

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
MONDAY - - - FEBRUARY 4, 2019 - - - 7:00 P.M.

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

ROLL CALL - Present: Commissioners Schwartz, Shabazz, Tilos and Chair Little – 4.

[Note: Commissioner Shabazz arrived at 7:41 p.m.; he had provided notification that he would be late due to a previous engagement.]

Absent: Commissioner Henneberry – 1.

ORAL COMMUNICATIONS, NON-AGENDA

Paul Foreman, Alameda, stated he is concerned about the ability of the Commission to function under the current circumstances; Section 2-93.8 of the Sunshine Ordinance states that the Open Government Commission (OGC) decides complaints and can direct Council action; however, the Interim City Attorney has stated the Section is in violation of the Alameda Charter and State law; he disagrees with the Interim City Attorney; the issue is a real problem.

AGENDA ITEMS

3-A. Select Chair and Vice Chair

Commissioner Tilos moved approval of having Commissioner Henneberry serve as Chair.

Commissioner Schwartz seconded the motion, which carried by unanimous voice vote – 3. [Absent: Commissioners Henneberry and Shabazz – 2.]

Commissioner Tilos moved approval of having Commissioner Schwartz serve as Vice Chair.

Chair Little seconded the motion, which carried by unanimous voice vote – 3. [Absent: Commissioners Henneberry and Shabazz – 2.]

3-B. Minutes of the November 14, 2018 and December 17, 2018 Meetings

Not heard.

3-C. Accept the Annual Public Report

Commissioner Schwartz moved approval of the Annual Report.

Commissioner Tilos seconded the motion, which carried by unanimous voice vote – 3.

[Absent: Commissioners Henneberry and Shabazz – 2.]

3-D. Hearing on Sunshine Ordinance Complaint Filed January 25, 2019

Serena Chen, Complainant, gave a brief presentation.

The Interim City Attorney gave a brief presentation.

Chair Little stated a comprehensive summary provided by former Commissioner Foreman outlines the issue.

Commissioner Tilos inquired whether the powers of the Commission is a topic that needs to be addressed, to which Chair Little responded the discussion needs to be separate.

In response to Commissioner Tilos' inquiry, the Interim City Attorney stated Ms. Chen's complaint is that not attaching the Commission's decision to a January 15th report is a violation of the Sunshine Ordinance; the City's position is that not attaching the decision to the report is not a violation of the Sunshine Ordinance since the Commission did not direct that the decision be part of any subsequent action or report; Ms. Chen secondarily contends that the agenda title was deficient with respect to describing the item the Council was going to consider; the City's position is the title more than adequately described the item which was the re-introduction of the cannabis ordinances and the repeal of the ordinances which the OGC rendered null and void.

Commissioner Schwartz inquired whether the Interim City Attorney's position is that the January 15th meeting was a first or second reading of the ordinance.

The Interim City Attorney responded had the Council majority voted to re-introduce the ordinance, it would have been the first reading.

Chair Little inquired whether the failure of the Council to make a decision maintains the circumstance that the ordinances are still null and void as decided by the OGC.

The Interim City Attorney responded in the negative; stated the Council has been advised that the ordinances will remain in full force and effect unless and until Council repeals the ordinances.

Commissioner Schwartz inquired what information was given to the public and Council about the impact of keeping the ordinances in effect.

The Interim City Attorney responded the information was adequately described in the report itself but the agenda title does go into that depth.

Commissioner Schwartz inquired what in the agenda title would inform someone of the effects and current state of the law, to which the Interim City Attorney responded the information is described in the summary of the title.

In response to Commissioner Schwartz's inquiry, the Interim City Attorney stated Attachment 3 of the report includes the information regarding the impacts.

Commissioner Schwartz inquired where the report state that the previously null and void ordinances are back in effect.

The Interim City Attorney responded the City's position is that the ordinances never went out of effect.

Commissioner Tilos stated the ordinances were never null and void because the Commission did not have the power to do so.

The Interim City Attorney concurred with Commissioner Tilos; stated if the Commission did not have the authority to render the ordinances null and void, by definition, they were still in full force and effect.

Chair Little stated that she is concerned the Commission is entering into a slightly different conversation by arguing the merits of whether or not the Commission has the right to render any Council action null and void; she would like to focus on the complaint before the Commission tonight; inquired whether there are technical questions; inquired what was the rationale behind not including the Commission's decision.

The Interim City Attorney responded there was no purposeful thought of not attaching the document; stated when the item was drafted, it seemed agenda report adequately described the issue and paraphrased the Commission's decision.

Chair Little stated stating information in the background and paraphrasing created the situation tonight; the Commission's purpose is to make sure issues are made available publicly and not just in the background.

Karen Butter, League of Women Voters, read a letter the League submitted on the matter.

Paul Foreman, Alameda, stated the failure to attach the decision is a technicality; the real problem is the title misled the public because it was not clear; the process should be two steps: 1) repeal the ordinances, and 2) re-introduce the ordinances.

Irene Dieter, Alameda, concurred with Mr. Foreman; stated there was no way for the public to figure out that any no vote was just symbolic; there was no opportunity for the public to realize the item was not a re-hearing; the item should be re-noticed.

Serena Chen, Complainant, stated the written decision of the Commission should have been issued within 14 days of December 17th; it was not, so it became a violation of the Sunshine Ordinance.

Ryan Agabao, Alameda, stated the public was given plenty of notice and many

opportunities to come out and speak; the OGC's concern was heard but just did not get the votes.

