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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

OSCAR DE LA TORRE and ELIAS SERNA

Plaintiffs,

v.

CITY OF SANTA MONICA and DOES 1 through 10, inclusive

Defendants.

Case No.: 21STCV08597

OPPOSITION TO DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Date: September 30, 2021
Time: 9:15 a.m.
Dept. 15

[Hon. Richard Fruin]

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I. INTRODUCTION

Councilmember de la Torre does not have a conflict of interest, statutory or otherwise, that prevents him from doing what the Santa Monica voters elected him to do – represent them in all city council meetings and decisions, including council decisions concerning *Pico Neighborhood Association v. City of Santa Monica* (the "Voting Rights Case").

To determine whether an elected official has a common law conflict in making decisions concerning an underlying litigation or other dispute, courts evaluate the relief sought in that litigation. If the elected official does not have a "personal" interest in that relief, different than that of any substantial group of constituents, there is no common law conflict. That is true regardless of the elected official's previous involvement in the litigation, or relationship to the named parties in the litigation. The only relief sought in the Voting Rights Case is a change to the method of electing Defendant's city council – a change that would impact all Santa Monica voters, not just Councilmember de la Torre. Defendant fails to identify any personal interest Councilmember de la Torre has in the relief sought through the Voting Rights Case; rather, as alleged in the operative verified complaint, he has none. (SAC ¶¶ 46-49).

When voters disagree with the actions and positions of elected officials, the voters make their voices heard by replacing those officials with candidates who more closely share their views. That is what representative democracy is all about; that is what happened when Mr. de la Torre was elected; and it may not be stifled by a council majority's flawed notion of what constitutes a "common-law conflict."

II. THE ALLEGATIONS OF THE VERIFIED SECOND AMENDED COMPLAINT

Defendant's demurrer is premised not on the facts alleged in Plaintiffs' verified complaint, but rather on its alternative facts under the guise of judicial notice. For the reasons more fully explained in Plaintiffs' Opposition to Defendant's Request for Judicial Notice, those alternative facts are not subject to judicial notice. It is the allegations of the operative complaint that provide the basis for evaluating Defendant's demurrer. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal. App. 4th 1397, 1403, 1406.)

A. Plaintiffs' Advocacy and the Voting Rights Case

For several decades, De La Torre has advocated for the elimination of at-large elections, both in Santa Monica and throughout California, because those elections are well-known to disadvantage minority voters and cause elected officials to be unresponsive, even hostile, to those voters. (SAC ¶¶ 14-18, 26; see also *Thornburg v. Gingles* (1986) 478 U.S. 30, 47 [The U.S. Supreme Court "has long recognized that … at-large voting schemes may operate to minimize or cancel out the voting strength of minorities."]; see also *id*. at 48, fn. 14 [at-large elections also cause elected officials to "ignore [minority] interests without fear of political consequences"].) The California Legislature expressed its disdain for at-large elections, for these very same reasons, by enacting the California Voting Rights Act. ("CVRA", Elec. Code §§ 14025 et seq.)

Beginning around 2015, De La Torre and others, including Plaintiff Elias Serna, focused their efforts on changing the at-large election system employed by Defendant. With their efforts ignored by Defendant, the Pico Neighborhood Association and Maria Loya filed a lawsuit in this Court to compel Defendant to comply with the CVRA. (SAC ¶¶ 18-20.) That case (the "Voting Rights Case"), captioned *Pico Neighborhood Association, et al. v. City of Santa Monica*, LASC Case No. BC616804, was filed in April 2016 and went to trial in August 2018. (SAC ¶ 22.) The Los Angeles Superior Court (Hon. Yvette Palazuelos) entered judgment in favor of the plaintiffs. (SAC ¶ 23). An intermediate appellate court reversed. (SAC ¶ 24). The California Supreme Court granted review and depublished the intermediate appellate court's decision. (Id.) The Voting Rights Case is currently pending in the California Supreme Court. (Id.)

