

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
MONDAY - - - NOVEMBER 16, 2020 - - - 7:00 P.M.

Chair Schwartz convened the meeting at 7:04 p.m.

ROLL CALL - Present: Commissioners Little, Pauling, Tilos and Chair Schwartz – 5. [Note: The meeting was conducted via Zoom.]

Absent: None.

[Staff present: Chief Assistant City Attorney Michael Roush, Assistant City Attorney John Le, Attorney James Harrison; and City Clerk Lara Weisiger]

Oral Communications

Jay Garfinkle, Alameda, stated that he was concerned about the way the Commission functions; that he was told he could only submit a complaint via oral communication; he is frustrated the October meeting was cancelled and there is lack of coordination; requested clarification on first and second readings of ordinances.

The City Clerk stated that she explained to Mr. Garfinkle that since he was not submitting a Sunshine Ordinance complaint, his matter could go before the Commission under Oral Communications; when he filed a complaint, which was later withdrawn and then refiled, it was past the deadline.

Chair Schwartz stated that Mr. Garfinkle could file a complaint or submit a letter prior to the next meeting if he wishes; the October meeting cancelation was not as a decision of the Commission and he shares the frustration.

Regular Agenda Items

3-A. Minutes of the Meeting Held on August 3, 2020

Chair Schwartz stated he would like to strike the part where Commission members were joking about ear injection technology; clarified a sentence to state why “an item could not be added.”

The City Clerk noted the changes.

Commissioner Shabazz moved approval of the minutes.

Commissioner Little seconded the motion which carried by the following roll call vote: Commissioners Little: Aye; Pauling: Aye; Shabazz: Aye; Tilos: Aye; Chair Schwartz: Aye. Ayes: 5.

3-B. Discuss and Provide Recommendations Concerning Potential Amendments to Article VIII (Sunshine Ordinance) of Chapter II (Administration) of the Alameda Municipal Code, as Amended, to Replace “Null and Void” Remedy.

The Chief Assistant City Attorney stated what is being presented tonight is in response to the Commission’s comments and recommendations; the City Attorney’s office did hire outside counsel, James Harrison, as requested by the Commission to review the proposal put forth by Paul Foreman; Mr. Harrison has provided comments which were incorporated in the agenda report; the item is intended to provide the Commission with the opportunity to respond to what staff has presented; further comments or amendments will be considered and moved forward to the City Council.

In response to Commissioner Shabazz’s inquiry, Chair Schwartz stated Mr. Harrison is outside Counsel from Olson Remcho hired by the City Attorney’s office.

Chair Schwartz stated it appears the chief authorities cited against the Commission’s proposal to add teeth to the Sunshine Ordinance, being cited by the City Attorney’s office and its outside counsel for the notion that the Commission’s proposal would violate the principle of “non-delegation,” are a case from 1904 (when 10% of Alameda was 600 people) - where, unlike today, sending back an ordinance would have cost two years - and another case, from over 50 years ago.

Chair Schwartz inquired whether the cases are the chief authorities, to which the Chief Assistant City Attorney responded in the affirmative.

Chair Schwartz inquired whether when drafting the recommendation the Chief Assistant City Attorney read the June OGC minutes when the Commission discussed their recommendations for over an hour, to which the Chief Assistant City Attorney responded in the affirmative.

Chair Schwartz stated City Attorney staff weighed in on independent legal counsel even though it was not an issue the Commission put forward; inquired why it was included.

The Chief Assistant City Attorney responded it was included as a response to Mr. Foreman’s proposal; stated it was a good idea to address all his concerns.

The Assistant City Attorney stated that he understands that Chair Schwartz felt the issue did not need to advance; he went back to listen to the recording and it was actually part of the motion.

Chair Schwartz stated that he does not believe that is correct, but now it explains why staff had a different understanding; his impression was that part was not recommended by the Commission.

Chair Schwartz inquired whether Mr. Harrison did not find any cases within the last 50 years which prohibit a commission from sending an ordinance back to Council for further review.

Mr. Harrison responded in the affirmative; stated the Commission certainly has power to make recommendations; he is not aware of any cases that would preclude making recommendations.

Chair Schwartz inquired whether any cases preclude a supermajority requirement in certain instances; for example, to reject the recommendation of a City's appointed Commission.

