LCW LIEBERT CASSIDY WHITMORE

135 MAIN STREET, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
T: 415.512.3000 F: 415.856.0306

ekunze@lcwlegal.com
415.512.3095

February 5, 2018

VIA EMAIL
City Attorney's Office
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: ***Assessment of Supplemental Retirement Benefit Request***
Client-Matter: SA460/012

Dear City Attorney's Office:

Thank you for your inquiry regarding the City of Santa Clara's ("City") ability to provide the former interim City Manager with a supplemental defined retirement benefit under state law. Our assessment of the City's question is provided below. We understand that this assessment is intended for distribution to City Councilmembers and to former interim City Manager, Rajeev Batra, for the purpose of providing the City with legal guidance; and that such distribution is not intended to waive any confidentiality or attorney-client privilege associated with this assessment.

I. QUESTION PRESENTED

Can the City provide the former interim City Manager with compensation in his retirement in the form of a defined retirement benefit that equates to the difference between the benefit he is receiving through the California Public Employees' Retirement System ("CalPERS") and the benefit he would receive if the full amount of his final compensation was pensionable under state law?

II. BRIEF RESPONSE

Under the circumstances, no. Under state law, the City cannot offer the former interim City Manager a supplemental defined benefit plan (e.g. a plan that offers a set dollar figure, based on a defined benefit formula using age, service credit and pensionable compensation) unless such plan existed prior to January 1, 2013, and the City Manager position was within a group of employees entitled to participate in the supplemental defined benefit plan at that time. We understand that no such plan applicable to the former interim City Manager existed.

In addition, as further detailed below, it is unlikely the City can provide former interim City Manager with any other type of additional retirement benefit as such benefit would likely be considered a gift of public funds or "extra compensation" prohibited under the state Constitution. Even if a permissible retirement benefit could have been provided during the former interim City

Manager's employment, it must have been subjected to an actuarial valuation and properly discussed and adopted in accordance with public meeting requirements.

III. FACTUAL BACKGROUND

On or around April 6, 2016, the City's Director of Public Works, Rajeev Batra, was appointed as the City's "Acting City Manager." On March 7, 2017, the City Council approved a 5% merit increase for Mr. Batra, in accordance with the Miscellaneous Management Bargaining Unit, Unit 9, Memorandum of Understanding ("MOU") to which both of Mr. Batra's positions were tied.[1] This action increased Mr. Batra's monthly salary from $25,141 to $26,398, effective March 12, 2017.

According to Meeting Minutes from the City Council's March 7, 2017 discussion of the "interim" City Manager's salary and merit increase, the Council approved the Director of Human Resources' recommendation that Mr. Batra's salary be increased, "subject to written confirmation of the application of the Internal Revenue Code Section 401(A)(17) related to the compensation limitation law." Specifically, during the meeting, with respect to agenda item 14.A.4, Councilmember Mahan verbally moved to approve the recommendation to increase the annual salary cost for the interim city manager, effective March 12, 2017, for the 5% increase for merit, "but also subject to getting some confirmation, preferably in writing, of the application of the Internal Revenue Code section 401(A)(17), because. . . that's the compensation limitation law." She added, "...if we get an affirmative determination under that section, I understand that it will be of a greater benefit than this, but if we get a negative determination on that law, then this would be in place..."[2] The motion passed unanimously. The "summary of actions" from the Council meeting reflects the Council's action of "[a]pprov[ing the motion] subject to written confirmation of the application of the Internal Revenue Code Section 401(A)(17) related to the compensation limitation law."

Notably, the caveat regarding confirmation of the application of the Internal Revenue Code section, "related to the compensation limitation law," is not reflected in the signed Agenda Report, for item 14.A.4, which recommends only that the Council approve the 5% merit salary increase per the MOU, and update the City's Compensation Schedule accordingly. Accordingly, the Mayor's signature (and signatures of the Acting Finance Director and Director of Human Resources), indicates approval of a 5% merit increase and update to the City's compensation schedule only.

