Office of the City Attorney

Date: August 9, 2018

To: Paul Buddenhagen, Acting City Manager

From: Farimah Brown, City Attorney
By: Kristy van Herick, Assistant City Attorney KVH

Re: Meet and Confer Requirements Related to Police Commission Ballot Measure

Background

This office issued an opinion to City Manager Dee Williams-Ridley on March 26, 2018, providing initial legal analysis of City Council's November 14, 2017 proposals related to police oversight reforms. (Attached hereto.) The opinion included a basic discussion of the meet and confer requirements triggered by the key proposals.

On July 10, 2018, after considering multiple proposals, the City Council agreed to move forward with a proposed Police Commission Charter Amendment provided by Mayor Arreguin and Councilmember Harrison. The City Council specifically voted to direct the City Manager to move expeditiously in the meet and confer process with affected bargaining units. The deadline to submit measures to the Alameda County Registrar of Voters to be placed on the ballot for the November 2018 election is Friday, August 10, 2018.

On August 7, 2018, this office was asked to provide additional information on the meet and confer process as it relates to the Police Commission Charter Amendment. In line with Council's July 10th action, the City's Human Resources Director provided notice of the Council action to the Berkeley Police Association (BPA) on July 12, 2018. The parties worked expeditiously to schedule meet and confer. The City and BPA have already held an initial meet and confer session. BPA and City representatives have been engaged and participating in good faith in the process, and the parties have already scheduled the next meet and confer session.

However, the parties are still early in the process. As set forth below, the parties must meet and confer in good faith and either reach an agreement or exhaust impasse procedures. It is not possible to reach an agreement or exhaust impasse procedures

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before the August 10th deadline to place the Police Oversight Ballot Measure on the November 2018 ballot. Following is a discussion of the various steps required in the meet and confer process before the Police Commission Charter Amendment can be placed before the voters.

Contract Amendment Required

There are certain Sections of the proposed Police Commission Charter Amendment that, if enacted, would modify the current discipline process. The Memorandum of Understanding (MOU) between the City and Berkeley Police Association, adopted by the City Council on July 31, 2018, includes Section 37.4, providing for a 120 Day Limit on Imposition of Discipline. This section is unchanged from the prior MOU. On the other hand, the proposed Police Commission Charter amendment, Section 17(5), seeks to implement a one year disciplinary process, which is inconsistent with the current MOU.

The MOU is a formal contract between the City and the Union, and is further covered by the Meyers-Milias-Brown Act (MMBA), as discussed in this office's March 2018 opinion. Any change to the MOU requires the mutual consent of the parties and ratification by the City Council, as stated in the MOU:

> "This Understanding cannot be modified except in writing upon the mutual consent of the parties and ratification by the City Council." (MOU 9.1.)

The City cannot make unilateral changes to the MOU. "The rule in California is well settled: a city's unilateral change in a matter within the scope of representation **is a per se violation of the duty to meet and confer in good faith**." (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.)

Meet and Confer Is Required

In addition to Section 17(5) referenced above, there are a number of other sections of the June 10, 2018 Police Commission Charter Amendment which are subject to meet and confer under the requirements of the MMBA as matters either directly altering, or having impacts on, the terms or conditions of employment for members of BPA[1]. There are also a few provisions that may have impacts on members of other unions.

In *Seal Beach*, impacted employee associations sued the City of Seal Beach after voters passed a ballot initiative that amended the city's charter to require the immediate

[1] Public agency management and employee representatives have a mutual obligation to bargain in g*ood faith* to reach agreement on decisions related to wages, hours and ***other terms and conditions*** of employment ("decision bargaining"). Separately, meet and confer can be triggered when a "*management right"* has impacts or effects on represented employees' wages, hours or other terms and conditions of employment This memo does not seek to identify which of the clauses in the Police Commission Charter Amendment may trigger "decision" bargaining as opposed to "impacts" bargaining.

firing of any city employee who participated in a strike. (*Seal Beach*, *supra*, 36 Cal.3d at p. 595.) The City of Seal Beach had not engaged in meet and confer with the impacted unions before placing the charter amendments before the voters. (*Ibid*.) The California Supreme Court found that a charter city must comply with the meet-and-confer requirements of the MMBA ***before*** placing an initiative measure on the ballot, holding:

> "[T]he city council was required to meet and confer …before it proposed charter amendments which affect matters within the scope of representation. The MMBA requires such action and the city council cannot avoid the requirement by use of its right to propose charter amendments." (*Id*. at p. 602.)

