

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE
4050 Main Street
Riverside, CA 92501
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CLERK'S CERTIFICATE OF MAILING

R. BEN CLYMER JR

vs.

CASE NO. RIC1806669

THE CITY OF RIVERSIDE

TO: TYLER & BURSCH, LLP
25026 LAS BRISAS RD.
MURRIETA CA 92562

I certify that I am currently employed by the Superior Court of California, County of Riverside and I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the attached 01/31/20 on this date, by depositing said copy as stated above.

Court Executive Officer/Clerk

Dated: 04/01/20

by: 
JAMIE M ALVAREZ, Deputy Clerk

APR 01 2020

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE**

J. Alvarez

TITLE: CLYMER VS THE CITY OF RIVERSIDE		DATE & DEPT. March 27, 2020 Dept. 7	NUMBER RIC1806669
COUNSEL None		REPORTER None Present	
PROCEEDING RULING ON COURT TRIAL			

RULING ON COURT TRIAL OF CLYMER, JR., V. THE CITY OF RIVERSIDE, ET AL.

Under the City of Riverside Charter, the Mayor had the authority to veto the City Council's February 6, 2018, approval of the Employment Agreement between the City and City Manager John Russo. The Mayor exercised that veto power at the City Council meeting on February 6, 2018, and by later advising the City Council members, in writing, of the reasons for the veto.

At any regular or adjourned meeting of the City Council, thirty to sixty days after the February 6, 2018, veto by the Mayor, the City Council was required to reconsider its approval of the Employment Agreement and was required to vote on whether to override the Mayor's veto.

The City Council had not reconsidered its approval of the Employment Agreement and had not taken a vote to override the Mayor's veto as of the January 31, 2020, trial of this lawsuit.

Because of the City Council's failure to reconsider its approval of the Employment Agreement and failure to vote to override the Mayor's veto, the Employment Agreement was neither approved nor adopted by the City.

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Facts and Procedural History

At a Riverside City Council meeting on February 6, 2018, the City Council voted to approve an employment agreement (the "Employment Agreement") for the position of City Manager between defendant The City of Riverside (the "City") and real party in interest John Russo ("City Manager Russo"). City Manager Russo was already the City Manager, pursuant to an earlier employment agreement. The earlier employment agreement was to expire in February 2020.

The Employment Agreement was for a seven-year term, beginning on January 1, 2018 and ending on December 31, 2024. The Employment Agreement increased City Manager Russo's salary and required that the City provide a mortgage on City Manager Russo's Riverside home (the "Mortgage"). The Employment Agreement had many other terms, which the Court does not discuss.

At the City Council's February 6, 2018 meeting, the Mayor of Riverside (William R. ("Rusty") Bailey III) vetoed the City Council's approval of the Employment Agreement. Within twenty days, the Mayor advised the City Council members, in writing, of the reasons for his veto.

The City has maintained, since the veto, that section 413 of the City of Riverside Charter does not authorize the Mayor to veto the City Council's approval of the Employment Agreement and that the Mayor's veto has no force or effect. The City bases its contention on section 601 of the Charter, which provides that the City Manager serves at the pleasure of the City Council. (The Charter also provides that the City's other two Charter officers, the City Attorney and City Clerk, serve at the pleasure of the City Council.)

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On April 6, 2018, plaintiff R. Ben Clymer ("Plaintiff Clymer") filed this lawsuit against the City and City Manager Russo. The City terminated City Manager Russo without cause in late April 2018 (i.e., he was not terminated as a result of wrongdoing). The operative pleading is Plaintiff Clymer's verified "First Amended Complaint Seeking a Reverse Validation Pursuant to Code of Civil Procedure section 860, et seq.," for "1) Unlawful Gift of Public Funds – Government Code section 8314; 2) Violation of the City Charter, Municipal Code, and California Constitution". Plaintiff Clymer seeks:

1. An order declaring the Mayor's veto of the Amended Contract, including the ensuing Mortgage, was a valid exercise of his power under the City Charter.
2. That the Amended Contract, including the ensuing Mortgage, be deemed null and void *ab initio* for the reasons stated herein.
3. That the money paid out to Mr. Russo by the City as a result of the Amended Contract be paid back to the City, less what he was entitled to under the original contract set to expire in 2020.
4. The mortgage executed in Mr. Russo's favor be unwound and paid back in full to the City.
5. That Plaintiff recover his attorneys' fees and costs of suit pursuant to California's Private Attorney General Act (CCP § 1021.5) for attempting to enforce the rights on behalf of all residents of Riverside.
6. For whatever further and additional relief this court deems appropriate." (First Amended Complaint, pages 11-12.)

