

1 GEORGE S. CARDONA (SBN 135439)
Interim City Attorney
2 george.cardona@smgov.net
BRANDON D. WARD (SBN 259375)
3 Deputy City Attorney
4 brandon.ward@smgov.net
1685 Main Street, Room 310
5 Santa Monica, California 90401
Telephone: (310) 458-8336
6 Facsimile: (310) 395-6727

7 Attorneys for Defendant
CITY OF SANTA MONICA

*Exempt from filing fee pursuant to
Government Code § 6103*

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **FOR THE COUNTY OF LOS ANGELES**

11 OSCAR DE LA TORRE,
12 Plaintiff,
13 v.
14 CITY OF SANTA MONICA,
15 and DOES 1 through 10, inclusive
16 Defendant.

CASE NO.: 21STCV08597

Assigned to Hon. Richard L. Fruin

**DEFENDANT CITY OF SANTA
MONICA’S NOTICE OF DEMURRER
AND DEMURRER TO PLAINTIFF’S
FIRST AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

*[Request for Judicial Notice and Declaration of
Brandon D. Ward filed concurrently herewith]*

Hearing Date: July 22, 2021
Hearing Time: 9:15 a.m.
Reservation No.: 515396310994

Filing Date: March 4, 20201
Dept.: 15

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE that on July 22, 2021, at 9:15 a.m., or as soon thereafter as the
3 matter may be heard, in Department 15 of the above-entitled Court, located at 111 North Hill
4 Street, Los Angeles, California 90012, Defendant City of Santa Monica (hereinafter “City”) will
5 and hereby does bring a demurrer pursuant to Code Civ. Proc., § 430.10, subd. (e), to the First
6 and Second Causes of Action in the First Amended Complaint (“FAC”) as follows:

7
8 A. Plaintiff’s first cause of action for declaratory relief fails to state facts sufficient to
9 satisfy the elements of the cause of action under the governing law because as a
10 matter of law Plaintiff has a common-law conflict of interest and the City Council was
11 within its authority to disqualify him from participation in the particular matter at issue
12 when he refused to recuse himself.

13 B. Plaintiff’s second cause of action for violation of the Ralph M. Brown Act (“Brown
14 Act”) fails to state facts sufficient to satisfy the elements of the cause of action under
15 the governing law because Plaintiff is not an “interested party” under the Brown Act
16 and did not comply—and did not plead compliance—with the demand or cease and
17 desist prerequisites to bring such a claim.

18 Pursuant to Code Civ. Proc., § 430.41, counsel for City of Santa Monica attempted to
19 meet and confer with counsel for Plaintiff prior to filing the City’s demurrer to the FAC. (See
20 Decl. of Brandon D. Ward In Support of Demurrer.) Counsel for City sent counsel for Plaintiff
21 two requests to meet and confer. (*Id.*) Counsel for Plaintiff responded to the second request
22 stating, “I will review and get back to you this week.” (*Id.*) However, counsel for Plaintiff never
23 followed up with dates and times to meet and confer. (*Id.*) As a result, the City now files its
24 demurrer.

25 This motion is based on this Notice of Demurrer and Demurrer, the accompanying
26 Memorandum of Points and Authorities filed, the Declaration of Brandon D. Ward, the Request
27 for Judicial Notice, the records and pleadings on file herein, any oral argument of counsel, and
28 such other evidence as may be presented at the time of hearing.

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Dated: June 24, 2021

Respectfully submitted,

By: /s/ Brandon D. Ward
Brandon D. Ward
Deputy City Attorney

Attorney for Defendant
City of Santa Monica

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DEFENDANT’S DEMURRER TO PLAINTIFF’S FAC

Pursuant to Code Civ. Proc., §§ 430.10, subd. (e) and 430.50, subd. (a), Defendant City of Santa Monica (“City”) demurs to the Plaintiff’s First and Second Causes of Action on the following grounds:

**DEMURRER TO PLAINTIFF’S FIRST CAUSE OF ACTION
(DECLARATORY RELIEF)**

1. The City generally demurs to the First Cause of Action for declaratory relief on the ground that it fails to state facts sufficient to satisfy the elements of the cause of action under the governing law. (Code Civ. Proc., § 430.10, subd. (e).)

**DEMURRER TO PLAINTIFF’S SECOND CAUSE OF ACTION
(VIOLATION OF THE RALPH M. BROWN ACT)**

2. The City generally demurs to the Second Cause of Action for alleged violation of the Ralph M. Brown Act on the ground that it fails to state facts sufficient to satisfy the elements of the cause of action under the governing law. (Code Civ. Proc., § 430.10, subd. (e).)

