STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

January 20, 2022

Jim McNeill
Assistant City Attorney
1200 Third Avenue, Suite 1620
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-21-138

Dear Mr. McNeill:

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 the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

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 City of San Diego Councilmembers Jennifer Campbell, Sean Elo-Rivera, Joe LaCava, and Stephen Whitburn ("GROUP B"), currently unable to participate in the San Diego City Employees' Retirement System ("SDCERS"), participate in Council decisions concerning the removal of Proposition B language from the San Diego City Charter and make necessary amendments to the San Diego Municipal Code, given that the result of such actions will be that they may be eligible to participate in SDCERS?

---

[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.

2. May Councilmembers Chris Cate, Monica Montgomery Steppe, and Vivian Moreno ("GROUP C"), who currently participate in SDCERS, participate in Council decisions concerning the removal of Proposition B language from the Charter and make necessary amendments to the Municipal Code, considering their decisions will not change the City retirement plans in which they currently participate?

3. May GROUP B Councilmembers participate in decisions regarding PERB's Make-Whole Remedy, given that they are not, and have never been, members of any City recognized employee organizations ("REOs") entitled to a payment or any other benefit under the Make-Whole Remedy?

4. May GROUP C Councilmembers participate in decisions regarding PERB's Make-Whole Remedy, considering their decisions will not entitle them to any payment or benefit under the Make-Whole Remedy?

CONCLUSIONS

1. & 2. Yes. Councilmembers in GROUP B and GROUP C may participate in Council decisions concerning the removal of Proposition B language from the City's Charter and make 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.

3. Yes. As GROUP B Councilmembers are not members of the REOs covered by the PERB Make-Whole Remedy, they do not stand to gain from the remedial measures and thus have no financial interest in the contract under Section 1090. Additionally, GROUP B Councilmembers are not barred from participation under the Act, as these decisions will not have a material financial effect on their personal finances.

4. Yes. As GROUP C Councilmembers are currently members of SDCERS, their interests will not be affected by the PERB Make-Whole Remedy and thus have no financial interest in the contract under Section 1090. Additionally, GROUP C Councilmembers are not barred from participation under the Act, as these decisions will not have a material financial effect on their personal finances.

FACTS AS PRESENTED BY REQUESTER

I. Proposition B and Its Invalidation

On June 5, 2012, City voters approved Proposition B, a pension reform initiative amending the 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, the San Diego City Employees' Retirement System ("SDCERS"), and are only eligible to participate in a defined

contribution plan.[2] 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.

In December 2015, the Public Employment Relations Board 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. (*City of San Diego*, PERB Dec. No. 2464-M (2015).)

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).) The City sought review with the United States Supreme Court, however, it was denied. (*City of San Diego, Cal. v. Public Employment Relations Board*, 139 S. Ct. 1337 (2019).)

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. The REOs requested that the Court of Appeal invalidate Proposition B, however, the court declined to do so, concluding that the question of Proposition B's validity would be more appropriately decided in a separate *quo warranto* proceeding. (*Boling v. Public Employment Relations Board*, 33 Cal. App. 5th 376 (2019).)

On June 25, 2019, the REOs served the California Attorney General with an Application for Leave to Sue in *quo warranto*. The Attorney General granted the REOs' Leave to Sue, and on September 27, 2019, the REOs filed their complaint in Superior Court. The City answered the REOs' complaint agreeing invalidation was appropriate. The REOs stipulated to the proponents of Proposition B entering the case as defendants-in-intervention.

---

[2] Proposition B added several provisions to the Charter, including closing SDCERS to new employees and Councilmembers taking office after July 20, 2012, and requiring a defined contribution plan as an alternative. 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.

On January 5, 2021, the court conducted a one-day virtual bench trial at the request of all parties following the Court's ruling issued on December 18, 2020, denying, without prejudice, the parties' dueling motions for summary judgment. At the conclusion of the trial, the Court ruled that Proposition B was invalid and awarded costs to the REOs and the City. Notice of Entry of Judgment was served on the proponents on February 8, 2021, and the deadline to file a notice of appeal (April 9, 2021) has passed and the 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 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.