The Voting Rights Case seeks only non-monetary relief – an injunction and declaration from the court. (SAC ¶ 46.) Consistent with the requested relief, the Judgment entered by the Los Angeles Superior Court awards the plaintiffs injunctive and declaratory relief, but no monetary relief. (Id; see also Plaintiffs' Request for Judicial Notice, Exs. A, B.) While the lawyers in the Voting Rights Case are likely entitled to recover their fees and costs, the plaintiffs in that case cannot share in those fees. (See Cal. Rule of Prof. Conduct 1-320); and the Voting Rights Case plaintiffs also need not pay any fees or costs; their attorneys accepted the case *pro bono*. (SAC ¶ 48.)

B. The 2020 Election

De La Torre sought election to Defendant's city council in the November 2020 elections, campaigning on a platform that included an end to the illegal at-large election system and the expensive legal fight to maintain that system. (SAC ¶¶ 27-28.) Like many other voters, Serna supported De La Torre because of De La Torre's strong opposition to at-large elections. (SAC ¶ 28.)

De La Torre and two other opponents of the at-large elections defeated the incumbents, and were sworn into office in December 2020. (SAC ¶ 31).

C. Defendant's City Council Votes to Exclude De La Torre From Council Decisions.

On November 25, 2020, Defendant's interim city attorney, who had actively participated in the defense of the Voting Rights Case, sought advice from the FPPC on whether De La Torre had a conflict of interest that prevented him from participating in council deliberations and decisions regarding the Voting Rights Case. (SAC ¶ 33.) Then, on January 22, 2021, without waiting for a response from the FPPC, the interim city attorney placed an item on the City Council's next meeting agenda, for a council vote to exclude De La Torre from all decisions concerning the Voting Rights Case. (SAC ¶¶ 35-36). Though some city council members expressed a desire to hear from the FPPC, they ultimately did not wait for guidance from the FPPC or any court. Instead, a bare majority (4 of 7), including one councilmember who testified at trial for the defense in the Voting Rights Case, voted to declare that De La Torre has a conflict of interest and to exclude him from all discussions, meetings and decisions concerning the Voting Rights Case. (SAC ¶¶ 22, 37-42.)

D. The FPPC Rules That De La Torre Has No Conflict of Interest, But Defendant Refuses to Revisit Its Exclusion of De La Torre.

On February 4, 2021 the FPPC responded to Defendant's inquiry, and definitively concluded that De La Torre does ***not*** have a conflict of interest that prohibits him from participating in meetings and decisions concerning the Voting Rights Case. (SAC ¶ 34, Ex. A) De La Torre requested that, in light of the FPPC's determination, Defendant reverse its previous action, but Defendant refused, and even refused to allow the matter to be considered by the council. (SAC ¶ 44.)

Plaintiffs maintain that De La Torre does not have a conflict that prevents him from participating in council decisions related to Defendant's election system and the Voting Rights Case.

(SAC ¶¶ 45-49). Specifically, as explained in the SAC, De La Torre has no *personal* interest in the case:

> De La Torre's interest in the outcome of the Voting Rights Case is no different than any other Santa Monica voter. [De La Torre] want[s] Defendant's city council elections to be brought into compliance with the CVRA, as requested by the plaintiffs in the Voting Rights Case … . And, [De La Torre] wants Defendant to stop wasting huge sums of money on a divisive case to fight against the CVRA … .

(SAC ¶ 49; see also id. ¶¶ 45-48)

E. Plaintiffs File This Lawsuit Seeking Declaratory and Injunctive Relief.

Plaintiffs' operative complaint includes two causes of action: 1) for declaratory relief (SAC ¶¶ 51-58); and 2) for threatened violation of the Ralph M. Brown Act (SAC ¶¶ 59-63). In their claim for declaratory relief, Plaintiffs detail the issues of dispute between Plaintiffs and Defendant – most importantly that Defendant asserts Councilmember De La Torre has a conflict of interest that entitles it to exclude him from council decisions concerning the Voting Rights Case, and Plaintiffs disagree. (SAC ¶¶ 52-53.) And, in their claim for threatened violation of the Brown Act, the SAC explains that the Brown Act generally requires all council meetings be open to the public, with limited specified exceptions. (SAC ¶ 60.) The only one of those exceptions potentially applicable here – "hold[ing] a closed session to confer [regarding] pending litigation" – does not permit a closed session accessible to just a majority of the members of a council rather than all the members. (Id.) By proclaiming it will exclude De La Torre from future closed session meetings, Defendant threatens to violate the Brown Act. (SAC ¶¶ 61-63.)

