LARA WEISIGER

From: ps4man@comcast.net
Sent: Tuesday, January 28, 2020 1:58 PM
To: Yibin Shen; Marilyn Ezzy Ashcraft; John Knox White; Malia Vella; Jim Oddie; Tony Daysog
Cc: Eric Levitt; LARA WEISIGER
Subject: Item # 6-E Feb. 4 City Council Agenda-Amendment of Subsections a. and b. of Section 2-93.8 (Penalties) of the Sunshine Ordinance
Attachments: OGCLegalMemo.pdf

Dear City Attorney Shen, Mayor Ashcraft and Council Members:

I am writing in opposition to the above captioned proposed amendment of the Sunshine Ordinance. I am including Mr. Shen as a primary addressee because Council's decision will greatly rely on his legal opinion.

The City Attorney's recommendation to repeal the current enforcement provisions of the Sunshine Ordinance is based entirely on his opinion that they unlawfully delegate legislative authority. The only legal authority that he cites for his position in his staff report are Thompson v. Bd. of Trustees of City of Alameda (1904) 144 Cal. 281 and Salmon Trollers Mktg. Assn. v. Fullerton (1981) 124 Cal. App. 3d 291, 302. Thompson, merely stands for the principal that fundamental legislative authority cannot be delegated, See https://www.courtlistener.com/opinion/3308379/thompson-v-board-of-trustees/ Salmon Trollers, See https://law.justia.com/cases/california/court-of-appeal/3d/124/291.html stands for exactly the opposite proposition for which it is cited! It approves the delegation of legislative authority if "(1) the legislative body retains control over the power to make fundamental policy decisions, and (2) the procedure established for the exercise of delegated power adequately safeguards those affected."

I commend to your reading the attached legal memorandum written by local attorney Cross Creason, and first submitted by me to Council via email on Feb. 12, 2019, specifically all the text starting with the middle of page 2, (Section 1 Delegation of Legislative Power). You will see Salmon Trollers, and several other cases that approve the delegation of legislative authority along with his assertion that the Ordinance easily passes muster under the test set forth in these cases..

However, my view is that the enforcement provisions of the Ordinance are not quasi-legislative, but are quasi-judicial. My conclusion is based upon the enforcement provision of the Brown Act which states in part:

54960.1. (a) The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section.

Thus, the Brown Act gives a complainant substantially the same remedy through the medium of a lawsuit and court order as Sec. 2-93.8 of our Sunshine Ordinance. If the City Attorney is correct in asserting that Sec. 2-93.8 is an unlawful delegation of legislative power, then this Brown Act provision is equally unlawful. A court has no more right to legislate than an administrative agency. However such action by a court is not legislation or repeal of legislation, it is enforcement of a statutory process for enacting legislation. It would be ludicrous to expect a legislative body to police its own due process requirements. That is the traditional role of courts.

Regardless of whether the enforcement provisions are quasi-legislative or quasi-judicial, the City Council in 2011 realized that it would be meaningless to allow City Council police its own legislative process. The original draft of the Ordinance presented to Council by the City Attorney on Oct. 18, 2011 contained a provision that allowed for an appeal of an OGC decision to Council. That provision was fully discussed, roundly rejected and deleted from the Ordinance ***without objection from the City Attorney***. (See the bottom of page 4 through page 6 of the minutes of the Oct. 18, 2011 meeting and pages 11-12 of the Nov. 1, 2011 meeting when the Ordinance was adopted unanimously.) It is important to understand that a "null and void" order from the Commission does not truly repeal the Council action, it merely remands it for a redo which was what occurred with regard to the Cannabis Ordinance in 2019. Those "null and void" ordinances were restored to full effect.