Two separate sections of the MMBA are triggered by the July 10th Police Commission Charter Amendment. The first involves notice, and the second involves the requirement to meet and confer. The Council's action triggers Government Code Section 3504.5, subdivision (a), which "is primarily concerned with requiring notice to employee organizations in one particular circumstance: when a governing body proposes a measure affecting matters within the scope of representation." (See *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 657.) Second, the California Supreme Court recently reaffirmed that "the duty to meet and confer under section 3505[2] applies ***in addition to*** the requirements of section 3504.5." (*Boling v. Public Employment Relations Board* (Cal., Aug. 2, 2018, No. S242034) 2018 WL 3654148 (*emphasis in original*).) "We have consistently located the source of the actual duty to meet and confer in section 3505, where the term "meet and confer" appears and is defined." (*Ibid.)*

Under the terms of section 3505, a charter city is required to meet and confer with the unions "prior to arriving at a determination of policy or course of action" on matters affecting the "terms and conditions of employment." (*Ibid*.) "The duty to meet and confer in good faith has been construed as a duty to bargain with the objective of reaching binding agreements between agencies and employee organizations .... The duty to bargain requires the public agency to refrain from making unilateral changes in

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[2] Government Code Section 3505. "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

employees' wages and working conditions until the employer and employee association **have bargained to impasse** ...." (*Boling, supra,* 2018 WL 3654148, citing *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.) Good faith bargaining under section 3505 "requires a genuine desire to reach agreement." (*Boling supra, 2018 WL 3654148*, citing *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630; *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 271.)

As noted, the meet and confer process involves back and forth and a genuine desire to reach an agreement, even if the parties are ultimately unable to do so. Such a process takes time and effort, typically over a period of months and multiple meetings.

Impasse Is Required (including Factfinding)

The City Manager is the representative of the City of Berkeley in employer-employee relations as provided in Resolution No. 43,397-N.S., adopted by the City Council on October 14, 1969. The City Manager must oversee the Section 3505 meet and confer process through post-impasse procedures as discussed below.

Under the MMBA, when the parties are unable to reach agreement in meet and confer, the public agency must next go through impasse procedures, which can take a minimum of two to four months. The process includes optional mediation, mandated factfinding process as noted below, and a public hearing on impasse. PERB treats bargaining over ballot measures similarly to bargaining over union contracts, and therefore requires bargaining to impasse, declaration of impasse and exhaustion of applicable impasse procedures, including factfinding if requested. (*County of Santa Clara* (2010) PERB Decision Nos. 2114-M & 2120-M; *City of Palo Alto* (2014) PERB Decision No. 2388-M.)

Since 2012, the MMBA has required factfinding. If a local public employer and its employee organization are unable to reach agreement in negotiations, the employee organization (but not the employer) "may request that the parties' differences be submitted to a factfinding panel." Per the MMBA factfinding provisions:

> "The employee organization may request that the parties' differences be submitted to a factfinding panel **not sooner than 30 days, but not more than 45 days**, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within

> five days after the selection of panel members by the parties, select a chairperson of the factfinding panel." (Govt Code §3505.4 (a).)