Mr. Harrison responded as to said point, they were relying on the City's Charter which specifies that the Council takes action by a vote of three members unless the Charter specifies a different threshold.

Chair Schwartz stated the Charter does not say anything about this particular situation where an appointed Commission makes a recommendation to City Council regarding the voting quorum that is necessary.

Mr. Harrison stated the Charter specifies that Council action occurs by a vote of three members unless the Charter specifies elsewhere; he would not expect to find anything in the Charter because in the absence of anything else, three votes are required.

Chair Schwartz inquired whether the Charter has any instances where it allows for a supermajority vote, to which Mr. Harrison responded in the affirmative; stated in cases of urgency ordinances, a four-fifths vote is required, which is in Section 3-12 of the Charter.

Chair Schwartz inquired whose responsibility is it to approve a Charter provision; gave the example of the Commission recommending to the City Council that a supermajority be required to adopt something against the recommendation of the Commission to reagendaize the matter; inquired whether the City Council could vote to adopt that as an amendment to the Charter.

Mr. Harrison responded Charter amendments would have to be placed on a ballot and approved by the voters.

In response to Chair Schwartz inquiry regarding the non-delegation notion, Mr. Harrison stated he indirectly relied on the Charter in the sense that it provides that the City Council carries out all legislative powers of the City, with the exception of the powers of initiative and referendum.

Commissioner Little stated the language is confusing; it appears there is a third proposal of a compromise between the Knox White and the Foreman proposals, which is not recommended by special counsel; inquired whether Mr. Harrison is special counsel and as such, does not recommend the compromise.

Mr. Harrison responded he is special counsel and did draft the third proposal; in doing so, they noticed it also raises several issues or practical concerns, particularly in light of the fact that if the City Council were unable to act in whatever period of time required at the Commission's order could have the effect of undoing City Council action, which raises the concern expressed with respect to the non-delegation doctrine and the provision that the City Council has full legislative authority.

Commissioner Little stated the Commission tried to bring forward something that would prevent ending up in the same situation as before, which was that the City moved forward with a second reading and in the meantime a complaint had been made before the second reading went through and nothing paused; the Commission put forward language so as not to be in the same position and that the Commission did not have the authority to go back and make something null and void; every option the Commission has brought forward seems to be fairly well rejected, except for the Knox White proposal, which in her opinion does not really afford the Commission its teeth; it does not feel satisfactory to just say the City Council can proceed as usual and there are no real consequences to pause the process; questioned what is the point of a Sunshine Ordinance and an Open Government Commission if it does not have authority.

The Chief Assistant City Attorney stated that he looks at the Knox White proposal as accomplishing what the Commission is after; it does indicate there would be a pause in the process and would allow the matter to be returned to the body which the Commission has found to be in violation of the ordinance and would allow that decision to be reviewed further; both Mr. Foreman's and Mr. Harrison's proposals still run into the problem that existed in the ordinance concerning non-delegation; the City Attorney's office has a different view about what the authority of Commission should be and are prepared to take forward to the Council the Commission's recommendation; the City Attorney's office is in the position to give the Commission the best legal advice; the Commission is not bound to accept it; what has been presented is the most legally defensible.

Chair Schwartz stated fundamentally, the City Attorney disagrees with what the Commission is trying to put forward; his understanding of why there was a very long pause to move something forward was because the City Attorney's office was going to give back to the Commission an essentially formalized version of what the Commission wanted to put forward; that was what the Commission was told and that is why there was so much time spent debating each item; he does not think presenting the Knox White proposal as something the Commission wanted is right; the Commission adopted a different proposal that was more along the lines of Mr. Foreman's proposal; the problem is going around and around for years trying to see that the Sunshine Ordinance has some teeth and the City Attorney has been pushing back; it seems none of the Commission's actions or votes have any bearing and the City Attorney's office comes back with a proposal that is explicitly what the Commission has rejected rather than sending what the Commission proposed to the City Council; suggested forming a subcommittee of the Commission to put forward a proposal consistent with what the Commission voted on in June since the City Attorney is not going to put that forward; stated both the Commission and the City

Attorney can present proposals to the Council and allow Council to decide; in his opinion, the Council will be deciding whether or not to have teeth in the Sunshine Ordinance and a real transparent legislative process; what Council has said months ago was that they adopted the City Attorney opinion that a null and void provision usurped the legislative process, but they still wanted real teeth in the ordinance; the Commission's proposal would do that; he disagrees that there is anything unlawful about it; suggested forming a subcommittee to put forth the Commission's proposal to the City Council; stated undoubtedly, the Council will also have the considered opinions of the City Attorney.

