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SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
MAR 27 2019
R. Loupe

MAR 28 2019

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE, CENTRAL DISTRICT

WILLIAM R. ("RUSTY") BAILEY III, MARCIA McQUERN, and THOMAS MULLEN,

Petitioners and Plaintiffs,

v.

CITY OF RIVERSIDE,

Respondent and Defendant.

CASE NO. RIC1804755
Unlimited Jurisdiction

Case assigned to Hon. Irma Asberry, Dept. 1 (Trial); Hon. Randall S. Stamen, Dept. 7 (Law and Motion)

RESPONDENT AND DEFENDANT CITY OF RIVERSIDE'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION

Complaint Filed:	March 9, 2018
Hearing Date:	April 10, 2019
Time:	8:30 a.m.
Dept.:	7
Trial Date:	None set

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I. INTRODUCTION

Whether to renegotiate the (now moot) contract of former City Manager John Russo was a political dispute of the sort that courts avoid. Petitioner William R. Bailey, III, Mayor of Riverside, lost that battle but won the war — the City Council fired Russo soon after. Despite his victory, Bailey still seeks more power. Elected officials commonly do. He seeks control of the appointment and dismissal of the City Manager and, through him or her, control of City staff. But City voters removed these powers from the Mayor's office more than 65 years ago by adopting a new Charter to implement the "weak mayor/strong manager" form of government. As in other "weak mayor" cities, the City Manager reports to, and serves at the pleasure of, the City Council. The mayor plays no role in his or her selection or dismissal.

Bailey also seeks to control the legal advice the City receives, but cites no case holding the City Attorney may not interpret the City Charter at the City Council's request. The City Attorney had no financial interest in Russo's contract and deferred to independent outside counsel on this issue to avoid even the appearance of partiality in his advice.

Bailey thus addresses the wrong audience here. If he wants to convince voters to adopt a "strong mayor" government to grant him supervisory control of the City Manager and City Attorney, he should propose to amend the City's charter — as the mayors of San Diego and San Bernardino successfully did and as the Mayors of Sacramento and Miami recently failed to do. Indeed, he appointed one of his co-Petitioners to the City's Charter Review Committee, which is considering charter amendments to so enhance mayoral power.

Bailey and co-Petitioners Marcia McQuern and Thomas Mullen (together "Petitioners" or "Bailey") move for summary adjudication (the "Motion") seeking to decide one of their two causes of action — a trial run, perhaps, of evidence and arguments they will reprise at trial. Triable issues of fact and fatal procedural defects abound. Bailey's undisputed facts do not entitle him to judgment on any the seven issues he identifies — at least two of which are undoubtedly mooted by Russo's dismissal. Accordingly, the Court should deny this motion and let the live issues be resolved at trial, which, in a case tried on an administrative record, will be less burdensome than this motion.

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II. STATEMENT OF FACTS[1]

A. HISTORY OF RIVERSIDE'S CITY CHARTER

From 1907 to 1953, "[t]he legislative power of the city" was "vested in a mayor and council consisting of seven members." (City's Separate Statement of Additional Material Facts ("AMF"), 31.) The Mayor could appoint and remove — with Council approval— the City Attorney, City Engineer, municipal court judges, and many other department heads. (AMF, 32, 33.)

None of these powers remain to the Mayor today. Voters amended the Charter in 1953 to adopt a council-manager government with a "weak," ceremonial mayor. (AMF, 34–36.) The 1953 Charter also empowered the City Council to hire, supervise and fire the City Manager, a position which did not exist under earlier, strong-mayor Charters. (AMF, 37.) Voters thus stripped the Mayor's office of authority over Charter Officers, transferring it to the City Council, where it remains under what is now Charter section 406 (AMF, 36, 43 ["All powers of the City shall be vested in the City Council except as otherwise provided in this Charter."]) and transferred the power to appoint other City officials from the Mayor to the City Council as well. (AMF, 37, 44, 56.)

B. CITY'S AMENDMENT AND TERMINATION OF RUSSO CONTRACT

The City made a five-year employment agreement with Russo in 2015. (Petitioners' Undisputed Material Facts ("UMF"), 5.) At its February 6, 2018 meeting — two years before the agreement was to expire — the City Council amended the contract to extend its term to 2025 and changing other terms (UMF 12), including allowing Russo a home mortgage funded by the City. Nevertheless, the City's Human Resources Department concluded the amendment had "no net cost" to the City. (AMF, 71.) Thus, the primary effect of the amendment was to assure Russo of his tenure through the next three City elections and to similarly assure department heads who serve at Russo's pleasure that they would not soon face a new, and perhaps unwelcome, boss.

On April 17, 2018, the City Council voted 4-3 to terminate Russo's employment without cause. (UMF 28; AMF, 72.)

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[1] The City presents an abbreviated summary of important facts here to meet page limit requirements. The City identifies many more material facts governing this motion and supporting its denial in its accompanying Separate Statement of Additional Material Facts. (Code Civ. Proc., § 437c, subd. (b)(3); *Blackman v. Burrows* (1987) 193 Cal.App.3d 889, 895–896.)

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C. BAILEY'S SUIT

On March 9, 2018, 31 days after the City Council amended Russo's contract, ignored Bailey's attempted veto, and began performing the amended contract (UMF, 22), Bailey sued. (AMF, 73, 74.) He asserts duplicative claims for writ of mandate and declaratory relief, seeking, inter alia, this Court's interpretation of the City Charter provision for the mayor's legislative veto, a declaration the amended Russo contract is void *ab initio*, and an order that the City seek to recoup benefits Russo received under the amended contract. (UMF, 4; AMF, 83, 84, 85.)