The City filed a Verified Answer to the First Amended Complaint on July 27, 2018. City Manager Russo filed a Verified Answer to the First Amended Complaint on October 17, 2018.

A related lawsuit exists, *William R. ("Rusty") Bailey, III, Marcia McQuern, and Thomas Mullen v. City of Riverside*, case number RIC1804755 (the "*Bailey lawsuit*"). Petitioner Bailey is the Mayor of the City of Riverside who vetoed the City Council's approval of the Employment Agreement. He and the other petitioners filed a Verified Petition for Writ of Mandate or Other Extraordinary Relief (Code of Civil Procedure section 1085, et seq.) and

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Complaint for Declaratory Relief. The petitioners seek, among other relief, “a judicial declaration and determination that the Office of the Mayor of the City of Riverside has veto authority over “any formal action taken by vote of the City Council...,except an emergency ordinance, the annual budget or an ordinance proposed by initiative petitioner,” and that the express language in the Charter allows the Office of the Mayor to veto City Council approval of contracts, including contracts of City employees who serve at the pleasure of the City Council.” (*Bailey, et al., v. City of Riverside*, case number RIC1804755, Petition, page 15.)

This lawsuit was originally scheduled to be tried to the Court on November 22, 2019. In the *Bailey* lawsuit, the petitioners and the City stipulated that the *Bailey* lawsuit be tried in two phases and that phase 1 be tried to the Court on the same date, jointly with the trial of this lawsuit. During phase 1, the “Veto Issues” of the *Bailey* lawsuit would be tried. The “Veto Issues” are: the *Bailey* Petitioners’ standing; whether former City Manager Russo is an indispensable party to the *Bailey* lawsuit; and, whether the Mayor may veto employment contracts offered by the City to the City Manager. Phase 2 of the trial *Bailey* lawsuit would concern other issues. In this lawsuit, Plaintiff Clymer, the City, and City Manager Russo stipulated that their trial briefs be filed and served on the same dates as the phase 1 trial briefs in the *Bailey* lawsuit.

The joint/concurrent trial of this lawsuit and the trial of phase 1 of the *Bailey* lawsuit were continued from November 22, 2019 to January 31, 2020, because lead trial counsel for petitioner Mayor Bailey was ill. Further, trial counsel for Plaintiff Clymer represented to the Court on the record that he and lead trial counsel for petitioner Mayor Bailey had divided between them the issues common to this lawsuit and the trial of phase 1 of the *Bailey* lawsuit for presentation and oral argument to the Court.

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The City Council had not reconsidered the Employment Agreement and had not taken a vote to override the Mayor's veto as of the January 31, 2020, joint/concurrent trial of this lawsuit and phase 1 of the *Bailey* lawsuit.

Reverse Validation Action (Lawsuit)

A validation action is a lawsuit brought by a public entity to determine the validity of a public act where the act is otherwise authorized. "A public agency may upon the existence of any matter which under any other law is authorized to be determined pursuant to this chapter, and for 60 days thereafter, bring an action in the superior court of the county in which the principal office of the public agency is located to determine the validity of such matter." (Code of Civil Procedure section 860.)

A reverse validation action is a lawsuit brought by an interested person pursuant to Code of Civil Procedure section 863, when the public agency has not brought its own validation action. "If no proceedings have been brought by the public agency pursuant to this chapter, any interested person may bring an action within the time and in the court specified by Section 860 to determine the validity of such matter." A benefit of a reverse validation action is that the judgment in the action binds the public agency and all other people, entities, and agencies. "A validating proceeding differs from a traditional action challenging a public agency's decision because it is an in rem action whose effect is binding on the agency and on all other persons." (*Millbrae School Dist. v. Superior Court* (1989) 209 Cal.App.3d 1494, 1497.)