WHEREFORE, Defendant City prays that its Demurrer as to the First and Second Causes of Action be sustained without leave to amend and that Plaintiff takes nothing by reason of the First or Second Causes of Action in the FAC.

DATED: June 24, 2021

Respectfully submitted,

By: /s/ Brandon D. Ward
Brandon D. Ward
Deputy City Attorney

Attorney for Defendant
City of Santa Monica

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 For six years, Plaintiff Oscar de la Torre (“Plaintiff” or “Councilmember de la Torre”)
4 substantially assisted in the preparation, filing, trial, and appeal of a lawsuit against the City of
5 Santa Monica (“City”) challenging its at-large election system for City Council under the
6 California Voting Rights Act (the “CVRA Action”). The CVRA Action remains pending. The
7 two named plaintiffs in the action are Maria Loya, Councilmember de la Torre’s wife, and the
8 Pico Neighborhood Association (“PNA”), a neighborhood organization his parents founded and
9 in which Councilmember de la Torre recently served as the chair of the board of directors until
10 resigning shortly after his election to the City Council in November 2020.

11 After taking his City Council seat, Councilmember de la Torre refused to recuse himself
12 from Council discussions and decisions relating to the CVRA Action. Faced with this refusal, on
13 January 26, 2021, the Council determined that Councilmember de la Torre suffered from a
14 common-law conflict and disqualified him from participating as a Councilmember in discussions
15 and decisions relating to the CVRA Action.

16 Councilmember de la Torre’s challenge to his disqualification fails because, as a matter of
17 law, he has a common-law conflict resulting from both his wife’s ongoing status as a plaintiff in
18 the CVRA Action, and the substantial assistance he provided to both his wife and PNA in the
19 preparation, filing, trial, and appeal of the CVRA Action. Common-law conflicts are separate
20 and distinct from financial conflicts under the Political Reform Act and extend to nonfinancial
21 interests. (*Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1171 & fn. 18 (1996); 92
22 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874.) The “temptation to act for personal or private
23 reasons” presents a “potential conflict.” (92 Ops. Cal. Atty. Gen. 19, 2009 WL 129874, *5.)
24 Where the conflict involves a public official’s immediate family member, the law “will not
25 permit” a public official “to place himself in a position in which he may be tempted by his own
26 private interests to disregard those of his principal.” (*Ibid.*) If this temptation exists, there is a
27 conflict requiring “complete abstention” from the matter regardless of whether the public official
28 actually would succumb to this temptation. (*Ibid.*) This ethical principle is fundamental to the

1 integrity of the governmental decision-making process. As a result, the Council had not only the
2 authority but the obligation to disqualify Councilmember de la Torre to protect the integrity of its
3 decision-making with respect to the CVRA Action.

4 Councilmember de la Torre seeks a remedy from this Court, but his Complaint is devoid
5 of facts sufficient to state a cause of action. The allegations he does plead are misstatements that
6 are contrary to judicially-noticeable documents. Ultimately, Councilmember de la Torre cannot
7 refute the undeniable point that, as a matter of law, a common-law conflict exists necessitating his
8 disqualification. For these reasons, Councilmember de la Torre’s claims fail, and this Court
9 should sustain the Demurrer without leave to amend.

10 **II. FACTUAL BACKGROUND**

11 **A. Councilmember de la Torre’s Active Involvement in the CVRA Case**

12 Prior to his November 2020 election to the City Council, Councilmember de la Torre and
13 his wife were instrumental in bringing and advancing litigation against the City that alleged the
14 City’s use of an at-large election system to elect City Council members violates the California
15 Voting Rights Act (“CVRA”). (Compl. ¶¶ 16-23.)

16 The original complaint in the CVRA Action was filed on April 12, 2016 by three
17 plaintiffs: the PNA, Maria Loya (Councilmember de la Torre’s wife), and Advocates for Malibu
18 Public Schools (“AMPS”). (Ex. A.) That complaint alleged that the City’s at-large elections for
19 City Council and the Santa Monica Malibu Unified School District (“SMMUSD”) Board violated
20 both the CVRA and the California Constitution’s Equal Protection Clause. (*Ibid.*) A first amended
21 complaint was filed on February 23, 2017 by Ms. Loya and the PNA; this first amended
22 complaint dropped AMPS as a plaintiff and dropped any claims relating to SMMUSD Board
23 elections. (Ex. B.) The CVRA Action proceeded to trial, judgment, and appeal on the first
24 amended complaint. (Ex. I at p. 113.)

