

MINUTES OF THE OPEN GOVERNMENT COMMISSION MEETING
MONDAY - - - DECEMBER 17, 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 ITEM

Before addressing the agenda item, Chair Little stated that she does not think the Commission's role as oversight on the Council and City Attorney's actions is appropriately addressed to the Open Government Commission (OGC); if the City Attorney would like to address inadequacies that were written into the law and presented at the last meeting, the issues would be better discussed by the City Council; she would like to propose a motion to table the conversation until after the City Council has been engaged on how the City would like to address the oversight and transparency implications of staff's request.

Commissioner Foreman called a point of order on whether or not it is appropriate for the Commission to consider the matter; stated that he believes it is out of order; the Sunshine Ordinance states the Commission had to make a decision within 30 days of the filing of the complaint; the decision was rendered on November 14th; the fact that the City Attorney has not prepared a written confirmation of that decision does not change the fact that the decision was made; the decision was made two days before the cannabis ordinance would have become effective; thus, the ordinance is null and void; there is no basis to proceed; as a consequence, the only thing left to do is write the written report required by law which should have been done by November 28th; what needs to be done tonight is to ask the City Attorney to assist the Commission with writing the opinion which confirms what has already been done; the matter should be done tonight because he and Commissioner Dieter will be termed out by tomorrow.

Commissioner Foreman moved approval of dismissing the reconsideration on the basis that it is out of order and requesting the City Attorney to assist the Commission in writing an order tonight confirming the November 14th decision.

In response to Commissioner Henneberry's inquiry, Chair Little stated that she would like to table the issue until the City Council decides about the OGC's authority; she believes that the Commission's decision made last month was under the purview of the Commission, but counsel is saying it is not; she believes the City Council needs to make the decision.

Commissioner Henneberry seconded Commissioner Foreman's motion.

Under discussion, Commissioner Dieter stated that she is uncomfortable with ignoring the people who showed up tonight to speak; the Commission should at least hear speakers; she is also uncomfortable with tabling the item because the implication is it will come back under the same conditions; she would like to continue with the agenda item and allow the citizens to speak; the outcome may be the same, but at least a motion would be made after public comment.

Commissioner Foreman stated the vote on the motion could be done after public comment.

Commissioner Dieter concurred.

In response to Commissioner Dieter's inquiry, Commissioner Foreman stated that he does not want to hear the staff report because it is out of order; he is not opposed to public comment and is adamantly opposed to tabling the matter because it would mean surrendering the Commission's authority.

Commissioner Henneberry stated that he does not see a point in public comment if the staff report is not going to be heard; if the issue has to go back to Council, there will be many opportunities for public comment and there was public comment at the last meeting.

Commissioner Foreman stated if the motion passes, it does not remove the possibility that the City Attorney's office may advise City Council that the Commission did not have the authority and City Council may agree with the determination; while the issue may end tonight at the Commission level, it may not be over.

Chair Little stated as the Sunshine Ordinance is written, she interprets that the Commission had every right to make the November 14th decision; the Commission was advised by the City Attorney that the decision was one the Commission could make; she was surprised to have to the issue return for another meeting; she is unclear why the Commission was told they could make a decision, then three weeks later, the authority is rescinded.

Commissioner Foreman concurred with Commissioner Henneberry; stated as much as he would like to hear public comment, it is out of order; the Commission could move forward after the vote if it does not carry.

Commissioner Henneberry called the question.

Commissioner Dieter requested Commissioner Foreman to restate his motion.

The City Clerk restated Commissioner Foreman's motion to have the City Attorney write an order confirming the Commission's November 14th decision.

Commissioner Foreman stated his motion included dismissing the reconsideration of the matter.

Chair Little inquired whether the motion should also include having the item re-noticed by City Council, to which Commissioner Foreman responded in the affirmative.

Commissioner Foreman stated that he thinks staff report Attachment B would suffice with some changes.

The Interim City Attorney stated Attachment B could be easily word-smithed to carry out what the Commission would like with respect to the matter; further stated that he is not going to agree with Commissioner Foreman's position that the ordinances in question are null and void; the decision will have the effect of providing direction to the Council to have said result come about; as indicated in his memo to the Commission, he does not think the Commission has the legal authority to render a legally adopted ordinance null and void.

Chair Little stated the Commission was told that the timing of their deliberations and delaying the second reading of the ordinances in order for the Commission hearing to take place first did not matter; inquired whether the issue came about because the Commission deliberated on the issue after the second reading of the ordinances.

The Interim City Attorney responded the matter proceeded on November 7th; at the October 16th meeting, the City Attorney advised the City Council that it was appropriate to introduce the ordinance with the amendment in question and that it did comply with the Sunshine Ordinance; Council relied on said advice and made the decision to proceed on November 7th notwithstanding the fact that a complaint had been filed on October 30th; Council adopted the ordinances on November 7th which went into effect on December 6th; it is his understanding that the Commission would like to have the ordinances re-noticed, and the two ordinances would be repealed.

Commissioner Dieter made a friendly amendment to the motion that the Commission affirm its November 7th decision.

Commissioner Foreman stated that is basically his motion; Commissioner Dieter may just be objecting to the first sentence regarding dismissing the matter as out of order; he thinks it is important for the Commission to make the assertion; he is not present to argue whether or not the City Attorney's position of delegation of power is correct; he is here to argue that the Commission's jurisdiction on the matter ended on November 14th.

Commissioner Dieter stated that she is ready to move forward with the vote because she is not persuaded by the City's legal analysis that no grounds exist to revisit the matter; she also believes the Commission does not have the authority to determine whether the ordinance is valid.

