VENTURA COUNTY EMPLOYEES' RETIREMENT ASSOCIATION

BOARD OF RETIREMENT

BUSINESS MEETING

FEBRUARY 22, 2021

MINUTES

TRUSTEES PRESENT:
Mike Sedell, Chair, Public Member
Arthur E. Goulet, Vice-Chair, Retiree Member
Steven Hintz, Treasurer-Tax Collector
Aaron Grass, Safety Employee Member
Cecilia Hernandez-Garcia, General Employee Member
Kelly Long, Public Member
Tommie E. Joe, Public Member
Jordan Roberts, General Employee Member
Sim Tang-Paradis, Public Member
Robert Ashby, Alternate Safety Employee Member
Will Hoag, Alternate Retiree Member

TRUSTEES ABSENT:

STAFF PRESENT:
Linda Webb, Retirement Administrator
Henry Solis, Chief Financial Officer
Julie Stallings, Chief Operations Officer
Dan Gallagher, Chief Investment Officer
Leah Oliver, Chief Technology Officer
Lori Nemiroff, General Counsel
Josiah Vencel, Retirement Benefits Manager
Jess Angeles, Communications Officer
Chris Ayala, Program Assistant

PLACE: In Accordance with the Governor's Executive Order N-29-20 (3), the Members of the Board will be participating via teleconference. Pursuant to Government Code §54954.3, members of the public, to the extent required by law, will have the opportunity to directly address the Board concerning the below mentioned business.

TIME: 9:00 a.m.

ITEM:

I. CALL TO ORDER

Chair Sedell called the Business meeting of February 22, 2021, to order at 9:04 a.m.

II. APPROVAL OF AGENDA

Chair Sedell proposed that the Board hear item VIII.A., "Consideration of Adoption of Further Resolution on Implementation of Supreme Court Decision in Alameda" immediately after Item IV. "Consent Agenda".

MOTION: Approve as Amended.

Moved by Hintz seconded by Roberts

Vote: Motion carried
Yes: Grass, Goulet, Hernandez-Garcia, Hintz, Joe, Long, Roberts, Tang-Paradis, Sedell,
No: -
Absent: -
Abstain: -

III. APPROVAL OF MINUTES

A. Business Meeting of January 25, 2021.

B. Disability Meeting of February 8, 2021.

C. Special Meeting of February 16, 2021.

Ms. Webb provided minor corrections to the minutes of January 25th and for February 16th. For the Business Meeting of January 25th, item XI was referenced twice under the Approval of the Agenda. For the Special Meeting of February 16th, Public Comment, the minutes should note that Trustees Grass and Tang-Paradis arrived before Ms. Gardner's public comments.

MOTION: Approve the Minutes for the Business Meeting of January 25, 2021, Disability Meeting of February 8, 2021, and Special Meeting of February 16, 2021, as Amended.

Moved by Goulet seconded by Long

Vote: Motion carried
Yes: Grass, Goulet, Hernandez-Garcia, Hintz, Joe, Long, Roberts, Tang-Paradis, Sedell,
No: -
Absent: -
Abstain: -

IV. CONSENT AGENDA

A. Approve Regular and Deferred Retirements and Survivors Continuances for the Month of January 2021.

B. Receive and File Report of Checks Disbursed in January 2021.

C. Receive and File Statement of Fiduciary Net Position, Statement of Changes in Fiduciary Net Position, Schedule of Investments, Cash and Cash Equivalents, and Schedule of Investment Management Fees for the Period Ending December 31, 2020.

MOTION: Receive and File.

Moved by Joe seconded by Long

Vote: Motion carried
Yes: Grass, Goulet, Hernandez-Garcia, Hintz, Joe, Long, Roberts, Tang-Paradis, Sedell,
No: -
Absent: -
Abstain: -

Following the vote on the item, the Board advanced to agenda item VIII.A., "Consideration of Adoption of Further Resolution on Implementation of Supreme Court Decision in *Alameda*."

V. INVESTMENT MANAGER PRESENTATIONS

A. Receive Annual Investment Presentation from Adams Street, Dave Brett, and Scott Hazen.

Dave Brett and Scott Hazen reviewed Adams Street's organizational changes, and discussed the firm's investment outlook, portfolio strategy, composition, and performance.

Trustee Goulet left the meeting during the presentation at 3:07 p.m.

Trustee Tang-Paradis left the meeting during the presentation at 3:08 p.m.

B. Receive Annual Investment Presentation from UBS Real Estate, Paul M. Canning, and Mia Y. Dennis.

Paul M. Canning and Mia Y. Dennis reviewed UBS Real Estate's organizational changes, and discussed the firm's investment outlook, portfolio strategy, composition, and performance.

VI. INVESTMENT INFORMATION

VCERA – Dan Gallagher, Chief Investment Officer.
NEPC – Alan Martin.

A. Preliminary Performance Report Month Ending January 31, 2021.
RECOMMENDED ACTION: Receive and file.

B. Quarterly Investment Performance Report for Period Ending December 31, 2021.
RECOMMENDED ACTION: Receive and file.

C. NEPC 2021 Investment Outlook – Capital Market Assumptions.
RECOMMENDED ACTION: Receive and file.

Mr. Martin presented the Preliminary Performance Report Month Ending January 31, 2021, Quarterly Investment Performance Report for Period Ending December 31, 2021 and NEPC 2021 Investment Outlook – Capital Market Assumptions to the Board. He said that he and Mr. Gallagher would be presenting the Asset Liability report at the in March business meeting.

Ms. Webb reported that Trustee Long had left the meeting at 4:18 p.m. and Trustee Tang-Paradis had also left at 3:08 p.m., during the investment presentation from Adams Street.