25 At the time the original and first amended complaint were filed in the CVRA Action,
26 Councilmember de la Torre was the co-chair of CVRA Action plaintiff PNA—an organization
27 that his mother and father were involved in founding in 1979. (Ex. D at p. 54; Compl. ¶ 15.) As
28 Councilmember de la Torre would later testify, “we have a long history of family involvement in

1 the [PNA].” (*Id.* at p. 55.) Councilmember de la Torre’s wife, Ms. Loya, is also a member of the
2 PNA board, and his niece, Griselda Garces de la Torre, at one time served as the agent for service
3 of process of the PNA. (*Ibid.*) As recently as his November 2020 campaign for City Council,
4 Mr. de la Torre continued to serve as chair of the PNA board, resigning from that position only
5 after his election to the City Council. (Compl. ¶ 29.)

6 Even before the CVRA Action was filed, Councilmember de la Torre actively
7 collaborated with the CVRA plaintiffs’ attorney, Kevin Shenkman, to develop the claims and
8 litigation strategy in that action. For example, on July 30, 2015, Mr. Shenkman, Councilmember
9 de la Torre, and Ms. Loya participated in a call regarding “progress and potential case.” (Ex. E at
10 p. 64.) A few months later, on September 29, 2015, Mr. Shenkman met with Councilmember de
11 la Torre regarding the “Santa Monica campaign and potential case and outreach to Latino
12 leaders.” (*Id.* at p. 65.) Those discussions continued and, the next month, on October 16, 2015,
13 Mr. Shenkman again met with Councilmember de la Torre and Ms. Loya about, “Santa Monica
14 case and public campaign” and “to discuss initial findings and potential case.” (*Id.* at p. 66.)

15 Councilmember de la Torre’s involvement on behalf of the CVRA plaintiffs only
16 increased after the case was filed. He not only worked with the CVRA plaintiffs’ attorney on
17 deposition outlines and discovery requests, but also frequently consulted with Mr. Shenkman on
18 case strategy and potential resolution. (Ex. E at p.68 [August 9, 2016 meeting regarding
19 deposition investigation, preparation, and general story/theme]; p. 70 [October 14, 2016
20 discussion regarding preparation for councilmember’s deposition]; pp. 72-73 [meetings in
21 December 2016 on discovery].) For example, on January 2, 2018, Councilmember de la Torre
22 and his wife met with Mr. Shenkman to discuss the case, including how to pursue resolution. (*Id.*
23 at p. 74.)

24 When Councilmember de la Torre was deposed in the CVRA Action in May 2018, both in
25 his individual capacity and as the person identified by PNA as most qualified to testify on PNA’s
26 behalf on specified topics, he was defended by Mr. Shenkman, who stated that he represented
27 both PNA and Councilmember de la Torre in his individual capacity. (Ex. C at pp. 44-45; Ex. F
28 at pp. 80-81.) Councilmember de la Torre also testified on the CVRA plaintiffs’ behalf at the trial

1 in the CVRA Action on August 22 and 23, 2018. (Ex. D.) His wife—the other named CVRA
2 plaintiff—also testified at trial and, among other things, explained that Councilmember de la
3 Torre was the representative for the PNA in the CVRA case. (Ex. G at pp. 88-89.)

4 **B. The CVRA Action Remains Pending on Appeal Before the California**
5 **Supreme Court**

6 After extensive post-trial briefing, on February 13, 2019, the trial court issued judgment in
7 favor of the CVRA plaintiffs on both of their causes of action. (Ex. I at p. 114.) Thereafter, the
8 CVRA plaintiffs’ attorneys filed motions seeking approximately \$23 million in attorneys’ fees
9 and costs. (*Ibid*) Pursuant to an agreement between the parties, the City’s response to the fee
10 motion, and the hearings regarding costs and fees have been continued to follow the resolution of
11 proceedings in the Court of Appeal and the California Supreme Court. (*Ibid*.)

12 The City appealed the judgment. On July 9, 2020, the Court of Appeal issued an opinion
13 holding that the City did not violate either the CVRA or the Equal Protection Clause of the
14 California Constitution. (See generally *Pico Neighborhood Assn. v. City of Santa Monica* (2020)
15 265 Cal. Rptr. 3d 530; Ex. I at p. 115.) The Court of Appeal reversed the trial court’s judgment,
16 ordered the CVRA plaintiffs to pay costs to the City, and directed the trial court to enter judgment
17 for the City. (Ex. I at p. 115.)

18 On October 21, 2020, in response to the CVRA plaintiffs’ petition, the California
19 Supreme Court granted review, but only on a limited question relating to the CVRA plaintiffs’
20 claim under the CVRA. (*Ibid*.) The California Supreme Court depublished but did not vacate the
21 Court of Appeal’s opinion, leaving intact its ruling in the City’s favor on the Equal Protection
22 claim. The CVRA plaintiffs filed their opening brief on December 21, 2020, the City filed its
23 answering brief on March 22, 2021, and the CVRA plaintiffs filed their reply brief on May 12,
24 2021. A number of amicus briefs have also been filed; among these is an amicus brief filed June
25 11, 2021 by Councilmember de la Torre in support of the plaintiffs. (Ex. K) Oral argument
26 before the California Supreme Court has not yet been set.