Two weeks later — and 44 days after the City began performing the contract — Bailey applied ex parte seeking, inter alia, to stay enforcement of the contract (AMF, 75), which this Court denied April 9, 2018 (AMF, 77). Bailey amended his pleading to add McQuern and Mullen as petitioners to address the City's standing defense. (AMF, 78.) Even though he would require the City to recoup money from Russo, Bailey does not name him as a defendant or respondent, nor does he name those who hold an interest in Russo's property subject to the City's mortgage. (AMF, 86, 87.)

D. CLYMER'S RELATED SUIT

After Bailey sued, R. Ben Clymer, Jr. sued in "reverse validation" under Code of Civil Procedure section 860 et seq., seeking similar relief. (AMF, 88, 89.) Clymer named Russo a defendant; Russo answered. (AMF, 90.) The City filed a notice of related case here, identifying *Clymer* as a related action and giving Bailey and his counsel notice of the case. (AMF, 91.) Bailey chose not to answer Clymer's action and is now barred from doing so. (AMF, 92.)

Bailey's counsel initially stipulated to consolidation of *Clymer* and *Bailey* to avoid unnecessary cost and delay. (AMF, 93.) At a trial-setting conference before Judge Asberry, however, Bailey's counsel announced her client's opposition to consolidation. (AMF, 94.) Judge Asberry set an order to show cause regarding consolidation of *Bailey* and *Clymer* for hearing on April 25, 2019 — after this Motion is to be heard. (AMF, 95.)

III. ARGUMENT

A. BAILEY BEARS A HEAVY BURDEN ON SUMMARY ADJUDICATION

To briefly state summary adjudication requirements: The statute — which applies with equal force to summary adjudication (Code Civ. Proc., § 437c, subd. (f)(2)) — is "unforgiving; a failure to

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comply with any one of its myriad requirements is likely to be fatal to the offending party." (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1607.) The movant bears the burden of persuasion that there is no triable issue of material fact **and** that he is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Only if she makes this showing must her opponent demonstrate a triable issue of material fact. (*Ibid.*)

Bailey seeks summary adjudication of his declaratory relief claim.[2] The Court must determine if there is a "triable issue as to **any** material fact" (Code Civ. Proc., § 437c, subd. (c), emphasis added); it may not grant summary adjudication as to fewer than all seven items the Motion identifies. Thus, to win the Motion, Bailey must show:

- all seven sought-after declarations are legally correct;
- there are no triable factual issues with respect to any of them; and
- each is appropriate for declaratory relief and involves "justiciable questions relating to the party's rights or obligations" (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909).

If he fails any of these tests as to any of the issues, the Court must deny the entire Motion.

B. THE MOTION'S PROCEDURAL FLAWS ARE FATAL

1. Bailey and McQuern Lack Standing

It is well settled that a plaintiff who lacks standing cannot state a valid cause of action. (*Cohen v. DIRECTV, Inc.* (2009) 178 Cal.App.4th 966, 981; Code Civ. Proc., § 367 ["Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute."].) As City officials — Mayor and Vice Chair of its Charter Review Committee, respectively (AMF, 79) — Bailey and McQuern lack standing. The Court cannot grant them summary adjudication.

A plaintiff must hold "some special interest to be served or some particular right to be

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[2] Had Bailey intended to move for summary adjudication as to less than the entire cause of action, or on each of the seven declarations individually in the alternative, he must have presented a stipulation. (Code Civ. Proc., § 437c, subd. (t)(1)(A).) He never proposed such a stipulation, nor would the City have so stipulated given the inefficiencies and unnecessary legal expenses this Motion imposes. Record cases are easily resolved at trial with less burden than summary judgment, more certainty of a resolution, and a more deferential appellate review.

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preserved or protected over and above the interest held in common with the public at large" to show standing. (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 (*Carsten*).) Our Supreme Court concluded in *Carsten* that a member of an administrative agency — like Bailey and McQuern — may not challenge an action of that agency. (*Id.* at p. 795.) This is so whether he member sues as a board member or taxpayer. (*Id.* at pp. 798, 799, 801.) This rule is well settled. (*Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 90–91 (*Braude*) [City Councilmember lacks standing to enforce his personal view of CEQA]; *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1258–1259 [City Councilmembers lacked standing to enforce rule that meetings must adjourn by 11 p.m.]; *Holtzman v. Schlesinger* (2d Cir. 1973) 484 F.2d 1307 [Congresswoman lacked standing to challenge bombing in Cambodia; cited with approval in *Carsten, supra*, 27 Cal.3d at p. 800 and *Braude, supra,* 226 Cal.App.3d at pp. 91–92].)

Carsten specifically warned against cases like this, in which an official on the losing side of a decision sues his agency for political purposes, risking disruption of internal deliberations and congestion of court calendars. (*Carsten, supra*, 27 Cal.3d at pp. 798–799.) The Supreme Court noted that, were the rule otherwise, "[t]he dissident board member, having failed to persuade her four colleagues to her viewpoint, now has to persuade merely one judge." (*Id.* at p. 799.)