III. COUNCILMEMBER DE LA TORRE HAS NO CONFLICT OF INTEREST

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." (SAC, Ex. A at pp. 4, 6.) While Defendant argues the FPPC limited its analysis to California's statutory framework governing conflicts of interest, that analysis applies equally to the "common law doctrine" of conflicts of interest as well. Just like De La Torre does not have a financial interest in the Voting Rights Case, as the FPPC explained, because none of the relief sought in that case could result in a financial benefit to De La Torre or his family, De La Torre also does not have a "personal" interest

because the relief sought in the Voting Rights Case would confer the same benefit on tens of thousands of Santa Monica voters as De La Torre.[1]

A. The Law of Conflicts of Interest for Elected Officials

California's law concerning conflicts of interest for elected officials is addressed by two statutes – the Political Reform Act ("PRA", Gov't Code §§ 81000-91014) and Section 1090 et seq. of the Government Code ("Section 1090"). To the extent it has not been abrogated by those two statutes, there also remains a common law prohibition on conflicts of interest. (See 88 Ops.Cal.Atty.Gen. 32 (2005), at p. 9 ["Since the Legislature has, in effect, authorized the lease agreement under this 'noninterest' exception, the common law prohibition may not be applied in a manner inconsistent with this statute."].) Here, Defendant does not contend De La Torre has a conflict under either statute; indeed, the FPPC conclusively and convincingly explained that he does not. (SAC ¶ 34, Ex. A.) Rather, Defendant relies exclusively on the common law doctrine.

Particularly because an unduly broad view of the "common law doctrine" could prevent public officials from doing what they were elected to do, the courts are reluctant to find a conflict of interest under the common law doctrine where no conflict exists under the PRA or Section 1090. (See *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1233 [declining to find a conflict of interest at common law where conflict of interest statutes had not been violated – "We continue to be cautious in finding common law conflicts of interest … We reject the application of the doctrine in this case, assuming, arguendo, it exists."].)

"While common law conflicts may sometimes arise in the absence of a financial interest, there still must be some personal advantage or disadvantage at stake" that is different than the interest of a group of constituents generally. (88 Ops.Cal.Atty.Gen. 32 (2005) at pp. 8-9.) If an elected official does not have "some personal advantage or disadvantage at stake" that is different than the interest of a group of constituents, there is no conflict of interest, even if the elected official is heavily involved in, or supportive of, one side of litigation. (Id; see also *BreakZone,* 81 Cal.App.4th at 1208-1209,

[1] In contrast, De La Torre does have a personal interest in being permitted to carry out the duties he was elected to perform, including participating in all city council decisions; that relief is unique to De La Torre. That does not, however, mean that De La Torre has a personal interest in the Voting Rights Case which seeks relief for tens of thousands of Santa Monica voters.

1213-1214, 1231-1239 [finding no common law conflict, even where Torrance councilmember participated in council's decision on *his own* appeal, because councilmember had no peculiarly personal interest in the relief sought through his appeal].)

Where the question of a common law conflict arises in connection with an underlying litigation or other dispute where an elected official may have some decision-making role, the existence of a personal interest is determined by evaluating the relief sought in the underlying dispute. (See, e.g., *BreakZone,* 81 Cal.App.4th at 1238-1239 [finding no common law conflict because the approval or denial of the conditional use permit would affect all of the pool hall's neighbors, not just the councilmember].) Where an official has a personal interest, different than the interest of other constituents, in the relief sought, he may have a conflict of interest; where he does not have such a personal interest in the requested relief, he does not have a conflict of interest. (See *id*., at 1238-1239 distinguishing *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1172-1173 [finding common law conflict because councilmember "stood to benefit personally by voting against the [condominium] project" since that project was one block from his residence and would block "his ocean view," but noting that no conflict prevents the councilmember from participating in council decisions regarding "the height of new construction" generally because that is a "subject[] of community concern" that affects a large group of constituents, not just the councilmember].) That is true regardless of whether the official has expressed a position different than that previously taken by the political subdivision through its governing board or other commission. (Cf. *BreakZone*, 81 Cal.App.4th at 1208-1209 [no conflict of interest where council member expresses a position contrary to determination by the City's planning commission].) A contrary rule would stifle dissenting voices and prevent the electorate from changing the direction of their local government through elections. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 781-782 [disapproving of disqualification of three city council members based on their expression of a view contrary to that of the former city council].)