Once factfinding is completed and findings are issued, the City must hold a public hearing regarding the impasse, and only then may the City take action to implement its last, best and final offer. This would involve a final version of the Police Commission Charter Amendment for approval by Council for placement on the ballot. The MMBA states:

> "[a]fter any applicable mediation and factfinding procedures have been exhausted, **but no earlier than 10 days after the factfinders' written findings** of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, **after holding a public hearing regarding the impasse**, implement its last, best, and final offer, but shall not implement a memorandum of understanding. …." (Govt Code Section § 3505.7.)

November 2018 Election is Neither Immutable Deadline Nor Operational Necessity

When there is a challenge to the adequacy of meet and confer due to timing of an election and the related pre-election deadlines, the Court (in the case of police associations) or the PERB (for other unions) may look to whether that particular election was an **immutable deadline**, in other words, the specific election was **the only one** at which the Charter Amendment could be considered. (See *City of Palo Alto* (2017) PERB Decision 2388a-M [Board found that "[n]o evidence suggests that if the City were unable to act in time for the November election … that it could not again defer action to the next election cycle"]; See also *County of Santa Clara* (2010) PERB Decision Nos. 2114-M, *15; PERB Decision Nos. 2120-M, *16 [PERB held that County was not "faced with an imminent need to act prior to the statutory deadline for submitting the measure for the ballot" and thus was not privileged to place a Prevailing Wage Measure on the ballot prior to the completion of bargaining].)

Here, while there is certainly Council interest in moving this ballot measure forward in 2018, the Police Review Commission Ordinance and process have been in place for more than 40 years, and there are no facts that makes the November 2018 election an immutable deadline to excuse compliance with state law (i.e. this November is not the only election at which police reform items can be considered.)

At times, a compelling operational necessity can justify an employer acting unilaterally before completing its bargaining obligation. However, the employer must demonstrate "an actual **financial emergency** which leaves no real alternative to the action take and allows no time for meaningful negotiations before taking action." (*County of Santa Clara* (2010) PERB Decision Nos. 2114-M, *16, citing *Oakland Unified School District* (1994) PERB Decision No. 1045.)

PERB has rejected efforts to use election deadlines to cut short meet and confer based on desirability as opposed to financial urgency. “[I]t does not appear that the County was faced with an imminent need to act prior to the statutory deadline for submitting the Prevailing Wage Measure for the ballot. The mere fact that the County thought inclusion of the measure on the November 2004 ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation.” (*County of Santa Clara* (2010) PERB Decision Nos. 2114-M, *16.) The Police Commission Charter Amendment does not address a financial matter, much less a financial emergency that must be addressed in November of 2018.

For the reasons set forth above, it is premature to place the Police Commission Charter Amendment on the ballot for 2018.

Attachment

cc: Mark Numainville, City Clerk

Office of the City Attorney

Date: March 26, 2018

To: Dee Williams-Ridley, City Manager

From: Farimah Brown, City Attorney
By: Kristy van Herick, Assistant City Attorney KVH

Re: **Legal analysis of City Council's November 14, 2017 Proposals related to the Police Review Commission**

Background

At its November 14, 2017 meeting, City Council voted to refer to the Police Review Commission (PRC) and to the City Manager a ballot measure proposal to present to Berkeley voters seeking to reform the PRC structure. The item included a referral for the PRC:

> *"to review the existing enabling legislation, rules, and regulations for the PRC, and to consider all options, including charter amendments, ballot measures, and any other amendments to strengthen the authority of the PRC to consider and act on citizen complaints, and other possible structural, policy and procedural reforms."*

The Council referral also sought to have "the City Manager, through the City Attorney, provide legal analysis regarding which proposals can be completed legislatively and which require amendments to the City Charter", and provided some initial recommendations for the PRC's and City Manager's consideration, as follows:

"*Changes the City Manager and PRC should consider, but not be limited to, include the following:*

1. *Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.*
2. *Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.*
3. *Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.*

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As part of the review of proposed improvements to the PRC process, the PRC should analyze police review policies and structures in other jurisdictions (e.g. San Francisco, BART, etc.), all PRC models and engage relevant stakeholders, including the Berkeley Police Association and community organizations, in developing proposals.