I am hoping that the above will convince the City Attorney that there is nothing unlawful about the current enforcement provisions of the Sunshine Ordinance. However, this still leaves Council with the discretion to determine if the current provisions are good or bad policy. It is notable that the Commission has only once - in its eight-plus years existence - deemed it necessary to exercise its null and void power. This is not a case of an over-used or abused power. There has not been even a whiff that the Commission has done anything in its public, on-the-record meetings other to than faithfully carry out the function assigned it by the City Council in the Sunshine Ordinance.

Obviously, repealing these provisions and rendering them advisory only still leaves a complainant with the remedy of going to court under the Brown Act. In my view the current enforcement provisions of our Sunshine Ordinance have the salutary effect of providing an alternative dispute resolution procedure to both the City and the complainant. Without it a complainant's only remedy is hiring a $400/hour attorney to litigate the matter for the limited purpose of a remand for a redo. This strikes me as a mockery of the goal of the Ordinance "to ensure that the citizens of Alameda have timely access to information, opportunities to address the various legislative bodies prior to decisions being made". AMC Sec. 2-91 I implore you to retain it.

Paul S Foreman

Open Government Commission Meeting - December 17, 2018

The Open Government Commission ("Commission") has been urged to decide that grounds exist to revisit its November 14, 2018, decision, and to accept the City Attorney's December 10, 2018 Report ("Report") which concludes that Sunshine Ordinance's "null and void" remedy is invalid and that, if nothing else, the Commission must exclude that remedy from its revised decision.

Altering the November 14 decision on the basis of the Report's conclusion about the legality of the "null and void" remedy would be problematic in several ways:

1) The Commission may not have the authority to determine the validity of the Sunshine Ordinance. Determining whether the "null and void" remedy expressly provided for in the Sunshine Ordinance is valid under the City Charter, state Constitution, etc., is not an express duty or power of the Commission under the Sunshine Ordinance or Section 2-22 of the Alameda Municipal Code ("AMC") [the Commission's "organic" statute]. The City Attorney's office also does not appear to have been assigned by the City Charter the task of retroactively determining previous City Council enactments to be invalid under the state Constitution, City Charter, etc.

See generally Hand v. Board of Examiners (1977) 66 Cal.App.3d 605, 619–620 ["since the Board of Examiners in Veterinary Medicine is…not an administrative agency of constitutional origin, it may not declare a statute enacted by the Legislature unconstitutional."]; *see also, generally, Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1086 ["when, as here, a public official's authority to act in a particular area derives wholly from statute, the scope of that authority is measured by the terms of the governing statute" and rejecting proposition that public agencies' "duty to follow the law (including the Constitution) includes the implied or inherent authority to refuse to follow an applicable statute whenever the official personally believes the statute to be unconstitutional, even though there has been no judicial determination of the statute's unconstitutionality and despite the existence of the rule that a duly enacted statute is presumed to be constitutional"].

Assuming that the Commission does not have the authority to determine the validity of the Sunshine Ordinance itself, or the remedies expressly provided for in the Ordinance, rescinding the "null and void" portion of the November 14 decision on the grounds of validity would also likely exceed the Commission's authority. *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 48–49 [agency *lacked the authority* to cure a facially unconstitutional statute by refusing to enforce it as written].

2) Assuming that the Commission somehow *does* have the authority to alter its November 14 decision based on a non-judicial determination that the "null and void" remedy expressly provided for by the City Council is invalid/unconstitutional, the Commission should also consider whether the legal analysis on these points is sufficiently developed to serve as a well-considered basis for reversing this duly-constituted body's decision. After all, the null and void remedy has been part of the Sunshine Ordinance since its enactment and was part of the original enactment with the advice of the City Attorney's office. Have there been developments in the law since the Sunshine Ordinance was enacted in 2011 that render the null and void remedy invalid? If so, it is difficult to discern from the Report because it cites to no legal authority. The legal authorities discussed below, at the very least, call into question the conclusion that the "null and void" remedy enacted by the City Council is invalid. It seems also, at the very least, that more than seven days consideration (the short period of time that has passed since the City Attorney's office first revealed its opinion that the "null and void"

remedy enacted by the City Council is invalid) should be given to this question before making it the basis for altering a previous decision of this Commission. Where the question is in doubt, the way to better implement the intent of the City Council and respect its fundamental policy determinations concerning proper noticing of public meetings would be to assume that its Sunshine Ordinance is a valid ordinance.