2. The Court Cannot Consider Bailey's Extra-Record Evidence

The City Council's approval of a contract is a legislative act. (*SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 191 (*SN Sands*).) Courts must resolve challenges to legislation on the administrative record before the legislative body, precluding Bailey's extra-record evidence. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 (*Western States*); *American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 460 [in mandamus review of legislation, court will "consider only the administrative record before the agency"]; *San Joaquin Local Agency Formation Com'n v. Superior Court* (2008) 162 Cal.App.4th 159, 167 (*San Joaquin LAFCO*); *SN Sands, supra*, 167 Cal.App.4th at p. 191.) The rule is rooted in the institutional competencies of legislatures and courts and in the separation of powers. (*San Joaquin LAFCO, supra*, 162 Cal.App.4th at p. 167 [admitting extra-record evidence would "infringe upon the separation of powers"].) The Court should deny this motion because nearly all

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"undisputed" facts Bailey submits cite only his conclusory, speculative, extra-record declaration.

The City certified and served the administrative record of its approval of Russo's amended contract (AMF, 96) but it has not yet lodged (nor briefed) that record. Thus the only evidence the Court may consider is not yet before it. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1292 (*Dunn*) ["Where, as here, the court is called upon to evaluate the sufficiency of the evidence to support an agency's decision, review is generally limited to the evidence contained in the administrative record."]; *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816, fn. 8 [trial court determines writ on the "whole record of the administrative proceedings"].)

That Bailey pursues both a writ and declaratory relief does not evade this rule. (*Western States*, *supra*, 9 Cal.4th at p. 566 [seeking declaratory and mandamus relief]; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 695 & 706 [seeking mandate, declaratory, and injunctive relief].) Indeed, the Court should dismiss his redundant declaratory relief claim: "When writ review is available, it is the exclusive means for affirmatively challenging municipal decisions." (Cal. Municipal Law Handbook (Cont. Ed. Bar 2018) § 13.2 [citations omitted]; *City of Pasadena v. Cohen* (2014) 228 Cal.App.4th 1461, 1467–1468 [reversing declaratory relief and injunction and remanding for retrial as writ].) "The declaratory relief statute should not be used for the purpose of anticipating and determining an issue which can be determined in the main action." (*California Insurance Guarantee Association v. Superior Court* (1991) 231 Cal.App.3d 1617, 1623–1624; *Hood v. Superior Court* (1995) 33 Cal.App.4th 319, 324 [declaratory relief "is to afford a new form of relief where needed and not to furnish a litigant with a second cause of action for determination of identical issues"].)

3. *Clymer* Precludes this Motion

After Bailey sued, Clymer filed his "reverse validation" action under Code of Civil Procedure section 860 et seq. to determine the scope of Riverside's mayor's veto power and the validity of Russo's contract. The suit is against all who are interested in its subject, including Russo and any others. (AMF, 88, 89.) Both suits seek to invalidate Russo's amended contract. (AMF, 84, 89.) Bailey had opportunity to answer Clymer's validation complaint but abstained. (AMF, 92.)

Plaintiffs cannot seek mandamus or other relief if a reverse validation is available. (*Hills for*

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Everyone v. Local Agency Formation Com. (1980) 105 Cal.App.3d 461, 466; *Leach v. City of San Marcos* (1989) 213 Cal.App.3d 648, 656–657.) Accordingly, the Court should dismiss or stay this action in favor of *Clymer*. Bailey previously agreed to have his action tried with Clymer's but reneged on that agreement, claiming differences between the cases where none exist. (AMF, 94.)

Bailey's tactical decision to litigate separately cannot evade the validation statutes, which give *Clymer* priority and broad preemptive effect. The taxpayers who fund the City's defense (and against who Clymer and Bailey both seek attorney fees) ought not be made to do so twice.

C. DISPUTED FACTS PRECLUDE SUMMARY ADJUDICATION

The Motion also fails because of the many disputed factual issues the Court must decide at trial and because the "undisputed" facts Bailey offers do not entitle him to summary adjudication. Instead, Bailey's facts and those the City cites in opposition justify declarations for the **City** on each issue, as the City will show at trial.

1. The Charter Precludes Veto as to Employment of Charter Officers (Issues 1, 2, 3, 4, 5)[3]

As Bailey concedes (Motion, p. 10, lines 4–8), the Court must interpret the Charter to harmonize all of its provisions and to serve voter intent. But he construes the Charter to maximize his veto power at the expense of other provisions, favoring one rather than harmonizing all. (*Mel v. Franchise Tax Board* (1981) 119 Cal.App.3d 898, 905–906 ["Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible," citation omitted].)

> The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. An interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in the light of the statutory

[3] The City refers to the seven issues Bailey identifies in his Notice of Motion by numbers in the order he identifies them.

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scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed.

(*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, citations omitted.)

Moreover, when statutes conflict, the specific controls the general because the law-giver can be expected to have modified general rules to accomplish the specific goals on which it focused rather than the reverse. (*Division of Labor Law Enforcement v. Moroney* (1946) 28 Cal.2d 344, 346.)

a. Bailey ignores Charter sections limiting mayoral power over Charter Officers

Bailey claims his veto power — stated in general terms in the Charter's legislative chapter — applies to any formal action of the City Council except for those enumerated in an exception. But as the City briefed in opposition to Bailey's ex parte application, Bailey ignores charter provisions which state the three Charter Officers serve at the pleasure of the City Council alone and thus reserve to the City Council the power to hire, fire, and supervise them. (AMF, 49 [City Manager "shall be responsible to the City Council"], 56.)