Plaintiff Clymer's Has Standing to Prosecute this Lawsuit

Plaintiff Clymer contends that as a City of Riverside resident, taxpayer, and business owner/operator, his interests were injured by the adoption of the Employment Agreement on

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February 6, 2018, without the City Council timely reconsidering its approval of the Employment Agreement and timely voting on whether to override the Mayor's veto.

Under Code of Civil Procedure section 863, a validation action may be brought by "any interested person." "That phrase has been narrowly construed." (*Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035, 1042.) " 'The Legislature, in using the words 'any interested person' had before it long established legislative precedents which make it clear that an 'interested person' in the sense in which those words are used in the statute is a person having a direct, and not a merely consequential, interest in the litigation.' " (*Torres*, 13 Cal.App.4th 1035, 1042 (quoting *Associated Boat Industries of Northern Cal. v. Marshall* (1951) 104 Cal.App.2d 21, 22, disapproved of on other grounds in *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal.App.4th 1011).)

In a validation action entitled *Regus v. City of Baldwin Park*, the City of Baldwin Park adopted a redevelopment plan. (*Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968.) The plaintiffs were residents of the city, but were not residents of the area covered by the project that was the subject of the redevelopment plan. The court upheld the standing of the plaintiffs as taxpayers of the city. "[P]laintiffs have a financial interest in the outcome of this proceeding, in that the tax increment financing of the Project will divert tax revenues from the taxing agencies to which plaintiffs pay taxes to the treasury of the Redevelopment Agency. Such a financial interest is likely to motivate plaintiffs to prosecute the action vigorously and provides sufficient basis to give them standing." (*Id.*, at 972.) *Regus* provides that the rules for taxpayer standing apply to validation actions.

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The City contends Plaintiff Clymer lost his taxpayer standing because, after filing this lawsuit, Plaintiff Clymer was appointed to the City's Charter Review Committee. The Charter Review Committee considers and recommends changes to the City Charter. Plaintiff Clymer continued to serve on the Charter Review Committee as of the January 31, 2020, trial of this lawsuit.

A person may not have taxpayer standing to prosecute a lawsuit when the person is a member of the public entity which he or she is suing. In *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, a member of the Psychology Examining Committee of the Board of Medical Quality Assurance filed a petition for writ of mandate to compel the Committee to comply with Business and Professions Code section 2942. That section required a grade of 75 percent by applicants for a passing grade. The Committee, over the petitioner's objection: substituted an objective national examination for the written portion of its test; and, adopted a national mean for its passing score, rather than 75 percent of the raw score required by section 2942. The Committee's demurrer was sustained and the petition dismissed primarily on the ground that the petitioner lacked standing to sue. She was not a "beneficially interested" party and did not have standing, as required by Code of Civil Procedure section 1086.

The California Supreme Court held in *Carsten* that a board member does not have taxpayer standing to sue the very board on which he or she serves. The Supreme Court held the California judiciary is ill equipped to add the duty of serving as an ombudsman for the plethora of state administrative agencies and local agencies that exist in all counties to its already heavy burden. That role would inevitably be imposed if board members could bring their defeats and frustrations to California's courts for a second chance at persuasion.

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"That brings us to the policy issues which militate against permitting disgruntled governmental agency members to seek extraordinary writs from the courts. Unquestionably the ready availability of court litigation will be disruptive to the administrative process and antithetical to its purpose of providing expeditious disposition of problems in a specialized field without recourse to the judiciary. Board members will be compelled to testify against each other, to attack members with conflicting views and justify their own positions taken in administrative hearings, and to reveal internal discussions and deliberations. Litigation - even the threat of litigation - is certain to affect the working relationship among board members. In addition, the defense of lawsuits brought by dissident board members - and such suits would undoubtedly be frequent - will severely tax the limited budgetary resources of most public agencies.

From the vantage point of the judiciary such litigation has ominous aspects. It is purely and simply duplicative, a rerun of the administrative proceedings in a second, more formal forum. The dissident board member, having failed to persuade her four colleagues to her viewpoint, now has to persuade merely one judge. The number of such suits emanating from members on city, county, special district and state boards, will add significantly to court calendar congestion.