After discussion by the Board, the following motion was made:

MOTION: Receive and File the Preliminary Performance Report Month Ending January 31, 2021, Quarterly Investment Performance Report for Period Ending December 31, 2021 and NEPC 2021 Investment Outlook – Capital Market Assumptions.

Moved by Roberts seconded by Grass

Vote: Motion carried
Yes: Grass, Hernandez-Garcia, Hintz, Joe, Roberts, Sedell,
No: -
Absent: Long, Tang-Paradis, Goulet
Abstain: -

VII. OLD BUSINESS

A. Review & Discussion of Personnel Review Committee Appointments.

1. Letter from Chair Sedell.

Chair Sedell said Trustee Tang-Paradis had brought to his attention that the 3 trustees appointed to the Personnel Review Committee were all new and she had proposed that at least one experienced trustee serve on the committee. Trustee Hoag volunteered to serve.

Chair Sedell appointed Trustee Hoag to the Personnel Review Committee.

Following the appointment of Trustee Hoag to the Personnel Review Committee, the Board advanced to agenda item X., “Informational”.

VIII. NEW BUSINESS

A. Consideration of Adoption of Further Resolution on Implementation of Supreme Court Decision in *Alameda.*
RECOMMENDED ACTION: Approve.

1. Letter from Ad Hoc Litigation Committee.

2. Proposed Resolution Regarding Non-Pensionability of In-Kind Only Flex Credit.

Ms. Webb made a presentation explaining staff’s determination that the non-cashable portion of the County’s flexible benefit credit was not pensionable. She recommended the Board adopt the proposed Resolution, noting she and both counsels to the Board believed it was the path to compliance under the law.

Chair Sedell said three individuals had submitted requests to make public comment: Emily Gardner, Principal Assistant County Counsel for the County of Ventura, State Assemblymember Steve Bennett, and Ventura County CEO Mike Powers.

Ms. Gardner said the proposed Resolution was the second time staff had asked the Board to exclude the flexible benefit credit from compensation earnable. The Board had previously declined

on October 12, 2020, to implement the Resolution language that would exclude flex credit, and neither should the Board implement now. Further, VCERA staff had spoken as if the Board had no choice, but this was untrue because the Board had always had the discretion to include the flex credit in pension calculations. Nothing in the Alameda case or any other legal case or any statute had changed that, which was why the County and Unions were blindsided by staff's interpretation. The Board had included flex credit in pension calculations for Legacy members since 1989, at which time CERL already said that in-kind benefits were not to be included, and yet the Board had exercised its discretion by concluding that flex credit was not a mandatorily excludable in-kind benefit. *Alameda* did not change the law regarding in-kind benefits, but instead simply restated the law the way it always had been. Neither did the much-cited *In Re: Retirement* require the Board to exclude flex credit from pension calculations, which was decided in 2003 after which the Board had continued to include the flex credit . Staff presupposed that the flex credit was an in-kind benefit when the County and the Board had always concluded that it was not. The Board had no reason now to change that conclusion.

Ms. Gardner asserted the proposed Resolution incorrectly said that the Board had previously resolved that the non-cashable portion of the flex credit may not be included in pension calculations, and had deferred implementation of the Alameda exclusions, and both of these statements were untrue. If the Board had taken such actions, the County would not have grounds on which to demur to the declaratory relief action, which the Board should dismiss, rather than severely diminish the pensions for Legacy members to whom the Board had a fiduciary duty.

Ms. Webb referenced Ms. Gardner's bullet points, agreeing that neither VCERA nor the parties wanted to reduce expected pensions. Unfortunately, the point was what the law said, and she was confused as to how Ms. Gardner could say that the Alameda case was neither clear nor definitive.

Ms. Webb said that the County's primary assertion was that flex credit was not an in-kind benefit when it was actually a textbook example. In fact, in July 20, 2000, ruling, Judge Pollack opined that "insurance-related benefits," including "employer payments into flexible benefit plans" were benefits of insurance coverage, not cash, and "as such, it was an in-kind advantage" and this language perfectly described Ventura County's flex credit benefit.

Ms. Webb said in regard to the argument that the Board got it right 30 years ago, in *Alameda*, the Supreme Court made it clear that retirement boards may not continue to include benefits that did not meet the definition of compensation and compensation earnable. She quoted, "*CERL retirement boards may not include items in compensation earnable that Section 31461(b) required them to exclude*". As for the argument that the Board had a previous Resolution that included flex credit, *Alameda* also said, "*…nor may these boards be contractually bound or estopped by settlement agreements, board resolution, or other actions, from implementing these amendments*."

Ms. Webb said Ms. Gardner's assertion that the Board "must have concluded" that the flex credit was not an in-kind benefit was incorrect; in fact, no determination was ever made by the Board of Retirement as to whether flex credit constituted an in-kind benefit. The decision to include flex actually was based on a 1989 County Counsel opinion, largely relying on the Guelfi case.

Quoting from Ms. Gardner's bullet points, Ms. Webb read, "*Alameda did not illuminate that discretion because it was still up to the Board to conclude if the flex credit was an in-kind benefit or not, just as it was in 1989*." Ms. Webb said this was neither true nor logical. Flex credit was either an in-kind benefit or it was not; the Board could not simply relabel it to say that flex credit was not an in-kind benefit to make it so.

Ms. Webb said the Board had been asked to not hurt the lowest-paid employees, yet the Board did not have the authority to pay benefits not authorized by law, whether to lower-paid employees, to higher-paid employees or anyone in between. It was actually the County who had the discretion to increase the types of compensation in the allowable categories of compensation and compensation earnable.