Bailey thus reads express exceptions to his veto power as the only limitations on that power. He reads "at the pleasure of the City Council" in sections 600 and 700 narrowly, claiming the phrase "provides no more exclusivity of control to the City Council" over charter official employment matters "than does [Charter] section 406," which states "All powers of the City shall be vested in the City Council except as otherwise provided in this Charter." (Motion, p. 14, lines 23–25). This reads "at the pleasure of the Council" out of sections 600 and 700 — absent that phrase, the Charter might allow the mayor to veto Charter Officer employment decisions as he could most other City Council actions. However, "at the pleasure of the Council" must have meaning; the Court must give meaning to **every** provision of the Charter and harmonize the Mayor's legislative veto with the Charter's direction that the Council have exclusive control over the employment of Charter Officers.

If "at the pleasure of the City Council" in sections 600 and 700 meant "at the pleasure of the City Council **and the Mayor**," it would say so, as Charter section 802 does. It would also give the Mayor a direct say in the selection of the City Manager, a reading section 600 precludes. (*Renna v. County of Fresno* (2000) 78 Cal.App.4th 1, 12 ["being personally accountable to someone other than the elected official means that the employee does not serve solely at the pleasure of the elected

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official, but of others as well," quotation and citation omitted].) Bailey contorts the Charter to make the Mayor at least co-equal with the Council in hiring and firing Charter Officers, such that each effectively serves at his pleasure, too — contrary to sections 600 and 700.

Indeed, "at the pleasure of" is a term of art — one serving "at the pleasure of" another may be hired or fired for any reason or no reason and the appointing authority has exclusive power to make those decisions. (Black's Law Dictionary (10th ed. 2014) ["pleasure appointment" is "the assignment of someone to employment that can be taken away at any time, with no requirement for cause, notice, or a hearing"]; *Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1693 ["[s]erving at pleasure means one is an at-will employee who can be fired without cause"].) Other Charter sections use the same phrase to identify at-will employees and officers and their appointing authorities:

- Section 405 – mayor pro tem serves "at the pleasure of the City Council" (AMF, 59a);
- Section 601 – department heads and other officers not appointed by City Council "serve at the pleasure of the City Manager" (AMF, 49);
- Section 804 – presiding officers of appointive boards and commissions serve "at the pleasure of such board or commission" (AMF, 59); and
- Section 802 – members of appointive boards and commissions "shall serve at the pleasure of the Mayor and City Council and shall be nominated and appointed by the Mayor and City Council" (AMF, 60).

Thus, Charter section 802 grants — as Charter sections 600 and 700 do not — power to the Mayor as to members of such boards. This confirms he lacks such a role as to other positions under the *expressio unius* canon. (*Gonzales & Co. v. Department of Alcoholic Bev. Control* (1984) 151 Cal.App.3d 172, 178.)

If the Charter's text left any doubt, legislative history confirms the point. Riverside's voters rejected a proposed charter amendment in 2004 to give the Mayor authority to appoint chairs of City boards and commissions. (AMF, 61.) That voters changed no other aspect of the Mayor's power suggests their 1953 decision to empower the Council at the expense of the Mayor as to the selection of the City Manager remains their will and, hence, the meaning of the Charter. The Mayor's remedy

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lies with the voters, not the courts. If he wishes to amend the Charter, he should try, as other Mayors have done; some successfully, others not.

b. Other Charter sections do not extend the Mayor's veto to Charter Officer employment decisions

Bailey argues other Charter sections extend his veto power to Charter Officer employment decisions. (Motion, pp. 11–12, 13.) These do not gainsay sections 600 and 700 that Charter Officers statement that "serve at the pleasure of the City Council" and — pointedly — not of the Mayor:

Section 201 – that the office of mayor "exist[s] to conduct the people's business" does not empower him to veto decisions reserved to the City Council. The section is general, not specific.

Section 406 – vesting "in the City Council" all powers of the City confirms that, in the absence of specific, contrary language, the City Council — not the Mayor — appoints Charter Officers.

Section 405 – giving the Mayor "a voice in all [City Council] proceedings" does not grant him a "vote" or a "veto" in those proceedings. That section states the Mayor may vote only to break ties. Thus, "voice" is not "vote," much less "veto." The Charter uses "voice" to mean a speaking role, and "vote" to mean a fraction of the Council's legislative authority. The distinction between "voice" and "vote" is both intentional and meaningful. The Court cannot edit the Charter to change "voice" to "vote" or "veto"; only Riverside's voters can.

c. Bailey's suggestions the City Council should override his veto assumes his view of his veto power

Bailey faults the City Council for not overriding his "veto" (UMF, 24), but recognizing his veto of Russo's contract would conflict with the Charter. Charter Section 600 states that the City Manager **shall** be appointed by a majority vote of the Council and **shall** serve at its pleasure — without mention of the Mayor. (AMF, 56.) Moreover, Charter section 413 requires votes of five of seven Councilmembers to override a veto. Could the Mayor veto Charter Officer employment decisions, section 600 — requiring appointment of the City Manager by "majority vote" — would read otherwise. If the Mayor could veto Charter employment decisions, those decisions would require: (1) votes of four of seven City Council members and the Mayor; or (2) a veto-proof super-majority of five of seven City Council members. A majority of council alone would never suffice.

