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RULINGS

1:30 p.m., Thursday, June 16, 2022

Sherril R. Carter, Officer/Clerk of Court  
By Michelle K. Garde, Deputy  
Michelle K. Garde, Deputy

OSCAR DE LA TORRE, et al. v. CITY OF SANTA MONICA, Case 21STCV08597

- A. MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY ADJUDICATION OF DEFENDANT CITY OF SANTA MONICA; AND
- B. MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR SUMMARY ADJUDICATION OF PLAINTIFFS

The City Council of defendant City of Santa Monica ("City") voted to exclude plaintiff Oscar De La Torre ("De La Torre"), an elected City Council member, from all Council discussions, meetings and votes relating to a certain litigation that is pending against the City on the ground that De La Torre has a common law conflict of interest that disqualifies him from acting in the City's best interests with regard to that litigation.

The referenced litigation, *Pico Neighborhood Association and Maria Loya v. City of Santa Monica*, Case No. BC616804, alleges that the City's at-large elections for City Council seats violates the California Voting Rights Act ("CVRA"), Elections Code 14025 et seq. The CVRA Action seeks a mandatory injunction to require that, in Santa Monica, the City Council members will be elected by districts.<sup>1</sup> The plaintiffs in the CVRA Action prevailed in the trial court; the Court of Appeal reversed the trial court. The CVRA Action is now pending in the California Supreme Court. The CVRA allows a prevailing plaintiff to recover reasonable attorneys' fees and costs from a defendant public entity. Elections Code §14030.<sup>2</sup> The CVRA plaintiffs in the trial court moved for an award of attorneys' fees and costs against the City, and that motion would be reinstated should the Supreme Court reverse the Court of Appeal.

De La Torre and Elias Serna, plaintiffs in this action, seek declaratory and injunctive relief to overturn the City's exclusion of De La Torre from participating in discussions/actions by the City Council relating to the CVRA Action. They filed their action on March 4, 2021. Their operative Second Amended Complaint ("SAC") alleges causes of action for "Declaratory Relief" and for "Violation of the Ralph M. Brown Act," Government Code § 54950.5 et seq.

The SAC alleges "De La Torre does not have a conflict of interest that prevents him from participating in city council meetings, deliberations or votes

<sup>1</sup> Elections Code 14026 defines at-large elections and district-based elections.

<sup>2</sup> Legal expenses are recoverable against a "political subdivision," that term including a charter city. Elections Code §14026(c). Santa Monica is a charter city.

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concerning the Voting Rights Case.” SAC, p. 15, para. 52. The prayer asks for various forms of declaratory and injunctive relief to overturn the City Council’s disqualification of De La Torre from participating in matters relating to the CVRA Litigation.

The City filed its Answer to the SAC on October 20, 2021. The Answer contains 24 affirmative defenses including “lack of standing” (the 13<sup>th</sup> affirmative defense) and “separation of powers” (the 23<sup>rd</sup> affirmative defense). The Court will address these threshold defenses before undertaking a wider discussion on the merits.

**Lack of Standing Argument:**

The City argues that plaintiffs’ claims fail because their SAC seeks injunctive/declaratory relief rather than mandamus relief to overturn the City Council’s action to disqualify De La Torre. The City vigorously argues that position. (City Mot. for Sum. Judgment, filed 2/12/22, p. 5; City Opp. to Plts.’ Mot., filed 3/10/22, p. 6.) The City explains its position as follows:

A court may decline to issue declaratory relief where it is “not necessary or proper at the time under *a//* circumstances.” Code Civ. Proc., §1061, *italics added.*) It is neither necessary nor proper to issue declaratory relief on the City Council’s past action of disqualifying De la Torre on January 26, 2021. “Declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs.” (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4<sup>th</sup> 1487, 1497.) [City Mot., filed 3/10/22, at p. 6.]

As the City observes, actions seeking to overturn the decision of a local agency are often brought in mandamus. There is no basis, however, to dismiss an action because its seeks that result by way of declaratory and injunctive relief. See, *Malott v. Summerland Sanitary Dist.* (2020) 55 Cal.App.5<sup>th</sup> 1102, 1109. In *Malott* the plaintiff filed a mandamus action but sought declaratory relief, prompting the *Malott* court to say “[p]arties challenging governmental actions often do so using a variety of causes of action, including mandamus, injunctive relief, or declaratory relief.” The appellate court held, even where a party mistakenly files a procedurally improper petition or complaint seeking relief with respect to an agency action, the Court may still award declaratory relief “where the allegations ... are sufficient to support” a cause of action for declaratory and injunctive relief.

The essential requirements for declaratory relief are the existence of an actual, present controversy over a proper subject. Code of Civil Procedure section 1060. The City’s apparent argument that no “present controversy” exists because the City Council’s action was taken in the past, specifically on January 26, 2021, is misguided. The City Council’s action to disqualify De La

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Torre from discussions and actions about the CVRA Litigation continues into the present and the future. The CVRA Litigation remains pending in our Supreme Court and the City Council will be required to address issues still to be decided in that Litigation. The CVRA plaintiffs' motion for attorneys' fees and costs remains pending in the trial court. De La Torre and Serna in their SAC have made the necessary allegations to show the existence of an actual and present controversy over a proper subject. They allege:

55. ... absent equitable relief from this Court, [Defendant] will continue to exclude De La Torre from city council meetings, and prevent De La Torre from fulfilling his duties as a member of the Santa Monica City Council—duties Serna and tens of thousands of other Santa Monicans elected him to fulfill—despite having obtained no judicial determination that De La Torre has a conflict of interest. (SAC, p. 16, para. 55.)