While it is true that this petitioner is not only a board member but also a taxpayer, it is as a board member that she acquired her knowledge of the events upon which she bases the lawsuit. Her interest in the subject matter was piqued by service on the board, not by virtue of the neutrality of citizenship. The suit was brought in the former, not the latter capacity." (*Id.*, at 799.)

Plaintiff Clymer notes that he was not a member of the Charter Review Committee at the time the Employment Agreement was approved by the City Council. He further notes that the Charter Review Committee did not provide the City with any input on the Employment Agreement or on the approval of the Employment Agreement. The Committee's tasks are to consider and recommend potential amendments to the Charter to the City Council, hold public meetings on the proposed Charter amendments, and to present a report on the Committee's recommendations to the City Council.

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In his Reply Brief, Plaintiff Clymer also contends that the limitations on taxpayer standing caused by membership in a public entity should not apply to him in this lawsuit.¹ The Court agrees. Under the unique facts of this lawsuit, the policy reasons for limiting taxpayer standing, which are discussed in *Carsten*, do not apply. Plaintiff Clymer had taxpayer standing at the time this lawsuit was filed. His initial complaint was filed in April 2018. Plaintiff Clymer applied for membership on the Charter Review Committee in October 2018. Plaintiff Clymer's interest in the subjects of this lawsuit was not piqued by service on the Charter Review Committee. Plaintiff Clymer is not a dissenting member of the Charter Review Committee who is attempting to overturn a vote he lost. Plaintiff Clymer did not acquire his knowledge of the City Council's February 6, 2018, approval of the Employment Agreement and the Mayor's veto of it as a member of the Charter Review Committee (i.e., he does not have inside knowledge). He will not be compelled in this lawsuit to reveal internal discussions and deliberations of the Charter Review Committee members. The City was aware that Plaintiff Clymer had filed this lawsuit and was aware of his views on the Charter when it appointed him to the Charter Review Committee. The City knew that Plaintiff Clymer would be interacting with other Committee members when it appointed him to the Charter Review Committee.

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¹ The City's and City Manager Russo's objections to the Reply Brief are overruled. Plaintiff Clymer is responding to arguments made in the Oppositions of the City and City Manager Russo, as is customary in reply briefs. Plaintiff Clymer is not making new arguments himself. At trial, the City and City Manager Russo were afforded the opportunity to respond to Plaintiff Clymer's argument regarding taxpayer standing. The City and City Manager Russo did not request that they be permitted to file supplemental briefs regarding Plaintiff Clymer's taxpayer standing.

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Additionally, the Court does not wish to strip standing from people, such as Plaintiff Clymer, who had standing and then sought to further their public involvement by serving on the committees and boards which assist the communities in which they live, work, attend school, and pay taxes. Finally, it is improper to allow a public entity to eliminate plaintiffs in existing lawsuits by appointing them to its committees and boards.

**Plaintiff Clymer's First Cause of Action for Unlawful Gift of Public Funds –
Government Code section 8314, is Not Subject to a Validation Action**

As explained in *City of Ontario v. Superior Court* (1970) 2 Cal.3d 335, the validation statutes were originally proposed and enacted only to be applicable “ ‘when, and to the extent, it is made applicable by the statutes relating to a particular public agency’ ” (*Id.*, quoting the Judicial Council), and was enacted concurrently with a variety of statutes relating to particular agencies designed to implement the new statute. (*Id.*) But “[f]rom these humble beginnings” (*Id.*) the validation procedure was quickly expanded by a variety of statutes, including Government Code section 53511(a), allowing that “[a] local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness”.

In *Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, the court held that “ ‘contracts’ under Government Code section 53511 should be assigned a restricted meaning. Rather than authorizing proceedings to validate any public agency contract—or even any contract constituting a financial obligation of a public agency—the ‘contracts’ under Government Code 53511 are only those that are in the nature of, or directly relate to a public agency's bonds, warrants or other evidences of indebtedness.” (*Kaatz v. City of Seaside* (2006) 143 Cal.App.4th 13, 42 (footnote omitted).)