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This is not merely hypothetical. Russo was fired on April 17, 2019 on a 4–3 vote. (UMF 28; AMF 72.) In Bailey's view, a mayor supporting Russo could have vetoed the decision, the Council would have been unable to override the veto, and Russo would remain in place absent majority Council support. This makes section 600 meaningless.

d. The powers of Riverside's mayor are similar to those in "weak mayor" general law cities, as the Charter intends

Before 1953, Riverside's mayor controlled employment of City officials. (AMF, 32, 33.) Riverside's voters adopted a new Charter that year to adopt the council-manager (or "weak mayor / strong manager") form of government, transferring control of City officials to the City Council. (AMF, 34–37.) Bailey notes Riverside's voters amended the council-manager form to give his office some duties not found in some other cities' charters (Motion, pp. 12–13), but these do not expressly extend to Charter Officer employment decisions. The intent of the voters in 1953 to strip Riverside's Mayor of control of Charter Officers remains. (*DeJung v. Superior Court* 169 Cal.App.4th 533, 547 ["it is an old and well-settled rule that when two laws upon the same subject, passed at different times, are inconsistent with each other, the one last passed must prevail"].)

Riverside's Charter is based on earlier drafts of the National Civic League's Model Charter and retains many of the same subject headings and provisions in much the same order. (AMF, 38.) It identifies mayoral powers similar to those of mayors in California general law cities, which have a weak, ceremonial mayor, elected by and serving at the will of the council of which he or she is a part. (Gov. Code, § 36801.) Charter section 405 shows the Mayor's duties are largely ceremonial: he presides at City Council meetings, participates in debates but votes only to break ties (and then, his "vote shall be deemed a City Councilmember's vote for all purposes") and he has "primary but not exclusive responsibility" to inform the people of the City's programs, policies, and their interpretation, including in an annual State of the City address. (AMF, 57, 58.)

By contrast, City Council powers are broad under section 406, reserving "[a]ll powers" of the City to the Council except as the Charter states otherwise. In addition to appointing Charter Officers and the CFO/Treasurer, the City Council also establishes the City's organizational structure. (AMF, 62, 63.) It alone may create Boards and Commissions. (AMF, 64.) It approves the budget and makes appropriations. (AMF, 65.) The City Council — not the Mayor — may propose charter amendments

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to voters (AMF, 66), although, like all registered voters, the Mayor may propose them by initiative. (Cal. Const., art. XI, § 3, subd. (b).)

e. Riverside's Charter is like those of other "weak mayor" cities which do not allow vetoes of employment decisions

Most American cities retain weak, ceremonial mayors like Riverside's. Such ceremonial mayors reflect Progressive-era reforms intended to avoid patronage politics famously seen in places like Cook County, Illinois and New York's Tammany Hall. (E.g., Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in A Federal System* (2006) 115 Yale L.J. 2542, 2548.)

City charters that authorize mayors to hire and fire chief executives do so expressly. San Bernardino's charter expressly allows its mayor to veto any action approved by fewer than five city councilmembers and to participate in votes to appoint or remove the city manager, city attorney, and city clerk. (AMF, 98.) San Diego approved a "strong-mayor" charter amendment in 2004, eliminating the city manager position and providing for a "chief operating officer" hired and fired by the mayor. (AMF, 99.) Like many strong mayors and — unlike Riverside's — San Diego's executive mayor does not sit in council and has no vote (or even voice) there, even to break ties. (AMF, 100.) Voters in Sacramento and Miami recently rejected strong-mayor charter amendments that would authorize mayors the power to appoint and fire Charter Officers. (AMF, 101, 102.)

Under Bailey's view, Riverside's Charter Officers would — at best — serve two masters, impairing efficient government. At worst, they would be drawn into the politics of mayoral elections, as seen in Cook County and Tammany Hall; good leaders would be discouraged from City service; and City services would suffer. Or at least that is what the voters appear to believe. To have their intended effect of establishing a single chain of command, Riverside's Charter vests all aspects of the employment of Charter Officers in the Council and excludes the Mayor — and the consequences of such control. There are counter arguments, but Bailey should make them to voters, not this Court.

2. Charter Officer Employment Agreements Do Not Require a "Formal" Resolution (Issues 2, 4, 5)

Bailey seeks a declaration that "formal resolutions" must be submitted to the City Council for all "formal actions" related to Charter Officers. (Notice of Motion, p. 2, lines 13–16.) This simply

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restates his veto arguments, requiring action in a form he believes he can veto. However, he does not carry his burden to show he is entitled to a declaration on this point, and his explanation of this argument in the Motion is sparse. He might be arguing the City Council attempted to deprive Bailey of a veto by modifying Russo's employment terms other than by resolution, but he has no power to veto the Council's employment decisions affecting the City Manager regardless of form. Thus, whether an ordinance, resolution, or minute action was proper is an academic question, and the Court should decline to grant an advisory opinion on this point.

The only facts cited in the separate statement on this issue show some City employment decisions were accompanied by resolutions (UMF 5, 6) and others were not (UMF 7, 16, 18). Bailey cites no section of the Charter or Municipal Code requiring the City Council enact a "formal resolution" to approve Charter Officer contracts, and thus, on Issues 2 and 4, Bailey has failed to meet his initial burden of production and the Court should deny the Motion.

a. Neither the Charter nor the Municipal Code requires a Resolution to approve Charter Officers' contracts

Bailey claims Russo's renegotiated contract "provided for changes to Mr. Russo's salary, vacation, and administrative leave" (UMF 13) and "added employment benefits" including a life insurance policy and low-rate mortgage (UMF 14), implying the amended contract required a "formal" resolution under the Municipal Code. But the City's discretion in setting employment terms is broad. A "city in its charter may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." (*Los Angeles G. & E. Corp. v. Los Angeles* (1922) 188 Cal. 307, 317.)