Mr. Batra announced his intent to retire from City employment, effective March 30, 2017. On March 21, 2017, the City passed a Resolution allowing Mr. Batra to serve as "Interim City Manager," as a "retired annuitant," as of March 31, 2017, without requiring a 180-day separation following his retirement. The Resolution set Mr. Batra's retired annuitant salary at the hourly rate of $152.296. This rate was not less than the minimum, nor in excess of the

[1] Specifically, the MOU provides that merit pay will range from 0 to 5% for Unit 9 employees, with a guaranteed 2% to 5% increase in 2016 and 2017.
[2] As noted below, the section 401(a)(17) cap applies to Mr. Batra's pensionable compensation with or without the 5% merit increase.

maximum monthly base salary paid to other employees performing comparable duties ($26,398), divided by 173.333. The Resolution also provided that Mr. Batra would not receive any other benefit, incentive, compensation in lieu of benefit or other form of compensation in addition to this hourly rate of pay. A letter to Mr. Batra, dated March 22, 2017, confirmed his interim appointment to City Manager, at the hourly equivalent of $152.30 per hour. Mr. Batra signed his acceptance of the terms and conditions of his appointment to City Manager on an interim basis, as set forth in the letter, on March 24, 2017. Mr. Batra's interim appointment was scheduled to end no later than December 31, 2017.

On August 31, 2017, Mr. Batra provided the Mayor and City Councilmembers with a memo indicating City staff had followed up on the application of IRC section 401(a)(17) to "the compensation limitation law." Mr. Batra explained that he received a written opinion from a CPA tax consultant, who expressed his opinion that the City could pay him a retirement benefit "based on the difference of the IRS salary cap...and the actual pension salary." Mr. Batra quoted the CPA as having confirmed that the "'[t]he difference is a non-qualified pension amount and may not be deducted to an employer for tax purposes, but the [C]ity should not have that issue for taxation purposes."

On September 7, 2017, Mr. Batra submitted a letter to the City, effecting his resignation on September 27, 2017. Also on September 7th, Mr. Batra notified the City's Director of Human Resources that he had provided a memo to the City's Mayor and a Councilmember requesting that the City pick up the difference from the IRS [401(a)(17)] compensation cap used in the pension formula and what he could have received if the cap wasn't imposed by CalPERS. We understand that the benefit Mr. Batra is seeking is the application of his CalPERS retirement rate (2.7%) multiplied by years of service (15), to the differential between his "actual" and "pensionable" compensation, which he estimated to be approximately $30,000.

On December 8, 2017, Mr. Batra obtained a tax attorney opinion stating that the City can, through a side agreement, pay Mr. Batra a retirement benefit in excess of the IRC Section 401(a)(17) limit. The opinion explained that the IRC limit based on Mr. Batra's retirement date was $265,000. It noted that Mr. Batra's average compensation the for the 12-month period ending with his retirement was $296,000. Thus, the letter opined, the City could pay Mr. Batra a retirement benefit on the difference of approximately $31,000 by a side agreement, without violating IRC section 401(a)(17). The assessment did not express any opinion about the existence of such agreement. The opinion also indicates that it is limited to an assessment about IRC section 401(a)(17). Thus, it does not consider state law impacting a public agency's authority to provide an employee or former employee with supplemental retirement benefits.

Mr. Batra forwarded the tax attorney opinion to the Mayor, City Council, and the Director of Human Resources on December 11, 2017. In his email, Mr. Batra noted that the opinion confirmed that the City could pick up the difference in his retirement salary and IRS salary cap of $26k for 2016 without violating any provisions of the IRC. On December 12, 2017, Mr. Batra submitted a memo to the Mayor, Councilmembers, and the Director of Human Resources, requesting that the City develop an agreement to pay him the difference in his

retirement benefit, based on his average salary and number of years served, to run parallel to his CalPERS retirement term.

To date, there is no written or signed agreement between Mr. Batra and the City regarding the application of IRC section 401(a)(17) to Mr. Batra's compensation or benefits.