3. By all accounts, the Commission, and each Commissioner, took its duties under the Sunshine Ordinance seriously and faithfully in hearing and reaching a decision on Serena Chen's complaint on November 14, 2018. As much as the Report hypothesizes about the potential for abuse of a "limitless and unbounded" power granted the Commission – while downplaying both the multiple safeguards against abuse and the very limited nature of the power itself – there is no indication that the Commission abused its authority for political reasons, or at all, in this case. While the City Council has full authority to modify the Sunshine Ordinance, revise standards under it, create carve-outs for certain legislation, or do away with it entirely, the Report makes a debatable case, at best, that what City Council has already enacted is invalid on its face, much less that the Commission's decision on November 14, 2018 in particular was invalid.

None of the herein is meant to argue that the City Council should not undertake to amend the Sunshine Ordinance, if it sees fit. The Report identifies parts of the Sunshine Ordinance that the Council may very well wish to review and consider revising. The Commission, however, should proceed very cautiously before taking action such as altering the November 14 decision on the basis of the Sunshine Ordinance's purported invalidity. That does not seem to be the role assigned to the Commission by the City Council, and one that seems better suited to a court to fulfill.

Attached are copies of some of the authorities discussed herein:

Golightly v. Molina (2014) 229 Cal.App.4th 1501
Kugler v. Yocum (1968) 69 Cal.2d 371
Lockyer v. City and County of San Francisco (2004) 33 Cal.4th 1055
Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859
Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal.App.3d 291
Whitmire v. City of Eureka (1972) 29 Cal.App.3d 28

1. Delegation of Legislative Power

A. General Principles

The Report does not cite to California case law in support of its assertion that "[The Commission] does not have legal authority to order a new first reading under the Sunshine Ordinance via the null-and-void remedy because it would amount to an improper delegation of legislative power". In *Kugler v. Yocum*, the California Supreme Court set forth a basic framework for evaluating the delegation of legislative power:

> 'The power * * * to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it * * *.' (citations omitted). Moreover, the same doctrine precludes delegation of the legislative powers of a city (citations omitted).
>
> Several equally well established principles, however, serve to limit the scope of the doctrine proscribing delegations of legislative power. For example, legislative

> power may properly be delegated if channeled by a sufficient standard. 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislature * * *.' (citations omitted)
>
> A related doctrine holds: 'The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect * * *.' (citations omitted) Similarly, the cases establish that '(w)hile the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.' (citations omitted).
>
> 8 We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that 'truly fundamental issues (will) be resolved by the Legislature' and that a 'grant of authority (is) * * * accompanied by safeguards adequate to prevent its abuse.' * * * * This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to *377 establish an effective mechanism to assure the proper implementation of its policy decisions.

Kugler v. Yocum (1968) 69 Cal.2d 371, 374–377; see also *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1604 ["An unconstitutional delegation of legislative power occurs when the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions. [Citations.] 'This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.']; *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1516.

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B. Delegation of Legislative Powers and Alameda's Sunshine Ordinance

It is not difficult to fit the Sunshine Ordinance, and the Committee's "null and void" remedy provided therein, within *Kugler's* framework for proper delegations of legislative power.

With passage of the Sunshine Ordinance, the ***City Council*** resolved the *"truly fundamental issue"* (*Krugler* at 377) that, "[i]t is government's duty to serve the public, reaching its decisions in full view of the public, except as provided elsewhere in this article" (AMC § 2-90.2(a)) and, as specifically relevant here, that:

> Twelve (12) days before a regular meeting of City Council, and seven (7) days for all other policy bodies, the policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. These time requirements shall apply to posting on the internet. (AMC § 2-91.5(a)).