B. Councilmember De La Torre Does Not Have a *Personal* Interest in the Relief Sought in the Voting Rights Case.

De La Torre simply does not have any "personal stake – financial or otherwise" in the relief sought in the Voting Rights Case. (88 Ops.Cal.Atty.Gen. 32 (2005) at p. 8, citing *BreakZone*, 81 Cal.App.4th at 1232-33).[2] On the contrary, if the plaintiffs prevail in the Voting Rights Case, Defendant's city council elections will be district-based, and the votes of thousands of Santa Monica residents will no longer be unlawfully diluted; De La Torre will receive nothing more than those thousands of other residents of Santa Monica – an undiluted vote in a fair and lawful election. (See SAC ¶¶ 46-49) The relief granted by the Los Angeles Superior Court in the Voting Rights Case (now pending appeal) confirms this fact. (See Pls. Req. for Jud. Notice, Exs. A, B.) And, while De La Torre may run for re-election and the method of election might impact his prospects, the same is also true for all other councilmembers and potential candidates – i.e. every registered voter residing in Santa Monica.

Defendant fails to identify any aspect of the relief sought in the Voting Rights Case that would peculiarly benefit De La Torre differently than thousands of other Santa Monica voters. Rather, Defendant seeks to distract this Court from the proper analysis – an evaluation of the relief sought in the Voting Rights Case – by focusing on De La Torre's past involvement in the prosecution of the Voting Rights Case and his relationships with the plaintiffs in that case. De La Torre's past involvement in the Voting Rights Case (which Defendant goes outside the pleadings to demonstrate) and his relationships with the plaintiffs in that case, is no substitute for showing a personal interest in the relief sought in the underlying case. Even where a councilmember is himself one of the litigants, he has no conflict in making decisions for the city concerning the litigation if a significant portion of

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[2] The FPPC has already concluded "neither the [PRA] nor Section 1090 prohibits Councilmember de la Torre from participating in governmental decisions relating to the [Voting Rights Case], including a potential settlement agreement, where his spouse is a named plaintiff. … Neither [Councilmember de la Torre] nor his spouse has any financial interest, direct or indirect in the outcome of the [Voting Rights Case], including any future settlement agreement. There is no obligation on the part of him or his spouse to pay any attorneys' fees or costs in connection with the litigation, and no arrangement under which any portion of any recovery from the City of attorneys' fees or costs would flow to him or his spouse." (SAC, Ex. A at pp. 2, 5).

the public has a similar interest in the relief sought through the litigation as the councilmember, i.e. the councilmember's interest is not "personal." (See *BreakZone,* 81 Cal.App.4th at at 1208-1209, 1213-1214, 1233-1241 [finding no common law conflict despite the councilmember himself being a party to the underlying dispute he decided as a member of the city council].)

In many types of cases, the plaintiffs necessarily have a personal interest. In a personal injury or wrongful termination case, for example, if the plaintiff prevails he receives money – unquestionably a benefit personal to the plaintiff. Even in some cases seeking non-monetary relief, such as a property-line dispute or a case seeking to abate a private nuisance, the relief may be personal to the plaintiffs. But cases brought under the CVRA, such as the Voting Rights Case here, are different. The relief available in CVRA cases is limited to remedying an unlawful election system. (See Elec. Code 14029 ["Upon a finding of a violation of [the CVRA], the court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."].) All voters have an equal interest in that relief, as recognized by the CVRA's standing provision, Elections Code section 14032: "***Any voter*** who is a member of a protected class and who resides in a political subdivision where a violation of [the CVRA] is alleged may file an action …" (emphasis added).