This very issue was also raised and rejected at the pleading stage in this litigation. On September 30, 2021, this Court overruled the City's demurrer to the SAC's cause of action seeking declaratory relief, saying in its written ruling:

The issue at stake here is the CVRA litigation now on appeal in which the City is a defendant. Plaintiff De La Torre does not have a personal stake in that litigation but voices a point of view that is contrary to the majority of the councilmembers. These differing viewpoints are to be resolved in a fair political process. The City's actions to exclude the participation of a councilmember who campaigned in support of the plaintiffs in the CVRA litigation thwarts the political process and raises an actual controversy for judicial determination. The Court will OVERRULE the City's demurrer to the first cause of action.

The litigation will decide whether, as alleged in the SAC, De La Torre "does not have a personal stake" in the outcome of the CVRA litigation. The SAC raises the issues that need to be decided in an action for declaratory and injunctive relief. An action in mandamus could have been used as well, but a petition seeking mandate is not a necessary predicate to challenge City Council action in disqualifying one of its members from participating in City business.

**Separation of Powers Argument:**

The Court agrees that the City Council is empowered to determine claims of conflicts of interest pertaining to its elected or appointed officials. This authority is based in the City Charter, its Rules of Order and Procedure and principles of municipal powers. The City argues that it decided correctly that De La Torre has a common law conflict of interest as to matters involved in the CVRA Litigation. The City suggests that, having made its decision that De La Torre is disqualified, the Court should defer to the City's decision. (City Mot. for Summary Judgment, filed 2/12/22, p. 7.)

The City's brief nonetheless recognizes that the courts have jurisdiction to review a city council's decision to disqualify a city official. The City cites for this point *Kimura v. Roberts* (1979) 89 Cal.App.3d 871, 875 (city council's determination of "an actual or implied conflict of interest existed [was] eminently rational, practical and legally sound in light of the record"). The issue, in this case, is what standard applies to judicial review of the City Council's disqualification of De La Torre. The recent decisions discussing the disqualification of a city council member for conflict of interest use the substantial evidence test. *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1209, 1233 ("We will conclude that the council member was not barred from participation and there was substantial evidence to support the council's quasi-judicial action."); *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1178, n.27 (The Court of Appeals "app[ie]d the substantial evidence test to [the trial court's] findings of fact and independently review conclusions of law."

A fuller description of the general principles for judicial review of a local entity's legislative decisions is found in *Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 as follows:

"Such review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support." [Citations omitted.] This test has also been formulated to add an inquiry whether the agency's decision was "contrary to established public policy or unlawful or procedurally unfair." [Citations omitted.] However, the test is formulated "... the ultimate questions, whether the agency's decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy or unlawful or procedurally unfair, are essentially questions of law. With respect to these questions the trial and appellate courts perform the same function, and the conclusions of the trial court are not conclusive on appeal. [Citation omitted.] The only exception is where there are foundational matters of fact as to which the trial court's findings could be conclusive on appeal, were they supported by substantial evidence.

### **The Relevant Evidentiary Record:**

The SAC challenges the specific action taken by the Santa Monica City Council at a special meeting on January 26, 2021. The evidence that is relevant to a judicial review of the Council's action taken on January 26, 2021 is the information that was available to the City Council members at that time—and only that.

In determining whether the Santa Monica City Council's decision on January 26, 2022 was lawful, this Court will only consider the facts known to

the City Council at the time the decision was made, as this would be the only category of “relevant evidence” to such inquiry. Evidence weighing in favor of De La Torre’s disqualification that was neither known nor presented while the City Council debated its decision would have no bearing on whether the City Council acted lawfully. “Relevant evidence” is “evidence ... having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” Evid. Code §§ 210, 350.

The relevant evidentiary record, therefore, consists of the notice and agenda for the special Council meeting on January 26, 2021; the staff report that was circulated before the meeting to recommend that the City Council disqualify De La Torre; the letters received (via email) by the Council relating to agenda item 8-A; the transcript prepared from the electronic recording of the special meeting; and the minutes of the special meeting. The City provides these documents to support its motion. Anderson–Warren Decl., Exhs. A and B; Silberberg Decl., Exh. 40.

The City, however, does not limit its argument to matters that were before the decisionmakers on January 26, 2020. The City’s motion argues outside the evidentiary record that De La Torre has a financial conflict of interest that justified the City Council’s action in disqualifying him. (City Mot., filed 2/12/22, pp. 14–17.) This argument is not only outside the evidentiary record, it is contrary to the evidentiary record. Even the staff report that was circulated before the special meeting on January 26, 2021 expressly excluded from consideration whether De La Torre was subject to a financial conflict of interest. The staff report stated that the City Council was to consider only whether De La Torre had a conflict of interest under the common law. The staff report, in fact, advised that the Council that the Interim City Attorney was awaiting from the Fair Political Practices Commission (the “FPPC”) a response to his inquiry on behalf of the City as to whether De La Torre’s participation in Council discussions about the CVRA Litigation would constitute a financial conflict of interest. On February 4, 2021—nine days after the City Council voted to disqualify De La Torre—the FPPC responded that De La Torre did not have a conflict of interest under Political Reform Act and/or Government Code §1090 et seq.