IV. LEGAL ASSESSMENT

As an initial matter, and as further detailed below, it helps to clarify that the compensation limits discussed by Mr. Batra is not a "limit" on compensation, but a limit on the amount of compensation that may be counted towards Mr. Batra's CalPERS retirement benefit. In other words, regardless of what the City decided to pay Mr. Batra as compensation for his employment, only a portion of that compensation could be counted as "pensionable."[3] Public employers are not restricted from paying employees *more* than the pensionable limit. However, as further discussed below, such payments must still be in accordance with an employment or collective bargaining agreement, and consistent with public meeting laws, to demonstrate that the payment is in exchange for specified services, and not an impermissible gift of public funds.

A. CalPERS Pensionable Compensation Limits

The pensionable compensation limit in each year, as published by CalPERS, initially depends on whether a CalPERS member is a "new" or "classic" member.[4] For "classic" members hired on or after July 1, 1996, compensation up to the limits expressed in IRC section 401(a)(17), as increased from time to time for cost of living, may be counted towards the member's pension benefit.[5] For the 2016 calendar year, the amount of a classic member's compensation that could be counted towards his or her pension benefit was $265,000.[6]

With the understanding that Mr. Batra is a classic member whose membership began on or after July 1, 1996, and whose final compensation was $296,000,[7] the difference between Mr. Batra's salary and his pensionable compensation in 2016 ($265,000) would have been $31,000. Assuming his pension benefit was 2.7% x 15 years of services, and that he is seeking the

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[3] See CalPERS Circular Letter No. 200-010-17.

[4] A "new member" is defined as someone who falls into one of the following three categories: (1) an individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was not a member of another public retirement system prior to that date; (2) an individual who becomes a member of a public retirement system for the first time on or after January 1, 2013, and who was a member of another public retirement system prior to that date, but whose prior public retirement system does not have "reciprocity" with the individual's new public retirement system; or (3) an individual who was an active member in a retirement system and who, after a break in service of more than six months, returned to active membership in that system with a new employer. (See Gov. Code, § 7522.04, subd . (f).)

[5] Gov. Code, §§ 20636, subd. (a), 21752.5.

[6] See CalPERS Circular Letter 200-010-17. For the 2017 calendar year, the limit was $270,000. With respect to "final compensation" employers should apply the cap that existed at the time the employee's final 12-months of employment *began.* In this case, because he retired on March 30, 2017, the final 12-month period applicable to Mr. Batra began in 2016, and the 2016 limit applies.

[7] We use this salary, expressed by the tax attorney opinion, for exemplary purposes, and understand that the City's calculation of Mr. Batra's 2016 compensation may be different. We have not confirmed this calculation.

application of the same benefit for the non-pensionable portion of his compensation, he would be entitled to 40.5% of $31,000 if no pensionable compensation limit existed. Thus, Mr. Batra would be entitled to, approximately, an additional $12,555 in pension benefits annually if no pensionable compensation limit existed.

B. Limits on Supplemental Defined Benefits Plans Post-PEPRA

With respect to "classic" members, and prior to the PEPRA, no statute prohibited an employer from providing employees with a retirement benefit, separate and apart from the CalPERS plan, that covered the portion of pay that is not reportable to CalPERS.[8] A person could not, and may not now receive credit for the same service in two retirement systems "supported wholly or in part by public funds under any circumstance."[9] However, this prohibition does not preclude concurrent participation and credit for service in a public retirement system (e.g. CalPERS) and a defined compensation plan (e.g. a 457 plan), money purchase pension plan and trust, or a defined benefit plan (e.g. a plan that provides a set benefit according to a defined benefit formula, regardless of contributions) provided that the plans meet the requirements of IRC section 401(k) and 401(a), respectively.[10] Supplemental "defined benefit" plans must also meet certain conditions under state law, including a condition that the CalPERS plan must be the employer's primary plan for the individual.[11]

However, in addition to restricting the amount of pensionable compensation that can be used to calculate the CalPERS benefit paid to a new member, PEPRA now prohibits employers from offering supplemental defined benefit plans that did not exist prior to January 1, 2013. This applies to both new and classic members. It additionally prohibits employers from offering pre-existing defined benefits plans to any new employee or additional employee group who were not eligible for the plan prior to January 1, 2013.[12] In effect, this means employers cannot offer any new supplemental "defined benefit plans" on or after January 1, 2013.