Neither the Charter nor Municipal Code requires "formal actions" or "formal resolutions" to approve Charter Officer employment agreements, nor do they prohibit the City Council from approving such contracts by minute actions — actions of the Council reflected only in its minutes rather than by another writing, too. (AMF, 42, 45, 67, 68.) At most, Bailey can prove a somewhat consistent practice. Habit is not mandate. His demand the Court require the City to approve Charter employee contracts by "formal resolution" would rewrite the Charter, which this Court may not do.

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Bailey suggests Municipal Code chapter 2.32, which sets forth general requirements for City employment and incorporates Charter section 701's instruction that the City Council set terms for such employment (AMF, 39, 40), requires "resolutions" for all Charter Officer employment decisions and "all changes in compensation and benefits." (Motion, p. 15, lines 18–21.) Not so. These sections require the City Council to enact "resolutions" for certain, but not all, employment benefits and say nothing about Charter Officers or the method by which the Council must accomplish this. (AMF, 40.)

Specific sections of the Charter pertaining to Charter Officers — not the Municipal Code or City Council resolution — set the requirements for Charter Officer employment. (AMF, 44, 48, 50, 55.) This suggests Charter section 701 — and, thus, chapter 2.32 of the Municipal Code that implements it — does not apply to Charter Officers. The City Council may not alter these Charter terms by resolution or ordinance (*Marculescu v. City Planning Commission of City and County of San Francisco* (1935) 7 Cal.App.2d 371, 373 ["The charter of a municipality is its constitution."]); only voters, not the City Council, can change them.

b. The signed contract and the City Council's minutes are sufficient "resolutions" even were they required

While an ordinance is a "local law" which "prescribes a rule of conduct prospective in operation, applicable generally to persons and things subject to the jurisdiction of the city," a "resolution" is "something less formal" and "the mere expression of the opinion of the legislative body concerning some administrative matter for the disposition of which it provides." (*Central Mfg. Dist., Inc. v. Board of Sup'rs of Los Angeles County* (1960) 176 Cal.App.2d 850, 860.) Consistent with this authority, the Charter does not define "resolution" or prescribe a form one must take other than stating it must be "signed by the Mayor and attested by the City Clerk." (AMF, 67.)

Even without a "formal" resolution, the contract was valid and the City treated it as such for several weeks until Bailey belatedly sued. Bailey admits City Council was presented with the contract at the public City Council meeting (UMF 12, 15), that the contract was "fully executed" with signatures of Russo, the mayor pro tem, the City Attorney, and the City Clerk (UMF 21), and that the City "immediately" began performing it (UMF 22). The mayor pro tem's, City Attorney's, and City Clerk's signatures are sufficient to bind the City to the contract's terms. (AMF, 69.) The

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City Council also approved the minutes of the meeting where they approved the renegotiated Russo contract, thus "resolving" the actions they took at that meeting were accurately reflected in those minutes. (AMF, 70.) No further "formal" writing is required.

c. Any failure by the City Council to conform to the Municipal Code's requirements does not invalidate the amended Russo contract

The Municipal Code provides no penalty if the City Council does not adopt a salary resolution, nor does it prohibit the City from authorizing certain employment benefits by minute action or other official act. (AMF, 41, 42.) Thus, these requirements are directory, not mandatory, and failure to satisfy them does not invalidate a contract. (*In re C.T.* (2002) 100 Cal.App.4th 101, 111; *People v. Lara* (2010) 48 Cal.4th 216, 227 ["The Legislature's failure to include a penalty or consequence for noncompliance with the statutory procedure also indicates that the requirement is directory rather than mandatory," citations omitted]; see also *City of Pasadena v. Paine* (1954) 126 Cal.App.2d 93, 96 [failure of City Council to observe administrative rules "is not jurisdictional and does not invalidate action which is otherwise in conformity with charter requirements"].)

Thus, even if the City violated the Municipal Code in not passing a "formal" resolution approving the amended Russo contract, the remedy is not invalidation of that contract, but a writ of mandate that the City Council pass such a resolution. As the City Council has terminated Russo's employment, this dispute is moot.

3. Issues Related to Russo's Amended Contract Are Moot (Issues 3, 4)

Bailey seeks declaratory relief both as to the mayor's authority to veto Charter Officer employment decisions generally **and** whether he had such authority to veto Russo's renegotiated contract in February 2018. (AMF, 83.) The City no longer employs Russo — Irvine does — and the Council has appointed another manager with no attempt at a mayoral veto. (UMF 28; AMF, 103, 104.) Thus, no active controversy remains as to Bailey's effort to veto the amendment of Russo's contract, and his request for an advisory opinion regarding his ability to veto a hypothetical contract in the future would draw the Court into a political dispute. For either reason, the Court might avoid the question.