Ms. Webb said she was troubled to hear the County characterize the deferred action of the Board on October 12, 2020, as an affirmative action to continue inclusion of flex credit, consequently nullifying declaratory relief as an option. The Resolution was adopted, deferring the paragraphs on flex credit pending declaratory relief in recognition of the dispute and controversy, in order for the Court to review the arguments. VCERA staff welcomed such a review, but evidently the other parties did not want their arguments reviewed as evidenced by the requests to stop the declaratory relief action. The County was contradicting itself because in October they requested that the Board wait to adopt those paragraphs so that the Court could render the correct answer; however, now the County asserted that the Board's failure to adopt the paragraphs meant there was no controversy on which the Court could rule. Dropping the declaratory relief action would essentially be pulling the plug on the one path to getting the right answer.

Ms. Webb reminded the board that members were retiring and every two weeks VCERA collected contributions on flex credit, despite the Supreme Court saying the portion not received in cash was not a viable pensionable benefit. If it took 1 to 2 years to get declaratory relief, these retirees would be saddled with a debt that was compounding with each benefit payment and the longer they were overpaid, the less likely the flex credit contribution refund would cover what was owed from overpayments.

Trustee Sedell said that Ms. Gardner might want to respond to Ms. Webb's remarks, which he would allow after the other speakers.

Mike Powers, Chief Executive Officer for the County of Ventura, made the following public comment. He noted a sharp difference in opinions among the qualified people on both sides of the issue, and he believed this was because there was no clear statute or case that supported the basis for the proposed Resolution. Thus, the Board indeed had the discretion to determine what was included in compensation earnable. There had been no change in the law through statute or a case since the Board's determination 32 years ago to merit changing the characterization and treatment of flex credit.

Mr. Powers noted areas of agreement among the parties. On October 12, 2020, the Board had acted in response to *Alameda* and removed items from compensation earnable, and the County agreed with action. There was also agreement that in-kind benefits should be excluded from compensation earnable. However, the County did not agree that flex credit was an in-kind benefit. Mr. Powers quoted from the proposed Resolution, "*The Court of Appeal did not address the question of whether retirement boards had the discretion to include flex credit payments in compensation earnable*." Mr. Powers said that case did not resolve the issue of whether flex credit was an in-kind benefit. While *Alameda* said there was no indication that a local board had the discretion to include the monetary value of in-kind benefits, that statement still begged the question of what an in-kind benefit was, and therein lied the disagreement. Also, in the Alameda case, the Supreme Court was focused on the issue before it, which was overtime and standby pay which were items that could be subject to "spiking" of pension benefits, and there was nothing regarding flex credit that would lend itself to spiking pension benefits. He urged the Board to sustain the position the Board had taken at the October 12th meeting and had adopted since 1989.

Steve Bennett, Assemblymember, District 37, provided the following public comment. Mr. Bennett noted there were County employees who had postponed their retirements and stayed on to help the County fight COVID, and those employees would now be getting lower retirement benefits. He could not imagine anybody given the choice who would not want to make the right choice and do right by those employees. While the County might be able to help in the future, the only way it could be made right now is if employees were allowed to get the benefit that they assumed they would get. There have been a few presentations since October that suggested that the Board had no choice, yet last October, when the Board was similarly advised, they exercised a choice. In all of his years of service, he had been advised by many attorneys and staff, and had never before seen people in an advisory role push their advice so hard and insistently, infringing upon the policymaker's ability and role. He disagreed that flex credit must be treated as an in-kind benefit, and there was not any direct language from the appellate courts that said that flex credits were in-kind benefits, and the Board had only heard interpretations pieced together from that Superior Court ruling and from other things.

Assemblymember Bennett also commented as to his intent in making the motion to adopt the October 12, 2020, Resolution. He emphasized that he did not believe that the Board had the definitive statement that they needed from an Appellate Court or Superior Court that identified specifically that the County's unique flex credit program was an in-kind benefit. As a Board, he felt that they had adopted all the other parts of the Alameda decision and he thought they had met their fiduciary duty at the time, while at the same time they tried to the best of their ability to treat the employees fairly. At some point, if flex credit became identified differently, then so be it, but he believed that there was no violation of the Board's fiduciary duty, and if it was, then it was in October also. Therefore, he strongly urged the Board to reject the proposed resolution.

David Mastagni, Attorney at Law, commented on behalf of the Ventura County Deputy Sheriffs' Association (VCDSA) and the Ventura County Professional Firefighters' Association (VCPFA). On behalf of his clients, he echoed the previous comments, and respectfully asked the Board to continue including the full value of the flex credit allowance in members' retirement calculations, and to dismiss the causes of action related to the flex credit allowance. He wanted to focus on the assumption that the flex credit allowance was an in-kind benefit, and Ms. Webb's remarks jumped over that point and just assumed that the issue was clear. However, he would respectfully submit this was a red herring, and the issue was just a factual dispute of whether the particular flex credit allowance met the definition of an in-kind benefit or whether it was a cash payment. He asserted that the flex credit paid by the County was a cash payment from which there was a deduction for payment to the union to be used for healthcare premiums. He said there was a separate ancillary dispute that pre-dated the Alameda case, where there was a federal court action where he was challenging those fees (opt out fees) that the County charged to the employees who received the allowance in cash, as illegal kickbacks. However, the pension issue was separate and distinct, and the fact that the employees received the full allowance amount in their paycheck was a positive thing, regardless that FLSA required the full amount to be included in the overtime rate and determined that there were illegal kickbacks. The fact was that the money was paid to the employees and complies with CERL's definition of compensation earnable. He claimed that in the Alameda decision, flex benefits and in-kind benefits, were not at issue in the case, it was the current Board reconsidering factual determinations made 30 years ago, by prior Board's and substituting their judgment on that factual determination. It was not clear cut, whether the Board had no choice to follow the law or they would be violating Alameda or any of the other cases, and no one was taking that position. It was a factual determination as to whether the flex credit allowance was allowance in cash compensation or a provision of the insurance benefit, which was an in-kind benefit and he submitted that it's exactly what it was, a cash payment. The CERL gave the Board broad discretion to apply the action and determine whether or not items of compensation met that definition, which was what everyone was asking. So, in conclusion, he just asked the

Board to exercise their discretion and affirm its original determinations that the flex credit allowance was compensation that could be included in pension benefit and respectfully asked that they would continue to do so.