The plan described by Mr. Batra appears to be the type of "defined benefit plan," that is no longer permitted by state law. Specifically, the plan seeks a pre-determined benefit (e.g. an approximate $12,555 per year), based on a defined benefit formula combining age, service credit and pensionable compensation, regardless of contributions to the benefit account, or any plan income, expenses, gains and losses, etc.[13] Thus, assuming the plan proposed by Mr. Batra did not exist prior to January 1, 2013, and assuming no such plan was offered to employees in the

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[8] See e.g. Gov. Code, § 20894.
[9] Gov. Code, § 20894, subd. (a).
[10] See Gov. Code, § 20894, subds. (b)-(c). A defined contribution plan is a plan that provides for an individual account for benefits based solely on the amount contributed to the account, and any income, expenses, gains and losses, and any forfeitures of account of other participants which may be allocated to the participant's account. (See 26 U.S.C., §§ 415, subd. (k)(1), 414, subd. (i), 414, subd. (j); 2 Cal. Code Regs., § 589.) A defined benefit plan is any plan that is not a defined contribution plan. (See 26 U.S.C., § 415, subd. (k)(1), 414, subd. (i), 414, subd. (j); 2 Cal. Code Regs., § 589.)
[11] Gov. Code, § 20894, subd.(c)(1).
[12] Gov. Code, § 7522.18.
[13] See 26 U.S.C., §§ 415, subd. (k)(1), 414, subd. (i), 414, subd. (j).

same employment group as Mr. Batra prior to that date, the City cannot now offer such plan to Mr. Batra.

C. Limits on Supplemental Defined Contributions Plans

As noted, employers *may* still provide supplemental retirement benefit plans in the form of a defined contribution plan (e.g. a 457 plan). Unlike a defined "benefit" plan, a defined "contribution" plan is one that provides a benefit based on a dollar amount contributed to the account, and any account income over time.[14] These accounts do not offer a "fixed" benefit, and may experience gains and losses on contributions. Under PEPRA, employers may contribute to an additional defined "contribution" plan, but new members are subject to annual dollar, and salary portion limits.[15] Because Mr. Batra is not a new member, these PEPRA contributions limits do not apply. However, because Mr. Batra is not a current employee of the City, he is ineligible to participate in a City-sponsored defined contribution plan (e.g., 457 or 401(k) plan) now.

If the City had wanted to provide Mr. Batra with a supplemental retirement allowance, other than a defined benefit plan, it could have contributed to an individual retirement account during his active employment[16] (e.g., a 457 plan) or a personal retirement account that Mr. Batra set up with his own banking institution. In this case, the amount the City contributed would not be the amount to "make up" the difference between his current retirement allowance and what the allowance would be if there were no IRS limits on compensation that may be credited to a pension system. Rather, whatever the City contributed would be invested to make gains for Mr. Batra's benefit.

D. Public Transparency Requirements

While the City may provide employees with some supplemental retirement benefits, it must still provide such benefits consistent with public transparency laws, and by contract within the bounds of the California Constitution. Because the benefit proposed by Mr. Batra does not appear compliant with the PERL and PEPRA, we only briefly opine on these additional issues.

1. Public Meeting Law Requirements

Under California's Brown Act, public employers may only compensate employees in accordance with publicly available pay schedules, as determined in an open meeting. As of January 1, 2017, prior to taking action, an agency's legislative body must orally report a summary of any recommendation for final action regarding the "salaries, salary schedule, or compensation paid in the form of fringe benefits of a local agency executive...during the open

[14] See 26 U.S.C., §§ 415, subd. (k)(1), 414, subd. (i).
[15] There does not appear to be any such limit for classic members, to contribute to a defined contribution plan.
[16] We are referring to his employment with the City *prior* to his retirement with CalPERS. As explained below, the City was prohibited from providing Mr. Batra with any fringe benefit during his retired annuitant employment, including any contribution to a deferred compensation or retirement plan.

meeting in which the final action is to be taken."[17] For the purposes of this provision, a "local agency executive" includes any employee not subject to the Meyers-Milias-Brown-Act ("MMBA"), a chief executive officer, deputy chief executive officer, assistant chief executive officer, department head, or person who's position in the agency is held by employment contract between the agency and that person.[18] In addition, a legislative body is prohibited from calling a "special meeting" regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive.[19] Thus, any salary or compensation in the form of fringe benefits provided to Mr. Batra, must be orally reported during a regularly scheduled open meeting.