On the call for the question, the motion carried by the following voice vote: Ayes: Commissioners Little, Foreman, Dieter, Henneberry – 4. Absent – 1 (Commissioner Schwartz).

In response to Commissioner Foreman's inquiry about drafting the report, the Interim City Attorney stated amending Attachment B of his analysis would be the easiest.

Commissioner Dieter stated that she has two amendments to propose; inquired whether it was important to treat the decision like a legal opinion.

The Interim City Attorney responded he followed the format the Commission has used before; stated the Commission could do something different.

Commissioner Dieter stated if the format is maintained, the entire paragraph on page 8 that starts with “Turning now to the question...” through the three provisions, should be deleted.

In response to the Interim City Attorney’s inquiry about what to do on the next page if the paragraph is deleted, Commissioner Dieter stated the third sentence stating “In order to carry out the decision...” could be deleted.

Chair Little clarified that if the paragraph and three provisions on page 8 are deleted, along with the third sentence on page 9, the Commission would end up with the same decision made on November 14th.

Commissioner Dieter concurred with Chair Little.

Commissioner Foreman stated the Commission has to state the direction; suggested the sentence to read, “In order to carry out the decision, the Commission directs that the ordinances passed on October 16, 2018 are hereby null and void...” and that “the City Council may re-introduce the two ordinances following a properly noticed public hearing...”

Commissioner Henneberry suggested allowing the City Council to do whatever they need to do; the complaint was sustained, the Council should re-notice and re-hear the ordinances.

Chair Little stated that she does not want to allow room for the Council to make the decision; the Commission should make it clear that the Council must to re-notice and re-introduce the ordinances.

Commissioner Henneberry inquired whether that direction was already in the original message to Council, to which Chair Little responded in the affirmative.

Commissioner Henneberry stated instead of rewriting the language, the Commission should just append what the decision was to the end of the report.

Chair Little concurred with Commissioner Henneberry; stated that is what the Commission is trying to do.

The Interim City Attorney stated without waiving his previous arguments, suggested including the amendments as the three provisions rather than deleting them altogether.

Chair Little stated that she would like the language to read, “the Council must re-notice...” and delete the word “consider” as she does not want Council to be able to consider the decision, and rather just be directed to do it.

The Interim City Attorney stated the Commission does not have the authority to direct the Council's action.

Commissioner Foreman stated the Commission has made the ordinances null and void; the Council can choose to re-notice the ordinances if desired; he does not think the Commission should force Council to reconsider.

Commissioner Henneberry stated the Commission's job is done upon Council being informed of the mistake.

The Interim City Attorney reiterated the language revisions to include deleting the word “circumscribed” in the fourth sentence, and having the Commission “directing” rather than “recommending” the following: 1) Ordinances 3227 and 3228 are null and void; and 2) the City Council may consider re-introducing the two ordinances in question following a properly noticed public hearing.

Commissioner Foreman stated the provision regarding the agenda title is not needed and can be deleted.

The Interim City Attorney affirmed Commissioner Foreman's statement.

Commissioner Foreman stated that he would like to make a change to a paragraph on page 8; the last sentence should just read: “the Commission finds that there was a violation of Section 2-91.5, and the complaint is thereby sustained.”

Commissioner Dieter stated that she does not think a full legal opinion is necessary in the future because it could be biased since it promotes a certain viewpoint.

The Interim City Attorney read the amended language and the Commission concurred with the changes.

Commissioner Foreman stated that he was concerned about the Commission being represented by the City Attorney's office in the enforcement proceedings; especially with the particular issue; on October 16th, the Acting City Attorney rendered the opinion that the notice on the agenda was appropriate; then, on November 14th, the Assistant City Attorney argued before the Commission in support of the Acting City Attorney; the Interim

City Attorney is in the middle, should be advising the Commission and has a conflict; further stated the City should consider hiring independent, private counsel to represent the Commission when a complaint is heard.

In response to Commissioner Dieter's inquiry regarding who has authority to request a re-hearing, the Interim City Attorney stated the request could come from a number of different sources; in this case, because the City Attorney's office did not do an accurate job of laying out what the Commission could do, it was incumbent upon the City to provide the information to the Commission and the Council so that the issue could be fully vetted and addressed.

The Commission agreed to hear the public comments.

3-A. Hearing on the Sunshine Ordinance Complaint Filed October 30, 2018 and the November 14, 2018 Open Government Commission Hearing and Decision, Including Scope of Legal Authority of the Open Government Commission to Impose Certain Penalties under the Sunshine Ordinance and Potential Next Steps.

Stated he is satisfied with the outcome of tonight's meeting and does not feel the Commission's decision encroaches on the Council's legislative authority: Richard Bangert, Alameda.

Read the League's letter supporting the Commission's decision: Karen Butter, League of Women Voters.

Thanked the Commission for reaffirming his faith in government: Bill Smith, Alameda.

Commissioner Foreman stated what the Commission did tonight is not an exercise or delegation of legislative power; it is a quasi-judicial function and the same penalty that would have been suffered under the Brown Act.

In response to Chair Little's inquiry regarding calling the question, the City Clerk stated she already called the question and the previous decision was upheld: 4 to 1 with Commissioner Schwartz absent.

3-B. Hearing on Sunshine Ordinance Complaint Filed December 4, 2018. [Withdrawn without prejudice]

COMMISSIONER COMMUNICATIONS

Chair Little thanked Commissioners Foreman and Dieter for their service; stated having them participate in tonight's meeting was important.

ADJOURNMENT

There being no further business, Chair Little adjourned the meeting at 7:49 p.m.

Respectfully submitted,

Lara Weisiger
City Clerk

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