispensaries, to which the Assistant City Attorney responded Ms. Chen and one other speaker are the only ones he is aware of that attended and spoke at the November 7th meeting.

Commissioner Dieter stated the public did not know that more retail businesses were going to be open; at the beginning of the process, there was a lot of concern about the amount of retail, but the public was relieved and reassured by the City Council that there would be a cap; the Council directed staff to bring back a report which included the cap; the cap was then removed; Ms. Chen's complaint is not about what happened at the November 7th meeting, it is about the first notice and whether members of the public were alerted to changes made before the second notice.

Chair Little clarified that the ordinance clearly states "add two cannabis retail businesses."

The Assistant City Attorney concurred with Chair Little; stated regarding Commissioner Dieter's comments, that he cannot speculate on whether or not the public was concerned about the issue.

Commissioner Dieter stated that she looked at the July meeting and no one on the Council suggested adding the two retail businesses; Council requested staff bring back a staff report with a cap; the staff report brought at the October meeting reiterated and reaffirmed what Council directed regarding the cap; inquired why the first clause adding two retail business was even included.

The Assistant City Attorney responded the report in July provided a status report on the cannabis request for proposals issued in April; Councilmember Ezzy Ashcraft and Vice Mayor Vella suggested adding "delivery only" at that meeting.

In response to Commissioner Dieter, the Assistant City Attorney stated the subsequent staff report did not include only the Council direction; additional items were included.

Commissioner Dieter inquired what prompted the first clause to add two cannabis businesses.

The Assistant City Attorney responded he does not recall; stated that he just remembers it was mentioned.

Commissioner Dieter stated as a member of the public reading the ordinance, she would interpret the additional two cannabis businesses as delivery-only businesses since there is nothing in the staff report to suggest otherwise.

The Assistant City Attorney stated the staff report was designed to report on outcomes, as opposed to creating a recommendation; staff was seeking direction from Council.

Commissioner Dieter inquired whether there would have been any harm to postpone the second reading until after the complaint was heard.

The Assistant City Attorney responded there is a current application that is pending and changes in the ordinance may impact the applicant.

Commissioner Dieter inquired what happens now if the Commission determines there was a violation of the Sunshine Ordinance.

The Assistant City Attorney staffing the Commission responded pursuant to the Sunshine Ordinance, if the Open Government Commission determines there is a violation of Section 2.91, the Commission may order the action of the body null and void and/or may issue an order to cure or correct, and may also impose a fine on the City for a subsequent similar violation.

Commissioner Dieter stated it did not make sense to her that the ordinance proceeded to a second reading when a complaint was filed with no opportunity for remedy.

In response to Chair Little's inquiry, the Assistant City Attorney stated staff reached out to Ms. Chen after his email to her stating that she could still provide comment; Ms. Chen's response to the email was that providing comment would not resolve her complaint.

Chair Little stated that she understands the item was pulled; inquired how doing so plays into the process.

The Assistant City Attorney responded the item was pulled for discussion but the second reading did take place; stated a further amendment is going forward to clarify definitions.

Commissioner Dieter stated the complaint is about the October 16th meeting, not about anything that happened after.

Commissioner Foreman inquired whether a motion should be put on the floor, to which the City Clerk responded the Commission is not required to follow Rosenberg's Rules even though the Council does.

Chair Little stated the Commission pushed following Rosenberg's Rules; called for a motion.

Commissioner Schwartz inquired whether the Commission should deliberate before making a motion, to which Commissioner Dieter responded in the negative.

Commissioner Schwartz moved approval of sustaining the complaint and that Council be ordered to re-notice the meeting so that community advocates can be heard on the issue of two additional dispensaries.

Commissioner Dieter seconded the motion.

Under discussion, Commissioner Foreman stated there are two cannabis ordinances; the zoning ordinance was not impacted by the complaint; suggested an amendment.

The Assistant City Attorney concurred with Commissioner Foreman, stated the changes were confined to the business ordinance which contains the definition of "delivery-only."

Commissioner Schwartz stated that he does not think the ordinance needs to be amended as long as it is clear when re-noticed that the conversion of delivery-only to delivery-required deserves a public hearing; commended the speakers for thorough presentations; stated that he agrees with Ms. Chen that the November 7th final vote did not give the impression that there would be any meaningful debate; to the extent that there are people in the community that want to be heard on this, it should be heard; it

would not have hurt the City to wait two more weeks; further stated he is also sensitive to efficiency in government and does not want endless meetings, but the issue is important enough to support sustaining the complaint.

Commissioner Henneberry concurred with Commissioner Schwartz; stated that he supports the motion.

Commissioner Foreman concurred with Commissioner Schwartz; stated that he thinks both the City and Ms. Chen are right, it is just a matter of degree; he supports the motion.

Commissioner Dieter stated the issue is also about setting a precedent about what is important in the City; when a member of the public files a complaint under the Sunshine Ordinance, the process should not just move forward; it is only right that the complaint should be heard before a second reading; what the Commission has to do now creates a longer delay; nothing may change in the end; there could have been a two week delay instead of another first reading and second reading; it is important to do the right thing.

The Assistant City Attorney for the Commission stated there was not a time savings as a practical matter; the issue would have been delayed and would have to be re-noticed anyway in the event of the Commission sustaining the complaint.

Commissioner Dieter stated the City moving forward even though a complaint was filed looks bad to the public.

The Assistant City Attorney for the Commission stated just because a complaint is filed does not mean the decision made at the October 16th meeting was not in order; the opinion did not change by November 7th; the Commission could have reached a different conclusion; there was not a compelling reason to change the opinion at the November 7th meeting.

Chair Little stated the 267 pages of information was confusing; assumptions cannot be made about the decision; comparing what was originally proposed to the eventual outcome of adding the two businesses has a greater weight; she supports the motion.

On the call for the question, the motion carried by unanimous voice votes – 5.

COMMISSIONER COMMUNICATIONS

Commissioner Dieter stated that she has enjoyed being on the Commission; sitting at the dais is harder than it looks; commends the people who volunteer to sit on the Commission.

The Assistant City Attorney for the Commission noted that he will draft a written decision for the Commission to review and edit so a final version can be completed.

ADJOURNMENT

There being no further business, Chair Little adjourned the meeting at 8:23 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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