2. Actuarial Assessment Requirement

In addition to the above requirements, a local legislative body (e.g. City Council) must obtain an actuarial valuation of costs, and make the valued costs public at a public meeting, prior to the adoption of any increased retirement or other postemployment benefits.[20] Whenever a public employer makes a change to a retirement benefits, or other post-employment benefit, that will increase future costs, Government Code section 7507 requires "...the future costs of changes..., as determined by the actuary, [to] be made public at a public meeting at least two weeks prior to the adoption of any [such] changes...."[21] To comply with this statute, the City would need to obtain an actuarial valuation of the benefit Mr. Batra proposed, and discuss the actuarial assessment in an open session. Subsequently, the City would need to hold a public meeting at least two weeks later to adopt the benefit.

Unless all of the above conditions are met, including the actuarial assessment and City Council's oral report at a regularly scheduled public meeting where final action is to be taken, the City could not provide Mr. Batra with additional (and otherwise lawful) retirement benefits.

E. Constitutional Limitations on Public Employee Compensation

As noted, the supplemental retirement benefit proposed by Mr. Batra does not appear to fit within the bounds of the PERL or PEPRA. However, we briefly address Constitutional restrictions below.

1. Restrictions on Public Employee Compensation

In addition to restrictions imposed by the Brown Act and state retirement law, the California Constitution, Article XI, section 10, prohibits a local government body from granting "extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part,

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[17] Gov. Code, § 54953, subd. (c)(3); Stats. 2016 c. 175 (S.B. 1436) § 1, eff. Jan. 1, 2017.
[18] Gov. Code, §§ 54953, subd. (c)(3), 3511.1, subd. (d).
[19] Gov. Code, § 54956, subd. (b).
[20] See Gov. Code, § 7507.
[21] Gov. Code, § 7507, subd. (c)(1)(A).

or pay a claim under an agreement made without authority of law."[22] The primary purpose of the prohibition, in its inception, was to prevent governing bodies from enacting "private statutes" in recognition of "individual" claims.[23] However, the provision does not prohibit every grant of compensation for work already performed. For example, "an *increase* in [existing] benefits to persons occupying a pensionable status is not to be treated as the payment of 'extra compensation or allowance,' as those terms are used in the proscription of article XI, section 10."[24]

As explained in *County of Orange v. Association of Orange County Deputy Sheriffs,* "'[a] pension is a gratuity [gift] only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation.... But where...services are rendered under a pension statute, the pension provisions become a part of [citation omitted] the contemplated compensation for those services and so in a sense a part of the contract of employment itself.'"[25] In *County of Orange*, the Court determined that the retroactive application of a more beneficial pension formula to current employees' past service was not "extra compensation" for services already rendered. It arrived at this determination, in part, because the promise for retroactive application of the benefit was in exchange for adequate consideration arrived at through MOU negotiations and was a benefit *already* available for adoption under the applicable public retirement system law – the County Employees' Retirement Law ("CERL").[26] By statute, prior to January 1, 2013, the CERL permitted a board of supervisors to, by resolution, make a benefit formula "applicable to service credit earned on and after the date specified in the resolution, which date may be earlier than the date the resolution is adopted."[27]

In 2000, a non-binding, but informative, Attorney General Opinion examined whether a "supplemental employee retirement plan" qualifying as a money purchase pension plan or a defined benefit plan under federal law [like the plan proposed by Mr. Batra], offered to employees as an incentive to take an early retirement, and in consideration for waiving employment-related claims against a County Office of Education, was unconstitutional. The Attorney General determined that this benefit *was* constitutional, even as to those employees who had retired prior to a window period for enrolling in the plan. In so determining, the Attorney General explained that the annuity did not constitute "compensation" for services already rendered (extra or not), because the plan was an inducement for employees to take early retirement and waive claims. In effect, the plan was not for the performance of service previously rendered, but for the cessation of service.[28] Again, the additional benefit was not an