Enforcement of, and abidance by, that easy to meet noticing standard established by the City Council, moreover, should not impose any real barrier to the Council's ability to make *other fundamental policy decisions*, such as the policy decisions underlying the two ordinances amending the Cannabis Business Regulatory Ordinance and the Land Use Ordinance (Ordinance Nos. 3227 and 3228, respectively) at issue in the complaint.

Kugler also teaches that "*legislative power may properly be delegated if channeled by a sufficient standard. 'It is well settled that the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a* ***rule*** *or* ***standard*** *previously established by the legislature*". That seems to be precisely what the City Council did with the Sunshine Ordinance, in at least two ways relevant here. The City Council did not give the Commission broad discretion to determine when the City government fails to make "its decisions in full view of the public". Instead, it gave the Commission power to determine whether the facts of a particular case constitute a violation of specific ***rules*** *established by the City Council*, including the rule that policy bodies must, within the deadlines set by the Council, "post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting" (AMC § 2-91.5(a)). The Council established not only a specific ***rule*** for the Commission to apply in this case, but also a reasonably specific and detailed ***standard*** for the Commission to apply when determining whether the "meaningful description" element of the rule is satisfied

> b. A description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted with the agenda or, if such documents are of more than one (1) page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours. (AMC § 2-91.5(b))

Those specific City Council-established rules and standards, which the Commission must find were violated before issuing a remedy, are primary "safeguards against its abuse". *Southern Pac. Transp. Co. v. Public Util. Comm'n* (1976) 18 Cal.3d 308, 313, (overruled on other grounds by adoption of Cal. Const. Art. III, § 3.5) [PUC must make various findings before closing railroad crossing was safeguard]. Another safeguard is the very limited duration of *any* remedy the Commission can issue. A null and void remedy issued by the Commission after a noticing violation, for example, has a temporal effect no longer than it takes the policy body to properly re-notice a meeting for consideration of the voided act. That the Commission's meetings and hearings are themselves subject to the Sunshine Ordinance and, therefore, conducted in public with notice, is another safeguard. Another safeguard is the Commission enjoyment of the assistance and guidance of the City Attorney, including at its meeting and hearings. *Salmon Trollers Marketing Assn. v. Fullerton* (1981) 124 Cal.App.3d 291, 295 [adequate safeguards existed on Fish and Game Director's power to temporarily suspend or conform statute statutes to multi-state fishing plan and issue emergency fishing regulations adopted without any public procedures in that they are limited to180 days' duration and submitted to Office of Administrative Law, and must immediately be reported to Legislature].

Mandamus relief is also available from the courts if the Commission were to abuse its discretion and authority under the Sunshine Ordinance. *Scott B. v. Board of Trustees of Orange County High School of Arts* (2013) 217 Cal.App.4th 117, 122-124. Moreover, whether through the Commission's own judgment, or as imposed by a court in a mandamus action, the Sunshine Ordinance on its face does not seem to pose the risk of hyper-technical grounds being used to invalidate City government actions. In the absence of an express command in the Sunshine Ordinance that strict compliance is required, the Commission would be justified in excluding de minimis violations as the basis for a null and void remedy under the Sunshine Ordinance. *People v. Wright,* (1982) 30 Cal. 3d 705, 713 [applicable standards can be implied from the statutory purpose]. In the present case, the Commission hardly seems to have applied the Sunshine Ordinance to use trivial violations as a way to hamstring the City Council and impose its own policy ends. Assuming the noticing violation found by the Commission was a violation of the Sunshine Ordinance, it was not a de minimis violation.

All of the the safeguards described above most likely satisfy the rules set forth in *Kugler* and the cases that have followed.

