

January 30, 2020

Councilmembers:

Thank you for your service to our amazing City. As a resident, I am grateful for the extraordinary, often-thankless efforts you put into your jobs. With so many things going wrong in our country, I feel blessed every day to be an Alamedan, living in a City that, for the most part, actually works very well! In addition to all the natural beauty of our island and its many great amenities, I especially cherish the diversity and civic-mindedness of our community, and the openness of our City government. I am writing to you today about the latter.

I am the recently-elected Chair of the Open Government Commission, and have served on the Commission since 2017.

Historically, I understand the Commission had a pretty quiet role in our City, but since its inception, it has stood as a backstop to protect public access to information and the right to civic engagement, embodied in our Sunshine Ordinance. I am proud of the mission of this Commission and feel lucky that, suddenly, our Commission has been asked to take on some important matters in protecting the City's governing process.

During my tenure on the Commission, for the first time, and according to the power granted in the Sunshine Ordinance, we nullified ordinances that were not properly noticed before being voted upon. You are all familiar with the issue, but from my perspective, essentially, a very civic-minded community member came forward and established that – if a matter had been clearly noticed, she would have attended and spoken out, but was unable to do so, because the scope of the matter was changed mid-stream and/or unclearly noticed. Ultimately, Council did exactly the right thing, after the Commission nullified the ordinances. Council re-noticed the matters properly, allowing all to speak who may have been interested, and passed the ordinances again. In so doing, Council honored small-“d” democracy and the residents of our very engaged City.

This should have been a great success story for Council, which showed respect for Sunshine Ordinance and the public in its response, a success story for the Commission, which performed its duty ably when finally (after years) called upon to do so, and a success story for the Sunshine Ordinance itself, which says that – at least in Alameda – the fairness of the process, and the openness to the public, matter more than any one ordinance or any one agenda item.

I regret that, instead of seeing this as a success story, the City Attorney's office has reacted by seeking amendments to the Sunshine Ordinance to take away the Commission's authority, having now seen the authority utilized successfully for the first time. The City Attorney tried to obscure what it was doing by couching the amendments as housekeeping-type amendments to a 10 year-old ordinance, but under questioning, it became very clear that the City Attorney's proposed amendments to the Ordinance were triggered specifically by a desire to strip away the Commission's authority, after the City Attorney had resisted having the ordinances nullified from the outset.

Notably, every single Commissioner – appointed by every single Councilmember – had voted to nullify the ordinances. This means that Commissioners appointed by the current Mayor, the former Mayor, and every different political alliance and faction, people in favor of marijuana dispensaries (what the ordinances were about) and opposed to them – all agreed that nullification was the right course. Again, when asked to ratify the current proposed amendments to the Commission, the Commissioners stood with one voice and said “no” to stripping the Commission of its nullification authority over improperly-noticed ordinances. I would urge you to read the excerpts attached of the minutes of our December 18, 2019 public meeting on this point.

In addition to what we said on December 18<sup>th</sup>, I am concerned reading the City Attorney’s legal justifications for the amendments, that they misstate the law. For example, the City Attorney cites *Salmon Trollers Marketing Assn. v. Fuller*, 124 Cal.App.3d 291 (1981), as limiting power to delegate legislative authority. In *Salmon Trollers*, a group of salmon fishermen contended that the code section permitting an unelected/executive-appointed director to impose emergency regulations and close salmon fishing season was an unlawful and unconstitutional delegation of legislative power. The trial court agreed with this position, akin to the position urged by the City Attorney now concerning the Sunshine Ordinance. However, the Court of Appeal *reversed* the trial court, holding that delegation of authority to an unelected/appointed director to close commercial salmon fishing season was *valid and constitutional*. While it is true that the Legislature “may not abdicate its responsibility to resolve the 'truly fundamental issues' by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policies,” (*Salmon Trollers*, 124 Cal.App.3d at 299), “*Where the Legislature has made the fundamental policy decisions and delegated to some other body the task of implementing those policies under adequate safeguards, there is no violation of the doctrine of nondelegability of legislative power.*” *Id.* at 300. As *Salmon Trollers* explained, “delegation by the Legislature is viewed as a positive and beneficial way to implement legislation.” *Id.*

So, the only question is whether delegation to the Open Government Commission of the ability to safeguard notice procedures for the City relates to “fundamental policy decisions” or “adequate safeguards” of the City’s already-adopted fundamental policies, in this case, the Sunshine Ordinance’s policies of transparency and access. Obviously, such delegation relates to the latter. The Open Government Commission took no position on marijuana dispensaries – the ordinances nullified – and ultimately, did not prevent those ordinances from being enacted. The Commission merely stood vigil for the City’s core values respecting open government. City Council should not, now, stray from these values.

Let the Commission help you do your jobs the way you want to do them – with transparency and respect for our City’s democratic process. Please reject the amendments to the Sunshine Ordinance that would strip the Commission of the null-and-void authority.

Bryan Schwartz  
Chair  
City of Alameda Open Government Commission