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[22] Cal. Const., art. XI, § 10, subd. (a).
[23] *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 40 [citing *Jarvis v. Cory* (1980) 28 Cal.3d 562, 577)]; see also Cal. Atty. Gen. Op. No. 81-1102 (1982).
[24] *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 44 [citing *Nelson v. City of Los Angeles* (1971) 21 Cal.App.3d 916], emphasis added.
[25] *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 42-43 [citing *Sweesy v. L.A. etc. Retirement Board* (1941) 17 Cal.2d 356, 110 P.2d 37].
[26] *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 46-48.
[27] *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 30 [citing Gov. Code, § 31678.2].
[28] 83 Ops.Cal.Atty.Gen. 45, (2000).

unconstitutional gift of public funds because it was provided in exchange for valuable "consideration" – specifically, early retirement and the release of employment-related claims.[29]

Extending the reasoning under *County of Orange* above, the City would need to consider whether Mr. Batra's services as the interim City Manager were "rendered under a pension statute, the pension provisions becom[ing] a part of...the contemplated compensation for those services and so in a sense a part of the contract of employment itself."[30] During Mr. Batra's service as the interim City Manager, he operated under the PERL and the PEPRA and therefore, these laws in a sense became a part of his contract of employment. Here, the PERL, the PEPRA, and even the IRC, prohibited crediting compensation to a public retirement system in excess of the IRS maximum. Further, the PEPRA prohibited the offering of a supplemental defined benefit plan to any employee who was not in the plan prior to January 1, 2013. Thus, the "terms" of Mr. Batra's employment contract with the City inherently included the PERL and PEPRA's prohibition on the retirement benefit Mr. Batra now seeks to receive. Accordingly, unlike in *County of Orange,* there is no retirement statute applicable to Mr. Batra's contract with the City affording him the requested benefit. Thus, providing such benefit now, after service was already rendered, is likely "extra compensation" prohibited by Article XI, section 10 of the California Constitution.[31]

2. Restrictions on Gifts of Public Funds

Like Article XI, section 10, the California Constitution's prohibition on gifts of public funds expressed in Article XVI, section 6, requires public entities to receive valuable consideration in exchange for money promised.[32] To constitute adequate consideration, such that a transfer of money or property *does not* constitute a "gift," an exchange must be of like value to the services provided.[33] Thus, if a City provides public money to an individual, it will constitute an unlawful gift of public funds unless the City secures an enforceable claim for a service or benefit of like value from the individual. [34] Applying this general prohibition here, any cash or benefit provided to Mr. Batra must be in exchange for a benefit of like value, for example, compensation and benefits commensurate with the level of service and experience he provides to the City, or, for example, a payment for the release of a colorable legal claim.[35]

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[29] 83 Ops.Cal.Atty.Gen. 45, (2000).
[30] *County of Orange v. Association of Orange County Deputy Sheriffs* (2011) 192 Cal.App.4th 21, 42-43 [citing *Sweesy v. L.A. etc. Retirement Board* (1941) 17 Cal.2d 356, 110 P.2d 37].
[31] See Cal. Civ. Code § 1608.
[32] Cal. Const. Art. XVI, § 6; Cal. Civ. Code, § 1550; see also *City of Oakland v. Garrison* (1924) 194 Cal. 298; *Allied Architects Ass'n of Los Angeles v. Payne* (1923) 192 Cal. 43; *Conlin v. Board of Supervisors of the City and County of San Francisco* (1893) 990 Cal. 17, 22; *Jordan v. California Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, 450.
[33] See *United States v. American Bar* (1986) 477 U.S. 105, 118.
[34] Civ. Code, § 1550.
[35] See *Jordan v. California Department of Motor Vehicles* (2002) 100 Cal.App.4th 431, at p. 450 [citing *Orange County Foundation v. Irvine Co.* (1983) 139 Cal.App.3d 195, 200] – finding that settlement payment for attorneys fees that exceeded State's maximum exposure in a suit was akin to a payment of a *wholly invalid* claim and violated the gift clause.