II. City Councilmembers' Financial Interest in SDCERS Retirement Benefits and PERB's Make-Whole Remedy

There are nine members of the City Council. You confirmed via email that as Councilmembers they are each employees of the City and receive a salary and benefits. Of these nine, Councilmembers Marni von Wilpert and Raul Campillo (GROUP A) were employed as represented employees after Proposition B's effective date and prior to their election to the City Council.[3]

Of another group of four Councilmembers, one assumed office in December 2018 and the other three assumed office in December 2020 (GROUP B). Like GROUP A, GROUP B Councilmembers are currently ineligible to participate in SDCERS due to Proposition B. They instead receive retirement benefits through the City Supplemental Pension Savings Plan-H. Unlike GROUP A, GROUP B Councilmembers were not employed as represented employees by the City prior to their election. Thus, GROUP B Councilmembers are not entitled to benefit under PERB's Make-Whole Remedy.

Finally, the remaining three Councilmembers were employed by the City prior to July 20, 2012, the effective date of Proposition B (GROUP C). Therefore, GROUP C Councilmembers are also not eligible to benefit under PERB's Make-Whole Remedy, as they were eligible to participate in SDCERS before Proposition B closed the plan to new members. Moreover, because GROUP C Councilmembers were eligible to participate in SDCERS when initially hired, their City retirement benefits were not affected by Proposition B.

The Council has not taken any action concerning current City employees and elected officers affected by Proposition B.

III. Council Actions

A. Removal of Proposition B language from the Charter and Amendments to the Municipal Code

---

[3] Councilmember Wilpert requested advice separately regarding her participation in the decisions, see *Wilpert* Advice Letter, No. A-21-114. You are not seeking advice on behalf of Councilmember Campillo.

It will be necessary for Council to take legislative action to remove Proposition B language from the Charter and make conforming amendments to the Municipal Code.

The result of such action will be that GROUP B Councilmembers (along with approximately 4,000 other current City employees) will be eligible to participate in SDCERS on a prospective basis, including the right to purchase with their own funds SDCERS service credits for the period of time they held office but were excluded from participating in SDCERS.[4]

The results of such action will not affect GROUP C Councilmembers as the changes do nothing to affect the retirement plans in which they currently participate.

B. Application of PERB's Make-Whole Remedy

It is anticipated that Council will need to approve payments to affected employees represented by the REOs under PERB's Make-Whole Remedy. Neither PERB, nor the Court of Appeal, clearly defined 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.

GROUP B Councilmembers will not be entitled to any payment or benefit under PERB's Make-Whole Remedy, given that they are not, and have never been, members of any City REO covered by the Make-Whole Remedy.

GROUP C Councilmembers will not be entitled to any payment or benefit under PERB's Make-Whole Remedy as they are currently members of SDCERS.

ANALYSIS

I. 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

---

[4] You confirmed via email that the opportunity to purchase SDCERS service credits is a consequence of the court order invalidating and requiring removal of the Proposition B language. The City would not be paying any portion of the service credits cost, rather, the purchase would be made by individual Councilmembers, if they so choose, using their own personal funds. The right to purchase service credit for time employed by the City but not participating in SDCERS is already permitted under San Diego Municipal Code (SDMC) section 24.1308. The *quo warranto* judgment requires the Council to take action to open SDCERS for prospective participation for Councilmembers (i.e., remove the previous Charter limitations imposed by Proposition B). Existing SDMC provisions would then allow Councilmembers to purchase service credit for the time they were Councilmembers but not participating in SDCERS due to Proposition B. Council may need to take action to amend SDMC §24.1308 so that it clearly covers affected Prop. B employees and Councilmembers, but the concept of using one's own funds to buy credit for time worked with the City when not covered by SDCERS is currently permitted under the SDMC.

"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 the Councilmembers 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.*)[5] 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, 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, none of the Councilmembers will 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. Thus, the restrictions of the Act barring participation by those who may be financially interested is inapplicable in this instance and Councilmembers in GROUP B and GROUP C may participate.