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To qualify for declaratory relief, the parties must "demonstrate [their] action present[s] two essential elements: (1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [the party's] rights or obligations." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 909, quotation omitted.) Declaratory relief requires a "currently active" dispute and that the plaintiff show both standing and ripeness. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 546.) Thus, the Court need not determine moot disputes. (*Pittenger v. Home Sav. and Loan Ass'n of Los Angeles* (1958) 166 Cal.App.2d 32, 36; *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal.App.4th 881, 894 [individual employee's declaratory relief claims moot because disputed non-compete clause expired].)

Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal.App.4th 877 (*Environmental Defense*), which Bailey cites, is not to the contrary. It holds that a "reasonable expectation" a wrong will be repeated may justify declaratory relief — which is always discretionary (*id.* at p. 885) — but the plaintiff there produced evidence the County would likely continue the disputed zoning practice and that it was likely to reoccur. Moreover, the plaintiffs there did not challenge a specific approval — as Bailey does here — only the County's interpretation of a statute. (*Id.* at p. 887.) It also holds disputes like Bailey's are no longer ripe and therefore not justiciable. (*Id.* at p. 885 [controversy is ripe "when it has reached, **but has not passed**, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made," emphasis added].) Thus, while *Environmental Defense* might support the Court considering whether Riverside's mayor has the power to control Charter Officer employment, it does not support the Court deciding moot issues, as Bailey requests here.

4. Whether the Court Should Exercise Its Discretion to Award Prospective Declaratory Relief Turns on Triable Issues of Fact (Issues 1, 2, 6, 7)

The Court may withhold relief if a "declaration or determination is not necessary or proper at the time under all the circumstances." (Code Civ. Proc., § 1061.) Code of Civil Procedure section 1061 requires Court to look at "all the circumstances" to determine whether declaratory relief is appropriate and thus to award summary adjudication, the Court must determine there will be no triable issue of fact regarding whether such circumstances exist and whether it should exercise its

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discretion to award relief. (*In re Tobacco Cases II* (2015) 240 Cal.App.4th 779, 804.) This suggests summary adjudication of declaratory relief claims should be used sparingly; accordingly, authority limits it to declaratory relief cases where all facts are undisputed. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1401–1402 [court may grant summary judgment of declaratory relief claims "when only legal issues are presented for its determination"].)

The Court should decline to exercise its discretion to grant declaratory relief for any of several other reasons the parties should brief at trial: because this case presents a political question from which "the least dangerous" branch (Hamilton, The Federalist Papers, No. 78 [1788 WL 492 at *1]) is wise to abstain; because McQuern — whom Bailey appointed — is vice chair of the City's charter review committee examining changes to the City's charter that could moot this dispute; because City Council elections will occur in June 2019 and several current Council members are not running for re-election; or because an in rem reverse validation action on the same topic and entitled to calendar preference is pending. (AMF, 79–81, 88, 89, 91, 95, 97, 105, 106.)

5. Laches Bars Invalidation of the Amended Russo Contract (Issues 1, 3, 4, 5)

Laches is an equitable defense and requires a showing of (1) delay in asserting a right or claim; (2) the delay was not reasonable or excusable; and (3) prejudice. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1157; *Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267, 289.) Laches bars the Court from granting the relief Bailey requests, or determination of the issue requires the Court to decide several disputed, triable issues of fact sufficient to deny summary adjudication.

Bailey delayed asserting his claim — he did not file suit until over a month after the City Council began performing Russo's renegotiated contract. (AMF, 73.) The Court rejected Bailey's belated ex parte application to interpret his powers under the Charter, too, and he has since taken few steps to pursue his claims. (AMF, 77, 82.) The City is obviously prejudiced by Bailey's failure to timely move for a declaration of his veto power; it performed the renegotiated Russo contract for over a month without legal challenge but would now have to seek to recover from Russo — who is not a party here — certain benefits paid under the contract almost a year after his employment was terminated. (AMF, 84, 85.)

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6. The City Attorney Has No Disqualifying Conflict in Interpreting the Charter for His Client — The City (Issue 6)

The City Attorney has no conflict of interest to advise on Charter interpretation issues that might affect him and no conflict exists under Government Code section 1090 ("Section 1090") when he offers such an interpretation, a duty compelled by that same Charter. (AMF, 52.) Bailey's argument otherwise is unsound, and he offers no undisputed facts establishing such a conflict. For either reason, he does not carry his initial burden as to this issue. This is a political argument, repeated here for political effect, perhaps, and represents an effort to insert the Mayor into the Council's exclusive role in overseeing the City Attorney's performance — the very ill the voters sought to prevent by the 1953 Charter.[4]

That the City Council might someday renew the City Attorney's contract or that the City Attorney is "in a uniquely similar financial position" to other Charter Officers (Motion, p. 18, lines 7–8) does not create a Section 1090 violation. Public employees have no conflict of interest as to personnel decisions affecting classes of which they are a part. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1093–1094.) Section 1090 applies to self-dealing and requires a person to be "financially interested" in a contract, not just "similarly situated." (*Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 402.) Section 1090 violations exist in two circumstances: (1) when a financially interested city officer or city employee is a member of the board that approves or executes the contract (*Thomson v. Call* (1985) 38 Cal.3d 633, 649); and (2) when the city officer or employee has a personal financial interest in the contract and participates in the making of the contract in his or her official capacity (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211). The Motion provides no undisputed facts that satisfy either of these situations.