Eli Naduris-Weissman, Attorney at Law, commented on behalf of his client, SEIU Local 721. He said his client was asking for two things: that the Board not adopt the proposed Resolution regarding the non-pensionability of the flex credit, and that the Board withdraw its pending lawsuit to allow legislation to proceed that would address the issue. The legislation was a new development and a good reason to forestall any dramatic action. As of Friday, there was a spot bill that was introduced into the California legislature which would make clear that flex credits of the type at issue here would be compensation earnable or pensionable.

As Ms. Webb noted in her presentation, there was disagreement regarding the interpretation of the Alameda decision. According to the County and Union Representatives, *Alameda* did not require the VCERA Board to exclude flex credit from compensation earnable, but only concerned the constitutionality of certain PEPRA exclusions under the 1937 Act, specifically focusing on exclusions that the three pension boards involved in the case had made in response to PEPRA. These included pension spiking issues with employee termination pay, specific PEPRA exclusions for standby pay, and the “straddling” of leave cash or payments across separate years to boost final compensation. The Alameda decision simply did not concern the flex benefit plans that VCERA had historically included. The Supreme Court did not perform a focused legal analysis regarding such compensation, or the actual circumstances of how that payment was made in Ventura County. Neither did it consider part of the Government Code, Section 31461.1, which specifically stated that certain county boards, or counties of the first class, may choose not to include cafeteria or flexible benefits plan contributions. The simple inclusion of the provision made it clear that county retirement boards had the general power to include such items. The Alameda decision did not require any further changes to how compensation earnable was currently processed and the Board had the discretion to continue to include the flex credit contributions., He indicated that there were plans to propose legislation to allow VCERA to continue to include employee compensation earnable things like flex benefit plans, in-kind and in cash benefits that VCERA had included for decades. He urged the Board to drop the lawsuit for now, pending passage of possible legislation.

Chair Sedell said that he would allow Ms. Gardner the opportunity to reply to the statements made by Ms. Webb regarding Ms. Gardner’s public comments.

Mr. Naduris-Weissman then asked if he could make one more brief remark.

Chair Sedell replied yes.

Mr. Naduris-Weissman informed the Board that the legislative bill that he had mentioned in his remarks was bill number, AB 1496.

Chair Sedell said that they would now hear from Ms. Gardner.

Ms. Gardner said that Ms. Webb had again relied on a statement made by Judge Pollack that was not binding on the Board. Again, there was no language in *Alameda*, *In Re Retirement*, or any other case that definitely said that the flex credit was an in-kind benefit, and in absence of specific definitive language, as Mr. Mastagni previously had said, “tie goes to the pensioner”.

Chair Sedell said that the Board would then take a 10-minute break, after which Ms. Dunning would present the proposed resolution to the Board.

The Board took a break at 11:05 a.m.

The Board returned from a break at 11:15 a.m.

Ms. Dunning commended Ms. Webb for an outstanding presentation that explained the issue that was before the Board. Before turning to the Resolution, which she believed from a fiduciary perspective was imperative that the Board adopt, she would briefly respond to a statement made by the office of County Counsel and the other attorneys that they still did not know what an in-kind benefit was. If they looked at *In Re Retirement* cases from 2003, cited in the proposed Resolution, they would see that Ventura was one of the parties in the coordinated proceedings before the Superior Court, that involved many of the retirement systems and counties, were the cases about which Judge Pollack ruled on. Ventura settled its case following Judge Pollack's ruling and before the Court of Appeal decision. She had served as Counsel on behalf of the Orange County Employees' Retirement System, and the issues that were to be decided on appeal were only two. The first was the so-called "retroactivity question", which was regarding whether the Ventura Decision needed should be applied to those who retired before October 1, 1997, when the Ventura Decision was issued. The second pertained to pay items and whether or not they were pensionable.

