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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OSCAR DE LA TORRE and ELIAS SERNA,

Plaintiffs,

v.

CITY OF SANTA MONICA, and DOES 1 through 10, inclusive

Defendant.

CASE NO.: 21STCV08597

Assigned to Hon. Richard L. Fruin

DEFENDANT CITY OF SANTA MONICA'S REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT

[*Reply in Support of Request for Judicial Notice filed concurrently herewith*]

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I. INTRODUCTION

As Plaintiff Oscar de la Torre ("Plaintiff") would have this Court understand the dispute at issue, the City Council is improperly refusing to allow Plaintiff to participate in any discussions on district-based elections because of his strong opinions on the topic and despite the Fair Political Practices Commission ("FPPC") concluding that he has no financial or any other type of conflict of interest. This is demonstrably false. After holding a public hearing at which the City Council considered a staff report explaining the common-law conflicts of interest doctrine, Plaintiff's own intimate involvement in pending litigation against the City challenging the at-large election system for City Council under the California Voting Rights Act (the "CVRA Action"), and his wife's continuing status as one of the named plaintiffs in the CVRA Action, the City Council determined that Plaintiff had a common-law conflict of interest and, because Plaintiff refused to recuse himself, was disqualified from participating in decisions on or discussions of the CVRA Action. This was the specifically limited extent of the disqualification. At no point did the City Council disqualify or otherwise seek to prevent Plaintiff from advocating as a councilmember for district-based elections. Nor did the FPPC provide any opinion on the common-law conflict of interest, which is a separate and distinct doctrine from the financial conflicts under the Political Reform Act ("PRA") and extends to nonfinancial interests, such as the ones Plaintiff has here. Indeed, the FPPC specifically noted it was not providing any such opinion.

In his Opposition, Plaintiff argues that common-law conflict of interest "arguably" does not exist, even though case law, Attorney General Opinions, and the Fair Political Practices Commission all conclude otherwise. When Plaintiff finally concedes that the common-law conflict of interest doctrine does exist, his argument as to why he does not have a common law conflict with respect to the CVRA Action relies on decisions that bear no similarity to the facts at issue here. As Plaintiffs' own allegations and judicially-noticeable facts establish: Plaintiff is the reason why the CVRA Action was filed by his wife and the Pico Neighborhood Association ("PNA"), a neighborhood organization his parents founded and in which the Plaintiff recently served as the chair of the board of directors. Plaintiff's wife remains a named plaintiff in the CVRA Action, actively litigating this action against the City—this alone supports a common-law conflict. Plaintiff's own extensive

involvement in every facet of the CVRA Action—from serving as the person most knowledgeable deponent and trial representative of PNA and advising on litigation strategy—only underscores that Plaintiff is unable to participate in decisions relating to the CVRA Action with the disinterested skill, zeal, and diligence required of a public officer. There is no litigation context where a person who was, and is still, so intimately involved in an opposing party's case, and with its plaintiffs and counsel, could ever take part in the confidential conversations and case strategy of the defendant. As the authorities cited in the City's Demurrer establish, the City Council acted properly and within its authority in disqualifying Plaintiff due to his common-law conflict of interest. Plaintiff therefore has failed to state a claim for declaratory relief, and the Demurrer should be sustained.

II. ARGUMENT

A. Plaintiff's Declaratory Relief Claim Fails Because He Is Not Entitled to a Declaration That He Has No Common-Law Conflict of Interest or That Only a Judge Can Make Such a Determination

According to Plaintiff, he has stated a declaratory relief claim because there is an actual controversy on whether he has a "disqualifying conflict of interest" and whether the City Council is "empowered to make that determination" and thus this Court need not consider the substance of the City's arguments. (Opp. at p. 6.) But in so arguing, Plaintiff disregards that this Court is empowered to "refuse" to issue a declaration of rights where doing so "is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061; see also, e.g., *Western Homes, Inc. v. Herbert Ketell, Inc.* (1965) 236 Cal.App.2d 142, 146 ["the remedy of declaratory relief is subject to an informed and sensible discretion of the trial judge"].) Applying this principle, the Court of Appeal in *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618, held that the trial court properly sustained a demurrer without leave to amend because the plaintiff failed to sufficiently allege that he was "entitled to a declaration the loan agreement is unconscionable"—a question of law the trial court could properly resolve on demurrer. (See also *id*. at p. 615 ["Once the court determines an 'actual controversy' exists, the court has discretion under Code of Civil Procedure section 1061 to refuse to make a declaration of rights and duties … 'where its declaration or determination is not necessary or proper at the time under all the circumstances.'"]; *Jackson v. Teachers Ins. Co.* (1973) 30 Cal.App.3d 341, 343–344 [demurrer on declaratory relief claim is

proper "when the complaint shows that there is no possible cause of action on the facts alleged"].)