The Interim City Attorney stated with respect to Ms. Chen's comment about the decision not being issued, it was issued that night and was compliant with the 14 days as required by the Sunshine Ordinance; regarding the structure of the ordinances, one section dealt with repealing Ordinances 3227 and 3228; there was nothing that prevented the Council from deciding not to re-introduce the ordinances and rather just repeal them; the Council chose not to repeal the ordinances; the issue brought up by the League of Women Voters recommending that the Commission has its own legal counsel to deliberate matters which may have internal conflict makes sense and he has made a recommendation to the Council for that to occur.

Chair Little moved approval of sustaining Ms. Chen's complaint.

Commissioner Shabazz seconded the motion.

Under discussion, Commissioner Shabazz stated, for the record, he attends the Quba Mosque on Haight Street which is adjacent to one of the proposed dispensaries; if at any point he feels there may be a conflict, he would recuse himself from the discussion.

In response to Commissioner Shabazz's inquiry regarding the status of the discussion since he arrived late, the City Clerk provided a brief summary.

Commissioner Schwartz thanked Ms. Chen and Mr. Agabao for their comments; stated he takes no position on the underlying issue of the ordinance; the Commission should be completely process-oriented and be totally without regard for the underlying content; his concern is with transparency and democracy and whether the public had an opportunity to be heard; the process is needs to be looked at; the process was not clear and the public was confused; transparency is an important value that the City has and everything should have been put out on the table; the Commission's decision should have been included in the staff report and executive summary; the exact status of the ordinances and impacts of passing a new ordinance should have been made clear; he felt it was unclear and a reasonable member of the public would find it unclear as well; what needs to be done for transparency and democracy is to just do it again; he understands that both sides have important issues at stake and deserve to have the issue resolved, but one more month to ensure transparency is worth it.

Commissioner Tilos stated he concurred with Chair Little's concerns about the issue being paraphrased and put in the background; a lot of time and effort was put in to a recommendation by the Commission, which was not included; although the issue passed on the legal tests, it should pass the test of being fully transparent.

Chair Little stated that she takes the duties of the Commission very seriously; the issues that have been brought before the Commission allow the opportunity to examine what exactly is going on in the City's government; tonight's matter has nothing to do with the

underlying issues regarding cannabis and everything to do with transparency in government and making sure the public does not have to hunt for information; the Commission made a decision based on the Sunshine Ordinance to make a Council action null and void, yet it is still unclear whether or not the Commission does have that authority, and it is left for the Council to decide; ultimately she would like to ask the City Council three things: 1) make a determination based on the OGC's decision in December to make the ordinances null and void, 2) the null and void clause of the Sunshine Ordinance needs review with the next City Attorney; if it is deemed unconstitutional, the Commission needs to have some method of oversight, and 3) the Commission needs to have separate legal counsel.

The Interim City Attorney requested the Commission review and provide a written decision concerning the matter.

Commissioner Schwartz stated redlining the decision on the fly does not make sense; the decision should simply state that the complaint is sustained; if the ordinance does not get sent back for a first reading, the City could potentially be faced with a lawsuit; suggested starting fresh and re-introducing the ordinances.

The Interim City Attorney stated the proposed decision could be amended to state there was a violation of Section 2-93.2-B and 2-91.5 and the complaint should therefore be sustained.

Commissioner Schwartz moved approval of the decision adding that the Commission based their findings on information presented during the hearing on the matter, including, but not limited to, the fact that the Commission's prior decision was not included in the January 15, 2019 City Council packet, causing average members of the public, or even a well-informed members, to be confused about what the Council was voting on.

Commissioner Shabazz requested a friendly amendment; stated that he would not include Commissioner Schwartz comment regarding "average members of the public" as it is an assumption and he wants to remain as factual as possible; suggested the motion state the OGC sustain Ms. Chen's complaint filed on January 25, 2019, and that there was a violation of Section 2-93.2-B and 2-91.5 of the Sunshine Ordinance based on the omission of the documentation of the Commission's decision in the Council packet.

Commissioner Schwartz concurred with Commissioner Shabazz and clarified the term he meant to use is "reasonable well-informed" member of the public.

The City Clerk stated the motion is: Ms. Chen's complaint will be sustained with the decision stating that the document of the Commission's decision was not attached to the January 15th Council packet and that a reasonable well-informed person would be confused as to what Council was voting on.

On the call for the question, the motion carried by unanimous voice vote – 4. [Absent: Commissioner Henneberry – 1.]

Commissioner Shabazz moved approval of requesting follow-up on the items regarding the legal counsel conflict, as well as the authority of the Commission over City Council decisions.

In response to Chair Little's inquiry regarding the follow-up items, the Interim City Attorney stated the items are not technically on the agenda, but the topic has come up within the context of the issue so a motion would be appropriate; the Council is aware of the Commission's concerns and there will be some movement on the issues raised.

Commissioner Schwartz stated the Commission should heed its own advice and not have motions at the meeting on issues that were not noticed; he feels confident that the Council will hear the message from tonight's OGC meeting.

Chair Little concurred with Commissioner Schwartz.

COMMISSIONER COMMUNICATIONS

Chair Little welcomed Commissioners Shabazz and Tilos to the Commission; stated she enjoyed serving as Chair and expressed appreciation to former Commissioners Paul Foreman and Irene Dieter for their guidance.

Commissioner Shabazz thanked the members of the public for communicating their issues to the OGC; inquired who determines whether there is a conflict of interest.

The Interim City Attorney responded once a complaint is received, based on the nature of the complaint, if it would appear that one of the outcomes of the complaint would be contrary to what the law provides and what the Commission is authorized to do, that would trigger having outside counsel advise the Commission.

ADJOURNMENT

There being no further business, Chair Little adjourned the meeting at 8:16 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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