Ms. Dunning then directed the Board to the section of *In Re Retirement* cases entitled, *Items of Remuneration to be Included in Calculations of Final Compensation,* and in that case, one of the only things unions argued was that cash payments into members' flexible benefit plans that were used to pay insurance premiums for the member and/or to purchase benefits for the member as well as cash payments to insurers to satisfy the members' obligation to pay premiums, both should be included in their calculations of pension benefits. The Court decided, "*We conclude that the legislature had expressed its intent not to include employer payments into flexible benefit plans and payments of insurance carrier premiums as 'compensation' under CERL", which was consistent with the language of CERL, in harmony with the statutory framework of CERL as a whole, and consistent with the interpretation of CERL as set forth and outlined in. Accordingly, we conclude that the trial court properly found that CERL did not require that these payments be included in the calculations of retirement benefits*". That was the California Court of Appeal, 1st District, ruling in a published decision in 2003. So, for the office of County Counsel to now suggest that they did not know what an in-kind benefit was, nor that flex credit qualified as an in-kind benefit, was something she was having a great difficulty understanding. The discussion in the In Re Retirement cases explained why it was indeed an in-kind benefit. As the Court said, "*A rule that differentiated between in-kind benefits based on the ease of determining their monetary value would be unworkable and contrary to the bright line drawn by Ventura*". The whole issue in that case, was whether insurance premiums or payments into flexible benefits plans on behalf of members were in-kind benefits, and the Court said that they were. This was the part that became challenging in its application, the portion that said, that they "*need not be included*" in retirement calculations. So, ever since 2003 the Board thought it had the discretion to exclude all of the flexible benefit or flex credit that members did not receive in unrestricted cash, but the Board at that time did not. Why they did not exclude it was for the very reasons put forth today; there was a concern about vested rights and a belief that including all of the flex credit was appropriate because there would not be an opportunity for members to use that to spike their pensions. So, VCERA continued to apply that rule that it thought was correct and that *In Re Retirement* cases supported, which was that they, "*need not exclude*" those items from compensation earnable. But they knew, and certainly the County and the Unions should have known, that at any time the Board could exclude those amounts, subject to any concern about a vested rights argument, which they knew could be made. So, fast forward to the Alameda case which discussed those arguments unions' counsels made, some of whom were attending the meeting today, from the trial court forward, and she was present during those arguments. They argued that once a retirement board exercised its discretion in a particular

manner, it had no right under law, to change that exercise of discretion and members would have a vested right to receive those benefits. But the Supreme Court rejected that argument, saying that there was not a vested right to include a benefit that was not permitted by statute to be included; further, if a specific item was not compensation because it could not be received in cash, then it may not be compensation earnable and local retirement boards had no authority to include in compensation earnable that which was not compensation and compensation must be able to be received in cash. She would disagree with the statement that there was a factual issue to be decided, because the proposed Resolution very carefully stated that it only applied to that portion of flex credit that may not be currently be received by member in cash.

Ms. Dunning said that the legislation currently being proposed proved her point, and actions spoke louder than words. Why would a statutory change be needed if a statute currently permitted or required the Board to do what they currently were doing? As fiduciaries, the Board had an obligation to manage the fund in compliance with CERL and in compliance with the case law that applied to them. The County may not control the Board's exercise of authority, which would be a fiduciary breach. The Resolution presented to the Board today went as far as the Board could within the limits of the law by assuming that all of the members chose the most advantageous approach to themselves from a pensionability standpoint, and received the most unrestricted amount of cash that they possibly could have, during the period of time the benefit was provided to them. It then went a step further by saying, because the Board did not know the state of the law on this issue until the Supreme Court issued its decision, it would only apply it to members who retired on or after *Alameda* was decided. As the Retirement Administrator had stated and as the unanimous decision of the Ad Hoc Litigation Committee supported, it was a very important time to adopt the Resolution because they now had members who were being overpaid retirement benefits that were not authorized by law. They had an opportunity to refund contributions that should largely cover the amount that they had been overpaid, if not entirely. However, the longer that the overpayments continued and the longer that the Board refused to comply with its legal responsibility not to overpay benefits, the deeper the hole was being dug. The Resolution also pointed out the Board's tax compliance responsibility, which was to follow the terms of VCERA's plan, and if they did not follow the terms of their plan, there were risks to the entire structure of the defined benefit plan in terms of its deferral from taxes that they received. This was a very serious matter, and very rarely would she advise that a retirement board did not have discretion in a particular matter because they had plenary authority and discretion over so much of the Plan. However, what the Board had no discretion over was to provide a benefit that was not authorized by law, which was what the California Supreme Court made crystal clear.

Ms. Dunning then walked the Board through the proposed Resolution.

Chair Sedell asked if the Trustees had any questions for Ms. Dunning regarding the proposed Resolution.

Trustee Long said she understood the Board on October 12, 2020, had reviewed the 2003 *In Re Retirement* cases and concluded that the flex credit was not an in-kind benefit, so she was unsure why lawyers representing VCERA had changed their opinion since the October 12th meeting.

Ms. Dunning replied that none of the lawyers representing VCERA had changed their opinions from the October 12th meeting. *In Re Retirement* cases had identified employer payments into flexible benefit accounts as being an in-kind benefit. So, that was the conclusion already of a published Court decision of the 1st District Court of Appeal, in 2003 and it was also articulated in the October 12, 2020, Resolution. The only point different now was that the Board had deferred action on the paragraphs that dealt with the flex credit, and now the recommendation was that such deferral

should no longer continue and that the Board adopt the proposed Resolution to implement the exclusion of the in-kind only portion of flex credit.

Ms. Long asked about a previous statement that the retirement systems for Kern and San Bernardino counties had made changes in response to the Alameda Decision, but she did not believe that they had a flex credit program.

Ms. Webb said that she believed it was not Kern County or San Bernardino Counties themselves that had a flex credit program, but rather small district employers within their retirement system. So, a small number of employees of those special districts were no longer receiving flex credit as a result of *Alameda*.

Ms. Long then said that she thought that Ventura was the only county with a flex credit program, which was why in the last 30 years they had not stated that the flex credit was an in-kind benefit. She asked Ms. Dunning if she had a response to Mr. Mastagni's statement that the flex credit was not an in-kind benefit.

Ms. Dunning noted Mr. Mastagni had said there was a factual issue regarding whether members could receive the flex credit in cash, and the response was in the Resolution, which excluded only the portion that members could not receive in cash, so there was no factual issue. *In Re Retirement* cases said that benefits members could not receive in cash were in-kind benefits, so the question had already been litigated and decided, and was one of the 4 questions Judge Pollack had ruled on and that the Court of Appeal had affirmed.