Commissioner Shabazz expressed his appreciation to Commissioner Little about confusion in the language; stated the current proposal does not meet the criteria of putting teeth back into the Sunshine Ordinance; inquired whether staff will still bring a proposal forward to the City Council for approval even if the Commission declines to move forward with it.

The Chief Assistant City Attorney responded staff would bring forth any proposal the Commission approves, either through a subcommittee or other process; depending on what the proposal says, he cannot say whether or not the City Attorney's office would recommend it, which is not an unusual situation for Commissions; without knowing precisely what the Commission may come up with, the City Attorney's office cannot say whether or not they would recommend it; it is fair to say if it involves a delegation issue, the City Attorney's office would not be in a position to recommend it because it is not authorized by the Charter; people can disagree, but Council will make the ultimate decision.

Commissioner Shabazz stated that he appreciates the legal analysis; there is a desire to have something substantive to replace what was lost with the removal of null and void; depending on where people may be, maybe move to recommend the Foreman proposal to the City Council.

Commissioner Tilos stated there are two different battles; whatever the Commission drafts will likely not be recommended by the City Attorney's office; if the Commission goes directly to the Council, they will probably not approve it either; it is an uphill battle both ways; the question becomes which battle to choose: the endless two year circle of rewriting a proposal to get endorsement from the City Attorney's office or go directly to Council just to be rejected.

Chair Schwartz stated it is a real concern, but does not necessarily have to go that way; it will be a different Council and a different moment; after the Council asked specifically to put teeth back into the ordinance and the Commission comes back with something that does so, it is something different than straight null and void; the arguments that were raised by the City Attorney which gave the City Council pause about an absolute null and void do not have the same force with respect to the proposal the Commission has already agreed and voted on; the Commission is not nullifying or usurping any legislative function of the Council, which is the argument the Council made; the Commission has to be true and decide what is best for transparency; the Commission was charged with putting teeth

back into the ordinance and does not feel the choice is simply between doing whatever the City Attorney tells the Commission to do and failure; there is a middle path, which is coming up with a proposal that takes into account the various legal advice but also stays true to the objective of putting teeth into the ordinance.

Commissioner Pauling stated that she shares the frustration and certain degree of confusion about what has been expressed already; there has to be a way to have a process that forces a real pause and requires proper notice; it seems the only definition needed is if and what constitutes an urgent time factor; she would like some boundaries; she concurs with Chair Schwartz's recommendation regarding a subcommittee to actually come forward with teeth and an approach for how that would be defined; the most important thing is that if there is not proper notice, the matter should be stopped and re-noticed; short of a life-threatening emergency, that is what should happen.

In response to Commissioner Pauling's inquiry, the City Clerk stated Commissioner Pauling's term will end on December 15th when the new Councilmembers are sworn in; a report is taken to the Council at the first meeting in January to inform the public of the new appointees.

Commissioner Pauling stated she is happy to help in any way she can, but her time is limited.

Chair Schwartz stated he would be happy to see a subcommittee recommendation before December 15th.

Chair Schwartz moved approval to not adopt the recommendation of the Knox White proposal and instead appoint a subcommittee to make a recommendation, consistent with what the Commission recommended at the June meeting, before December 15th.

Commissioner Pauling seconded the motion.

Under discussion, Commissioner Shabazz inquired whether a person has to be a Commissioner to be on the subcommittee.

The Chief Assistant City Attorney responded in the affirmative; stated by definition a person would need to be on the Commission in order to be on the subcommittee; it would be up to the subcommittee to allow a non-commissioner as a subcommittee member.

The City Clerk stated, for timing purposes, the next regular meeting of the Commission is December 7th and the agenda packet would need to go out on November 30th; the latest potential meeting date is December 14th, but the packet would need to go out December 2nd because of the new 12-day publication for special meetings.

Chair Schwartz stated the subcommittee could make its recommendation by December 15th; if it is not done, the Commission could vote at a later meeting if necessary.