The discussion in the parties’ briefs about whether De La Torre had a financial conflict of interest is irrelevant to the issues that must be decided here.<sup>3</sup>

**A. RULING ON CITY OF SANTA MONICA’S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION:**

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<sup>3</sup> The City’s Statement of Undisputed Facts (SUF) contains many assertions about events that occurred after the City Council acted to disqualify De La Torre. The Court regards the City’s SUF Nos. 97–131 as irrelevant to the legal issues.

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On January 21, 2021, the City Clerk noticed a special meeting of the Santa Monica City Council for January 26, 2021, to consider agenda item 8-A: "Determination Regarding Common Law Conflict of Interest of Councilmember De La Torre." Anderson-Warren Decl., Exh. A. The special meeting was conducted over a remote video-conferencing platform due to restrictions imposed by emergency orders issued during the pandemic on public meetings. The City Council after conducting a public hearing voted 4-2 (with one abstention) to disqualify De La Torre.

The scope of the City Council's disqualification is uncertain. The motion as described by Mayor Himmelrich before the City Council vote was to exclude De La Torre from "closed sessions or confidential conversations" relating to the CVRA Litigation. The Mayor told the City Council:

Okay. Are we ready to take a vote? So, as I understand the motion now, Mr. de la Torre will not recuse, so we are voting to determine that Mr. de la Torre has a common law conflict of interest that disqualifies him from his involvement in any closed session or confidential conversations concerning [the CVRA Litigation]. [1/26/21 Transcript, p. 46, Silberberg decl., Exh. 40.]

The City Council Minutes, which were prepared after the vote, describe the scope of the disqualification motion differently. They provide:

[S]taff recommends that Council determine that ... Councilmember de la Torre has a common law conflict of interest and is therefore disqualified from participating in or attempting to influence discussions or decisions relating to [the CVRA Litigation]. [City Council Minutes, p. 1, Anderson-Warren decl., Exh. B.]

The motion's scope, as defined in the City Council Minutes, is consistent with decisional law which deems a councilmember's disqualification appropriate whenever "necessary to prevent bias, conflicts of interest, or the appearance of either." *Kimura v. Roberts*, supra at 875. If De La Torre's disqualification is limited to his exclusion from closed meetings that discuss the CVRA Litigation, he would be able to vote in a public session on any matter relating to the CVRA Litigation and to participate in any discussion of the CVRA Litigation in a public meeting. The uncertainty of the scope of the disqualification of De La Torre undermines any rationale for the City's action.

On the City's motion for summary judgment or, alternatively, summary adjudication, the Court DENIES summary judgment. The Court DENIES summary adjudication to the City against plaintiffs' first cause of action seeking declaratory and injunctive relief to overturn the City's disqualification from matters relating to the CVRA Action.

The Court probably will GRANT summary adjudication against plaintiffs' claim that the City's exclusion of Oscar De La Torre from closed meeting that discuss the CVRA Litigation violated the Brown Act, specifically Government Code §54954.3 or any other section. The Court will hear argument.

**Discussion: City's Motion for Summary Adjudication against Plaintiffs' First Cause of Action for Declaratory and Injunctive Relief Is DENIED.**

The Court DENIES the City's motion for summary adjudication because the City has not established that De La Torre has a common law conflict of interest. A common law conflict of interest permitting a local agency to disqualify a board member requires that the board member have, with respect to the matter subject to agency review, a personal interest that is different from the general public's interest.

De La Torre does not have a personal interest in the CVRA Litigation because that lawsuit does not seek relief that is individual or personal to De La Torre, nor to his immediate family or his business interests. The CVRA Litigation seeks to compel changes in Santa Monica's election procedures that the CVRA plaintiffs allege are required by California law. This Court does not know whether the CVRA Litigation will be successful in that purpose—the matter is under review by our Supreme Court. However, the CVRA Litigation addresses a matter of significant public debate in the Santa Monica community.

It is immaterial that De La Torre, before he was sworn in as a member of the City Council, actively participated in the CVRA Litigation. That was his right as a citizen. It is immaterial that De La Torre's wife, Maria Loya, is an individual plaintiff in the CVRA Litigation. That is her right as a citizen. Neither De La Torre nor this wife will receive any financial benefit if the CVRA Litigation should be decided against the City.

**Fact Findings Made by the City Council on January 26, 2021**

The Court has examined the voluminous evidence that the City submitted in support of its motion for summary adjudication. The Court reviewed the City's notice of a special meeting for January 26, 2021, the agenda packet, the staff report, the emails and letters submitted by the public, the minutes of the special meeting and the transcript of the special meeting. These documents are found at the Anderson-Warren Declaration, Exhibits A and B; the Silberberg Declaration, Exhibit 40; and the City's Request for Judicial Notice, Exhibits A-F. The Court grants the City's request for judicial notice (RJN). Evid. Code, § 452, subs. (b) and (d). (Some of the same documents were also attached to the De La Torre Declaration filed in support of plaintiffs' motion for summary judgment.)