Full analysis by the PRC and City Manager must be reported to the City Council by May 2018."

The following is a legal review of the three initial proposals provided in the City Council's November 2017 referral. The PRC has not yet issued its response to the November 2017 referral, although this office is informed the PRC has created a subcommittee to work on the referral. Should the PRC provide additional proposals, this office will provide a supplemental response.

Issues/Conclusions

Issue: As to each of the three proposed PRC reforms listed below, what legal steps are required in order to implement the reform? Which proposals can be completed legislatively and which require amendments to the City Charter?

Proposal #1: Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.

Conclusion: Changing the current standard of proof would require a simple majority vote of the PRC to amend the PRC Regulations. This proposed change also has impacts on Berkeley Police Association (BPA) members, therefore, it requires meet and confer with the Berkeley Police Association. No Charter Amendment is necessary to implement this change.

Proposal #2: Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.

Conclusion: This proposal would require a change to the Memorandum of Understanding between the BPA and the City. Such a change can only be made through meet and confer and a formal amendment to the Memorandum of Understanding.

Proposal #3: Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.

Conclusion: Depending on the type of evidence the PRC is seeking, this proposal may require a Charter Amendment. A governing-body-sponsored ballot measure as proposed by the referral would trigger meet and confer, which must be completed ***before*** the ballot measure goes to the voters.

Discussion/Analysis

General legal background on the PRC

Berkeley voters adopted Ordinance 4644-N.S creating the Police Review Commission on April 17, 1973. (*See* Berkeley Municipal Code (B.M.C.), Chapter 3.32.) The purpose of the PRC was to, "provide for community participation in setting and reviewing Police Department policies, practices and procedures and to provide a means for prompt, impartial and fair investigation of complaints brought by individuals against the Berkeley Police Department." (B.M.C. § 3.32.010.)

A "Board of Inquiry" is the confidential hearing process used by the PRC to review specific complaints against officers. Three Commissioners are impaneled to hear and render findings on a complaint, and Commissioners are required to sign a confidentiality and nondisclosure agreement. (PRC Regulations, I.A and I.B.4 [eff. March 28, 2016].) After the hearing, a summary of the PRC's findings are provided to the City Manager and the Chief of Police. (PRC Regulations, I.B.10.)

A case decided shortly after the PRC's creation invalidated certain provisions of Ordinance 4644-N.S. that would have "(1) given the PRC the power to recommend specific disciplinary actions against individual police officers, (2) prohibited the Berkeley Police Department from conducting its own internal investigations and disciplinary proceedings, and (3) given the PRC the right to demand and receive information from the police department or other city departments." (*Berkeley Police Ass'n v. City of Berkeley* (2008) 167 Cal.App.4th 385, 390, citing *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 233–235 (*Brown*).)

In *Brown*, the Court found that the invalidated provisions in the Ordinance were in conflict with "the charter grant of powers to the city manager." (*Brown v. City of Berkeley*, *supra*, 57 Cal.App.3d at p. 233.) It is long established that, to be valid, an ordinance must harmonize with the charter. (*See South Pasadena v. Terminal Ry. Co.* (1895) 109 Cal. 315, 321.) "An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the state Constitution." (*Brown v. City of Berkeley*, *supra*, 57 Cal.App.3d at p. 231.) Therefore, the powers specified in the Charter take precedence over the language in City ordinances, even those passed by voter initiative.