As the City established in its Demurrer, it is neither necessary nor proper for this Court to issue a declaration because it is evident that Plaintiff has a common-law conflict of interest and that the City Council—vested with all powers of the City—had the authority to disqualify Plaintiff when he refused to recuse himself (as he should have done and so avoided this entire dispute). Plaintiff's declaratory relief claim thus fails, and the Demurrer should be sustained.

1. Plaintiff Has Failed to Demonstrate That the Common-Law Conflict of Interest Doctrine is Inapplicable

As explained in the Demurrer, California has long recognized that 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" and that the "law will not permit [a public officer] to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal." (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) This common-law conflict of interest doctrine "'prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties.'" (*Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1171 (1996) [citing 64 Ops.Cal.Atty.Gen. 795 (1981), 1981 WL 126816].) And this common-law doctrine has not been abrogated by the Political Reform Act, which "focuses on financial conflicts of interest, [while] the common law extends to noneconomic conflicts of interest." (*Id.* at p. 1171 fn. 18, citation omitted; see also *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 301 [Government Code section 1090's "overlap with the common law rule is not completed because the statutes are concerned with *financial* conflicts of interest and the common law rule encompassed both financial and nonfinancial interests that could result in divided loyalty."], original italics.)

In response to this clear authority and the judicially-noticeable facts establishing Plaintiff's extensive personal interest in the CVRA Action, Plaintiff's Opposition continues to incorrectly assert (as does his FAC) that the FPPC determined that he has no common-law conflict. (E.g., Opp. at p. 7 ["As the FPPC confirmed, Councilmember De La Torre 'does not have a disqualifying conflict of interest in City Council decisions concerning the [Voting Rights] lawsuit against the

City.'"].) But the FPPC's letter explicitly disclaims providing any analysis of the common-law conflict of interest; as a result, the FPPC's conclusion that Plaintiff does not have a *financial* conflict of interest has no bearing on whether the *common-law* conflict of interest applies. (FAC, Ex 1, p. 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.")[1] Simply put, whether Plaintiff has a *financial* conflict of interest is not at issue. The sole basis for the Council's decision to disqualify Plaintiff from "participating in, voting, or attempting to influence discussion or decisions relation to this litigation *Pico Neighborhood Association and Maria Loya v. City of Santa Monica*" was because "he has a common law conflict of interest." (RJN, Ex. J at p. 145.) As explained in the Demurrer, the common-law conflict of interest decidedly applies because of Plaintiff's own extensive involvement in the CVRA Action and his wife's continued involvement as a named party in that action. (Mem. at pp. 8-11.)

Plaintiff tries to downplay his involvement in the CVRA Action by claiming that he has simply "expressed his desire that one side—the plaintiffs—prevail in the Voting Rights Case so district-based elections are implemented for Santa Monica's City Council" and attempting to draw parallels to *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205. (Opp. at pp. 9-10.) As an initial matter, Plaintiff's attempt to recast himself as merely a strong advocate for district-based elections would require this Court to ignore Plaintiff's own allegations demonstrating that he was the catalyst for PNA and his wife filing the CVRA Action against the City (FAC ¶ 17) as well as the judicially-noticeable facts establishing that Plaintiff served as the representative for PNA in the trial itself, provided both deposition and trial testimony on behalf of PNA, and was intimately involved in all aspects of litigation strategy (and apparently still is, as evidenced by his recent amicus brief). (Mem. at pp. 2-3, 7, 8.) Plaintiff's revisionist history does not withstand scrutiny. More fundamentally, nothing about the Council's disqualification of Plaintiff from participating in privileged, closed-session discussions on the CVRA Action prevents him from continuing to advocate as a councilmember for district-based elections or participating in discussions of whether

[1] Plaintiff's suggestion that the common-law conflict of interest does not exist is further belied by this acknowledgment, which reflects the FPPC's recognition that the common law conflict of interest does exist.

the City should pursue district-based elections. All Council's action did was to disqualify him from "participating in, voting, or attempting to influence discussion or decisions relation to [the *PNA v City*] litigation." (RJN, Ex. J at p. 145.) Such a disqualification therefore raises none of the concerns identified in *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780, which addresses only whether "[c]ampaign statements" "disqualify the candidate from voting on matters which come before him after his election."