BreakZone, supra, is particularly instructive in demonstrating how a councilmember's involvement in an underlying dispute, and even being a party to the dispute himself, does not establish a personal interest under the common law doctrine of conflicts of interest. In *BreakZone*, a business obtained an amendment to its conditional use permit from the City of Torrance's planning commission over the objections of several residents and the police chief. (*Id*. at 1209-1213.) A Torrance City Councilmember, Dan Walker, filed an appeal of the planning commission's decision. (*Id*. at 1213-1214.) Councilmember Walker adjudicated the appeal, along with his council colleagues, ultimately granting the appeal and denying the business the conditional use permit amendment. (*Id*. at 1214-1219.) The business challenged that decision in court, claiming, among other things, that Councilmember Walker had a conflict of interest because: 1) he himself filed the appeal; and 2) he had received campaign contributions totaling over $8,000 from businesses that stood to gain financially by the denial of the conditional use permit amendment. (*Id*. at 1220.) The *BreakZone* court found those allegations, even if true, did not amount to a legally cognizable conflict of interest, under the common

law doctrine or any statutory prohibition, because even though Councilmember Walker was a party to the appeal he had no personal interest different from other Torrance residents at stake in the appeal. (*Id*. at 1231-1239; also see 88 Ops.Cal.Atty.Gen.32 (2005) at pp. 8-9.) Rather, Councilmember Walker's interest was the same as that of other Torrance residents – the elimination of the noise and crime they attributed to the pool hall. The *BreakZone* court summed it up: "In this case we consider de novo whether a member of the Torrance City Council may appeal the decision of that city's planning commission to grant a conditional use permit, participate in the public hearing and city council deliberations on the appeal, and vote on that appeal. … We will conclude that the council member was not barred from participation." (*Id.* at 1208-1209.) As in *BreakZone* where Councilmember Walker's role as the appellant did not justify his disqualification, Councilmember De La Torre's wife's role as one of the plaintiffs in the Voting Rights Case likewise does not present a disqualifying conflict of interest here, because there is no *personal* interest (for De La Torre or his wife) in the relief sought.

Just like Councilmember Walker in *BreakZone*, Councilmember De La Torre has 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. De La Torre has consistently expressed his support for district-based elections, in his campaign and for several years prior. (SAC ¶¶ 2, 14-20). That was one of the reasons he was elected. (SAC ¶¶ 27-28, 30-31.) But that strong advocacy, and even expressing disagreement with the positions of a previous council, including how they have responded to litigation, is no reason to exclude Councilmember De La Torre from decisions concerning that litigation. As the California Supreme Court explained in *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, disqualifying elected officials from decisions on topics about which they have expressed their strong opinions "would be contrary to the basic principles of a free society … [and] the very essence of our democratic society." (*City of Fairfield*, 14 Cal.3d at 781-782, approvingly quoting *Wollen v. Fort Lee* (1958) 27 N.J. 408 and citing cases from several other states.) Where, as here, the electorate disagrees with the positions taken by their elected representatives, including in litigation, and replace those representatives through the democratic process, the will of the electorate should not be thwarted by excluding the newly elected representatives from decisions concerning that litigation. In *City of*

Fairfield, the California Supreme Court expressly rejected the contrary view expressed in *Saks & Co. v. City of Beverly Hills* (1951) 107 Cal.App.2d 260. (*City of Fairfield*, 14 Cal.3d at 781-782 ["The Court of Appeal decision in *Saks* effectively thwarted representative government by depriving the voters of the power to elect councilmen whose views on this important issue of civic policy corresponded to those of the electorate."].)

None of the authorities cited by Defendant support its apparent view that a personal interest can be inferred from an elected official's involvement in litigation or relationship with the parties to that litigation. 92 Ops.Cal.Atty.Gen. 19 (2009) addressed a redevelopment agency's decision to enter into a loan agreement for commercial property improvement with a corporation wholly owned by the son of one of the agency's members. (*Id*. at p. 1). Receiving a substantial loan obviously has personal value – of a financial nature, and, as the Attorney General opinion explained: "it is difficult to imagine that the agency member has no private or personal interest in whether her son's business transactions are successful or not." (*Id*. at p. 7.) The loan had value to the agency member's son, not to a large group of the agency's constituents. (*Id*.) In contrast, the "interest" Councilmember De La Torre, and even the plaintiffs in the Voting Rights Case, have in the relief sought through that case is no different than the interest thousands of Santa Monica voters have in that same relief – to enjoy an undiluted vote in the city council elections. (SAC ¶¶ 45-49.)