Article VII, section 27, of the Charter reads: "The Council shall appoint an officer, who shall be known as the City Manager, who shall be the administrative head of the Municipal Government and who shall be responsible for the efficient administration of all departments." Further, Article VII, Section 28, states, in relevant part:

> *"...The City Manager shall have the following powers and duties:*

> *... (b) Except as otherwise provided in this Charter, to appoint, discipline or remove all officers and employees of the City, subject to the Civil Service provisions of this Charter. ... Except for the purpose of inquiry, the Council and its members shall deal with the administrative service solely through the City Manager, and neither the Council nor any member thereof shall give orders to any of the subordinates of the City Manager, either publicly or privately.*
>
> *(c) To exercise control over all departments, divisions and bureaus of the City Government and over all the appointive officers and employees thereof....*
>
> *(f) To make investigations into the affairs of the City, or any department or division thereof, or any contract, or the proper performance of any obligation running to the City.*
>
> *(g) To prepare and submit to the Council for its consideration the proposed annual budget."*

Under the City Charter, Article VII, sections 28(b), (c) and (f), the City Manager has the authority to oversee all performance issues of City staff, to oversee the administration of the police department, and to direct the activity of the Chief of Police and his staff. Any shift in these key roles from the City Manager to an appointed or elected police commission would therefore require a Charter amendment.

Referral No. 1: Use the "preponderance of the evidence" as the standard of proof for all PRC decisions.

The first proposal referenced in the Council resolution involves changing the standard of proof used for all PRC Board of Inquiry decisions from "clear and convincing evidence" to "preponderance of the evidence". As discussed below, this proposed change would not require a Charter Amendment or ballot measure. However, this proposal requires two steps: (1) amending the PRC Regulations for Handling Complaints Against Members of the Police Department, which can be accomplished through a simple Commission action, and (2) completion of a meet and confer process with the BPA prior to implementation.

The PRC's enabling ordinance specifically empowers the PRC to "adopt rules and regulations and develop such procedures for its own activities and investigations as may be necessary." (B.M.C. § 3.32.090.E.) The PRC Regulations currently specify a "clear and convincing" evidence standard:

> *"Standard of Proof. No complaint shall be sustained unless it is proven by clear and convincing evidence presented at the hearing or otherwise contained in the record. "Clear and convincing" is more than a preponderance of evidence, but less than beyond a reasonable doubt."*

(PRC Regulations, VIII.C.)

As background, under California law, " 'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (Evid. Code § 115.)

The PRC has utilized the "clear and convincing evidence" standard in its BOI hearings for more than 30 years. The PRC in 2014 proposed changing the standard of proof as part of a package of regulation amendments. After engaging in meet and confer as required under the Meyers-Milias-Brown Act (MMBA) (Govt. Code § 3500, et seq.) concluded, this proposed amendment was not implemented.

The MMBA "has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies." (*Seal Beach* Police Officers Assoc. v. City of Seal Beach (Seal Beach) (1984) 36 Cal.3d 591, 597; *see* Govt. Code § 3500; *DiQuisto v. Co. of Santa Clara* (2010)181 Cal.App.4th 236, 254.) To achieve these purposes, "the MMBA requires governing bodies of local agencies to 'meet and confer [with employee representatives] in good faith regarding wages, hours, and other terms and conditions of employment' and to 'consider fully' such presentations made by the employee organizations." (*Seal Beach*, *supra*, 36 Cal.3d at p. 596 (quoting Govt. Code § 3505).) Section 3505 of the Government Code defines "meet and confer in good faith" as both parties having "the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation...."

As to the PRC's Regulations, the City is obligated, consistent with MMBA, to meet and confer with representatives of the Berkeley Police Association and endeavor to reach agreement on the practical consequences "***of any changes*** in wages, hours and ***other terms and conditions of*** employees represented by the Association." Meet and confer continues until management and labor either reach an agreement or reach impasse. "Impasse" means that the City and the BPA have a dispute over matters within the scope of representation and have reached a point in meeting and negotiating over the dispute at which their differences in positions are ***so substantial or prolonged*** that future meetings would be futile.

Impasse is only reached after multiple meetings and extensive effort on both sides to reach an agreement. Before imposing a regulation, the parties typically would be required to participate in fact finding before a neutral party. After this process is completed, if the union does not agree to implement the change, the City Council can

unilaterally impose the change. However, such imposition can result in legal action, particularly if there is any question as to whether the parties were truly at impasse and whether the parties were participating in good faith.