27 **C. de la Torre’s Election to City Council and Subsequent Refusal to Recuse**
28 **Himself from Closed Session Discussions on the CVRA Action**

On November 3, 2020—while still serving as PNA president—de la Torre was elected to

1 serve as a member of the Santa Monica City Council. He took his oath and assumed his duties as
2 a councilmember on December 8, 2020. (Compl. ¶ 5.) In anticipation of closed session meetings
3 to discuss litigation strategy, the City Attorney sought an opinion from the Fair Political Practices
4 Commission (“FPPC”) on whether a financial conflict of interest exists.¹ (Ex. I at p. 116.)

5 On January 26, 2021, the City Council held a special meeting prior to its regular meeting
6 where the sole item for consideration was Councilmember de la Torre’s common-law conflict of
7 interest and disqualification. (Ex. H.) As detailed in the accompanying staff report, the City
8 Attorney recommended that the City Council determine that Councilmember de la Torre
9 maintains a common-law conflict of interest and should therefore be disqualified from
10 participating in or attempting to influence discussions or decisions relating to the CVRA case.
11 (Ex. I. pp. 112-118.) The staff report also explained that the City had posed the question of
12 financial conflict of interest to the FPPC, as of the meeting the FPPC had not returned an opinion,
13 but any decision from the FPPC would not address the common-law conflict of interest issue put
14 before Council at the January 26 meeting. (*Id.* at pp. 115-116.)

15 At the special meeting, the City Council reviewed the staff report, received the City
16 Attorney’s oral report, and heard public comment. (Ex. J.) Councilmember de la Torre also
17 spoke as to why he believed that a conflict of interest does not exist. (*Id.* at pp. 144-145.) When
18 presented by his City Council colleagues with the opportunity to recuse himself prior to a
19 disqualification vote, he chose not to do so. (*Id.* at p. 145.) Councilmember de la Torre was one
20 of only two councilmembers who voted against finding that a common-law conflict of interest
21 exists. One councilmember abstained, and the remaining four voted to determine that
22 Councilmember De la Torre had a common-law conflict of interest and, therefore, would be

23 ¹ The City also sought guidance from the Attorney General on whether Councilmember de la
24 Torre’s prior position as a board member and representative of PNA during the litigation or his
25 wife’s continuing status as a plaintiff in the litigation poses a common-law conflict of interest.
26 (Ex. I at p. 116.) The Attorney General declined to provide advice, indicating that their authority
27 to issue legal opinions is controlled by Gov. Code, § 12519, which limits the issuance of opinions
28 to a “city prosecuting attorney ... relating to criminal matters.” (*Ibid.*) Nevertheless, as a matter
of general guidance and reference, the Attorney General provided the City with a copy of a prior
Attorney General Opinion, 92 Ops.Cal.Atty.Gen. 19 (2009), which discusses the common-law
doctrine and its application in a particular case. (See Section IV.B., *post.*)

1 disqualified from participating in, voting, or attempting to influence discussion or decisions
2 relating to the CVRA case. (*Ibid.*) The City Council proceeded to its regular meeting where it
3 met in closed session, without Councilmember de la Torre, to discuss the CVRA Action.

4 On February 4, 2021, the City Attorney received a response letter from the FPPC.
5 (Compl. Ex. 1.) In its letter, the FPPC stated that Councilmember de la Torre does not appear to
6 have a financial conflict of interest. (*Id.* at p. 1.) The FPPC made clear that it was only providing
7 advice on financial conflicts under the Political Reform Act (“PRA”) and Gov. Code, § 1090, and
8 not other general conflict of interest prohibitions, such as common-law conflict of interest. (*Ibid.*)

9 On March 4, 2021, Councilmember de la Torre filed his Complaint claiming that no
10 conflict of interest exists. He did so in large part by asserting that the FPPC’s letter finding no
11 financial conflict of interest under the PRA or Gov. Code, § 1090 is dispositive. The Complaint
12 made no reference to the common-law conflict of interest.