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The City staff before the January 26, 2021 meeting circulated a 13–page staff report over the signatures of George Cardona, Interim City Attorney, and Lane Dilg, Interim City Manager. The staff report attaches a letter from attorney Daniel Ambrose supporting De La Torre’s position and a letter from De La Torre to the FPPC describing his circumstances in reference to an earlier letter from the Interim City Attorney to the FPPC. This City staff report became the basis for the Council discussion leading to its disqualification vote, and the facts recited in the staff report about De La Torre’s involvement with the CVRA Litigation are the predicate factual findings for the City Council’s vote to disqualify De La Torre. (The City Council made no other factual findings.) The excerpts are the factual basis which the Court must consider in deciding whether the City Council’s disqualification of De La Torre was lawful. The Court quotes verbatim from the staff report as follows:

In the election conducted on November 3, 2020, Oscar de la Torre was elected to serve as a member of the Santa Monica City Council....[ ]

The City of Santa Monica (“City”) is currently the defendant in pending litigation alleging that the City’s use of an at–large election system to elect its City Council members violates the California Voting Rights Act. ... A First Amended Complaint (“FAC”) was filed on February 23, 2017. The FAC was filed by two plaintiffs, PNA and Ms. Loya (collectively “Plaintiffs”). The FAC ... alleged only that “the provision in the Santa Monica City Charter requiring at large elections for the city council, not only runs afoul of the CVRA, it also runs afoul of the Equal Protection Clause (Article 1, Section 7) of the California Constitution, among other controlling laws.” The FAC did not seek damages, but did seek an award of Plaintiffs’ attorneys’ fees, costs and litigation expenses. The litigation proceeded to trial, judgment, and appeal based on the allegations of the FAC.

During the litigation, Mr. de la Torre was deposed on May 9, 2018 in his individual capacity [and] on May 10, 2018, as the person identified by PNA as most qualified to testify on behalf of PNA on specified topics. At both depositions, Mr. de la Torre was represented by Kevin Shenkman, one of the attorneys for Plaintiffs in the litigation. At the time of the depositions, Mr. de la Torre was the co–chair of PNA.... Mr. de la Torre was also called by Plaintiffs as a witness at trial and testified on August 22 and 23, 2018.... During his recent City Council campaign and as of November 2020, Mr. de la Torre served as chair of the PNA board. Councilman de la Torre has advised that following his election to the City Council, he resigned from his position as chair of the PNA board at a PNA board meeting conducted on or about November 19, 2020. As of January 22, 2020, PNA’s website identifies Councilmember de la Torre as “Santa Monica City Councilor since December 2020: previously a board member.”

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Trial on the allegations in the FAC began August 1, 2018.... After extensive post-trial briefing, on February 13, 2019, the trial court issued judgment in favor of Plaintiffs on both of their causes of action. [ ] Following issuance of the trial court's judgment, Plaintiffs' attorneys filed motions seeking approximately \$23 million in attorneys' fees and costs.

The City filed a notice of appeal from the judgment on February 22, 2019. After briefing, the Court of Appeal held oral argument on June 30, 2020. [ ] On July 8, 2020, the Court of Appeal issued an opinion holding that the City did not violate either the CVRA or the Equal Protection Clause of the California Constitution. The Court of Appeal reversed the trial court's judgment, ordered the Plaintiffs to pay costs to the City, and directed the trial court to enter judgment for the City.

On August 18, 2020, Plaintiffs filed a petition seeking review by the California Supreme Court. On October 21, 2020, the California Supreme Court granted review only on a limited question relating to Plaintiffs' claim under the CVRA: "What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act?" The California Supreme Court left intact the Court of Appeal's ruling in the City's favor on the Equal Protection claim. [ ] No date has yet been set for oral argument before the California Supreme Court.

Were the California Supreme Court to affirm the holding of the Court of Appeal, the litigation would conclude; the City would not be required to make any change to the Charter-established at-large election system, and the City would not be required to pay any fees to Plaintiffs' attorneys. Were the Supreme Court to reverse the holding of the Court of Appeal the City would anticipate a remand to the Court of Appeal for further review and to resolve the remaining issues relevant to Plaintiffs' CVRA claim that the Court of Appeal found unnecessary to reach because of the basis of its ruling. Were Plaintiffs ultimately to prevail in the litigation, the City would anticipate returning to the trial court for resolution of the pending motions in which Plaintiffs seek payment by the City of Plaintiffs' attorneys' fees and costs.

The City staff report that was circulated for the January 26, 2021 meeting relies upon and attaches a 2009 Attorney General Opinion. 92 Ops. Cal. Atty Gen. 19 (2009) (Cal.AG No. 07-807). The staff report summarizes that 2009 AG Opinion, arguing that while the Attorney General did not find in that case a financial conflict of interest "this did not preclude a finding of common law conflict of interest because 'the common law prohibition extends to noneconomic interests as well.'" The staff report describes the 2009 AG Opinion as finding "a city redevelopment agency board member had a common law conflict of interest with respect to the agency's decision whether to enter

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into a loan agreement for commercial property improvement where the proposed recipient of the loan was a corporation solely owned by the adult son of the agency board member.”

