Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: July 7, 2021

TO: Councilmember Marni von Wilpert, Council District 5

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Related to the Unwinding of Proposition B

INTRODUCTION

On February 8, 2021, judgment was entered in the *quo warranto* action ordering Proposition B[1] invalid and directing the City of San Diego (City) to comply with the order by striking Proposition B provisions from the San Diego City Charter (Charter) and conforming the San Diego Municipal Code (Municipal Code) accordingly. The April 9, 2021, deadline to appeal the judgment has now passed without the proponents filing an appeal. You asked our Office whether you have a conflict of interest concerning any City Council (Council) actions the Council must take to comply with the judgment and unwind Proposition B since you would be eligible to participate in the soon-to-be reinstated pension plan administered by the San Diego City Employees' Retirement System (SDCERS).

QUESTION PRESENTED

1. Whether Councilmembers have a prohibited conflict of interest related to actions necessary to remove Proposition B from the Charter and make conforming amendments to the Municipal Code and related documents?[2]

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[1] Proposition B added several provisions to the Charter, including closing the City's defined benefit pension plan (San Diego City Employees' Retirement Plan or SDCERS) to new employees and requiring a defined contribution plan as an alternative. A defined contribution plan is a retirement program in which each employee has an individual account into which contributions are deposited. Employees direct the investment of their contributions, and a given employee's retirement benefit is determined solely by the balance in his or her account at retirement. In contrast, under a defined benefit plan, like SDCERS, an employee is entitled to a specified monthly benefit for life at retirement. The benefit is based on a formula, which usually is a percentage of salary multiplied by an employee's years of service. The City provides post-Prop. B Employees with their defined contribution plan benefit through the City's Supplemental Pension Savings Plan (SPSP)-H Plan.

[2] Proposition B also closed SDCERS to Councilmembers taking office after July 20, 2012. Thus, Councilmembers could have a potential conflict of interest in taking actions necessary to put themselves back into SDCERS prospectively. Additionally, certain Councilmembers may be subject to PERB's make-whole remedy to the extent they were initially employed as represented employees by the City after July 20, 2012, and before being elected to the Council. Moreover, PERB's make-whole remedy could be extended to unrepresented employees, including Councilmembers, who were initially hired or elected to office after July 20, 2012. Therefore, to the extent current Councilmembers are covered by PERB's make-whole remedy, they would likely have a conflict of interest that would prevent their participation in a decision concerning the make-whole remedy.

SHORT ANSWER

1. No. Councilmembers do not have a prohibited conflict of interest related to actions required to comply with the judgment because the Council's actions are ministerial and not discretionary.[3] Even if some of the actions necessary to unwind Proposition B or implement the "make-whole" remedy [4] involve discretion, the "public services" exception under California Government Code section 1091.5(a)(3) would likely apply.

ANALYSIS

I. THE *QUO WARRANTO*[5] JUDGMENT

The judgment invalidates all provisions of the Charter added by Proposition B and requires the City and the Council to strike the ". . . 2012 Proposition B provisions from the City Charter and [conform] the San Diego Municipal Code and other related documents accordingly." To comply with the court's direction, the Council must direct the City Clerk to remove the provisions of the Charter added by Proposition B, including the requirement of Charter section 140 mandating participation in a defined contribution plan only for those employees hired after July 20, 2012. The Council must also amend the Municipal Code provisions related to the SDCERS and the City's Supplemental Pension Savings Plan (SPSP-H) to strike changes made to those plans when implementing Proposition B's requirements, such as provisions excluding City employees hired on or after July 20, 2012 (post-Proposition B employees) from SDCERS and including those employees in SPSP-H instead. The result of such action would be participation by all new hires and all current post-Proposition B employees in SDCERS after amendments to SDCERS and SPSP-H become effective. Council's actions to implement the court's judgment involve no discretion on their part and are considered ministerial.

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[3] In general, a ministerial act is an act a public official is required to perform in a prescribed manner without regard to his or her own judgment or opinion concerning the act's propriety. A discretionary act, on the other hand, is the power conferred on a public official to act officially according to the dictates of his or her own judgment. *People ex rel. Fund American companies v. California Ins. Co.*, 43 Cal. App. 3d 423, 431 (1974). Here, Councilmembers are required by the judgment to strike the Proposition B provisions from the Charter and make conforming amendments to the San Diego Municipal Code. They have no discretion.