Trustee Goulet said he was distressed by the County and some of the unions repeatedly suggesting that the Board was trying to exclude the entire flex credit, which was not accurate. The proposal was to only to exclude the portion of the flex credit that could not be received in cash. He then referred to a footnote in the letter from County Counsel dated, February 19, 2021, that read, "*employees can choose between taxable benefits (cash) and tax-free benefits, health insurance*", thus making a distinction between the two. He found the following statement from *In Re Retirement* to be definitive that read, "*…here the employees receiving an insurance premium, not a cash payment, thus it was an in-kind benefit, which was not compensation under Section 31460*." Also, in the next paragraph, "*…sums expended for board and lodging were not sums paid directly to the employee*", going on to say, "*We see no reason why the payment of insurance premiums should be any different*". The employee received insurance coverage, not cash, and therefore it was not compensation under CERL, which seemed definitive to him. As for Assemblymember Bennett's representation regarding the intent of the motion of October 12th, Trustee Goulet believed there were only four current trustees who voted on that motion, himself included, and it was clear to him that the motion was to temporarily defer the implementation of paragraphs 3, 6, and 9, pending a decision in declaratory relief, which was why the lawsuit was filed. Concerning the interest amount to be included in the Resolution, he stated he was not convinced that the Board should agree to a 7% rate currently, and believed that the sentence should be changed to read, "at an interest rate to be determined by the Board". The reason he believed that was because the Board needed to understand the implications of the various levels of interest that might be charged, in terms of the impact of the Trust Fund. Also, with respect to the Opt-Out fee for insurance coverage, he suggested it might be sufficient if the County paid back opt-out fees for 3 years only, prior to July 30th, since the last 3 years were what was typically used to determine the pension amount. He reiterated that if the County eliminated the opt-out fee the issue would go away.

Trustee Long asked if the Ad Hoc Litigation Committee could speak on spot bill AB 1496 and if they knew about any legislation was going to be submitted regarding the clarification of the flex credit issue.

Trustee Goulet said the Committee knew that the County was going to introduce legislation but the reference today to AB 1496 was a spot bill by Assemblyman Cooper that addressed a totally different section of the law. This was not unusual, but he was surprised that there was not already a bill introduced to address the issue, as the County had previously said they intended to do.

Ms. Dunning said that she believed the introduction of the spot bill proved the point that if the County needed to change the law to have the full amount of the flex credit included, then that meant the current law did not permit the inclusion.

Trustee Long said she would disagree, as perhaps they needed a law to clarify the issue, because it was not clear and there were 30 years stating flex credit should be included.

Mr. Naduris-Weissman explained that text in the proposed bill said that it was declaratory of existing law, which was fairly common because sometimes the legislature needed to clarify a law, not to change it, but to declare what that law was. Also, the spot bill was not the County of Ventura's bill, just to be clear.

Ms. Dunning said the Resolution proposed to implement the exclusion only to individuals who were retired on or after July 30, 2020. So, it was a relatively small group and if the law did change to permit the item to be included, then it would be very easy to address. But that would require the legislature to adopt a statute that she believed would be in direct violation of PEPRA because PEPRA itself said that there should be no retroactive enhancements to retirement benefits, which such a change would be.

Chair Sedell said that tax qualification was critical and asked if it was correct to say that failure of the Board to adopt the Resolution would trigger a tax qualification risk.

Ms. Dunning replied that it was always a concern when a retirement system was not being administered consistent with its plan, and tax qualification was the IRS's nuclear option. Typically, one would not expect that to happen. After speaking with several tax attorneys over the years, it was a significant concern, however, which was why the Board sought IRS determination letters and voluntary compliance plans to avoid it.

Ms. Webb that staff had discussed various tax aspects of the proposed Resolution with VCERA's tax counsel, Hanson-Bridgett. Staff had specifically asked, if the Board were to fail to adopt the Resolution and continue on the current path, whether there would be a risk in terms of plan qualification. Tax counsel had responded yes, it would be a risk for VCERA's plan qualification.

Chair Sedell said that while the Ad Hoc Litigation Committee had made a unanimous recommendation, they had met before more discussion on the issue had taken place. This did not mean that the Committee's recommendation would have been different if they had voted after the current discussion, but he wanted it on record that they had voted before the current discussion which was a significant progression on the issue.

Trustee Roberts asked Ms. Webb, if the Board were to adopt the Resolution and VCERA started refunding contributions to the affected retirees, and then AB 1496 went into effect, would retirees then have to pay that money back.

Ms. Webb replied that in her experience, whenever a member owed or was required to have money recouped from a retirement plan, depending on the amount and the timeframe, often the benefit

was adjusted going forward to recoup the money over a period of time, as opposed to a retiree having to write a check to VCERA.

Ms. Nemiroff added that staff was intending to hold off on refunding the contributions until either the declaratory relief action was resolved, or the parties agreed to be bound by the new proposed resolution.

Trustee Roberts asked how many members had retired since July 30, 2020.

Ms. Webb said she would get that number while the Board continued the discussion.

Trustee Joe asked Ms. Dunning how, if the Resolution were adopted, the issue of how flex credit was reflected in member paychecks be handled, given Mr. Mastagni's comments.

Ms. Dunning explained that the only portion that would be excluded would be that which the member may not take in unrestricted cash, regardless of how it was reported on the earnings statement.

Ms. Webb said it was a circular argument to state that flex was includable because it could be seen on a paycheck stub and seeing it on a paycheck stub meant it was includable. The paycheck or the W-2 simply reflected how an employer reported an item.

Trustee Long noted Trustee Goulet's previous remark that he had an issue with the 7% interest for contribution refunds. She then asked, why was there a certain percentage stipulated in the proposed Resolution.