Nor can *Breakzone* carry the weight Plaintiff has placed on it. In *Breakzone*, a councilmember filed an appeal of the planning commission's decision to grant a conditional use permit ("CUP") for BreakZone to operate a billiards parlor. (81 Cal.App.4th at p. 1213.) On appeal before the city council, the council granted the appeal and denied the application for the CUP. BreakZone thereafter filed a petition for administrative mandamus, claiming, among other things, that "it was denied a fair hearing" because four councilmembers received campaign contributions from a third party opposed to the CUP and the councilmember that filed the appeal participated in the decision. (*Id* at p. 1220.) As to the receipt of the campaign contributions, the Court of Appeal held that "BreakZone has not made the necessary record to invoke th[e] protections [from the appearance of unfairness], whether they be founded on statute or common law" and thus declined to apply the common-law doctrine. (*Id.* at p. 1212; see also *id.* at p. 1227.)[2] As to the appealing councilmember's involvement, the court explained that a "party seeking to show bias or prejudice on the part of an administrative decision maker [must] prove the same with concrete facts" and that standard was not met because there was "no allegation of prior personal animosity by [the councilmember] and no indication that he had a personal financial interest in the [CUP] application" or a "relationship" to the party making the campaign contributions. (*Id.* at p. 1237, 1238-1239.)

Here, by contrast, there is clear record of a relationship between Plaintiff and *both* parties in the CVRA Action. His parents founded PNA and he recently served as its chair, resigning from this position only after he was elected as a Councilmember. His wife is the other named plaintiff in the CVRA Action. Moreover, as explained above, Plaintiff was intimately involved with crafting the

[2] Thus, contrary to Plaintiff's suggestion, *Breakzone* did not hold that the common-law conflict of interest ceases to exist. Rather, it did not recognize such a claim based on the specific facts before it.

claims and developing the plaintiffs' litigation strategy against the City. (Mem. at pp. 2-3, 7, 8.) Nor does this case arise in the context of council acting in a quasi-adjudicatory capacity. Plaintiff is therefore a far cry from the disinterested councilmember in *Breakzone* who appealed from a planning commission's approval of a permit.

There is also no merit to Plaintiff's contention that he does not have a "personal stake" in the outcome of the CVRA Action because that case does not seek "monetary or other individual relief" and prevailing in that litigation would purportedly benefit all Latino residents in the City. (Opp. at p. 9.) Again, such an argument ignores his and his wife's extensive involvement in the litigation, which, on its own, would lead any reasonable person to question whether he can "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. 50)—the foundation for the common-law conflict of interest doctrine. And taking Plaintiff's argument to its logical conclusion, it would mean that Plaintiff could participate in decisions resolving any litigation brought against the City by a family member so long as that family member seeks only equitable relief. The City is unaware of any case or Attorney General ("AG") Opinion that would endorse such an expansive view, which would eviscerate the common-law doctrine. But even setting that aside, Plaintiff's own allegations demonstrate that he has a personal interest because he contends that, if PNA and his wife were to prevail in the litigation, in which they seek to move to a district system in which one district would be the Pico Neighborhood in which both he and his wife reside, candidates like him and his wife, who both previously ran for and lost a city council race, would benefit because any councilmember would "need the votes of Latinos or Pico Neighborhood residents to win re-election." (FAC ¶¶ 16, 17; RJN Ex. B. at pp. 26–27.) Accordingly, the facts of this case are unlike those in the Attorney General Opinion on which Plaintiff relies, where a councilmember who served on a nonprofit trust created to support operations of a national historical park in the city was permitted to participate in city council discussions on whether to grant a lease to a business that donated to the nonprofit and with which the councilmember was not alleged to have any familial relationship. [3] (88 Ops. Cal.