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At issue in this lawsuit is an employment contract. Plaintiff Clymer alleges that the obligations owed by the City to City Manager Russo are indebtednesses. They are not indebtednesses in the sense of bonds or warrants. In *Phillips v. Seely* (1975) 45 Cal.App.3d 104, the court held that a contract for the provision of legal services to indigent defendants "is not the kind of financial obligation contemplated to be automatically validated absent a challenge within the 60 days proscribed in sections 860 and 863 for instrument, such as bonds and assessments, whose very marketability may well depend upon their prompt and automatic validation upon the passing of the 60-day period." (*Phillips v. Seely* (1975) 45 Cal.App.3d 104, 112.)

The reasoning of *Phillips* applies here. The Employment Agreement between the City and City Manager Russo and its terms are not marketable instrument and not the kind of indebtednesses for which the validation procedures were enacted. Applying the validation statutes to them would be an extension of the validation procedure beyond where it has been allowed to go in the past. The Employment Agreement and its terms are not subject to a validation action.

**Additionally, the Employment Agreement is not
an Unlawful Gift of Public Funds (Government Code section 8314)**

Plaintiff Clymer contends in the first cause of action of his First Amended Complaint that the interest rate of the Mortgage is below market rate and that it and other benefits of the Employment Agreement are an unlawful gift of public funds, in violation of Government Code section 8314. Section 8314 provides: "It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which

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are not authorized by law.” The City contends “[t]he Unlawful Gift Rule Does Not Apply to Charter Cities, But if It Did, Russo’s Mortgage is Not an Unlawful Gift.” (City’s Opposition Trial Brief, page 2.) The Court agrees. Riverside is a charter city and Government Code section 8314 does not apply. (*Tevis v. City and County of San Francisco* (1954) 43 Cal.2d 190, 197.)

Moreover, there was no gift of public funds. Under the Employment Agreement, City Manager Russo extended the time he was committed to work for the City in exchange for a salary increase, the Mortgage, etc. There was consideration for the Employment Agreement and the salary increase, the Mortgage, etc., were not gifts of public funds.

This Court does not rule on the appropriateness of the salary increase, the Mortgage, etc., provided for by the Employment Agreement. “The determination whether proposed rates of compensation are in accord or in harmony with generally prevailing rates is within the discretion of the rate-making authority. The courts will not interfere with that determination unless the action is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law.” (*City and County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 690.) The City argues that “[m]any public employers that compete in the same labor market with private entities, including UC Riverside, offer mortgage assistance to attract and retain top talent give the State’s increasingly expensive housing market.” (City’s Opposition Trial Brief, page 15.) Plaintiff Clymer presents no evidence of fraud and no evidence of compensation of similarly situated officials such that the Court could find City Manager Russo’s compensation “palpably unreasonable and arbitrary”.

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The Second Cause of Action for Violation of the City Charter, Municipal Code, and California Constitution is a Cause of Action for Declaratory Relief

The second cause of action of First Amended Complaint is labeled "Violation of the City Charter, Municipal Code, and California Constitution". It is a cause of action for declaratory relief under Code of Civil Procedure section 1060, regardless of that label. Paragraph 39 of the cause of action states, in part, "Plaintiff further prays for a declaration upholding the validity of the Mayor's veto of both the Amended Contract and ensuing Mortgage." In paragraph 1 of the First Amended Complaint's prayer for relief, Plaintiff Clymer prays for "[a]n order declaring the Mayor's veto of the Amended Contract, including the ensuing Mortgage, was a valid exercise of his power under the City Charter." A complaint states a cause of action according to what the complaint alleges in substance, regardless of any "[e]rroneous or confusing labels." (*Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.)

Moreover, the labels and terms used in Plaintiff Clymer's First Amended Complaint confuse "count" with "cause of action". A cause of action is an injury to a primary right, while a count is the legal theory justifying recovery of damages. (*Merlino v. West Coast Macaroni Mfg. Co.* (1949) 90 Cal.App.2d 106, 115.) Unfortunately, "the phrase 'causes of action' is often used indiscriminately to mean what it says and to mean *counts* which state differently the same cause of action." (*Eichler Homes of San Mateo, Inc. v. Superior Court* (1961) 55 Cal.2d 845, 847 (*italics in original*); see also *Slater v. Blackwood* (1975) 15 Cal.3d 791, 796 (quoting *Eichler Homes*).)