Likewise, in *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 the court found a conflict of interest because the official "stood to benefit personally by voting against the [condominium] project" since he had "an interest in preserving his ocean view" from his residence. (*Id*. at 1172.) Had the proposed condominium project not threatened his personal ocean view, but rather the official was generally opposed to developments that exceeded height limitations because those developments would impede the ocean views of residents living inland, the court stated that would not be a conflict of interest. (*Id*. at 1172-73 ["Here, Benz's conflict of interest arose, not because of his general opposition to 35-foot buildings, but because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence.). Just like the hypothetical "general opposition to 35-foot buildings" the *Clark* court confirmed would not constitute a personal interest because it would protect many constituents' ocean views, the relief

sought in the Voting Rights Case – the elimination of at-large elections – would inure to the benefit of thousands of Santa Monica voters, not just De La Torre. (SAC ¶ 49).

The Voting Rights Case does not involve a "personal" interest for Councilmember de la Torre; it involves an interest common to a large group of Santa Monicans whom De La Torre was elected to represent. Therefore, he has no legally cognizable conflict in addressing the Voting Rights Case.

IV. THE FPPC AND COURTS, NOT DEFENDANT, ARE EMPOWERED TO DECIDE CONFLICT OF INTEREST ISSUES.

Recognizing local governing boards are ill-suited to make determinations concerning conflicts of interest of their own members, the Legislature has expressly conferred that authority on the courts and the FPPC. (See, e.g., Gov't Code § 91003; see also *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068-69, 1094 ["a local administrative agency has no authority under the California Constitution to exercise judicial power"].) Here, Defendant did not wait for the FPPC to respond to its inquiry before it unilaterally excluded Councilmember de la Torre from its meeting. (SAC ¶¶ 35-41). When the FPPC did complete its analysis, it concluded that De La Torre does not have a conflict of interest under California's comprehensive statutory scheme. (SAC ¶ 34, Ex. A).

While the Legislature's delegation of these matters to the courts and the FPPC are within California's statutes governing conflicts of interest, and thus Defendant may argue it has the authority to determine common law conflicts, such a rule would render the Legislature's delegation to the courts and FPPC a nullity. California's statutory scheme governing conflicts of interest come from the common law; every conflict under the PRA or Section 1090 is also a conflict under the common law. (See .) Therefore, if a city is permitted to make unilateral determinations that its councilmembers have common law conflicts, it could always avoid the courts, by merely referencing the common law rather than California's conflict of interest statutes.

Allowing a bare majority of a city council to unilaterally decide that a councilmember in the minority cannot participate in its meetings and votes, would be incredibly dangerous. When a councilmember excludes another councilmember, she inherently grants herself additional power; in this case, for example, by excluding Councilmember De La Torre each remaining councilmember increases her own power from one-seventh to one-sixth of the council. What would stop any council

majority from exploiting an amorphous concept like the "common-law conflict" as pretext to silence its opponents in any council minority on any matter before the council? It is for that reason that the issue is left to the disinterested courts and FPPC.

Defendant attempts to avoid the Legislature's considered delegation of conflict issues to the courts and FPPC, by pointing to its authority, as a charter city, over "municipal affairs." (Demurrer, p. 20.) But the issue of conflicts of elected officials, even local elected officials, is not a "municipal affair"; it is a "statewide concern." (*County of Sacramento v. Fair Political Practices Com*. (1990) 222 Cal.App.3d 687, 691-692 ["The Political Reform Act … reflects statewide concern that both local and state government officials serve the public interest."].) Where the "Legislature [has] legislated as to a matter of statewide concern," as the Legislature has done with the issue of conflicts of interest with the PRA and Section 1090, the issue "ceases to be a 'municipal affair' pro tanto." (*City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 254-255; see also *Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 795 ["[A] charter city's authority … is not unlimited."].) Charter city authority does not extend to statewide concerns, such as the PRA, "even in regard to matters which would otherwise be deemed to be strictly municipal affairs". *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 600. Therefore, Defendant's charter city authority over "municipal affairs" has no impact here.

