STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 27, 2021

Marni von Wilpert
Councilmember
202 C Street
San Diego, California 92101

Re: Your Request for Advice
Our File No. A-21-114

Dear Ms. Wilpert:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act") and Government Code Section 1090, et seq.[1] Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTIONS

1. May you participate in Council decisions concerning the removal of Proposition B language from the San Diego City Charter and making necessary amendments to the San Diego Municipal Code, given that the result of such actions will be that you will be eligible to participate in the San Diego City Employees' Retirement System ("SDCERS")?

2. May you participate in decisions regarding the Public Employment Relations Board ("PERB") Make-Whole Remedy, given that you may be entitled to benefits from the City as a former member of the San Diego Deputy City Attorneys' Association? Would the conclusion be

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[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

different if you explicitly waive any right to receive a payment from the City under PERB's Make-Whole Remedy?

CONCLUSIONS

1. Yes. You may participate in Council decisions concerning the removal of Proposition B language from the City's Charter and making necessary amendments to the City's Municipal Code because these actions are specifically required as the result of a court order, and are thus ministerial in nature.

2. No. Section 1090 prohibits you from participating in the making of agreements necessary to effectuate the Make-Whole Remedy; however, the "rule of necessity" applies to allow the City to enter into such agreements so long as you do not participate in any manner in this process.

FACTS AS PRESENTED BY REQUESTER

On June 5, 2012, City voters approved Proposition B, a pension reform initiative amending the City's Charter. As a result, employees hired on or after July 20, 2012, other than sworn police officers, are no longer eligible to participate in the City's defined benefit plan, SDCERS, and are only eligible to participate in a defined contribution plan. The City provides post-Proposition B employees and elected officers with their defined contribution plan benefit through the City's Supplemental Pension Savings Plan-H. A defined contribution plan is a retirement program in which each employee has an individual account into which contributions are deposited. Employees direct the investment of their contributions, and a given employee's retirement benefit is determined solely by the balance in his or her account at the time of retirement. In contrast, under a defined benefit plan, like SDCERS, an employee is entitled to a specified monthly benefit for life at retirement. The benefit is based on a formula, which is usually a percentage of salary multiplied by an employee's years of service.

In December 2015, the PERB issued a decision (the "PERB Order") in an unfair labor practice charge filed by certain City recognized employee organizations ("REOs"), ruling that the City had violated the Meyers-Milias-Brown Act ("MMBA") when it failed to meet and confer with the REOs over the language of Proposition B prior to placing it on the June 2012 ballot.

Between January 2016 and March 2019, the matter was adjudicated at both the California Appellate Court and California Supreme Court levels. The California Supreme Court ultimately upheld PERB's determination of an MMBA violation and remanded the matter back to the Court of Appeal for further proceedings to determine the appropriate judicial remedy. *Boling v. Public Employment Relations Board,* 5 Cal. 5th 898 (2018).

On March 25, 2019, the Court of Appeal affirmed the PERB Order with the following modifications: (1) The City must meet and confer with the REOs over the effects of Proposition B; (2) For the time period that ends with the completion of the bargaining process (including the exhaustion of impasse measures, if an impasse occurs), the City must pay the affected current and former employees represented by the REOs the difference between the compensation (including retirement benefits) the employees would have received prior to when Proposition B took effect and the compensation those employees received after Proposition B took effect (the "Make-Whole Remedy"), plus seven percent annual interest on that difference; and (3) The City

must meet and confer at the REOs' request and is precluded from placing a Charter amendment on the ballot that is advanced by the City that affects employee pension benefits and/or other negotiable subjects until the bargaining process is complete.

On January 5, 2021, in a quo warranto proceeding before the Superior Court, the Court conducted a one-day virtual bench trial at the request of all parties and ruled that Proposition B was invalid and awarded costs to the REOs and the City. This judgment is final.

The City must now comply with the Court's order to strike the Proposition B provisions from the Charter and conform the San Diego Municipal Code and any related enactments, accordingly. The City has begun the meet and confer process with the REOs and is providing PERB with status updates.

Your Financial Interest in SDCERS Retirement Benefits and PERB's Make-Whole Remedy

You were elected to the City Council at the November 3, 2020, election and assumed office on December 10, 2020. Prior to that, you were employed as a Deputy City Attorney with the San Diego City Attorney's Office from July 2, 2018, to December 9, 2020. During your employment with the San Diego City Attorney's Office, you were also a member of the San Diego Deputy City Attorneys' Association, one of the REOs subject to PERB's Make-Whole Remedy. While serving as a Councilmember and employed as a Deputy City Attorney, you have been ineligible to participate in SDCERS due to Proposition B, and instead receive retirement benefits through the City's Supplemental Pension Savings Plan - H.

Now that the Superior Court in the *quo warranto* matter has invalidated Proposition B, the Council will be required to take legislative action to remove Proposition B from the Charter, make conforming changes to the San Diego Municipal Code, and approve agreements with the REOs concerning PERB's Make-Whole Remedy. These actions will make you eligible to participate in SDCERS, prospectively. Moreover, as part of PERB's Make-whole Remedy, through Council legislative action you may also be eligible for service credit with SDCERS for the time you were employed by the City, but not eligible to participate in SDCERS due to Proposition B. Finally, Council action may also make you eligible for a payment from the City under PERB's Make-Whole Remedy.