13 **D. Plaintiff Files First Amended Complaint to Fix Some, But Not All, Fatal**
14 **Flaws in the Complaint**

15 On May 5, 2021, the City filed its demurrer to the Complaint. The City argued, among
16 other things, that although the Complaint referenced Code of Civil Procedure §§ 1085 and 1094.5
17 (traditional and administrative mandamus, respectively), nowhere in the Complaint did Plaintiff
18 assert a cause of action for traditional or administrative mandamus. The Complaint also included
19 a cause of action for injunctive relief, which failed as a matter of law since, “ ... *injunctive* relief
20 is a remedy rather than a standalone cause of action, the demurrer to that claim [is] properly
21 sustained.” (*Granny Purps, Inc. v. County of Santa Cruz* (2020) 53 Cal.App.5th 1, 9 [original
22 italics].)

23 On May 25, 2021, Plaintiff filed his FAC, where he removed references to Code of Civil
24 Procedure §§ 1085 and 1094.5. In doing so, Plaintiff appears to have dropped any claim to relief
25 under traditional or administrative mandamus. Plaintiff also deleted the cause of action for
26 injunctive relief. The FAC, however, fails to address the many other fatal flaws the City listed in
27 its demurrer to the Complaint. Moreover, in recent weeks, Plaintiff has further demonstrated that
28 he has a conflict of interest that precludes his participation as a Councilmember in City

1 discussions and actions regarding the CVRA Action by filing with the California Supreme Court
2 an amicus brief in support of the plaintiffs in the CVRA Action. (Ex. K.) As a result, the City
3 now demurs to the Plaintiff's FAC.

4 III. STANDARD OF REVIEW

5 A demurrer "test[s] the sufficiency of a complaint by raising questions of law," including
6 "whether the complaint states facts sufficient to constitute a cause of action." (*Award Metals,*
7 *Inc. v. Super. Ct.* (1991) 228 Cal.App.3d 1128, 1131.) To survive a demurrer, "a pleading must
8 contain factual allegations supporting the existence of all the essential elements" of the asserted
9 claims. (*Mobley v. L.A. Unified School Dist.* (2001) 90 Cal.App.4th 1221, 1239.) In particular, a
10 court may properly sustain a general demurrer to a declaratory relief action without leave to
11 amend when the controversy presented can be determined as a matter of law. (*California State*
12 *Employees' Assn. v. Flournoy* (1973) 32 Cal.App.3d 219, 240–241.) [REDACTED] And "the defect of a
13 lack of standing to sue makes a complaint subject to general demurrer for failure to state a cause
14 of action." (*Tarr v. Merco Constr. Engineers, Inc.* [REDACTED], 713.) [REDACTED]

15 Although courts "assume the truth of all facts properly pleaded," they need not assume the
16 truth of "contentions, deductions or conclusions of fact or law." (*Cansino v. Bank of America*
17 (2014) 224 Cal.App.4th 1462, 1468.) "[A] complaint otherwise good on its face is subject to
18 demurrer when facts judicially noticed render it defective." (*Evans v. City of Berkeley* (2006) 38
19 Cal.4th 1, 20, citations omitted.) A court "must" "disregard allegations that are contrary to
20 judicially noticed facts and documents." (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th
21 1331, 1337, italics added.) And where the contents of a document not otherwise attached to the
22 complaint "form the basis of the allegations in the complaint, it is essential that [the court]
23 evaluate the complaint by reference to [those] documents." (*Ingram v. Flippo* (1999) 74
24 Cal.App.4th 1280, 1285 & fn.3.)

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IV. ARGUMENT

A. The Declaratory Relief Claim Fails Because Judicially-Noticeable Facts Establish That Plaintiff Has a Common-Law Conflict of Interest Necessitating His Disqualification

The demurrer should be sustained because judicially-noticeable facts—and even Plaintiff’s own allegations—establish that, as a matter of law, Councilmember de la Torre has a common-law conflict of interest and the Council therefore acted properly in disqualifying him from attending closed session when he refused to recuse himself.

Both Councilmember de la Torre’s prior substantial involvement in the CVRA Action, and his wife’s continued involvement as a plaintiff in that action, are the exact types of common-law conflict that are of utmost concern to government entities. California courts have long recognized that a common-law conflict of interest may exist, separate and apart from any conflict posed by disqualifying financial interests within the meaning of Government Code section 1090 or the Political Reform Act. (E.g., *Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51; *Clark, supra*, 48 Cal.App.4th at p. 1171.) As explained over 90 years ago, a “public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.” (*Noble, supra*, 89 Cal.App. at p. 51.) Courts today continue to apply the common-law conflict of interest doctrine. For example, in *Clark*, the court explained that the “common law prohibition on conflicts of interest” “prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties.” (48 Cal.App.4th at p. 1171 [citing 64 Ops.Cal.Atty.Gen. 795 (1981), 1981 WL 126816]; see also, e.g., *Z.A. ex rel. K.A. v. St. Helena Unified School Dist.* (N.D. Cal., Jan. 25, 2010) 2010 WL 370333, at *4 [father’s dual role as a school board member and guardian ad litem “creates an impermissible conflict of interest”].) The court in *Clark* specifically addressed and rejected the argument that the common-law doctrine had been eliminated by statute, explaining that “while the Political Reform Act focuses on financial conflicts of interest, the common law extends to noneconomic conflicts of interest. The common law may be abrogated by express statutory provisions, but that is not the situation here.” (48 Cal.App.4th at p. 1171 fn. 18, citation omitted; see also *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 301

1 [same].)