[3] This AG Opinion also has no application to this case because the interest at issue there was solely financial, and the "common law has been abrogated with respect to the financial interest 'of a noncompensated officer of a nonprofit, tax-exempt corporation....'" (2005 WL 716501, at *7.)

Atty. Gen. 32 (2005), 2005 WL 716501, at *1, 7.)[4]

Rather, the facts of this case bear more similarity to those at issue in the authorities cited by the City where a violation of the common-law doctrine has been found, including both *Clark*, where the councilmember's participation in a project "would have a direct impact on the quality of his own residence" (48 Cal.App.4th at 1173), and the 2009 AG Opinion, where the board member's son who lived with her made an application to the agency for a loan (92 Ops.Cal.Atty.Gen. 19 (2009), 2009 WL 129874, at *1, 4). As in the 2009 AG Opinion, Plaintiff's "status" as the husband of the plaintiff adverse to the City "places [him] in a position where there may be at least a temptation to act for personal or private reasons rather than with 'disinterested skill, zeal, and diligence; in the public interest, thereby presenting a potential conflict." (*Id*. at *5).

2. The City Council Has the Authority to Decide Whether or Not a Conflict of Interest Exists

Plaintiff provides no authority for the principal contention that underlies his request for declaratory relief: that the Court—not the Council—must decide in the first instance whether a common-law conflict of interest exists. That on its own is reason enough to sustain the Demurrer.

As the City explained in its Demurrer, the City's Charter vests in the City Council "[a]ll powers of the City," subject only to the "provisions of this Charter and to the Constitution of the State of California." (Mem. at p. 11.) This power is "all embracing" and provides a charter city, like Santa Monica, "plenary powers with respect to municipal affairs not expressly forbidden to it by the state Constitution or the terms of the charter.'" (*Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 468; *City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 259 [same].)

Plaintiff does not dispute this basic concept; nor could he. Instead, he relies on PRA provisions that have no application to the common-law doctrine and contends that the Council's disqualification intrudes on the "province of the judicial branch." (Opp. at 12.) The notion that the Council lacks authority to act to ensure that the actions it takes comply with the law, and that this authority somehow is reserved only to the judicial branch is preposterous. Indeed, it would grind to a

[4] Plaintiff's argument that he has no personal interest in the CVRA Action is further undermined by his Brown Act claim arguments, in which he contends that he has a "personal stake in the outcome of the relief sought"—participation in discussions on the CVRA Action. (Opp. at p. 14.)

halt any action by a city council where there are disputed legal positions, because, according to Plaintiff, action by council in such circumstances would risk "usurp[ing] the role of the courts." (Opp. at p. 13.) This position is nonsensical and turns the separation of powers doctrine on its head.

A fundamental principle underlying the separation of powers doctrine is that all "'questions of policy and wisdom concerning matters of municipal affairs are for the determination of the legislative governing body of the municipality and not for the courts.'" (*People ex rel. Harris v. Rizzo* (2013) 214 Cal.App.4th 921, 940.) While Plaintiff may challenge the Council's policy and wisdom in court to the extent Plaintiff can show—and he cannot—that the Council's action was unlawful (*ibid.*), the decision whether to disqualify Plaintiff when he refused to recognize the existence of his common-law conflict of interest was a determination properly made by the City Council in the first instance, subject to potential court review. It was not required to postpone action pending a judicial determination in the first instance, just as it is not required to do so in connection with innumerable other situation in which the Council must weigh competing legal positions and then act, again subject to subsequent judicial review if a proper legal challenge is pursued.

B. Plaintiff Has Failed to State a Brown Act Claim

In response to the City's argument that *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, holds that a councilmember like Plaintiff lacks taxpayer-citizen standing to bring a Brown Act claim, Plaintiff relies on *Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, to argue that he has a "personal stake" sufficient to allege standing. But *Galbiso* cannot assist Plaintiff in his argument that he has standing to ensure Brown Act compliance for "future meetings." (Opp. at p. 14.) *Galbiso* expressly held that when a public official files a Brown Act to "ensure compliance with the Brown Act in *future* meetings," the "elected member" "lack[s] standing to maintain such a cause of action." (182 Cal.App.4th at p. 671 [citing *Holbrook, supra,* 144 Cal.App.4th at p. 1257.) Plaintiff therefore lacks standing here.[5]

[5] Plaintiff de la Torre argues that his co-plaintiff Elias Serna has Brown Act standing. But that does not rescue Plaintiff de la Torre's claim—the focus of the City's Demurrer. The City, however, will bring a motion for judgment on the pleadings because Plaintiff Serna's claims fail for similar reasons, including that he has no standing to pursue declaratory relief on common-law conflicts and he has also failed to comply with the Brown Act's cease and desist and cure notice provisions.