Ms. Dunning explained that there was a range of reasonable interest rates that a Board could adopt. Several Boards may choose the assumed rate of return from their actuary, but the proposal here was slightly lower than VCERA's current assumed rate of return, which she understood was 7.25%. But it seemed appropriate under the circumstances to have a 7% pre-judgment interest rate. That being said, reasonable minds can differ, and as Trustee Goulet noted, the Board could wait until they had the financial impact information regarding the different interest rates, which was certainly within the Boards authority and discretion. So, if the Board decided to adopt the resolution, it could change the last sentence of paragraph 3 on the final page to say, "*the interest on such refunds would be at a rate to be determined by the retirement board*", which would be fine. It would just be brought back to the Board after staff had run the numbers.

Trustee Long asked what would happen if the Resolution were not approved by the Board.

Ms. Dunning replied that in her judgment, the Board would be continuing to pay benefits that were not permitted by law.

Chair Sedell asked if it would then put the Plan's qualified tax status in jeopardy.

Ms. Dunning replied that was what she understood VCERA's tax counsel had advised. Ms. Nemiroff added that the Board could also be at risk for a claim that the Board had breached its fiduciary duty by not following the law.

Ms. Long asked if the Board had the same risk in October when the first Resolution was proposed.

Ms. Webb replied yes.

Ms. Long then asked if the Board knew at the time.

Ms. Webb said yes.

Trustee Roberts asked how many parties in the lawsuit had demurred.

Ms. Dunning said that none had demurred to date, but she had received two "meet and confer" requests, one from the County and one from the outside counsel representing the Courts. All of the parties stipulated to giving the defendants more time to respond, so they now had until March 23rd, or 30 days after the filing of a second amended complaint, which they would discuss in more detail in Closed Session.

Ms. Webb said in answer to Trustee Roberts' earlier question, there were roughly 150 members who retired since the Alameda ruling, and the average number of members that retired every month was between 25 to 35.

Trustee Roberts asked if staff had calculated the delta point at which a member's contribution refund was outpaced by their overpayment.

Ms. Webb replied that that point would vary based on the individual.

Ms. Gardner offered a comment regarding the tax qualification issue, urging the Board not to be overly concerned about it, as it was extremely unlikely.

Ms. Webb responded that she would minimize neither the risk to the Plan's tax qualification, nor the risks of a breach of fiduciary duty, or overpaying benefits. Being mindful of these risks was at the heart of fiduciary duty.

Trustee Roberts noted that on October 12, 2020, the Board decided to seek declaratory relief regarding the flex credit issue and asked why they did not simply let this play out, though perhaps such a discussion should be reserved for Closed Session.

Chair Sedell asked, to elaborate on Trustee Roberts' question, what the impact on declaratory relief would be if the Board were to adopt the Resolution.

Ms. Dunning replied that in her experience, litigation could be prolonged and in the case of Alameda, it had taken 7 years. It was increasingly clear that as time passed, more benefits were being overpaid with no clear end in sight regarding legal resolution. Further discussion should occur in Closed Session.

Trustee Long asked if employees could sue VCERA for adopting the Resolution.

Ms. Dunning replied yes, which was a potential reason not to dismiss because then the Board would be starting again as opposed to already being assigned to a Judge and having it in the proper forum.

Trustee Long reiterated her question, asking if employees would sue the Retirement Board for adopting the Resolution.

Ms. Dunning replied it would be up to the employees.

Chair Sedell asked if adoption could preclude the Board from potential options, as it seemed declaratory relief would then be moot.

Ms. Dunning said the discussion of what direction the Board would take in litigation should be discussed in Closed Session, but if the Board adopted, they would be doing their job by implementing the law, and whether VCERA still needed a declaratory relief action was up to the Board.

Chair Sedell said he had not had much success in his efforts to find common ground. Also, he noted the Closed Session was scheduled after the vote on the proposed Resolution. He asked if the other trustees had any concerns with going into Closed Session prior to the vote on the item.

After discussion by the Board, the following motion was made:

MOTION: Enter into Closed Session Before Voting on the Proposed Resolution.

Moved by Joe seconded by Grass

Vote: Motion carried
Yes: Grass, Goulet, Hernandez-Garcia, Joe, Roberts, Tang-Paradis, Sedell,
No: Hintz, Long
Absent: -
Abstain: -

Trustee Long recused herself from the Closed Session.

The Board advanced to agenda item IX.A., "CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION (Government Code section 54956.9(a)) Name of Case: Ventura County Employees' Retirement Association v. County of Ventura, et. al, Case No.: VENCI00546574".

The Board returned from Closed Session at 2:25 p.m. and resumed the Open Session meeting.

Ms. Nemiroff said that the Board did not have any reportable action from Closed Session.

The Board resumed their discussion on the proposed Resolution.

Ms. Nemiroff proposed including some language that Ms. Dunning cited from *In Re Retirement*, asking Ms. Dunning to display the proposed Resolution with the additional language.

Ms. Dunning said the language from *In Re Retirement* cases that was a proposed addition was, "*We conclude that the Legislature had expressed its intent not to include employer payments into flexible benefit plans and payments of insurance carrier premiums as compensation under CERL, accordingly we conclude that the trial court properly found that CERL did not require these payments to be included in the calculation of retirement benefits*", then on the following line, it said, "*the Court of Appeal did not address the question of whether retirement boards had the discretion to include flexible benefit payments in compensation earnable*", and she would further propose that adding, "*even though they were not required to do so*" to the end of that sentence.

Chair Sedell asked Ms. Dunning to clarify, "*the Court of Appeal did not address the question of whether retirement boards had the discretion to include flexible benefit payments in compensation earnable, even though they were not required to do so*."