2 The common-law conflict of interest doctrine has also repeatedly been the subject of
3 opinion letters issued by the Office of the Attorney General (“AG”). The AG’s office has
4 repeatedly opined that if a situation arises where a common-law conflict of interest exists as to a
5 particular transaction, the interested official “is disqualified from participating in any discussions
6 or votes concerning” the particular matter. (88 Ops.Cal.Atty.Gen. 32 (2005), 2005 WL 716501,
7 at *6; see also, e.g., 64 Ops.Cal.Atty.Gen. 795 (1981), 1981 WL 126816, at *2 [“the common law
8 doctrine against conflicts of interest, which prohibits public officials from placing themselves in a
9 position where their private, personal interests may conflict with their official duties, may usually
10 be avoided by complete abstention from any official action with respect to or attempt to influence
11 the transaction”]; 70 Ops.Cal.Atty.Gen. 45 (1987), 1987 WL 247237, at *2 [same].)

12 While the AG’s office declined to issue an opinion in this matter (see fn. 1, *ante*), the
13 AG’s office did direct the City’s attention to a California Attorney General Opinion
14 (92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874), which advised that a common-law conflict
15 of interest existed where the adult non-dependent son of an agency board member who also
16 resided with the board member in the same rented apartment made an application to the agency
17 for a loan. Although no financial conflict of interest existed, that did not preclude its finding of a
18 common-law conflict of interest. As the opinion letter explained, “even if the agency board
19 member cannot be said to have a statutory financial interest in her son’s contract with the agency
20 within the meaning of section 1090 or the Political Reform Act, it is difficult to imagine that the
21 agency member has no private or personal interest in whether her son’s business transactions are
22 successful or not.” (*Id.* at *4.) Thus, the opinion letter concluded that “[i]n our view, the agency
23 board member’s status as the private contracting party’s parent and co-tenant places her in a
24 position where there may be at least a temptation to act for personal or private reasons rather than
25 with ‘disinterested skill, zeal, and diligence’ in the public interest, thereby presenting a potential
26 conflict.” (*Id.* at *5.) As a result, the opinion letter held, “to avoid a conflict between her official
27 and personal interests, the board member should abstain from any official action with regard to
28 the proposed loan agreement and make no attempt to influence the discussions, negotiations, or

1 vote concerning that agreement.” (*Ibid.*)

2 Here, just as it was “difficult to imagine that the agency member has no private or
3 personal interest in whether her son’s business transactions are successful or not” in the 2009
4 Opinion Letter (92 Ops.Cal.Atty.Gen. 19), it is difficult to imagine that Councilmember de la
5 Torre has no private or personal interest in whether the lawsuit brought by his wife and the
6 nonprofit his parents formed and for which until very recently he served as president is
7 successful. Given Councilmember de la Torre’s intimate involvement with every facet of the
8 CVRA Action—strategizing with his wife and the CVRA Action plaintiffs’ counsel on which
9 claims to bring and which discovery to take, providing deposition testimony on an individual
10 basis and as PNA’s person most knowledgeable, serving as PNA’s representative at trial, and
11 providing trial testimony—there can be no question that the Councilmember’s private, personal
12 interests in the CVRA Action may conflict with his official duty to act with disinterested skill,
13 zeal and diligence. That this is the case is clearly demonstrated by his recent filing of an amicus
14 brief supporting the positions taken by PNA and his wife his in this Action, positions directly
15 contrary and adverse to those taken by the City. Whether prior to or after his election to the
16 Council, therefore, Councilmember de la Torre has actively participated in the CVRA Action,
17 taking positions in that Action supporting PNA and his wife and adverse to the City. Permitting
18 Councilmember de la Torre to participate in City discussions and decisions regarding its strategy
19 and positions in this same Action would effectively put him on both sides of the same piece of
20 litigation. This poses a clear conflict. To avoid any such conflict, the City Council acted
21 properly in disqualifying Councilmember de la Torre from attending closed session. And to be
22 clear, though the Council disqualified him from attending closed sessions or participating in
23 decisions regarding the CVRA Action itself, the Council clarified that this does not preclude
24 Councilmember de la Torre from advocating for a change from at-large to district elections, or
25 participating in Council discussions regarding any such proposed change separate and apart from
26 the CVRA Action. In short, Councilmember de la Torre is only excluded from participating in
27 closed session discussions and decisions relating to privileged litigation matters and strategy in
28 the CVRA Action itself. (See *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050, 1058

1 [affirming denial of writ of mandate where councilmember with financial conflict of interest
2 sought access to closed session audio and noting that “council member might use the confidential
3 information to his advantage personally, or he might disclose the information improperly to
4 others interested in the decision”].)