Neither PERB, nor the Court of Appeal clearly define how the Make-Whole Remedy must be calculated. Thus, Council will likely be required to exercise some discretion in determining the methodology for calculating the amount of the Make-Whole Remedy payments.

Since you were elected, the Council has not taken any action concerning current City employees and elected officers affected by Proposition B.

ANALYSIS

Removal of Proposition B Language from the Charter and Amendments to the Municipal Code

Section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official "makes a governmental decision" when the official "authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of the official's agency."

We first examine whether you would be "making a decision" relating to the Council's removal of Proposition B from the Charter, Municipal Code, and related documents responsive to a court-issued judgment requiring those actions.

Pursuant to Regulation 18704(d)(1), an official is not "making or participating in making a government decision" if the official's actions are solely ministerial, secretarial, manual, or clerical. The exception for ministerial decisions is not specifically defined in the Act and has been narrowly construed. (*Torrance* Advice Letter, No. A-94-043.) "Ministerial" actions include those that do not involve discretion as to the results or performance, or are pursuant to a clear objective. (*Id*.)[2] Ministerial actions do not constitute the making or participating in making of a governmental decision because they do not involve any discretion on the part of the official. (See, *Brown* Advice Letter, No. 1-02-026; *Hahn* Advice Letter, No. 1-91-037.)

In regard to the decision involving the removal of Proposition B at issue, you indicate that the City is subject to a court order to strike the Proposition B provisions from the Charter and conform the San Diego Municipal Code and any related enactments. Voting to approve striking the Proposition B provisions from the Charter, where a court has invalidated the language of the proposition, and no substantive discussion occurs as to the action that must be taken, falls into a ministerial class of action. Accordingly, you would not be "making a governmental decision" under the Act when voting to remove the provisions of Proposition B from the charter and conform the municipal code as directed by court order. You are not prohibited from participation in these ministerial decisions under the Act. Because these decisions are not of a contractual nature, Section 1090 is not implicated.

PERB's Make-Whole Remedy

The City employees are eligible for retirement benefits along with other typical employee benefits by virtue of their contractual relationship with the City, which are negotiated as a part of the collective bargaining process. The City will need to negotiate and approve agreements with the REOs concerning PERB's Make-Whole Remedy. A collective bargaining agreement is a "contract" under Section 1090. 89 Ops.Cal.Atty.Gen., 217, 218-219 (206); 69 Ops.Cal.Atty.Gen. 102, 110 (1986). Thus, the decisions related to the Make-Whole Remedy to determine payments and service

[2] Additionally, an action is ministerial, even if it requires considerable expertise and professional skill, if there is no discretion as to the outcome (or at least, no discretion with respect to any part of the result which could influence the governmental decision in question). An example of this would be a complex calculation for which there is a single "right" answer. (*Kaplan* Advice Letter, No. A-82-108.)

credits for Post Proposition B employees and elected officials involve the making of a contract and we must first examine the application of Section 1090 to these decisions.

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id*. at pp. 647-649.)

With respect to the making of a contract, Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call*, supra, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Furthermore, case law and statutory exceptions to Section 1090 make clear that the term "financially interested" must be liberally interpreted. It cannot be interpreted in a restricted and technical manner. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.)

You state that you may be eligible for service credit with SDCERS for the time you were employed by the City and not eligible to participate in SDCERS, and that you may also be entitled to a payment from the City as a former member of the San Diego Deputy City Attorneys' Association. As a former City employee who was not eligible to participate in SDCERS, you are necessarily a member of the class of employees who will be subject to any City agreements that are entered into as a part of the Make-Whole Remedy. Any subsequent or ancillary agreement to waive your right to receive a payment from the City would not change that fact that you are still explicitly within the class of employees subject to these agreements, and thus financially interested.

Remote and Noninterest Exceptions

Section 1091 and 1091.5 establish exceptions to Section 1090 for a financial interest in a contract that is a "remote interest" or "noninterest." If an official's interest is a "remote interest," an

agency may execute a contract if (1) the officer in question discloses his or her financial interest in the contract to the agency, (2) the interest is noted in the agency's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005).) If the official's interest is a "noninterest," an agency may execute the contract and the official is not required to abstain from the decision. Except in limited circumstances, a noninterest does not require any disclosure. (*City of Vernon v. Central Basin Mun. Water Dist*. (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

"Government Salary" Exceptions

Under Section 1091.5(a)(9), a public official is deemed to not be interested in a contract—and therefore may take part in the contracting process—if the official's interest is "[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record." Section 1091.5(a)(9) is applicable where an official has an interest "in whatever indirect or incidental benefits might arise from the simple fact of contracting with or on behalf of one's employer," but does not apply where the contract under consideration would "actually affect a direct change in the [public official's] personal compensation." (99 Ops.Cal.Atty.Gen. 35 (2016); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1083-1084 [Section 1091.5(a)(9) "does not extend further to contracts that . . . most directly affect one's interests by actually altering the terms of one's employment . . . ."].)