In this case, the declaratory relief cause of action of the First Amended Complaint is based on an alleged injury to the public (the adoption of the Employment Agreement by the

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City without reconsidering the approval of the Employment Agreement and holding a veto override vote). The legal theories (counts) are based on a theory that the Employment Agreement constitutes an illegal gift of public funds and violates the City Charter. As stated in paragraph 1 of the prayer for relief of the First Amended Complaint, the remedy Plaintiff Clymer seeks is a declaration by the Court of the rights and duties of the parties to the Employment Agreement, pursuant to the Charter. This is a cause of action for declaratory relief under Code of Civil Procedure section 1060, regardless of what it is labeled as in the First Amended Complaint. As discussed above, Plaintiff Clymer has taxpayer standing and may prosecute the cause of action.

On the Cause of Action for Declaratory Relief, the Court Rules that the Mayor had the Authority to Veto the City Council's Approval of the Employment Agreement

Section 400(a) of the Charter provides: "The elective officers of the City shall consist of a City Council of seven members, elected from wards, and a Mayor elected from the City at large...."

Charter section 600 provides that the City shall have a City Manager. It further provides how the City Manager shall be selected and that the City Manager serves "at the pleasure of the City Council." Section 600 states:

"There shall be a City Manager who shall be the Chief Administrative Officer of the City. The process for the selection of a City Manager shall be determined by the City Council. It shall appoint, by a majority vote, the available person that it believes to be best qualified on the basis of executive and administrative qualifications, with special reference to experience in, and knowledge of, accepted practice in respect to the duties of the offices as set forth in this Charter. The City Manager shall serve at the pleasure of the City Council.

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No person shall be eligible to receive appointment as City Manager while serving as Mayor or as a member of the City Council nor within one year after ceasing to hold such office."

The City Manager's powers and duties are set forth in Charter sections 601 through 603. Section 601 provides in pertinent part: "The City Manager shall be the head of the administrative branch of the City government. The City Manager shall be responsible to the City Council for the proper administration of all affairs of the City."

Charter section 700 establishes the City's other two Charter officers, the City Attorney and the City Clerk. It states: "In addition to the City Manager, there shall be a City Attorney and a City Clerk who shall be appointed by and serve at the pleasure of the City Council." The City Attorney's eligibility, powers and duties are set forth in Charter section 702. The City Clerk's powers and duties are set forth in Charter section 703.

Charter section 701 states in pertinent part, "The City Council, subject to the provisions of this Charter, shall provide for the number, titles, qualifications, powers, duties and compensation of all officers and employees."

Charter section 900 states, "The City Council shall by ordinance establish a personnel merit system for the selection, employment, compensation/classification, promotion, discipline and separation of those appointive officers and employees who shall be included in the system."

Chapter 2.32 of the Riverside Municipal Code regulates the salary, working time, overtime, vacation time, automobile allowance, etc., of employees of the City. Municipal Code section 2.32.010 states: "This chapter shall be known as the "Salary Regulations of the City," and may be cited as such."

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Municipal Code section 2.32.020 states: "This chapter is enacted pursuant to Section 701 of the City Charter to provide for the number, titles, qualifications, powers, duties, compensation and terms of employment of City officers and employees and to conform to the principle of equal pay for equal work."

Municipal Code section 2.32.030 states: "The basic monthly compensation plan for City officers and employees shall be established by resolution of the City Council."

Charter section 413 provides for a check and balance on actions of the City Council by: 1) authorizing the Mayor to veto any formal action taken by vote of the City Council, including the approval or adoption of any ordinance or resolution; and, 2) providing that the City Council may override the Mayor's veto. Section 413 states in pertinent part:

"At any time before the adjournment of a meeting, the Mayor may, by public declaration spread upon the minutes of the meeting, veto any formal action taken by vote of the City Council including any ordinance or resolution, except an emergency ordinance, the annual budget or an ordinance proposed by initiative petition. Thereupon, pending the vote to override the veto as herein provided, such ordinance, resolution or action shall be deemed neither approved nor adopted. The Mayor shall, no more than twenty days following the veto, provide to Council members, in writing, reasons for the Mayor's veto. If the Mayor fails to provide a written veto message within the time allotted, the original action of the Council shall stand. At any regular or adjourned meeting held not less than thirty days, nor more than sixty days after veto the City Council shall reconsider such ordinance, resolution or action and vote on the question of overriding the veto. Five affirmative votes shall be required for its adoption or approval. The Mayor shall have no right to veto the veto override of any ordinance, resolution or action."