In order to demonstrate adequate and enforceable consideration, public agencies and their employees (or employee groups) must enter into written agreements that set forth the valued exchange – e.g. services for salary and benefits. This is because public money must be provided in exchange for an *enforceable* claim in order to avoid making a gift of public funds. Absent a contract between the parties, any agreement of exchange lacks the requisite enforceability.

As noted above, City has not, to date, entered into a contract to provide Mr. Batra with a supplemental retirement benefit, in excess of that which he was entitled to under CalPERS or the MOU applicable to his employment. Arguably, Mr. Batra also lacks a "colorable" legal claim for an additional retirement benefit since the benefit he appears to be seeking conflicts with state retirement law applicable to his employment.

F. Enforceable Contractual Obligations

Agreements between a governing body and public employees are only binding when approved or otherwise authorized by the governing body pursuant to a resolution or ordinance.[36] In addition, "[t]he consideration of a contract must be lawful..."[37] "If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."[38] "Contracts that are contrary to express statutes or to the policy of express statutes... are illegal contracts. [Citations] Any such illegality voids the entire contract."[39] A contract is unlawful if it is: (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or, (3) otherwise contrary to good morals.[40]

Here, the City and Mr. Batra did not enter into a written contract providing him with the benefit he is requesting. Nevertheless, even if such contract had been entered, it would have been void as unlawful because the PEPRA prohibits supplemental defined benefit plans to any employee or employee group who was not a part of that plan prior to January 1, 2013. In addition, such contract could have been void as unconstitutional.

G. Retired Annuitant Benefits

Finally, we note that once an employee retires from service, if he or she is hired as a "retired annuitant," the public agency employer may not provide him or her with benefits other than compensation without reinstating the employee to service.[41] This means the retired annuitant cannot receive any supplemental retirement benefit as consideration for his or her retired annuitant services.[42] A retired annuitant who is employed in violation of retired annuitant

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[36] *Reitred Employees Assn. of Orange County v. County of Orange* (2011) 52 Cal.4th 1171, 1182.
[37] Cal. Civ. Code §1607.
[38] Cal. Civ. Code §1608.
[39] *Green v. Mt. Diablo Hospital Dist.* (1989) 207 Cal.App.3d 63, 73 [citing *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 609].
[40] Cal. Civ. Code §1667.
[41] See Gov. Code, § 21221, subd. (h).
[42] Gov. Code, § 21221, subd. (h); see also Gov. Code, § 7522.56, subd. (c).

rules will be required to reimburse the system for any retirement allowance received during the period of employment that was in violation of the law; make contributions to the system as though he or she had been reinstated during that period, plus interest; and will be required to reimburse the system for administrative expenses to the extent the member is determined to be at fault.[43] An employer will be subject to similar penalties, and, potentially, fees for the violation.[44]

In accordance with the above restrictions, any additional retirement benefit provided to Mr. Batra must have been in consideration for his service *prior* to his retirement. Once he retired, the City could not supplement his retired annuitant compensation with any benefit other than hourly compensation provided in consideration for his service as a retired annuitant.[45]

V. CONCLUSION

The City cannot provide Mr. Batra with the type of defined benefit plan he proposes, because the plan did not exist prior to January 1, 2013, and/or neither Mr. Batra nor employees in the same employment group as Mr. Batra, were entitled to participate in such a plan prior to that date. In addition, it does not appear that the City can provide Mr. Batra with any other type of additional retirement benefit or compensation as it could be considered a gift of public funds or extra compensation prohibited under the state Constitution due to lack of valuable consideration. Though there is no written contract between the City and Mr. Batra agreeing to provide him with the supplemental defined benefit he requested, even if such contract had been formed, the promise would have been void as unlawful. Moreover, even if a permissible additional retirement benefit could have been provided to Mr. Batra, in consideration for his pre-retirement employment, it must have been subjected to an actuarial valuation and properly discussed and adopted in accordance with public meeting requirements prior to implementation.

Recognizing that this opinion covers a wide range of state law, we would be pleased to discuss any of the identified issues with the City in further detail, upon request.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Erin Kunze

MIJ:FR:EK:ffs

[43] Gov. Code, § 21220, subd. (b).
[44] Gov. Code, § 21220, subd. (c).
[45] As distinct from consideration for services prior to his retirement.