C. *Whitmire v. City of Eureka* and *Salmon Trollers Marketing Assn. v. Fullerton*

Although the Report cites no case authority, the California case that perhaps comes closest to supporting the argument that the Sunshine Ordinance constitutes an improper delegation of legislative power to the Open Government Commission is the case of *Whitmire v. City of Eureka* (1972) 29 Cal.App.3d 28. However, crucial differences between Alameda's Sunshine Ordinance and the ordinance at issue in *Whitmire* render *Whitmire* very weak authority for opining that the Sunshine Ordinance is invalid.

Whitmire addressed the Firemen's and Policemen's Retirement Fund System of the City of Eureka ('System'), which was established by an ordinance that provided, in relevant part, that "This Ordinance….may be amended in the following manner, to wit: 'That any proposed improvement or amendment shall be voted upon by secret ballot in the Fire Department and Police Department, separately, and the results thereof certified to the City Council. That in the event such proposed amendment shall have passed by a majority vote by each said Fire and Police Department, then if the Council, by a majority vote, shall pass such proposed amendment, the same shall become effective and binding.' *Whitmire* at 30. Between 1960 and 1968, the unfunded liability of the System grew from $1,241,395 to $3,373,841.

The *Whitemire* court, relying on the principles discussed in *Kugler, supra,* held that an ordinance requiring the Eureka City Council to obtain prior approval from fire and police employees before amending the System's enabling ordinance would constitute an unlawful delegation of legislative power.

> As the city points out, none of the recognized exceptions or limitations to the application of the doctrine as set forth by the Supreme Court in *Kugler* are evident in section 16. Section 16 does not limit itself to a delegation of power to determine a fact or state of facts upon which the operation of the ordinance depends; rather, it delegates to a small number of private persons in the employ of the city the Original control of the enactment of laws relating to the administration of the fiscal affairs of the city and provision for maintenance of its fire and police departments and to payment of compensation for services. In effect, if section 16 is interpreted as the Exclusive procedure for amending the

> System, any proposed action by the city council regarding the retirement fund is subject to Approval or veto by the two departments' members**.** Since the power to approve or veto actions of a legislative body is, of course, part of the legislative process, this grant of authority must be accompanied by "safeguards adequate to prevent its abuse" (Kugler, supra, at p. 376, 71 Cal.Rptr. at p. 690, 445 P.2d at p. 306). None exist under appellants' 'exclusive remedy' interpretation, and therefore this section must be declared an unconstitutional delegation of legislative power if interpreted in that manner.

Whitmire at 32–33.

Alameda's Sunshine Ordinance stands in contrast with each aspect of the Eureka ordinance in *Whitmire* that failed the test of a proper delegation of legislative power. The Sunshine Ordinance establishes specific rules and standards the Commission is required to apply when determining whether proper notice was given by a published meeting agenda. By contrast, the Eureka ordinance in *Whitmire* set no standards whatsoever that fire and police employees were required to apply in deciding whether to approve of amendments to the ordinance. In essence, fire and police employees would have been given a veto power over city legislation that they could exercise for *any reason*, including for the very purpose of frustrating the city council's policy decisions.

The "null and void" sanction under Alameda's Sunshine Ordinance does not constitute a "veto" power. It cannot be imposed because the Commission dislikes, on substantive policy grounds, a particular ordinance (as the Governor and some mayors are permitted with the veto power). Instead, it can only be imposed when events – outside of the control of the Commission – occur which violate the specific rules established in the Sunshine Ordinance. Moreover, an obvious and non-burdensome way for the City Council to avoid the null and void remedy – and to make fundamental policy decisions - is to simply not violate the objective noticing rules it established in the Sunshine Ordinance or promptly cure any failure to do so. Thus, even if it were considered a very limited form of "veto" – which it is not – the null and void remedy in the Sunshine Ordinance is confined by specific standards and safeguards against abuse which *Whitmire* found lacking in the Eureka ordinance.