[4] Four of the City's recognized employee organizations (REOs) filed unfair labor practices charges with the Public Employment Relations Board (PERB), alleging the City violated the Meyers-Milias-Brown Act by failing to meet and confer before placing Proposition B on the ballot. PERB found in favor of the REOs and issued a remedial order requiring the City to make current and former bargaining unit members whole for the value of lost compensation, including but not limited to pension benefits, offset by the value of new benefits required from the City under Proposition B, plus seven percent interest. (*City of San Diego*, PERB Dec. No. 2464-M (2015).) Through various court challenges, the California Supreme Court upheld PERB's order (*Boling v. Public Employment Relations Board (City of San Diego),* 5 Cal. 5th 898 (2018)). Ultimately, as noted above, the court in the *quo warranto* action found Proposition B invalid and ordered the City to strike the Proposition B provisions from the Charter.

[5] *Quo Warranto* is a legal action brought to resolve disputes concerning the validity of citizens initiatives. Cal. Civ. Proc. Code § 803.

II. GOVERNMENT CODE SECTION 1090 AND THE POLITICAL REFORM ACT

California Government Code section 1090 (Section 1090) generally prohibits public officials from the making, or participating in the making, of contracts in which they have a financial interest. It codifies the common law rule that public officials are barred from entering into contracts in their official capacities in which they have a personal financial interest. *Brandenburg v. Eureka Redevelopment Agency*, 153 Cal. App. 4th 289, 317 (2007). In general, Section 1090 has its origin in the principal that no person can serve two masters whose interests may conflict. *Thompson v. Call*, 38 Cal. 3d. 633, 637, 647 (1985) (citing *San Diego v. S.D. & L.A. R.R. Co*., 44 Cal. 106 (1872)). Courts have recognized that California Government Code section 1090 should be broadly construed and strictly enforced. *Stigall v. Taft*, 58 Cal. 2d 565, 569-571 (1962). Moreover, when Section 1090 applies to a member of a governing body of a public entity, in most cases, the prohibition cannot be avoided if the interested member abstains from the decision. In such a case, the entire governing body is precluded from entering into the contract. 86 Op. Cal. Att'y Gen. 138, 139 (2003); 70 Op. Cal. Att'y Gen. 45, 48 (1987). A contract that violates Section 1090 is void. *Thompson v. Call*, 38 Cal. 3d. at 646.

The Political Reform Act of 1974 (Cal. Gov't Code §§ 81000, *et seq*.) (the Act) similarly creates ethical rules for state and local government officials that impose limits on certain actions they may take affecting public officials' financial interests. In general, the Act prohibits public servants from making, or participating in making, a decision if they know or have reason to know that they have a financial interest in such a decision. Cal. Gov't Code § 87100. Under the Act, a public servant has a disqualifying financial interest in a government decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public servant's financial interests. Cal. Gov't Code § 87101.

Public officials participate in the making of a contract when they amend the terms of a public retirement system. *Lexin v. Superior Court*, 41 Cal. 4th 1050, 1094 (2010). Accordingly, we must analyze both Section 1090 and the Act when determining whether a public official has a prohibited conflict of interest. *People v. Honig*, 48 Cal. App. 4th 289, 327 (1996) (citing 65 Op. Cal. Att'y Gen. 41, 57 (1982)).

III. EXCEPTIONS: MINISTERIAL ACTS AND PUBLIC SERVICES

Certain exceptions apply to decisions made by public officials under 1090 and the Act. These exceptions include ministerial acts and the "public services" exception.

A. Ministerial Acts

Regulations interpreting the Act provide that when the actions of a public official are solely ministerial, secretarial, or clerical, that official is not making, or participating in making, or influencing a government decision and, thus, is not violating the Act. Cal. Code Regs. title 2, § 18704(d). Here, the Council's removal of Proposition B from the Charter, Municipal Code, and related documents is responsive to a court-issued judgment requiring those actions. Accordingly, discretion is not involved, and a ministerial action such as this is exempt from the Act.

B. "Public Services" Exception

If the Council exercises discretion, then the "public services" exception under California Government Code section 1091.5(a)(3) likely applies. This exception provides that an official has a non-interest in receiving public services provided by his or her agency or board as long as that official receives those services in the same manner as members of the public. The California Supreme Court has held this "public services" exception applies to pension benefits provided to employees of the entity "so long as the services are broadly available to all others similarly situated, rather than narrowly tailored" to favor any officials, and are provided on substantially the same terms for all affected officials. *Lexin v. Superior Court*, 47 Cal. 4th 1050, 1092 (2010).