The staff report recommends to the City Council that it make and adopt a motion to disqualify councilmember De La Torre from participating in discussions about the CVRA Litigation.<sup>4</sup> The Court has quoted (and italicized) that recommendation from the staff report:

*Just as it was “difficult to imagine that the agency member has no private or personal interest in whether her son’s business transactions are successful or not,” it seems difficult to imagine that Councilmember de la Torre has no private or personal interest in the outcome of the pending litigation where his wife remains a plaintiff in the litigation, his wife remains a board member of the other plaintiff in the litigation, and, until shortly before being sworn in as a councilmember, he was the chair of the board of the other plaintiff in the litigation and served as that plaintiff’s representative at deposition and trial. As a result, in accordance with the principles set out in the 2009 Attorney General Opinion, staff recommends that Council determine that Councilmember de la Torre has a common law conflict of interest and should therefore be disqualified from participating in or attempting to influence discussions or decisions relating to this litigation.*

#### **Facts Established in Declarations or Discovery in this Action**

The parties understand the central legal issue is whether De La Torre’s support for the CVRA Litigation is in furtherance of a “private or personal” interest that would bias him in performing his duties as a City Councilmember. If there is no private or personal interest there is no common law conflict of interest. *BreakZone Billiards v. City of Torrance*, supra at 1237. The nature of De La Torre’s interest in the CVRA Litigation is thoroughly canvassed in the City’s motion for summary judgment.

The CVRA Litigation does not seek monetary relief from the City. The

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<sup>4</sup> The transcript of the electronic recording of the City Council’s January 26, 2021 special meeting that the City provided is not complete. The City’s exhibit (Exh. 40 to the Silberberg declaration) jumps from page 1 to page 21 of 49. Pages 21–49, however, contain the public comment and the City Council discussion and vote on the disqualification motion. The missing pages 2–20 include the staff’s presentation of its report and probably Interim City Attorney Cardona’s comments to the City Council. There is another gap, from page 30 to page 39 of 49. These gaps are not a present concern to the Court because the City has the burden of providing evidence to support its arguments. (The same gaps are found in Exhibit 40 in Silberberg’s declaration filed in opposition to plaintiffs’ motion for summary judgment.)

CVRA plaintiffs, if successful in that litigation, will not receive any damages, fees or any monetary compensation from the Litigation. The attorneys who have represented the CVRA plaintiffs did so on a pro bono basis; the CVRA plaintiffs have not paid and do not owe legal fees or costs to their attorneys for bringing the CVRA action. Should their attorneys receive an award of attorneys' fees and costs, none of it will be shared with the CVRA plaintiffs; any legal fees or costs will be retained by the attorneys. Plaintiffs' lead counsel in the CVRA Litigation is Kevin Shenkman. He testified that the CVRA plaintiffs have not paid and are not obligated to pay attorney fees or expense to their lawyers. Shenkman decl., para. 5, and Exhibit C. De La Torre testified that neither he nor his wife have a financial stake in the CVRA Litigation. De La Torre decl., para. 17.

Over the course of the CVRA Litigation De La Torre and Shenkman discussed the litigation on numerous occasions. De La Torre has advocated for district-based councilmanic elections since at least 2015. De La Torre has incurred no financial obligation to the attorneys representing the CVRA plaintiffs. Shenkman has provided input to De La Torre with regard to the present action and assisted him, once the City gave notice that it was calling a special meeting to consider a disqualification motion, in his statement in opposition to the disqualification motion. Shenkman has not billed De La Torre for legal services; De La Torre has not paid nor agreed to pay legal fees to Shenkman.

Whether Santa Monica should elect its councilmembers at large or by district is a political issue and has been part of the Santa Monica's political dialogue for 30 years. De La Torre in his declaration testifies:

I first understood the need for district-based elections in Santa Monica when then City Council member Antonio "Tony" Vazquez publicly advocate for a change to the at-large election system in the early 1990s. Council member Vazquez was the first Latino elected to the Santa Monica City Council ... and was a proponent of district-based elections. (De La Torre decl. @ 2:10-14.

Santa Monica held councilmanic elections in November 2020. De La Torre and three other candidates campaigned in 2020 on a "change platform" to include that councilmanic elections should be by district. The Santa Monica Outlook published a pop quiz it posed to every candidate including the question "Should Santa Monica switch from an at-large election system to districts?" Candidates Phil Brock, Christine Parra, De La Torre and Mario Fonda-Bonardi answered that question "yes" and gave their reasons. The Court understands that the other candidates who participated in the pop quiz answered no. In total 21 candidates ran for four seats on the Santa Monica City Council. Brock, Parra and De La Torre were elected, defeating incumbents who, in the pop quiz, disfavored district elections. De La Torre received 17,560 votes, the lowest vote count of those elected to the City Council. De La Torre

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decl., Exhs. A and B. The voters who voted for De La Torre presumably hoped he would continue his advocacy for district elections as a new councilmember.