Indeed, the Court of Appeal in *Salmon Trollers Marketing Assn. v. Fullerton,* upheld the delegation by the Legislature of a limited power akin to a "veto" power to the Director of Fish and Game of the State of California. The delegation upheld in *Salmon Trollers* is best characterized as exceeding the power granted the Commission in the Sunshine Ordinance because, among other things, the Director was given the authority to *suspend* the operation of state statutes – with broader discretion – for up to 180 days. Here, the limited power of the Commission has a duration no longer than the *much shorter* period of time it would take the City Council to properly notice

In *Salmon Trollers* the court addressed the Legislature's grant to the Fish and Game Director power to temporarily suspend or conform statute statutes to multi-state fishing plan "if necessary to avoid a substantial adverse impact on the Pacific Fishery Management Council's plan" and issue emergency fishing regulations adopted without any public procedures up to180 days' duration.

> Reviewing sections 7650-7653, it is clear that adequate standards are set forth to guide the Director as he implements the basic policy decision already made by the Legislature. It is legislative judgment that the state shall fully cooperate and assist in the formulation of fishery management plans adopted by the council. A basic

> policy determination has also been made to support the Fishery Management Plan once adopted by the council. This support is to be carried out by the Director, when necessary, by suspending inconsistent statutes or regulations temporarily and adopting consistent regulations effective up to 180 days only. In the meantime, the Legislature clearly intends to consider conforming California statutory law to fishery management plans adopted by the council (Fish & G. Code, s 7653), based on the Director's report to the Legislature as to which statutes should be amended, repealed or adopted. (Fish & G. Code, s 7653.) A lasting and underlying policy decision is that the Legislature has determined to continue state jurisdiction over its fisheries within three miles offshore by avoiding conflict with the Federal **367 Fishery Plan. (Fish & G. Code, s 7652.) These are fundamental policy determinations made by the Legislature and not by the Director of Fish and Game.

Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal.App.3d 291, 300. For the reasons discussed above and don't need to be repeated here, Alameda's Sunshine Ordinance grants more limited authority to the Sunshine Commission, and contains comparable safeguards to those addressed in *Salmon Trollers*.

At the very least, the above-cited cases do not lead to any clear and certain conclusion that the Sunshine Ordinance's null and void remedy is invalid.

2. Alameda City Charter

The Report asserts that "Second, and most significantly, is the null-and-void remedy cannot be applied to the legislative action of a City Council without conflicting with certain provisions of the City's Charter." The Report states, more specifically, that "Under the City's Charter, the Council is vested with all powers of the City and powers vested in city councils. See Article III, Sec. 3-1. Chief among these powers is the power to legislate locally", and that "use of the null-and-void remedy to effectively repeal an ordinance contravenes the Charter's provisions related to local lawmaking."

The Report cites no authority for this reading of the City Charter and it seems mistaken. Nothing in the Charter provisions vesting legislative control in the City Council cited in the Report appear to assert principles more restrictive than the delegation of legislative power doctrine discussed above. Moreover, no express provision of the Charter prohibits the creation of the Open Government Commission or granting it the narrow authority to enforce the notice requirements set forth in the Sunshine Ordinance. As the Report acknowledges, moreover, "the Council also has the authority to vest in officers or boards "powers and duties additional to those set forth in the Charter." See id., at Sec. 3-3." That is what the Council did within its considerable and broad authority to legislate under the Charter:

> A charter constitutes a city's local constitution, and city ordinances stand in the same relationship to a charter as do statutes to the state constitution. (Porter v. City of Riverside (1968) 261 Cal.App.2d 832, 836, 837 (Porter).) Thus, ***the same presumptions favoring the constitutionality of statutes apply to ordinances.*** (Id. at p. 837.) " 'In considering the scope or nature of appellate review in a case [concerning the validity of an ordinance] we must keep in mind the fact that the courts are examining the act of a coordinate branch of the government-the legislative-in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a factfinding body.' " (Ratkovich v. City of San Bruno (1966) 245 Cal.App.2d 870, 879 (Ratkovich).) "Courts have nothing to do

with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties." (Ibid.)