Charter section 413 expressly lists three exceptions to the Mayor's veto authority, an emergency ordinance, the annual budget, and an ordinance proposed by initiative petition. It is a basic rule of statutory interpretation that a list of exceptions without qualifications, along the lines of "including" or "such as", is considered exclusive. " 'Under the maxim of statutory construction, *expressio unius est exclusio alterius*, if exemptions are specified in a

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statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary.’ ” (*People v. Oates* (2004) 32 Cal.4th 1048, 1057 (quoting *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230).) In this case, there is no evidence of a contrary legislative intent. The Court will not imply the additional exception the City seeks, that the Mayor is prohibited from vetoing a formal action taken by vote of the City Council setting the compensation of the City Manager.

The Court notes and rejects the City’s contention that “the power to veto the City Manager’s compensation is tantamount to the power to veto selection of the City Manager. If the Mayor could veto the City Manager’s contract or its terms. The Mayor could veto any terms for any City Manager he did not like....”[t]here is no greater power than the power of the purse.” (*Committee To Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 284.)”

The City does not address that it may establish the compensation and benefits for the position of City Manager by a resolution in advance of recruiting and contracting with the candidate it selects, rather than establishing the compensation and benefits in a contract with a specific person (in this case City Manager Russo). That course of action may have the added benefit of promoting citizen confidence in local government.

The Court reads Municipal Code section 2.32.030, et seq., and the Charter sections together and rules:

1. The City Council must pass a resolution to establish the City Manager’s compensation.
2. The Mayor may veto the resolution establishing the compensation.

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3. The City Council may override the Mayor's veto of the City Council's resolution establishing the compensation to be paid to the City Manager. To do so, the City Council must at any regular or adjourned meeting of the City Council, thirty to sixty days after the veto by the Mayor, reconsider the resolution and vote on the question of overriding the veto. Five affirmative votes shall be required for its adoption or approval. The Mayor shall have no right to veto the veto override of the resolution.
4. Pending the City Council's vote to override the Mayor's veto, the City Council's resolution establishing the compensation to be paid to the City Manager is neither approved nor adopted.
5. The Mayor does not have the authority to veto the City Council's appointment, employment extension, re-employment, or termination of the City Manager because the City Manager serves at the pleasure of the City Council.

In arriving at this ruling, the Court placed Municipal Code section 2.32.030, et seq., and the Charter sections side by side and harmonized them, rather than picking one section to triumph over another. The interpretation is logical and consistent with the Municipal Code and the Charter. " '[T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.' " (*Landau v. Superior Court* (2019) 32 Cal.App.5th 1072, 1082 (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012) pp. 180-182).)

As to the specific occurrences in this lawsuit, the Court rules:

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1. At its February 6, 2018 meeting, the City Council voted to approve the Employment Agreement between the City and City Manager Russo, which included monetary compensation (annual salary, the Mortgage, etc.).²
2. The Mayor vetoed the City Council's approval of the Employment Agreement, pursuant to the veto authority afforded to the Mayor by Charter section 413.
3. At any regular or adjourned meeting of the City Council, thirty to sixty days after the February 6, 2018 veto by the Mayor, the City Council was required to reconsider its approval of the Employment Agreement and was required to vote on whether to override the Mayor's veto.
4. The City Council had not reconsidered its approval of the Employment Agreement and had not taken a vote to override the Mayor's veto as of the January 31, 2020, trial of this lawsuit.
5. Because of the City Council's failure to reconsider its approval of the Employment Agreement and failure to vote to override the Mayor's veto, the Employment Agreement was neither approved nor adopted by the City.

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² Plaintiff Clymer suggests the City Council did not pass a resolution approving the Employment Contract, but rather simply voted to approve the Employment Contract. Plaintiff Clymer contends the City Council did so to circumvent the Mayor's veto power.

The approval of the Employment Contract by a vote of the City Council was sufficient. It is a ministerial matter that a written resolution has not been prepared yet. "The law has been obeyed" and the mechanics of the adoption of the resolution are presumed to have been done at the time the ministerial duty to perform them arose (i.e., upon the vote of the City Council). (Civil Code section 3548.)