In response to Commissioner Tilos's inquiry, the City Clerk stated if the desire is for the recommendation to return to the existing Commission, it could be done on the December 7th meeting or a special meeting on December 14th; the reports would need to be published on either November 30th or December 2nd.

Chair Schwartz inquired whether the subcommittee recommendation needs to come back to the Commission or can it be taken directly to Council.

The Chief Assistant City Attorney responded typically the subcommittee would make a recommendation to the full Commission; technically, the subcommittee itself can make a recommendation directly to the Council, which may not carry as much weight as the full Commission, but it could be done that way.

The Assistant City Attorney stated there might be a rule that if a subcommittee composition includes a member of the public and not a member of the commission, it might have to be an open and public meeting; the motion ought to include the subcommittee membership and have its charge made clear on the record; he is confused by the charge of the subcommittee because even if the City Attorney's office disagrees with the recommendation of the Commission for legal reasons, it is not as though the agenda report to the Council would not include the recommendation; the report would include input provided by the Commission in addition to input provided by the City Attorney's office; questioned what the charge of the subcommittee would be if it is already known that the original recommendation would be forwarded to Council.

Chair Schwartz stated the goal of the subcommittee is to write the amendments clearly for presentation to the Council rather than relying on three pages of minutes from a meeting.

The Assistant City Attorney stated the proposal that was recommended by the Commission is not based on minutes, it is based on a motion from the Commission on the Foreman proposal which is clearly outlined in redline form; if the Commission is moving in the direction of a subcommittee, there should be some concrete direction to that subcommittee vis-à-vis the motion that is made by the Commission concerning the Foreman proposal; he is not sure if the Commission still supports the Foreman proposal as modified by the Commission or is the charge to create something completely new; that ought to be part of the motion as well.

Chair Schwartz stated he hears what the Assistant City Attorney is saying but it was not unclear that the idea of the subcommittee is to write a proposal that is consistent with what the Commission recommended at the June; identifying the subcommittee members can be done as part of the motion or after Commissioners agree there should be a subcommittee.

The Chief Assistant City Attorney stated the charge of the subcommittee is sufficiently clear and the motion should proceed to see if there is support for a subcommittee, decide who will be on it, and go from there.

On the call for the question, the motion carried by the following roll call vote: Commissioners Little: Aye; Pauling: Aye; Shabazz: Aye; Tilos: Aye; Chair Schwartz: Aye. Ayes: 5.

In response to Chair Schwartz's inquiry, Commissioner Pauling stated she is interested in being in the subcommittee with the understanding that she will step down from the Commission on December 15th.

Commissioner Tilos inquired whether the subcommittee plans to present the proposal to the full Commission for a vote on December 7th, to which Chair Schwartz responded in the affirmative; stated the full Commission presenting the proposal to the Council would carry more weight, as the Chief Assistant City Attorney stated.

In response to Commissioner Pauling's inquiry, the City Clerk reiterated the report deadlines of November 30th and December 2nd.

In response to Chair Schwartz' inquiry regarding whether Commissioner Little would like to be on the subcommittee, Commissioner Little stated there can only be two members from the Commission so as not to violate the Brown Act; inquired whether a Councilmember or other body could be asked to participate.

The Chief Assistant City Attorney stated once you start expanding the membership, there is a risk of the subcommittee becoming a policy body which would need the 12-day noticing; if it is simply kept as an ad hoc committee, it would be classified as a passive body under the Sunshine Ordinance and can meet without the strict requirements.

Chair Schwartz inquired whether the Commission would be amenable to him and Commissioner Pauling serving on the subcommittee.

Commissioner Pauling stated because she has only been on the Commission for a year, she is willing to allow someone who has more experience to serve; she is happy to contribute, but also happy to step aside if any of the other Commissioners are interested.

Commissioner Little stated although the OGC is near and dear to her, she is gearing up and focused on her new role as a School Board Member.

Commissioner Tilos stated he has full confidence that Chair Schwartz has a good idea of what everyone on the Commission wants to convey to the Council.

Commissioner Shabazz stated he concurs with Commissioner Tilos and is confident in Chair Schwartz and Commissioner Pauling making it happen; he appreciates how Chair Schwartz has conveyed the Commission's concerns multiple times with passion and looks forward to what they will be bring forward.

Commissioner Shabazz moved approval of appointing Chair Schwartz and Commissioner Pauling as members of the subcommittee.