Further, unless expressly limited by its charter, a city council has plenary authority to interpret and implement charter provisions and may exercise all powers not in conflict with the California Constitution. (Miller v. City of Sacramento (1977) 66 Cal.App.3d 863, 867-868 (Miller); Simons v. City of Los Angeles (1976) 63 Cal.App.3d 455, 467-468.) The City Council's action "will be upheld by the courts unless beyond its powers, 'or in its judgment or discretion is being fraudulently or corruptly exercised.' " (Porter, supra, 261 Cal.App.2d at p. 836.) **Thus, a party making a facial challenge to an ordinance, requesting that it be voided, must demonstrate that its provisions " 'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions .' "** (Personal Watercraft Coalition v. Marin County Bd. of Supervisors (2002) 100 Cal.App.4th 129, 137-138 (Personal Watercraft Coalition).) "If reasonable minds might differ as to the reasonableness of the ordinance [citations] or if the reasonableness of the ordinance is fairly debatable [citations], the ordinance must be upheld." (Ratkovich, supra, 245 Cal.App.2d at p. 878.)
Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859, at *2

Alameda's charter provides that its legislative powers are vested in the City Council, and because there is no provision in the charter limiting the authority of the City Council, the City Council had full power to enact ordinances interpreting and implementing [a Charter provision]. (See Miller, supra, 66 Cal.App.3d at pp. 867-868.)

Where a charter provision is ambiguous or susceptible of two or more meanings, the city council, not the court, has the authority to decide issues of interpretation and applicability. (*Porter, supra,* 261 Cal.App.2d at p. 836.)

Matthew v. City of Alameda (Cal. Ct. App., Apr. 19, 2007, No. A113144) 2007 WL 1153859, at *3.

Ordinances enacted by the City Council are presumptively ***valid*** under the City Charter. Because the Charter contains no prohibition against enactments such as the Sunshine Ordinance, it is unlikely it would be found invalid under the Charter.

The argument that "unless cabined in some way, the null-and-void remedy is arguably an end-run around [the referendum] process as well" is not well developed and is doubtful. As discussed above, the remedy is cabined by specific rules, a violation of which must be found before it is imposed. Moreover, the Report cites no authority for its arguable position. One would think that there would be such authority relating to the Brown Act (under which the null and void remedy has existed for over 30 years), which has been heavily litigated and would "arguably" be just as much of a potential "end-run" around the referendum process, which has constitutional status in California. The lack of mention of any such authority indicates that this concern may be misplaced.

3. Miscellaneous Points

a. "when viewed in context, the Sunshine Ordinance's null-and-void remedy is without precedent….. Additionally, as applied here, the null and void remedy is at odds with the Brown Act."

As an initial matter, the second point raises questions about the first. The "null and void" remedy under the Sunshine Ordinance is a remedy under the much older Brown Act and can hardly be called "unprecedented". It may be "unprecedented" at the municipal level in California, but there is no applicable rule of law (derived from the Charter or the state constitution) under which "unprecedented" equates to invalid or illegal. Nor is it correct to label the Sunshine Ordinance "at odds" with the Brown Act, or clear how that invalidates the Sunshine Ordinance.