In *Lexin,* several City employees who served on the board of SDCERS were prosecuted for voting to authorize an agreement allowing the City to defer payments to the retirement system in exchange for the City's agreement to provide increased pension benefits for City employees, including board members. For most employees, the increased benefit was an enhanced multiplier for calculating their final benefit. The contract also created a "presidential leave" benefit for one board member who served as president of one of the City's recognized employee organizations (REO), allowing him to use a higher salary for his pension benefit.

The Supreme Court ultimately found that the board members had a "non-interest" in the contract under the "public services" exception because the pension benefits they approved were broadly available to all similarly situated members rather than narrowly tailored to favor a particular employee or small group of employees. In reaching this result, the court also relied on legal authorities interpreting the Act's "public generally" exception. Notably, this exemption did not apply to the REO's president, as he received a special benefit available only to him.

Based on the Supreme Court's decision in *Lexin*, if it is determined that Councilmembers exercised discretion in implementing the court's judgment, they will likely qualify for the "public services" exception as long as their decisions concerning the unwinding of Proposition B broadly benefit all other similarly situated employees and are not specifically tailored to favor Councilmembers in any way.

Similarly, the Act's "public generally" exception provides that an official does not have a personal financial interest in a contract when the decision affects a significant segment of the population in the jurisdiction of the official's agency and its effect on the public official's economic interest is indistinguishable from its effect on the population previously identified.[6] Cal. Code Regs. title 2, § 18703.

[6] Moreover, the Act also provides a decision will not have a material personal financial effect where changes are made to benefits provided under a retirement plan, if the effect of the decision applies equally to all public servants in the same bargaining unit or other representation group. Cal. Code. Regs. title 2, § 18702.5(b)(4).

IV. THIS OFFICE'S ADVICE ON CONFLICT OF INTEREST MATTERS DOES NOT PROVIDE IMMUNITY TO COUNCILMEMBERS

Where a prohibited conflict of interest exists under Section 1090 of the Act, the contract is void, and the official who made the contract will be subject to a number of civil and, if found a willful violation, criminal penalties, including disqualification from holding public office. Cal. Gov't Code § 1097; 89 Op. Cal. Att'y Gen. 121, 123 (2006).

California courts have consistently held that reliance on legal counsel's advice is not a defense to a Section 1090 violation. *Thompson v. Call*, 38 Cal. 3d 633, 646 (1985); *People v. Honig*, 48 Cal. App. 4th 289, 347-348 (1996); *Chapman v. Superior Court*, 130 Cal. App. 4th 261, 274 (2005). Therefore, although this memorandum provides reliable guidance, Councilmembers are advised to request written advice from the Fair Political Practices Commission (FPPC). Cal. Gov't Code § 83114(b). A formal advice letter from the FPPC, if followed by the requestor, provides immunity to the requestor under the specific facts referenced.[7] Cal. Gov't Code § 83114(b). Informal FPPC advice[8] does not provide the requestor with immunity for a Section 1090 violation, but the requestor can use it as evidence of the official's good faith. Cal. Code Regs. title 2, § 18329(c)(3); Cal. Gov't Code § 1097.1(d). The FFPC is prohibited from issuing an opinion or advice related to past conduct (Cal. Gov't Code § 1097.1(c)(2)); FPPC advice, if desired, should be sought prior to acting.

CONCLUSION

Councilmembers do not have a prohibited conflict of interest under Section 1090 or the Act related to ministerial actions required to comply with court's order to strike the Proposition B provisions from the Charter, Municipal Code, and related documents. Even if the Council's actions in complying with the court's judgment were determined to involve some discretion, the "public services" exception under California Government Code section 1091.5(a)(3) likely applies.

[7] The City's Ethics Ordinance contains provisions mirroring Section 1090's prohibitions on officials being financially interested in any contracts they make or participate in making. Thus, Councilmembers could also contact the Ethics Commission for additional guidance; however, any advice from the Ethics Commission is not binding in a Section 1090 action.

[8] Informal advice is provided by the FFPC in response to an email or phone call from a requestor. Formal FFPC advice consists of a written opinion from the FFPC.

Notwithstanding the above, this Office's opinion does not provide immunity to a Councilmember from a civil or criminal enforcement proceeding under Section 1090. For that reason, this Office recommends a written formal opinion from the FPPC, which this Office is available to help you draft.

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By */s/Thomas J. Brady*
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