5 Nor is there any merit to Plaintiff’s assertion that the Council did not have the authority to
6 disqualify him when he refused to recuse himself. Pursuant to Section 605 of the City Charter,
7 “All powers of the City shall be vested in the City Council, subject to the provisions of this
8 Charter and to the Constitution of the State of California.” (Ex. L.) One of those inherent—and
9 indeed necessary—powers the City vested in its City Council is to ensure that the procedures
10 which it approves and the actions it takes comply with the law. (See *Simons v. City of Los*
11 *Angeles* (1976) 63 Cal.App.3d 455, 468 [“The power of a charter city over exclusively municipal
12 affairs is all embracing, restricted and limited only by the city’s charter, and free from any
13 interference by the state through the general laws.”]; *ibid.* [“a charter city ‘has plenary powers
14 with respect to municipal affairs not expressly forbidden to it by the state Constitution or the
15 terms of the charter”].) As part of that inherent authority, the City Council has the power to
16 make determinations as to conflicts to ensure that, when the Council considers issues, it is not
17 participating in decisions that violate the law because of a conflict—common law or financial.
18 (See Ex. M at p. 190 [“Every Councilmember is entitled to vote unless disqualified by reason of a
19 conflict of interest.”].) To safeguard against the participation of conflicted members, the City
20 Council was entrusted with determining whether one of its members is disqualified under the
21 common-law conflict of interest doctrine.

22 Finally, any argument by Plaintiff that the FPPC’s opinion letter somehow exonerated him
23 from any conflict—both financial *and* common law—as he suggests in his Complaint (¶¶ 3, 30,
24 31, 41) is plainly wrong. The very first paragraph of the FPPC letter provides that the City
25 Attorney requested advice regarding *financial* conflicts of interest. (Compl. Ex. 1.) To dispel any
26 doubt, the FPPC’s letter expressly states that it is “only providing advice under the [Political
27 Reform] Act and [Gov. Code] Section 1090, not under other general conflict of interest
28 prohibitions such as common law conflict of interest.” (*Ibid.*) And because the statutory

1 provisions on financial conflict of interest do not abrogate the common-law conflict of interest
2 (*Clark, supra*, 48 Cal.App.4th at p. 1171 fn.18), the FPCC letter has no bearing on whether
3 Councilmember de la Torre has a common-law conflict of interest.

4 In sum, this Court should sustain the demurrer because, as a matter of law, Plaintiff has a
5 common-law conflict of interest, and the City Council acted within its power when it disqualified
6 him from attending closed session.

7 **B. The Brown Act Claim Fails Because Plaintiff Lacks Standing, and, in Any**
8 **Event, Plaintiff Failed to Exhaust All Remedies Before Bringing This Claim**

9 The second cause of action alleges that at its January 26 meeting, the City Council
10 violated the Ralph M. Brown Act (“Brown Act”), specifically, Gov. Code, § 54953. (Compl. ¶¶
11 53–57.) Plaintiff lacks standing to bring this claim, and, regardless, the claim fails because
12 Plaintiff failed to exhaust all remedies before bringing this action.

13 To the extent that Plaintiff asserts that he is an “interested person” within the meaning of
14 the Brown Act,² and thus has statutory standing to bring his claim, the court’s ruling in *Holbrook*
15 *v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 forecloses any such argument. In
16 *Holbrook*, two Santa Monica councilmembers filed a petition for writ of mandate and complaint
17 for declaratory relief, alleging that city council meetings that ran beyond 11:00 p.m. violated the
18 federal and State Constitutions, the Brown Act, and the California Occupational Safety and
19 Health Act. In considering who qualifies as “any interested person” under the Brown Act,
20 *Holbrook* held that standing is based on citizenship—precisely the kind of standing that an
21 individual forfeits when he or she becomes a public official. (144 Cal.App.4th at pp. 1256–
22 1257.) *Holbrook* was particularly concerned with a public official’s attempt to use the Brown Act
23 as a method of overturning the legislative acts of his or her colleagues when the dissatisfied
24 public official could not convince them otherwise. “We agree with the Supreme Court that citizen

25 ² Under Gov. Code, § 54960, subdivision (a), “any interested person may commence an action by
26 mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or
27 threatened violations of [the Brown Act] by members of the legislative body...” Similarly, under
28 § 54960.1, subdivision (a), “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 [specified sections of the Brown Act] is null and
void under this section.”