De La Torre, in his argument to his colleagues on January 26, 2021, advocated for district elections and attacked by name the authors of the staff report. De La Torre referred to at-large voting in Santa Monica as a tool of “white supremacy.” He described as a waste of money the City spending “vast sums” in legal fees to oppose district elections. He argued that Government Code section 91003 provides “the exclusive procedure for excluding a councilmember from participating in council deliberations—namely to first seek an opinion from the FPPC “and then seek an injunction in state court.” He said: “Neither I nor my wife, nor the Pico Neighborhood Association, nor any member of my family has any financial interest in the outcome of the Pico Neighborhood Association’s litigation against the City.” He said: “To be in litigation is also a form of advocacy.” He said “... until a judge tells me that Mr. Ambrose’s analysis is wrong<sup>5</sup>, and I have a conflict of interest, I will do what the voters elected me to do: participate in all City Council deliberations and advocate for an end to this horrible costly mistake.” Exh. 40, Silberman decl.

When asked by Mayor Himmelrich, De La Torre said he would not recuse himself on matters relating to the CVRA Litigation. She asked: “So, you [are] going to insist that any closed session we have regarding the CVRA is illegal if it doesn’t include you, is that right?” and De La Torre responded “yes.” Id. at p. 44.

### **The Fair Political Practices Letter the City Received**

The City staff did not recommend, and the City Council did not decide, that a financial conflict of interest applied to De La Torre. The Fair Political Practices Commission (FPPC) nine days after the City Council vote advised that De La Torre is not prohibited under statutory law “from participating in governmental decisions relating to pending litigation against the City, including a potential settlement agreement, where his spouse is a named plaintiff in the lawsuit” nor “where his spouse is the Communications Officer for a nonprofit organization that is also a named plaintiff in the lawsuit.” The FPPC letter is Exh. F, De La Torre decl.

The FPPC letter is erroneously dated January 4, 2021; its actual date was a month later, February 4, 2021. Both the City and De La Torre had emailed letters requesting the FPPC’s opinion as to whether in light of De La Torre’s advocacy for district-based elections there was a conflict of interest under the Political Reform Act or Government Code §1090 et seq. The City’s letter to the FPPC describes at length the facts the City claims to establish De La Torre’s

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<sup>5</sup> Attorney Ambrose submitted a letter advising the City Council De La Torre did not have a conflict of interest.

conflict of interest. The FPPC response, although it arrived nine days after the City Council had disqualified De La Torre, raises questions as to whether De La Torre's role can constitute a common law conflict of interest if it is conceded the relevant facts do not constitute a financial conflict of interest.

The FPPC letter noted that De La Torre and his wife have no financial interest in any success of that the plaintiff Pico Neighborhood Association may have in the litigation, saying:

According to the facts, neither Councilman de la Torre nor his spouse has ever received nor have they been promised, any compensation from PNA, and there are not other facts to suggest PNA is a source of income to them. Additionally, Councilmember de la Torre does not have a business interest in PNA because, as a nonprofit organization, PNA is not a "business entity" as defined by the Act. ([Gov. Code] Section 82005.) Finally, there are no facts suggesting decisions related to the pending lawsuit will have any financial effect on his or his immediate family's personal finances. Therefore, based on the facts provided, Councilmember de la Torre does not have a disqualifying conflict of interest under the Act in future City Council decisions related to the instant lawsuit.

The FPPC letter also addressed an issue presented by the City: whether De La Torre would be financially disqualified from participating any possible settlement discussions "resulting in a monetary payment that would benefit PNA." The FPPC answered that hypothetical in the negative, saying:

Accordingly, for purposes of the Act, Councilmember [de la Torre] does not have a disqualifying conflict of interest in City Council decisions concerning the instant lawsuit against the City. For purposes of Section 1090, he is not financially interested in any future settlement agreement based on his spouse's status as a plaintiff, and he has a noninterest in any future settlement agreement resulting in a monetary payment that would benefit PNA.

Only one councilmember provided fact-specific reasons for her vote to disqualify De La Torre. Mayor Himmelrich explained she would vote to disqualify De La Torre because:

...so look, I've been involved in this. I'm a lawyer. I have a pretty strong opinion. I talked to Oscar over the weekend. I feel Oscar is disqualified in this case. Oscar was in my deposition in this case, was in other depositions in this case, worked on the strategy in this case, and I said to Oscar over the weekend, it's like a football game, right? ... If I am going into a huddle to do my last charge towards the goal line, I am not inviting the coach for the other team into my strategy session about the play I'm

going to call. I mean, it just does not make sense. Similarly, I would never be asking Maria Loya or PNA to attend their sessions with their lawyer, Mr. Shenkman, to discuss what their strategy is going to be on this case, where they are our opponents.

### **City Council's Action on January 26, 2022 in Disqualifying De La Torre Is Not Supported by Sufficient Evidence**

The Court finds as the most persuasive the following authorities: the FPPC letter that eliminated any claim that De La Torre is subject to a financial conflict of interest; the 2005 Attorney General Opinion (88 Ops. Cal. Atty. Gen. 32 (2005)) that states "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; and, among the few appellate decisions, Clark v. City of Hermosa Beach, supra; BreakZone Billiards v. City of Torrance, supra. However, none of the few cases discussing the propriety of a city acting to disqualify a member due to a common law conflict of interest are factually analogous. They all discuss an allegedly conflicted councilmember voting on a one-time issue, e.g. a vote to approve a conditional use permit, whereas the Santa Monica City Council voted to exclude De La Torre from participating in all future discussions involving the CVRA Litigation and that Litigation, as the Interim City Attorney conceded, could be years from concluding.