In any event, Defendant concedes, as it must, that its council's exclusion of Councilmember De La Torre is "subject to subsequent judicial review." (Demurrer, p. 20.) Indeed, where, as here, a city council's decision is based on an incorrect view of the law - specifically, here, that a common law conflict can arise based on an official's past involvement in litigation or relationship with the parties to litigation, even in the absence of a personal interest in the relief requested in that litigation – it must be reversed by the courts. (*People v. Knoller* (2007) 41 Cal. 4th 139, 156 [it is the courts' duty to intervene "if the [tribunal] based its decision on impermissible factors or on an incorrect legal standard."]; *Gabriel P. v. Suedi D*. (2006) 141 Cal. App. 4th 850, 862 [reversal required where a tribunal "transgresses the confines of the applicable principles of law"].) The decision by Defendant's council majority is subject to de novo review by this Court; no deference is owed. (*BreakZone,* 81 Cal.App.4th at 1208-1209 [applying de novo review to finding that councilmember did not have a

common law conflict].) So, while the issue in this case should have been brought to the Court by Defendant in the first instance, the important thing is that it is before this Court now for the proper application of the personal interest standard.

V. DEFENDANT'S ALREADY-REJECTED ARGUMENTS SHOULD BE REJECTED ONCE AGAIN.

In its Demurrer to Plaintiffs' First Amended Complaint, Defendant argued Plaintiffs failed to state a claim under the Brown Act because, according to Defendant: 1) De La Torre, as a councilmember, cannot pursue a Brown Act claim against Defendant; and 2) Plaintiffs did not exhaust the notice and cure provisions in the Brown Act. This Court (correctly) rejected those arguments, and overruled Defendant's demurrer as to Plaintiffs' Brown Act claim in the FAC. The Brown Act claim in the SAC is not materially different than that in the FAC. (Compare FAC ¶¶ 53-57, SAC ¶¶ 59-63.) Yet, now Defendant repeats its same arguments, nearly verbatim, from its previous, overruled, demurrer. For all of the reasons detailed in Plaintiffs' opposition to that previous demurrer, which are incorporated here, this Court should once again reject Defendant's challenge to the Brown Act claim.

VI. DEFENDANT'S REMAINING ARGUMENTS ARE BARRED BY SECTION 430.41(B) OF THE CODE OF CIVIL PROCEDURE, AND ARE MERITLESS

The remainder of Defendant's arguments are barred by Code of Civil Procedure section 430.41(b). That section provides:

> "A party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer.

Elias Serna was listed as a plaintiff on both causes of action in the FAC, and Defendant did not challenge his standing in its demurrer to the FAC. Defendant, therefore, cannot do so now through a subsequent demurrer. (Code of Civ. Proc § 430.41(b).)

In any event, Defendant's belated argument – that Serna lacks standing – is meritless, and immaterial. Serna, like any other interested citizen of Santa Monica, has standing to compel Defendant to comply with the law. (*Common Cause v. Bd. of Supervisors* (1989) 49 Cal.3d 432, 439-441 [To establish standing in a case seeking to compel a public agency to comply with the law,

plaintiffs must only have a "sufficient interest in the subject matter of the dispute to press their case with vigor."]; see also *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 122 ["[T]here has been a marked accommodation of formerly strict procedural requirements of standing to sue."].) Serna has a sufficient interest in seeing the representative he helped to elect participate in all decisions of the city council, to press this case with vigor. (Cf. *United States v. Classic* (1941) 313 U.S. 299, 315 [the mere right to cast a ballot is a hollow right if that vote is unlikely to result in meaningful representation].) Moreover, Serna's standing is of little consequence here, because De La Torre certainly has standing.

Similarly, Plaintiffs' Brown Act claim did not materially change between the FAC and SAC, and Defendant did not argue in its demurrer to the FAC that the Brown Act allows closed session meetings to which only a majority of the council is permitted to attend. Defendant, therefore, should not be permitted to do so now through a subsequent demurrer. (See Code of Civ. Proc § 430.41(b).)