Bailey also ignores that the Charter **requires** the City Attorney advise the Council on matters like the scope of the mayor's veto power. (AMF, 52.) The Charter entrusts all the City's legal matters and all its litigation to the City Attorney's supervision and commits all City litigation to the City

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[4] Bailey has threatened a motion to disqualify the City's counsel in this matter — which is not the City Attorney's office — but the City does not read this Motion as such a motion. That motion would be time-barred, besides. (*River West v. Nickel* (1987) 188 Cal.App.3d 1297, 1309 [one who challenges attorney's qualification to represent his adversary must do so at the first reasonable opportunity].)

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Council's control. (AMF, 51, 53.) Moreover, the City Attorney's client is the institution of the City and there is no multiple-client conflict. (AMF, 54.) That the Mayor and a majority of Councilmembers disagree on a legal issue — a common occurrence — does not create a disqualifying conflict, and Bailey cites no law supporting this point. He has never identified a case supporting this point even after briefing this issue in his initial pleading, again in his unsuccessful ex parte application, and for a third time here. The Court can safely conclude no such law exists.

The rationale for a rule entrusting all City legal business to City Council control is obvious: if various City actors had access to independent counsel, disputes would multiply and defeat the goal of a single chain of command ending with a strong Manager reporting to a strong Council. Indeed, Bailey's retention of counsel here — whose fees he seeks to recoup from the City treasury — has had that effect. Bailey does not explain who could represent the City or give the Council advice on disputed issues in his view and does not explain why counsel he chooses would not be so conflicted.

People ex rel. Deukmejian v. Brown (1981) 29 Cal.3d 150 (*Deukmejian*) — the only case Bailey cites to claim a conflict exists — is not to the contrary. Plaintiffs there sued State officers and entities to enjoin them from implementing State law. The Attorney General withdrew from representing his clients, authorized them to hire special counsel, and later filed suit against those same entities on the same grounds. (*Id.* at pp. 154–155). The Supreme Court held the problem was not that the plaintiffs hired outside counsel — as the City does here, which *Deukmejian* expressly allows (*id.* at p. 154) — or that the Attorney General gave legal advice benefiting one set of State employees over another. It was that the Attorney General switched sides to sue his former clients. (*Id.* at p. 157.) No such side-switching has occurred here; if anything, Bailey has switched sides by suing the City he serves.

7. Bailey Is Not Entitled to Attorney Fees (Issue 7)

The Court can easily dispose of Issue 7, where Bailey asks the Court award him attorney fees under Code of Civil Procedure section 1021.5 ("Section 1021.5"). First, attorney's fees may not be resolved on summary judgment; they require a separate, noticed motion.[5] (*Hardie v. Nationstar*

[5] The City does not expect Court to decide this request for attorneys' fees now and asks that it defer the request until after judgment, as the law requires. The City briefs it here only because Bailey presents it in his Motion; it provides another basis on which the Court might deny the Motion.

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Mortgage LLC (2019) 32 Cal.App.5th 714, 914 [California Rules of Court require "a noticed motion procedure whenever the court is required to determine whether the requested fee is reasonable or whether the requestor is a prevailing party"].) Second, Bailey proffers only one undisputed fact in support of this issue — which relies on self-serving, conclusory extra-record declarations stating "facts" the City disputes — ignoring the several other elements he must prove to win fees under Section 1021.5. (*Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 176.)

Even if Bailey had proffered facts meeting every element of Section 1021.5's test, the City would likely dispute them. As one example, a determination in Bailey's favor will not confer a "significant benefit" on the general public or a large class of persons — required for a Section 1021.5 award — because Riverside's mayor's ability to veto Charter Officer contracts will arise infrequently and will provide no benefit to anyone in Riverside besides the mayor. Such limited relief is not the "significant benefit" necessary to support a Section 1021.5 award. (*LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 946 [no "significant benefit" when single employee successfully petitioned for reinstatement of employment].)

IV. CONCLUSION

The Motion is procedurally and substantively flawed for many reasons. The history of the City Charter, its many sections giving broad authority to the City Council, and canons of construction all support the City's interpretation of that Charter as to the mayor's veto power. At the very least, there are triable issues of fact that preclude determining otherwise on this Motion.

The City refrained from a cross-motion to ensure the judgment here is made at trial on the whole record, as the law requires, and is not assailable on appeal by proceeding otherwise. This Court need not determine which interpretation of the Charter it prefers now; it is sufficient here to deny Bailey's motion and direct the parties to brief these issues at trial.

DATED: March 27, 2019

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PROOF OF SERVICE
William R. ("Rusty") Bailey III v. City of Riverside
Case No. Case # RIC 1804755
11082-0010

I, Lourdes Hernandez, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 E. Colorado Boulevard, Suite 850, Pasadena, California 91101-2109. On March 27, 2019, I served the document(s) described as **RESPONDENT AND DEFENDANT CITY OF RIVERSIDE'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION** on the interested parties in this action as follows:

By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

☒ ☐ **BY OVERNIGHT DELIVERY:** I deposited such envelope in a facility regularly maintained by ☒ FEDERAL with delivery fees fully provided for or delivered the envelope to a courier or driver of ☒ FEDERAL EXPRESS authorized to receive documents at 790 E. Colorado Boulevard, Suite 850, Pasadena, California 91101-2109, with delivery fees fully provided for.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on March 27, 2019, at Pasadena, California.

Lourdes Hernandez

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SERVICE LIST
William R. ("Rusty") Bailey III v. City of Riverside
Riverside Superior Court Case No.: RIC1804755
11082-0010

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