It is difficult for the Court, after reading the FPPC's thorough review of the facts in this very case to find persuasive the City's argument that, even if there is no financial interest that would disqualify De La Torre from participating CVRA settlement discussions, there are nonspecific common law conflict issues that would preclude an elected councilmember from participating in discussions about the CVRA Litigation.

Depositions were taken by the City's attorneys of De La Torre and Kevin Shenkman, the lead counsel for the PNA plaintiffs in the CVRA Litigation. De La Torre testified, and he has also provided a declaration stating, that he will receive no compensation from the CVRA Litigation. Shenkman testified, and he has also provided a deposition stating, that he and the other attorneys representing the PNA plaintiffs in the CVRA Litigation provided their legal services pro bono basis. They intended to be paid, if at all, by seeking from the court an award of reasonable legal fees and costs against the City. Shenkman testified that any attorneys' fees he or the other plaintiffs' counsel receive would not be shared with the PNA plaintiffs and that any such sharing would violate the rules of professional conduct (as they are not lawyers).

The situation discussed in the 2009 AG Opinion, therefore, is not analogous to the relationship between De La Torre and his wife, Maria Loya, a plaintiff in the CVRA Litigation. While the 2009 AG Opinion concluded that it

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was reasonable to assume that an agency decisionmaker would hope her son was successful, even if she would not share in his financial success, that financial result does not apply to interests of PNA and Maria Loya in the CVRA Action. They will not personally benefit from the PNA litigation. Any benefits from the CVRA Litigation, if the courts determine that the California Voting Rights Act requires in Santa Monica elections by districts, will be the citizens who favor district elections.

The Court finds distinguishable the 2009 Attorney General Opinion cited by the staff report. It involved a financial transaction and any comment about a common law conflict was dicta. The Court finds the declaration and supplemental declaration of Frank V. Zerunyan has no probative value. Zerunyan claims, in essence, that De La Torre has divided loyalties because his wife is a plaintiff in the CVRA Litigation. De La Torre, as an elected school board member, has advocated for district-based elections for City Council “since at least 2015.” De La Torre’s advocacy for district elections is independent of his wife’s role in that litigation. De La Torre does not have divided loyalties; the City Council does not have a unanimous view on this “hot button” political issue. The CVRA Litigation is a spin-off of a long-standing political issue. The CVRA Litigation is costly. The City Council is the place where these opposing political values, and the costs to the community of continuing a political battle, should be debated and resolved. The fact that a city councilmember supports but has no personal interest in the lawsuit seeking a change in voting procedures does not support that the councilmember has a common law conflict of interest.

The reasons volunteered by Mayor Himmelrich for her vote to disqualify De La Torre deserve comment. Mayor Himmelrich’s remarks suggest that her vote to disqualify De La Torre was influenced by a concern that De La Torre might relay confidential communications from the City’s lawyers provided in closed meeting with the City Council to the CVRA plaintiffs (one being De La Torre’s wife) and their lawyers. There is nothing to back up any such suspicion. There is no evidence that has occurred or likely would occur. If the majority of the City Council had a concern that De La Torre would misuse confidential attorney-client information learned in closed meetings, it is an unspoken concern. An unspoken concern cannot be the basis for finding a common law conflict of interest. Any reason for finding a councilmember is disqualified must be clear in the record and supported by substantial evidence.

De La Torre did address this issue but in support of plaintiffs’ motion rather than in opposition to the City’s motion. The plaintiffs’ motion was filed first, so when the City filed its motion it had the benefit of De La Torre’s declaration, filed on January 8, 2022 reading as follows:

I have served as a local elected official for nineteen (19) years—as a school board member from 2002 through 2020, and then as a city

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council member since 2020. [ ] I understand that the Brown Act prohibits the disclosure of confidential information, and imposes serious consequences on any official who discloses confidential information from a closed session. I have received training regarding the Brown Act on several occasions in my role as a local elected official.

The City provided no response to this assurance by De La Torre. This Court finds no need to discuss the issue of protecting the confidentiality of closed meetings because the City does not expressly invoke the issue as justification for its disqualification of De La Torre. As the Court stated above, an undisclosed reason cannot support a common law conflict of interest.

The Court DENIES summary adjudication to the City against plaintiffs' first cause of action for declaratory and injunctive relief.

**Discussion: City's Motion for Summary Adjudication against Plaintiffs' Second Cause of Action for Violation of the Brown Act Is GRANTED.**

After the City Council majority voted to exclude De La Torre, the City Council entered into a closed session to discuss three litigations, one of them being the CVRA Litigation. Apparently De La Torre was excluded from the closed session considering the CVRA Litigation. How this was done and whether De La Torre was permitted to join the closed discussion of the other two litigations is not disclosed in the record. The City provides no declaration at all re the special meeting on January 26, 2021 and its aftermath. The minutes for the general meeting on January 26, 2021 identifies that closed sessions were held to discuss three litigations but does not identify whether any councilmember had been excluded. Anderson-Warren decl., Exhs. C and D.