1 standing is not a weapon to put in the hands of dissatisfied public officials seeking a new venue
2 for advocacy; that the courts must not become a body to hear what would amount to legislative
3 appeals; and that permitting this kind of citizen lawsuit would be incompatible with the officials’
4 acceptance of public office and detrimental to the separation of powers.” (*Id.* at p. 1259.)

5 Here, by filing a Brown Act cause of action, Plaintiff attempts to overturn Council’s
6 quasi-legislative act in determining a common-law conflict of interest exists. As *Holbrook* and
7 other case law makes clear, Plaintiff does not qualify as an “interested person” under the Brown
8 Act for this purpose and thus lacks standing to bring this claim.

9 Regardless, Plaintiff’s Brown Act claim fails because he failed to comply with the Brown
10 Act’s demand and cease and desist notification procedures. Plaintiff’s request for a determination
11 that the past action of the Council at the January 26 meeting violated the Brown Act would be
12 subject either to Gov. Code, §§ 54960.2 or 54960.1, both of which set out either demand or cease
13 and desist prerequisites that Plaintiff never satisfied. (Gov. Code, § 54960.1, subs. (a) & (b);
14 § 54960.2, subs. (a)(1), (2).) At no time prior to filing his Complaint did the City receive a
15 demand or cease and desist letter from Plaintiff pursuant to Gov. Code, §§ 54960.2 or 54960.1—
16 nor did Plaintiff plead compliance with such requirements despite having the burden to do so.
17 (*TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 148–149.) This failure
18 alone is a basis to sustain the demurrer.

19 V. CONCLUSION

20 For all the foregoing reasons, this Court should sustain the demurrer without leave to
21 amend.

22 Dated: July 24, 2021

Respectfully submitted,

By: /s/ Brandon D. Ward

Brandon D. Ward

Attorney for Defendant

City of Santa Monica

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PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. My business address is 1685 Main Street, Santa Monica, California 90401.

I hereby state that I electronically filed the foregoing document with the Clerk of the Court for the Superior Court of California, County of Los Angeles through First Legal, our Electronic Filing Service Provider, on **June 24, 2021** described as:

**DEFENDANT CITY OF SANTA MONICA’S NOTICE OF DEMURRER AND
DEMURRER TO PLAINTIFF’S FIRST AMENDED COMPLAINT;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

The above document was sent from e-mail address **bradley.michaud@smgov.net**.

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Email: wtp@tpalawyers.com, wtpesq@gmail.com**

/s/ Bradley C. Michaud
BRADLEY C. MICHAUD



Make a Reservation

OSCAR DE LA TORRE vs CITY OF SANTA MONICA

Case Number: 21STCV08597 Case Type: Civil Unlimited Category: Other Complaint (non-tort/non-complex)
Date Filed: 2021-03-04 Location: Stanley Mosk Courthouse - Department 15

Reservation

Case Name: OSCAR DE LA TORRE vs CITY OF SANTA MONICA	Case Number: 21STCV08597
Type: Demurrer - without Motion to Strike	Status: RESERVED
Filing Party: City of Santa Monica (Defendant)	Location: Stanley Mosk Courthouse - Department 15
Date/Time: 07/22/2021 9:15 AM	Number of Motions: 1
Reservation ID: 515396310994	Confirmation Code: CR-QRPJECVR4XJANGKH8

Fees

Description	Fee	Qty	Amount
Demurrer - without Motion to Strike *** Fees Exempted by Gov Code 6103.1 ***	60.00	1	0.00
TOTAL			\$0.00

Payment

Amount: \$0.00	Type: GOVT_EXEMPT
Account Number: n/a	Authorization: n/a

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21STCV08597

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The Electronic Filing described by the below summary data was reviewed and accepted by the Superior Court of California, County of LOS ANGELES. In order to process the filing, the fee shown was assessed.

Electronic Filing Summary Data

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Submission Number: 21LA03739359

Court Received Date: 06/24/2021

Court Received Time: 3:27 pm

Case Number: 21STCV08597

Case Title: OSCAR DE LA TORRE vs CITY OF SANTA MONICA

Location: Stanley Mosk Courthouse

Case Type: Civil Unlimited

Case Category: Other Complaint (non-tort/non-complex)

Jurisdictional Amount: Over \$25,000

Notice Generated Date: 06/24/2021

Notice Generated Time: 4:00 pm

Documents Electronically Filed/Received**Status**

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Request for Judicial Notice

Accepted

Declaration (name extension)

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