This belated argument too – that this Court should read into the Brown Act an implied exception to the rule against secret meetings accessible to only a majority of the council, so it can hold secret meetings excluding Councilmember De La Torre – is meritless. As explained in the SAC, as it was in the FAC, the Brown Act "does not permit a closed session accessible to just a majority of the members of a legislative body rather than all the members." (SAC ¶ 60; FAC ¶ 54; see also Gov't Code § 54953 [with only specified exceptions, "all persons shall be permitted to attend" meetings of all or a majority of any city council]; Gov't Code § 54956.9 ["a legislative body of a local agency," but not just a majority of a legislative body, may "hold[] a closed session to confer [regarding] pending litigation."]) The Brown Act's definitions, cited by Defendant, just serve to show that where the Legislature wanted to refer in the Brown Act to "a majority … of the members of a legislative body" rather than the entire legislative body, the Legislature did exactly that explicitly. (See, e.g., Government Code §§ 54952.2, 54952.6 and 54957.5.) The litigation exception of the Brown Act should not, as Defendant invites, be interpreted broadly to suit its preferred policy goals; if Defendant disagrees, it should take it up with the Legislature. (See, *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917 ["Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly."]; 71 Ops.Cal.Atty.Gen. 96 (1988) ["Litigation exceptions to the Ralph M. Brown

Act's open meeting requirements must be strictly construed … If there is to be any change [to allow closed sessions], it is one for the Legislature to make."]; see also Cal. Const. Art. 1, section 3(b)(2) [added by Proposition 59 in 2004, requiring Brown Act exceptions to open meeting requirement to be construed narrowly].)

Nor does *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050 help Defendant's cause. The *Hamilton* court expressly did not decide the issue presented in this case – whether the Brown Act permits a closed session meeting where a majority, but not all, of the councilmembers are permitted to attend. (*Id*. at 1054 ["We need not determine whether the June 1987 council session was properly closed under the Brown Act [] because Hamilton does not raise this issue on appeal."]; see also *In re Tartar* (1959) 52 Cal. 2d 250, 258 ["Cases are not authority for propositions not considered."].) The policy statements in *Hamilton,* upon which Defendant relies for its view that the Brown Act exceptions should be interpreted broadly, are also no longer good law because the contrary policy was added to the California Constitution 15 years after *Hamilton*. (Cal. Const. Art. 1, section 3(b)(2).) Moreover, unlike here, the councilmember in *Hamilton* voluntarily recused himself because of a conceded conflict under the PRA. If, as in *Hamilton*, a councilmember voluntarily recuses himself due to a conflict under the PRA or Section 1090, or is adjudicated to have such a statutory conflict, a closed session meeting of the remainder of the council might be permissible because, as the later enacted and more specific statute, the PRA or Section 1090 might supersede the Brown Act, but that too is not the question here because Defendant concedes Councilmember De La Torre has no conflict under either statute. (*Governing Board v. Mann* (1977) 18 Cal.3d 819, 828 ["[W]hen, as here, a subsequently enacted specific statute directly conflicts with an earlier, more general provision, it is settled that the subsequent legislation effects a limited repeal of the former statute to the extent that the two are irreconcilable."].) Unlike the PRA, upon which *Hamilton* was decided (see *id*. at 1055-1060), the common law is not a statute and thus cannot supersede the Brown Act, or any other statute for that matter.

DATED: September 17, 2021

Respectfully submitted:
TRIVINO-PEREZ & ASSOCIATES

By: /s/ Wilifred Trivino Perez
Wilifred Trivino-Perez
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 10940 Wilshire Blvd., 16th Floor, Los Angeles, CA 90024.

On September 17, 2021, I served true copies of the following document(s) described as

OPPOSITION TO DEMURRER

on the interested parties in this action as follows:

George Cardona
Interim Santa Monica City Attorney
1685 Main Street, Room 310
Santa Monica, CA 90401

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with our practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 17, 2021 at Los Angeles, California.

/s/ Wilifred Trivino-Perez
Wilifred Trivino-Perez