The Court is inclined to grant summary judgment in the City's favor on plaintiffs' second cause of action alleging a violation of the Brown Act. Municipal law principles permit a city to determine whether a councilmember has a conflict of interest that would disqualify him or her from voting on a matter in which the councilmember has a financial or common law conflict. The Brown Act, as a statute, does not permit a councilmember who has been found to have a conflict of interest to attend a closed session that will discuss the matter in which the councilmember has a conflict. A city council's determination of disqualification can be challenged in court. Even if a court should determine that the City Council acted without substantial evidence the court finding should not justify a concurrent finding that the Brown Act was violated. Any such finding, leading to concurrent damage and legal fee remedies, would discourage city councils to deciding conflict of interest issues.

**A. RULING ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR SUMMARY ADJUDICATION:**



Plaintiffs' motion for summary judgment does not address significant legal issues. The Court DENIES the summary judgment motion The Court DENIES summary adjudication on each of plaintiffs' two causes of action.

### **No Basis for Summary Adjudication for Declaratory Relief**

Plaintiffs' motion is inadequate to obtain summary adjudication on the SAC's cause of action for declaratory and injunctive relief for various reasons.

For starters, plaintiffs ask for injunctive relief that would deprive the Santa Monica City Council, and by implication any city council, of the power to determine whether a member is disqualified from participating in matters in which the councilmember has a conflict of interest. The Court has underlined in the following quotation from the SAC's prayer the injunctive relief that would change California law:

3. For preliminary and permanent injunctive relief enjoining Defendants from excluding De La Torre from meetings, discussions or decisions of the Santa Monica City Council unless and until a court of competent jurisdiction determines that Plaintiff has a conflict of interest that prevents him from participating in the corresponding meetings, discussions or decisions.

Under California law a local agency has inherent authority to exclude from participation a member having a conflict of interest. *Kimura v. Roberts*, supra.; *Clark v. City of Hermosa Beach*, supra.; *BreakZone Billards v. City of Torrance*, supra. The injunctive and declaratory relief sought by plaintiffs would take this power away the Santa Monica City Council with respect to De La Torre, but there is no discussion in plaintiffs' briefs to provide legal support for this proposition.

What is plaintiffs' theory that would take away a city council's power to declare a conflict? Are plaintiffs arguing, if this Court overturns the City's disqualification of De La Torre, that the City loses its power to decide any conflict issues involving De La Torre in the future? Are plaintiffs arguing that because the City's exclusion of De La Torre was limited discussions/actions relating to the CVRA Litigation that the City may not in the future decide any conflict based on the CVRA Litigation without court clearance? Exactly what do plaintiffs want? Not surprisingly, the order that plaintiffs submitted to grant of summary judgment does not specify what declaratory or injunctive relief should issue.

Plaintiffs' briefs, in fact, fail to provide any legal argument to support imposing mandatory injunctive relief against a local agency. This issue is certainly worth a nod if only to obtain the City's response.

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No information, argument or authorities are provided to support relief in favor of the co-plaintiff Serna. Is he to be dismissed from this lawsuit?

Plaintiffs, furthermore, seek in their SAC a form of relief that is not discussed anywhere in their motion. Plaintiffs in their prayer ask the Court for:

6. For injunctive relief requiring Defendant to permit De La Torre to view the recording of the January 26, 2021 closed session council meeting from which he was excluded.

The fact that the City Council concluded a closed session presumably involving the CVRA Action after voting to exclude De La Torre is not mentioned in the statement of undisputed facts, nor in De La Torre's declaration, nor in plaintiffs' brief.

Plaintiffs filed their motion for summary judgment two months before the City filed its motion. Plaintiffs' motion is lacking in sufficient evidentiary support to grant summary judgment. Plaintiffs support their motion only with declarations from De La Torre and Shenkman (not counting the Trivino-Perez declaration to provide the Court with a copy of its own prior ruling). The Shenkman declaration does not address what plaintiffs knew would be a main issue for the City, e.g its contention that Shenkman is a de facto attorney for De La Torre. The De La Torre declaration does not address the elephant in the room: should he participate in the City's decisions as to the claims of the CVRA attorneys for \$22 million in attorneys' fees (inflated by the use of 2.3 multiplier)?

A movant for summary judgment cannot ignore obvious issues and expect that the Court too will ignore those questions and grant summary judgment.

#### **No Basis for Summary Adjudication for Violation of Brown Act**

Plaintiffs' contention appears to be that if a city council disqualifies a council member due to a conflict of interest the city is liable under the Brown Act to the council member if he/she is excluded from a closed meeting. Does that apply only if the disqualification is overturned by a court? Is there a good faith exception? Or are plaintiffs arguing that the city council cannot disqualify a member unless and until a court should conclude the member has a disqualifying conflict? Isn't there a conflict between Plaintiffs' interpretation of the Brown Act and the power of a local agency in the first instance to determine whether a member has a a conflict of interest? None of these issues are discussed. Summary adjudication on the cause of action for violation of the Brown Act is accordingly DENIED.

\* \* \*

The Moving Party on each motion is to serve notice of ruling. This TR shall be the order of the Court, unless changed at the hearing, and shall by this reference be incorporated into the Minute Order.

TENTATIVE RULING EMAILED TO COUNSEL ON 6/16/22 AT 9:30 a.m.

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