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The Court does not order affirmative remedies on the declaratory relief cause of action.

City Manager Russo's Equitable Estoppel Defense

City Manager Russo contends Plaintiff Clymer and the City are equitably estopped from denying the validity of the Employment Agreement because he relied on the City Attorney's opinion that the Mayor did not have authority to veto the Employment Agreement. As to equitable estoppel in general, Evidence Code section 623 provides, "[w]henver a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."

Neither equitable estoppel nor any other theory may be used to bind a city to a contract which is approved in violation of the terms of the city's municipal charter. (*First Street Plaza Partners v. City of Los Angeles* (2998) 65 Cal.App.4th 650, 667 - 668.) The reliance of a person or entity contracting with a city is immaterial. If a contract is not adopted pursuant to the terms of a city's municipal charter, the contract is void. "It is also settled that the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable." (*Los Angeles Dredging Co. v. City of Long Beach* (1930) 210 Cal. 348, 353; see also *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 110.)

As discussed above, the Employment Agreement was not approved in compliance with the Charter. Thus, City Manager Russo's contention that Plaintiff Clymer and the City are equitably estopped from denying the validity of it is without merit.

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Plaintiff Clymer's Request for Judicial Notice in Support of His Opening Brief

Plaintiff Clymer requests that the Court take judicial notice of: 1) the Federal Reserve interest rate; 2) the average mortgage interest rates for 15-year mortgages; 3) Mayor Bailey's Petition for Writ of Mandate filed on March 9, 2018 in Riverside Superior Court case number RIC1804755; and, 4) the Proof of Service of Publications filed in this lawsuit on May 31, 2018.

The Court denies requests 1 and 2. The information/documents are not relevant to the Court's ruling. The Court grants requests 3 and 4.

The City's Request for Judicial Notice in Support of Its Opposition Brief

The City requests that the Court take judicial notice: A) that City Manager Russo is now the City Manager for the City of Irvine; B) that Mayor Bailey is not running for reelection in 2020; C) of the Minutes of the Charter Review Committee's January 16, 2019 meeting; D) of the Minutes of the Charter Review Committee's March 11, 2019 meeting; E) of the Notice of Related Case the City filed in *Bailey, et al., v. City of Riverside*, case number RIC1804755; F) of the Notice of Ruling in the *Bailey* lawsuit on April 22, 2019; G) of the City of San Bernardino Charter; H) of Article XV of the City of San Diego Charter; I) of Document titled "City of Sacramento Measure L"; J) of Official Results of the Sacramento County General Election; K) City of Miami, Florida Resolution R-18-0354; L) of Official Results of Miami-Dade County Election; and, M) Riverside County Assessor – County Clerk- Recorder Property Report for a Whitegate Avenue, Riverside, CA property.

The Court denies requests G, H, I, J, K, and L. The information/documents are not relevant to the Court's ruling. The Court grants requests A – F and M.

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Immediately before the joint/concurrent trial of this lawsuit and phase 1 of the *Bailey* lawsuit, the City filed a Notice of Entry of Orders in *Bailey, et al., v. City of Riverside*, case number RIC1804755. The Notice noted, among other things, that in the *Bailey* lawsuit, the Court granted the City's Ex Parte Application for Leave to File a Supplemental Request for Judicial Notice of: N) the Agenda for the Charter Review Committee's January 13, 2020 meeting; O) a Staff Report from the City Attorney's office for the Charter Review Committee's January 13, 2020 meeting; and, P) the 2019 Charter Review Committee – Conceptual Approval List.

Claim for Attorney's Fees and Costs by Plaintiff Clymer

At this time, the Court does not rule on Plaintiff Clymer's prayer to recover attorney's fees and costs under California's Private Attorney General Act (Code of Civil Procedure section 1021.5). Plaintiff Clymer may file a motion for attorney's fees, memorandum of costs, etc.

Proposed Judgment

Plaintiff Clymer shall submit and serve a proposed judgment to the Court within thirty days of this Notice of Ruling on Court Trial.

____ R. STAMEN, Judge

____ J. Alvarez, Clerk

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