Section 1091(b)(13) similarly provides that a public official has only a "remote" interest in a contract—such that the contract may still be entered into without the official's participation—if the official's interest is "[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity." As with Section 1091.5(a)(9), however, the Supreme Court of California has explained that while Section 1091(b)(13) "relaxed the prohibition against contracting in a way that affected one's own department, it did so only so long as the contract in question would not result in personal financial gain." (*Lexin*, *supra*, 47 Cal.4th at p. 1081.)

In 89 Ops.Cal.Atty.Gen., 217 (2006), the Attorney General considered the renegotiation of a collective bargaining agreement between a community college district's governing board and its faculty members that would involve changes in the level of health benefits for faculty members, where one of the governing board members was a retired faculty member and, as such, received health benefits by virtue of having been a faculty member. The Attorney General found no exceptions to Section 1090 that would permit a community college trustee to renegotiate the health benefits of the district employees stating:

> Neither case law nor our own opinions have extended these exceptions to include circumstances where the public official 'has a personal financial interest . . . in the terms of a contract between the governing body and its own employees' (89 Ops.Cal.Atty.Gen, *supra*, at p. 221). The 'government salary' exceptions--both the remote interest exception set forth in Section 1091, subdivision (b)(13), and the noninterest exception set forth in Section 1091.5, subdivision (a)(9) do not apply in circumstances such as these. Both of those provisions allow exceptions from the

> general Section 1090 rule for 'a person receiving salary, per diem, or reimbursement for expenses from a government entity.'

The Attorney General has consistently interpreted these exceptions as encompassing "a public official's employment with another government agency seeking to contract with the legislative body of which the official is a member," thereby permitting, for example, a city to contract with a county sheriff's department for patrol services, despite the fact that a deputy sheriff from that department is a member of that city's council. (83 Ops.Cal.Atty.Gen. 246, 249 (2000).)

In its decision in *Lexin v. Superior Court*, the California Supreme Court expressly endorsed the Attorney General's conclusion on that point:

> [T]he Attorney General considered [in 89 Ops.Cal.Atty.Gen. 217 (2006)] whether a community college district board member could participate in collective bargaining negotiations when his own personal health benefits, as a retired faculty member, were directly tied to those of the faculty with whom the district board would be negotiating. The Attorney General correctly concluded that, notwithstanding section 1091, subdivision (b)(13) and section 1091.5(a)(9), the board member could not. [Citation.] While the retirement health benefits qualified as government salary for purposes of the two provisions, the contract nevertheless created a personal financial interest--the board member's health benefits would rise or fall according to the results of the negotiations. The board member thus faced a 'two masters' problem: as a board member he was obligated to conserve the district's resources, while personally he stood to benefit if the board was lavish in increasing faculty benefits.
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> [The government salary exception] is a defense if one's financial interest in a proposed contract is only the present interest in an existing employment relationship with a first or second party to the proposed contract, and thus an interest in whatever indirect or incidental benefits might arise from the simple fact of contracting with or on behalf of one's employer. It does not extend further to contracts that . . . most directly affect one's interests by actually altering the terms of one's employment; such interests directly implicate the 'two masters' problems section 1090 was designed to eliminate. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050.)

Under Section 1090, you have a financial interest in the decisions concerning the Make-Whole Remedy and no remote or noninterest exception applies.

Rule of Necessity

Despite the Section 1090 prohibitions above, the "rule of necessity" may apply to allow the City to enter into agreements necessary to effectuate the Make-Whole Remedy. In limited circumstances, the rule of necessity has been applied to allow a contract to be formed that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 111 (2005). The California Supreme Court has stated, "[t]he rule of necessity permits a government body to act to carry out its essential

functions if no other entity is competent to do so (*Eldridge v. Sierra View Local Hospital Dist.*, *supra*, 224 Cal.App.3d at pp. 321-322; see *Olson v. Cory* (1980) 27 Cal.3d 532, 537 . . .), but it requires all conflicted members to refrain from any participation. If a quorum is no longer available, the minimum necessary number of conflicted members may participate, with drawing lots or some other impartial method employed to select them. (*Eldridge*, at pp. 322-323.)" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.)

The City must meet and confer with the REOs as a part of the bargaining process and is ultimately responsible for approving contracts concerning employee salary and benefits. Based on these facts, and consistent with applicable law, we therefore conclude that the rule of necessity applies, and the City may enter into the agreements necessary to effectuate the Make-Whole Remedy. However, as discussed above, you must abstain from any participation in the making of those contracts.

Additionally, because the remedy in this situation is for you to abstain from any participation in the approval of such contracts, we do not analyze the conflict of interest further under the Act as the remedy for conflicts under the Act would not differ from the action already required, except to note that you must leave the room during the consideration of any agreements necessary to effectuate the Make-Whole Remedy pursuant to the Act's recusal requirements.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
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