Additionally, because these decisions are not of a contractual nature, Section 1090 is not implicated.

II. Application of PERB's Make-Whole Remedy

A. Section 1090

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 credits for post-Proposition B employees and elected officials involve the making of a contract and we must 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

---

[5] 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.)

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.) Section 1090 is intended not only to strike at actual impropriety, but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103Cal.App.3d 191, 197.)

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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id*. at pp. 646-649.) 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.)

1. GROUP B Councilmembers

As GROUP B Councilmembers are not members of REOs, they do not have financial interests pertaining to the current PERB Make-Whole Remedy. Put another way, even though these Councilmembers assumed office at a time when they were ineligible to participate in SDCERS due to Proposition B, they are not included in the class of represented employees covered under the PERB Make-Whole Remedy order. Thus, they are not entitled to any benefits under PERB Make-Whole Remedy.

Additionally, there are no facts to indicate that compliance with the Make-Whole Remedy will in any way affect the City's ability to provide the salary and benefits GROUP B Councilmembers currently receive.

With no financial interest in the contract, they are not subject to the restrictions of Section 1090 in regard to these decisions.[6]

2. GROUP C Councilmembers

GROUP C Councilmembers are those who were employed by the City prior to the enactment of Proposition B. As they are currently members of SDCERS, they are not entitled to any benefits from the PERB Make-Whole Remedy. Additionally, there are no facts to indicate that

[6] You also posed a hypothetical whereby the Mayor may decide to bring a matter to the Council asking for a vote to extend the Make-Whole Remedy to elected officials initially hired or taking office after July 20, 2012. Would the GROUP B Councilmembers in this instance have a prohibited conflict of interest? We decline to provide formal advice in response to this question because it is hypothetical and overly broad; additional facts specific to each governmental decision are needed to enable a full and comprehensive analysis. (Regulation 18329(b)(6)(F).)

compliance with the Make-Whole Remedy will in any way affect the City's ability to provide the salary and benefits GROUP C Councilmembers currently receive.

With no financial interest in the contract, they are not subject to the restrictions of Section 1090 in regard to these decisions.

B. The Act

Under Section 87100 of the Act, a "public official at any level of state or local government shall not make, participate in making, or in any way attempt to use the public official's official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest." "A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family," or on certain specified economic interests. (Section 87103.)

A public official has an economic interest in "[a]ny source of income . . . aggregating five hundred dollars ($500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made." (Section 87103(c).) Under the Act, "income" expressly does not include "[s]alary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency . . . ." (Section 82030(b)(2).) Accordingly, none of the Councilmembers have an interest in the City as a source of income for purposes of the Act. However, separate from sources of income, the Councilmembers have an economic interest in their own personal finances.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)." As employees of the City, the Councilmembers have a personal financial interest in their employer.

A governmental decision's reasonably foreseeable financial effect on a public official's financial interest in their personal finances or those of immediate family, also referred to as a "personal financial effect," is material if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of $500 or more in any 12-month period due to the decision. (Regulation 18702.5(a).) A personal financial effect is not material if the decision would affect only the salary, per diem, or reimbursement for expenses the public official or a member of their family receives from a federal, state, or local government agency unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of their immediate family, or to set a salary for the official or a member of their immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position, or when the member of the public official's immediate family member is the only person in the job classification or position. (Regulation 18702.5(b)(1).)

Here, enactment of the Make-Whole Remedy will serve to "make-whole" those individuals who are part of covered REOs for the benefits they were denied during the time Proposition B was in effect. The Make-Whole Remedy will not result in a financial benefit or loss to any Councilmembers in GROUP B as they are not members of REOs. Likewise, GROUP C Councilmembers will not realize a financial benefit or loss, as they are already members of SDCERS and not entitled to payments under the Make-Whole Remedy. Accordingly, to the extent enactment of the Make-Whole Remedy will not result in an increase (or decrease) in salary or benefits for the Councilmembers, these decisions will have no material effect on their personal finances.

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

Sincerely,

Dave Bainbridge
General Counsel

By: Erika M. Boyd
Senior Counsel, Legal Division

EMB:dkv