

BEFORE THE OPEN GOVERNMENT COMMISSION
OF THE CITY OF ALAMEDA

In re:
The Complaint of Serena Chen

Serena Chen,
Complainant

The City of Alameda,
Respondent

Case No. 18-02

DECISION OF THE
OPEN GOVERNMENT COMMISSION
OF THE CITY OF ALAMEDA

Originally, the above entitled matter came on for hearing by the Open Government Commission of the City of Alameda under the Sunshine Ordinance of the City of Alameda, Section 2-93.2 (b), Alameda Municipal Code on November 14, 2018, at which time the Commission rendered a decision to sustain the complaint. (All further references to Section numbers are to the Alameda Municipal Code.) At the request of the City Attorney's Office, the Commission held a special meeting on December 17, 2018 to consider a memorandum from the City Attorney's Office and to provide the parties an opportunity to respond.

Facts

In compliance with the Sunshine Ordinance, the City Clerk on October 4, 2018 published the agenda and supporting materials for the City Council's meeting on October 16, 2018. In relevant part, the title for Agenda item 6-G provided that there would be a public hearing to consider the introduction of an ordinance to

amend the Municipal Code in a number of respects concerning cannabis businesses, for example, by adding cannabis retail businesses as conditionally permitted uses in certain zoning districts, by adding two “delivery-only” Cannabis Retail Businesses as a conditionally permitted use in the C-M, Commercial-Manufacturing Zoning District, eliminating the dispersion requirements for “delivery-only” cannabis businesses. The agenda for this item is attached as Exhibit 1.

The City Council conducted a public hearing on these items on October 16, 2018. During the public hearing, Council resolved to include in the amendments a modification to the amendment allowing two “delivery-only” dispensaries, such that these cannabis businesses would be required to offer delivery of cannabis (“delivery required”) and would also be open to the public, in recognition that the State and local requirements for either (“delivery-only” versus “delivery required”) would be the same. Following the close of the public hearing the City Council introduced on first reading an ordinance amending various sections of the Municipal Code concerning cannabis businesses, including that two “delivery required” dispensaries, which would be open to public, be allowed. In response to a question about whether the ordinance could be introduced that evening with the inclusion of the two “delivery required” dispensaries as conditionally permitted uses, the City Attorney advised yes.

On October 30, 2018, Serena Chen timely filed a Sunshine Ordinance Complaint against the Alameda City Council concerning an alleged violation of a public meeting on October 16, 2018, citing a violation of Section 2-91.5, Agenda

Requirements. The complaint states the City Council voted to add two additional cannabis dispensary permits without prior notification. More specifically, the complaint states nowhere in the agenda title or text of the staff report concerning cannabis businesses was there any mention that the number of “full-service marijuana dispensaries” would be increased.

The complaint cites to Section 2-90.1 of the Municipal Code that provides that one of the goals of the Sunshine Ordinance is to ensure that Alameda residents have the opportunity to address the Council prior to a decision being made. The complaint also cites to Section 2-91.5 of the Municipal Code that provides agenda items must contain a meaningful description of each item of business to be transacted and that the description of such items be 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 about the item. A copy of the complaint is attached as Exhibit 2.

In response to the complaint, the City Attorney’s Office emailed Ms. Chen that the ordinance addressed in her complaint was not final (“are being amended”), but would be on the Council’s November 7, 2018 agenda for “second reading”. She was invited to attend and be heard concerning the ordinance amendments, or to submit comments in writing if she could not attend, in addition to being furnished with materials to do so. A copy of that response is attached as Exhibit 3. A copy of the Council’s November 7, 2018 agenda and supporting materials is attached as Exhibit 4.

On November 7, 2018, Ms. Chen appeared, as did other members of the public, at the City Council meeting and addressed the Council concerning the amendments, in addition to emailing written comments prior to the meeting. After discussion, Council adopted the ordinances as presented in the November 7 agenda.

On November 14, 2018, the Commission conducted a hearing on the complaint. After hearing from the complainant and the City, the Commission sustained the complaint and, as provided in the Penalty section of the Sunshine Ordinance, ordered that the Ordinances in question were null and void.

Thereafter, the City Attorney's Office provided a legal memorandum to the Commission that set forth in more detail why there had not been a violation of the Sunshine Ordinance but, assuming there was a violation, that the Commission did not have legal authority to render Ordinances adopted by the City Council as null and void. Rather, if the Commission continued to conclude that there had been a violation of the Sunshine Ordinance, it should recommend to the City Council that the Ordinances be considered for re-introduction following a public hearing and that the adopted Ordinances be repealed.

At the request of the City Attorney's Office, the complaint was returned to the Commission on December 17, 2018 for further consideration in light of the City Attorney's memorandum.

Procedure

Under the Sunshine Ordinance, when an official complaint has been filed, the Open Government Commission, created under the Sunshine Ordinance, hears the complaint and renders a formal written decision. The complainant and the City shall then appear at a hearing. During the hearing, the Open Government Commission considers the evidence and the arguments of the parties before making its decision. Section 2-93.2 (b). The Commission conducted the hearing on November 14, 2018 and considered the evidence and arguments of Ms. Chen and the City. The Commission conducted a further hearing on the complaint on December 17, 2018 for the limited purpose of considering the City Attorney's legal memorandum and providing the parties an opportunity to respond to the legal memorandum.

Discussion

One of the goals of the Sunshine Ordinance is that residents have the opportunity to address the City Council prior to decisions being made. Section 2-90.1, AMC. Here, Ms. Chen had, and took, the opportunity on November 7, 2018, to address the City Council about her concerns about the amendments to the cannabis ordinances prior to the City Council making a final decision on the amendments. Notwithstanding that, for the following reasons, the Commission finds a violation of Section 2-90.1, AMC, but also of Section 2-91.5, AMC.

Concerning the agenda title on October 16, 2018, the title included numerous proposed changes to the cannabis ordinances including the possibility of cannabis retail businesses being conditionally permitted in certain zoning districts, increasing the number of cannabis retail businesses and eliminating the dispersion

requirements for certain cannabis businesses. Despite the breadth of these revisions, a person of average intelligence and education who had concerns about the number of full-service cannabis dispensaries could have considered attending the meeting on October 16 (or sought more information). More specifically as to Ms. Chen's complaint, although it is arguable that the agenda description was meaningful in that it apprised members of the public that there would be an increase in the number of dispensaries that would offer delivery services, the City Council's action fell outside the ambit of that brief, concise description. At a minimum, the difference between the agenda description posted for the October 16, 2018 regular meeting ("delivery only" dispensaries, closed to the public) and the actual action taken by the Council ("delivery required," open to the public) is substantial enough that members of the public may have been confused as to whether or not they should appear to be heard or seek more information. In the end, the Commission finds there was a violation of Section 2-91.5, AMC, and the complaint is hereby sustained.

Turning now to the question of the appropriate penalty and how to give force and effect to Section 2-93.8 that provides that the Commission may order an action taken in violation of Section 2-91.5 "null and void" in light of the Commission's authority to set aside Council legislative action, the Commission directs the following:

1. Ordinance Nos. 3227 and 3228 are null and void.
2. City Council may consider re-introducing the two Ordinances in question following a properly noticed public hearing.

Signatures are on the following page.

Dated: December 17, 2018

Heather Little, Chair

Paul Foreman, Member

Mike Henneberry, Member

Irene Dieter, Member

{ Absent }

Bryan Schwartz, Member