Referral No. 2: Extend the current 120-day limit on the imposition of discipline up to one year, consistent with existing California law.

To be effective, this referral would involve a change to language in the current Memorandum of Understanding ("MOU" or "Understanding") between the City and the Berkeley Police Association. The current MOU states in relevant part:

> ***37.4 120 Day Limit on Imposition of Discipline***
>
> *The City agrees that no disciplinary action against an employee covered by this Understanding, which action involves a loss or reduction of pay or discharge, shall be imposed unless such action is taken within one hundred twenty (120) calendar days after the date of the incident giving rise to the disciplinary action or within one hundred twenty (120) calendar days of the date the City has knowledge of the incident giving rise to the disciplinary action.*
>
> *If a letter of advice or written reprimand is issued by the Department, neither the document nor any testimony offered by the Department or the City in an appeal process shall reference any time restrictions set forth in this section, nor reference any other discipline that may have been considered, recommended or imposed, but for the time restrictions set forth herein.*

Any change to the MOU requires the mutual consent of the parties and ratification by the City Council.

> "This Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein [...] This *Understanding cannot be modified except in writing upon the mutual consent of the parties and ratification by the City Council.*"
>
> (BPA –COB MOU Section 9.1.)

For a modification to the MOU to be discussed in the *current* negotiation process, it would have needed to be shared with the BPA in May of 2017. Therefore, to make this change without violating state law, any change to the 120 calendar day provision must be done through a separate meet and confer process reaching mutual consent and ratification by Council.

Any attempt to implement a change to the MOU without mutual agreement is considered a "unilateral change". A unilateral change in violation of the MMBA occurs when an employer takes any action to change the status quo on a matter within the scope of representation without having given the employee organization proper notice

and an opportunity to bargain. "The rule in California is well settled: a city's unilateral change in a matter within the scope of representation is a per se violation of the duty to meet and confer in good faith." (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.)

Referral No. 3: Give the PRC full discretion and access to evidence to review complaints as to alleged officer misconduct.

For the reasons set forth below, this third proposal would require a Charter Amendment. The *Brown* case, referenced above, examined and invalidated a number of provisions in the original 1973 voter initiative creating the PRC as conflicting with the City Charter. One of the invalidated provisions is substantially similar to the Council's third referred proposal.

Specifically, Section 10(c) of the original voter adopted ordinance had provided the PRC with the power:

> *"to request and receive promptly such written and unwritten information, documents and materials and assistance as it may deem necessary in carrying out any of its responsibilities under this ordinance from any office or officer or department of the city government, including but not limited to the Police Department, the City Manager, the Finance Department, the Public Works Department, and the City Attorney, each and all of which are hereby directed as part of their duties to cooperate with and assist the Commission in the carrying out of its responsibilities; ..."*

This section was found to violate the charter mandate that everything pertaining to administrative services go solely through the City Manager. (*Brown, supra,* 57 Cal.App.3d at p. 233–235.) In order for the PRC to have "full discretion and access to evidence" under the current proposal, the City Charter would need to be amended to shift some of the City Manager's authority to the PRC.

Depending on the level of discretion and access envisioned, state laws protecting the confidentiality of peace officer personnel records could also be implicated. Any language to change the Charter or PRC Ordinance also needs to be consistent with Penal Code sections 832.5 and 832.7[1] as well as Evidence Code 1043 to 1046, which specifies that p*eace officer personnel records are confidential pursuant to the California Penal Code.*

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[1] Penal Code section 832.7(a), provides, in part, that "[p]eace officer or custodial officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." The Evidence Code provides that in order for personnel records of a peace officer to be disclosed for possible use in a civil proceeding, the agency must pursue a discovery motion (commonly referred to as a *Pitchess* motion.)

In addition to requiring amendment to the City Charter, the proposal triggers a requirement to meet and confer with the BPA and possibly with other City unions to the extent the changes impact other represented employees. Meet and confer must be conducted with all impacted unions ***before*** the City Council puts such an amendment before the voters.