Moreover, Plaintiff styles his Opposition to make it appear that the Brown Act claim is solely based on alleged future violations, but the FAC concedes that the January 26 meeting is the basis for the claim and that any alleged future violations would stem from what occurred at the January 26 meeting. As just one example, Plaintiff alleges that "Defendant's threatened closed session meetings of a majority of its city council will, like its January 26, 2021 closed session meeting, violate the Ralph M. Brown Act unless stopped by this Court." (FAC ¶ 55.) As the FAC goes beyond Government Code § 54960 and seeks a determination that the January 26, 2021 action itself violated the Brown Act, such a determination is subject either to Government Code §§ 54960.2 or 54960.1, both of which set out either demand or cease and desist prerequisites that were not satisfied by the Plaintiffs. (Gov. Code, § 54960.1(a) & (b); 54960.2(a)(1), (2).)

"[A] person seeking a writ of mandate and declaratory relief under the Brown Act for an allegedly illegal past practice of a legislative body has the burden to show not only compliance with section 54960.2, subdivision (a)(1), but also the existence of a justiciable controversy, meaning one that is actionable under section 1060 and has not been rendered moot." (*TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 148–149.) *TransparentGov Novato* is clear that compliance with 54960.2, subdivision (a)(1) is a condition precedent to seeking declaratory relief because a government entity must be afforded the opportunity to consider taking curative action. By not submitting a cease and desist letter, a government entity is deprived of such consideration, and a party cannot then rush into court seeking writ relief and declaratory relief. Plaintiff's Brown Act claim fails for this reason as well.

C. This Court May Properly Consider Judicially-Noticeable Facts When Ruling on This Demurrer

Although Plaintiff expressly refers in his FAC to many of the documents over which the City seeks judicial notice[6] and the other documents consist of sworn testimony, declarations, and flings properly subject to judicial notice, Plaintiff seeks to avoid this Court's reliance on any of the facts set out in these documents, labeling them as "alternative facts." But these judicially-noticeable facts are

[6] E.g., FAC ¶¶ 19 [complaint], 33 [city council agenda and staff report], 35 [Charter Section 605]; 36 [public comment, as reflected in minutes]; 37-38 [council's vote, as reflected in minutes].

properly before this Court. Where, as here, the contents of a document not otherwise attached to the complaint "form the basis of the allegations in the complaint, it is essential that [the court] evaluate the complaint by reference to [those] documents." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285 & fn.3.) The Code of Civil Procedure also expressly authorizes the Court to consider judicially-noticeable facts when ruling on a demurrer. (Code Civ. Proc., § 430.30, subd. (a).)

Nor is it correct, as Plaintiff argues, that the Court cannot consider the truth of the matters asserted in the documents subject to judicial notice. On the contrary, and as further explained in the City's concurrently filed reply to the request for judicial notice, "the general rule [is] that judicial notice of a document does not extend to the truthfulness of its contents or the interpretation of statements contained therein, *if those matters are reasonably disputable*." (*Apple Inc. v. Super. Ct*. (2017) 18 Cal.App.5th 222, 241 [affirming trial court properly took judicial notice of existence and contents of SEC filings], italics added.) Accordingly, "whether the fact to be judicially noticed is the document or record itself …, the legal effect of the document …, a fact asserted within the document …, or an act by a government agency, the essential question is whether the fact to be judicially noticed is not reasonably subject to dispute." (*Scott v. JPMorgan Chase Bank, N.A*. (2013) 214 Cal.App.4th 743, 758.) There is no reasonable dispute as to any of the facts set out in the documents presented to this Court for judicial notice on which the City seeks to rely, and thus they may be considered when ruling on the Demurrer.

III. CONCLUSION

For all the foregoing reasons and those stated in the City's Memorandum, this Court should sustain the demurrer without leave to amend.

Dated: July 15, 2021

Respectfully submitted,

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