There is no claim in the Report that the Sunshine Act somehow purports to set lower standards, allow for less public participation, or to relieve City government of any of its duties under the Brown Act. Were that the case, the Sunshine Ordinance would be "at odds with" – and preempted by – the Brown Act. *People v. Nguyen* (2014) 222 Cal.App.4th 1168, 1174 ["If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void."]; *see Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150, 168 ["Ribakoff misperceives the relationship between the Brown Act and the ordinance. Ribakoff's argument that the ordinance must be authorized by the Brown Act evidences a misunderstanding of the fact that the City of Long Beach is a charter city and therefore has plenary power over its municipal affairs, including the police power to adopt ordinances such as LBMC 2.03.140, so long as its actions are not preempted by state or federal law. (Cal. Const., art. XI, §§ 5, 7; see *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1"], as modified (Sept. 13, 2018), reh'g denied (Oct. 3, 2018), review filed (Oct. 23, 2018)

The Report cites no authority for the suggestion that as a matter of constitutional or statutory law that such a null and void determination must be made in the first instance by a court and that it cannot be properly assigned within the *Kugler* framework to an administrative body such as the Commission. Moreover, the decisions of the Commission *are in any event* subject to judicial review in a mandamus action in court.

Lurking in the Report might be the implied argument that if the Sunshine Ordinance requires greater public access or imposes more stringent noticing standards than the Brown Act, it is invalid. It cites no authority for this proposition or the corollary notion that the Brown Act somehow establishes the maximum in terms of public access to which residents of any California city can ever be entitled. And, whatever the strength of the legal argument, it goes contrary to the intent of the City Council: **"In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply." AMC § 2-91.3.**

b. "the null-and-void remedy contradicts the local organic statute that formed the Commission and governs its continued existence"

Although the Commission might consider whether the local organic statute that formed the Commission AMC § 2-22 was intended to repeal the null and void remedy in the Sunshine Ordinance or that the two so inconsistent that they cannot both be enforced or carried out (*see e.g. Burlington N. & Santa Fe Ry. Co. v. Puc* (2003) 112 Cal.App.4th 881, 889), there does not in fact seem to be any contradiction between the two. In fact, the Commission's organic statute was enacted in the same ordinance (Ord. No. 3042, § 4, 1-3-2012) that amended the provisions in the Sunshine Ordinance that named the Commission the primarily regulatory and enforcement body under the Sunshine Ordinance AMC § 2-93.1 ["The primary regulatory and enforcement body of the Sunshine Ordinance shall be the Open Government Commission formed pursuant to Section 2-22 (Open Government Commission) of Article II (Boards and Commissions)"]. Because the *same* ordinance enacted the Commission's organic statute *and* amended the

Sunshine Ordinance, it is highly unlikely that the City Council intended to repeal any part of the Sunshine Ordinance except as explicitly stated in Ord. No. 3042. The Sunshine Ordinance also provides in AMC § 2-93.7, "Sunshine Ordinance Supersedes Other Local Laws. The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply."

Moreover, together, the organic statute and the Sunshine Ordinance direct the Commission to "Hear and decide complaints by any person concerning alleged non-compliance with the Sunshine Ordinance" and "Consider ways to informally resolve those complaints and make recommendations to the Council regarding such complaints" and grant it the power to issue a null and void remedy when the Sunshine Ordinance's noticing rules are violated. Those functions are not mutually exclusive; the Commission is capable of both considering ways to to informally resolve complaints as well as deciding cases and imposing remedies.

The Report's concern that "At a minimum, the Sunshine Ordinance lacks guidelines for assisting the Commission to decide whether to make a recommendation or use the extraordinary null-and-void remedy," does not make the Sunshine Ordinance invalid under the delegation principles discussed above. In some instances, the Commission may able to do both and in other cases a choice between remedies may be dictated by the case presented. A recommendation may be appropriate in some cases, whereas in other cases *not* imposing a null and void remedy would essentially be a judgment validating an underlying noticing violation. That does not lead the conclusion that the Ordinance itself gives unfettered and unconstitutional discretion to the Commission.

Conclusion

Thank you for considering this response to the City Attorney's December 10 Report. Finally, this is not a paid effort. Please excuse any shortcomings in it in light of the fact that it was necessarily prepared during "free time" in the very short time since the City Attorney first made public its opinion that the "null and void" remedy enacted by the City Council is an invalid remedy.