According to the MMBA,

> *"[e]xcept in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation* ***proposed to be adopted*** *by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions."*
>
> (Govt Code § 3504.5 [*emphasis added*].)

The language "proposed to be adopted" indicates that the meet and confer needs to happen before the ordinance or other legal change can take effect.

In *Seal Beach*, impacted employee associations sued the City of Seal Beach after voters passed a ballot initiative that amended the city's charter to require the immediate firing of any city employee who participated in a strike. (*Seal Beach*, *supra*, 36 Cal.3d at p. 595.) The City of Seal Beach had not engaged in meet and confer with the impacted unions before placing the charter amendments before the voters. (*Ibid.*) The California Supreme Court found that a charter city must comply with the meet-and-confer requirements of the MMBA ***before*** placing an initiative measure on the ballot, holding: "[T]he city council was required to meet and confer ...before it proposed charter amendments which affect matters within the scope of representation. The MMBA requires such action and the city council cannot avoid the requirement by use of its right to propose charter amendments." (*Id.* at p. 602.)

It is less clear whether there the City must meet and confer on a citizen-sponsored initiative which does not *directly* involve a proposal *by* the governing body. Last year, a California Court of Appeal decision annulled a decision of the Public Employment Relations Board (PERB) that the 'pre-ballot" meet-and-confer requirement for a governing-body-sponsored ballot proposal also applied to a citizen-sponsored initiative. (*Boling v. Public Employment Relations Board* (2017) 10 Cal.App.5th 853, *reh'g denied* (May 1, 2017), *rev. granted*, California Supreme Court (July 26, 2017).) In *Boling*, the voters of City of San Diego approved a citizen-sponsored initiative, the Citizens Pension Reform Initiative ("CPRI"), which adopted a charter amendment mandating changes in the pension plan for certain employees of City of San Diego. However, the mayor of San Diego (a City with a strong mayoral form of government) had provided support to

the proponents of the citizen-sponsored initiative to develop and campaign for the CPRI. (*Boling*, *supra*, 10 Cal.App.5th at p. 856.) The underlying PERB Decision found that the initiative could not be deemed purely a citizen action because of the public official's support.

The California appellate court ruled that: "[b]ecause a governing body lacks authority to make any changes to a duly qualified citizen's initiative (Elec. Code, § 9032), and instead must simply place it on the ballot without change, imposing a meet-and-confer obligation on the governing body before it could place a duly qualified citizen's initiative on the ballot would require an idle act by the governing body." (*Boling*, *supra*, 10 Cal.App.5th at p. 875.) However, as noted, the California Supreme Court has taken this case up for review, to consider among other matters, whether under the circumstances the voter initiative addressing a matter that falls within the MMBA was subject to meet and confer before the matter went to the voters.

Regardless of what the Supreme Court decides in *Boling*, pursuant to the language of the MMBA and the *Seal Beach* case, it is well established that governing-body-sponsored ballot proposals must go through the meet and confer process before going to the voters.

cc: Mark Numainville, City Clerk
Opn. Index: I.E; II.G.3.c

PERB has rejected efforts to use election deadlines to cut short meet and confer based on desirability as opposed to financial urgency. “[I]t does not appear that the County was faced with an imminent need to act prior to the statutory deadline for submitting the Prevailing Wage Measure for the ballot. The mere fact that the County thought inclusion of the measure on the November 2004 ballot was desirable does not constitute a compelling operational necessity sufficient to set aside its bargaining obligation.” (*County of Santa Clara* (2010) PERB Decision Nos. 2114-M, *16.) The Police Commission Charter Amendment does not address a financial matter, much less a financial emergency that must be addressed in November of 2018.

For the reasons set forth above, it is premature to place the Police Commission Charter Amendment on the ballot for 2018.

Attachment

cc: Mark Numainville, City Clerk