Commissioner Tilos seconded the motion which carried by the following roll call vote: Commissioners Little: Aye; Pauling: Aye; Shabazz: Aye; Tilos: Aye; Chair Schwartz: Aye. Ayes: 5.

3-C. Select Chair and Vice Chair

In response to Chair Schwartz's inquiry, the City Clerk stated typically the person who is the Vice Chair becomes the Chair; it is up to the Commissioners who they want going forward.

In response to Chair Schwartz's inquiry, Commissioner Tilos s expressed interest in the process of rotating into the Chair position.

Commissioner Shabazz stated that he supports whatever process the Commission would like to move forward with and also supports Chair Schwartz remaining the Chair.

Commissioner Tilos concurred with Commissioner Shabazz; stated that he supports Chair Schwartz remaining Chair and appreciates Chair Schwartz's leadership.

Chair Schwartz stated that he appreciates the support; he does not want to disrupt the rotation and is willing to continue as Chair but is confident in Commissioner Tilos and Commissioner Shabazz as well.

Commissioner Little stated that she feels strongly about the demonstration of leadership through giving the opportunity for lots of people to stand up, participate, and spread their wing; it would be good for the health of the Commission to offer the opportunity to others; it's part of succession planning and growing the breadth and depth of a full board; Chair Schwartz has done a remarkable job and she has every faith that Commissioner Tilos and Commissioner Shabazz would do a phenomenal job as Chair and Vice Chair; it is important, especially with two new members, that they have the opportunity now.

Chair Schwartz stated Commissioner Little's comments were eloquently stated and he could not agree more.

Commissioner Tilos thanked Commissioner Little and moved approval of himself becoming Chair and Commissioner Shabazz as Vice Chair.

Chair Schwartz seconded the motion.

Under discussion, Commissioner Shabazz inquired what goals Commissioner Tilos has regarding being Chair.

Commissioner Tilos responded that he would like to see the Sunshine Ordinance carry through and have the current Commission's voices heard on December 7th so that there will be something showing the Commission's voices brought to Council; his goal for the next few meetings would be to bring the two new Commissioners up to speed; then, to continue to address any current and future public complaints; regarding Commissioner Shabazz's ideas, he would also like to bring more transparency to the Commission and more public access; these are issues he would focus on in the upcoming term and next few months.

The Chief Assistant City Attorney left the meeting for a family matter.

Commissioner Shabazz stated Alameda is an interesting place; he is currently applying to several doctorate programs outside of the Bay Area; if he does attend a program in the Bay Area, he will stay in Alameda; he can accept the Vice Chair position with the understanding he may not be in Alameda in 2022.

Under call for the question, the motion carried by the following roll call vote: Commissioners Little: Aye; Pauling: Aye; Shabazz: Aye; Tilos: Aye; Chair Schwartz: Aye. Ayes: 5.

Commission Communication

Commissioner Little expressed her thanks to the Commissioners for making her time on the Commission interesting, fulfilling and exciting; stated the Commission demonstrates the ability to set aside personal agendas in order to do what is best for the City, the people, and the various other bodies that come before the OGC; thanked everyone for the wonderful opportunity in her first role of government service.

The City Clerk expressed her appreciation for Commissioner Little's service; noted Commissioner Little served on a subcommittee that tackled a lot of issues and put in a lot of hard work for the Commission; it is sad to see her go; wished her great success on the School Board.

Chair Schwartz stated that he appreciated the opportunity to serve as Chair and it has been a great pleasure to serve with everyone; echoed Commissioner Little's comments on the ability for everyone to agree on the fundamental mission; he looks forward to working with the new members.

Commissioner Pauling stated that she wished she could have served with Commissioner Little longer on the Commission and wished her the best.

Commissioner Shabazz expressed his appreciation and congratulations to Commissioner Little; thanked Commissioner Pauling for stepping in and serving on the Commission; stated that he has been in touch with the League of Women Voters regarding the Public Records Act workshop; gave a shout out to the Youth Activists of Alameda for their Instagram video explaining how City Council meetings work.

Adjournment

Commissioner Shabazz moved approval of adjourning the meeting.

Commissioner Little seconded the motion.

Commissioner Shabazz withdrew his motion since a motion is not needed.

The meeting was adjourned at 8:18 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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