Ms. Dunning replied that in *In Re Retirement* cases, unions had argued that retirement boards were required to include flexible benefit payments in compensation earnable; Judge Pollack decided, and the Court of Appeal confirmed, that the retirement board was not required to include flexible benefit payments.

Chair Sedell suggested that "they" be clarified as a reference to the Board and not to the Court of Appeal.

Ms. Dunning said it could change to say, "*Boards were not required to do so*".

Chair Sedell said that he believed the proposed Resolution read better with that change.

Ms. Webb asked Ms. Dunning if it were true that in *In Re Retirement* cases, the Court had pointed out that the question before it was not whether Boards had *discretion* to include flex benefit credit but rather whether inclusion was *mandated*.

Ms. Dunning replied that some in those cases worked to preserve maximum board discretion and the counties' counsels were arguing that retirement boards had no discretion to include those items in compensation earnable. So, discretion was something that mattered to the litigants and was stated in a way, that in retrospect was less than clear by the Court of Appeal, because it was a "need not" rather than a "may not". The Alameda Decision said definitively that it was a, "may not" or "shall not".

Ms. Nemiroff added that footnote 2 in the 2000 ruling from Judge Pollack read, "*Pursuant to the procedure established with counsel, no consideration had been given at this time to whether a retirement board had the discretion to include any particular benefits, which it was not required to in the calculations*", which was to Ms. Webb's previous point, that the courts specifically did not address whether retirement boards had the discretion because the parties did not request resolution on that issue from the Court.

Chair Sedell said that if there were no further questions regarding the proposed additions, the Board would proceed to discussing the Resolution itself.

Ms. Dunning said, in respect to the question regarding timing of the return of contributions to employees, the proposed change to Section 3 of the Resolution added another variable. Without the amendment, active and deferred members who would not have the in-kind only flex credit included in their retirement calculation would need to wait until the final resolution of the declaratory relief action, adjudging that VCERA's implementation was permitted by law or everyone agreed to the terms of the proposed Resolution, in order to get those contributions back. The proposed amendment to Section 3 of the Resolution proposed a potential alternate date, which would be if VCERA were to decide to dismiss the litigation, without prejudice, which would trigger a return of contributions to active and deferred members. The other change was in response to Trustee Goulet's concern about whether it was currently appropriate to determine the interest rate on the refund of contributions, or whether the Board required more information on the range of potential interest rates that were within the Board's discretionary authority to adopt.

Chair Sedell asked Ms. Dunning if there was anything else in the proposed Resolution that had been modified or changed.

Ms. Dunning replied no.

Chair Sedell then said that it was an uncomfortable situation, but the Board needed to decide on the proposed Resolution, and to explain their rationale for their decision.

After discussion by the Board, the following motion was made:

MOTION: Adopted the Proposed Resolution as Revised.

Moved by Goulet seconded by Hintz

Vote: Motion failed
Yes: Goulet, Joe, Sedell
No: Grass, Hernandez-Garcia, Hintz, Long, Roberts, Tang-Paradis
Absent: -
Abstain: -

Chair Sedell said that he voted yes because of his concern about risk to the Plan's tax qualification status, though he had issues with certain parts of the Resolution. He asked the other Board members if there were any additional changes to the proposed Resolution or alternatives that could be considered to move the issue forward. Hearing none, he then asked where the Board stood legally in the current process, given that there was still declaratory relief.

Ms. Dunning replied that there was ongoing litigation and recommended the Board hold a Closed Session in the near future to discuss it.

Chair Sedell asked if the following meeting on March 8th would be acceptable.

Ms. Dunning replied yes.

Ms. Webb noted that the Ad Hoc Litigation Committee meeting was scheduled before the March 8th meeting.

Ms. Dunning said it could be arranged outside of that meeting.

Chair Sedell asked if the Board needed to give direction regarding the current staff processes related to inclusion of flex credit for retirees.

Ms. Webb replied that in absence of the adoption of the proposed Resolution, staff would continue to pay retirees the flex credit in retirement benefits and collect contributions from active members on it as well.

Chair Sedell asked if the Board wished to change its direction of this current process, and whether that could that be done without a Resolution.

Ms. Nemiroff recommended against the Board directing staff contrary to the previous Resolution it had adopted.

Chair Sedell asked if the Board could freeze the process to comply with Counsel’s recommendation.

Ms. Webb then asked if by “freeze” he meant that VCERA stop including the flex credit portion when calculating retirement benefits and to stop collecting contributions on it from active members.

Chair Sedell said that was correct.

Ms. Nemiroff said that she believed that he was asking for reconsideration of the item, similar to Trustee Jordan's previous request.

Chari Sedell said yes.

Ms. Nemiroff said the Board would then be asking staff to adjust retiree checks from July 30, 2020, forward.

Ms. Webb said if VCERA were to stop paying benefits on the non-tax portion of flex credit and stop collecting contributions on it, if it were later determined that all of the flex credit should be *included*, staff would simply resume paying benefits and collecting contributions on flex. If it were later determined that the non-cash portion of flex credit should be *excluded,* there would be no need for further adjustment to the then-current benefit amounts.

Ms. Long said if this discussion would need to be brought back at the future meeting, as only the recommendation to approve the Resolution was on the agenda.

Ms. Nemiroff said that she was comfortable with the Board directing staff on how to implement the Resolution it had adopted previously, as Chair Sedell was proposing the Board direct staff to prospectively adjust the retirement allowances to exclude the non-cash portion of flex credit for those who retired on or after July 30, 2020.

Chair Sedell said this was to avoid a "clawing" back situation related to the overpayment of retirees.

Ms. Webb asked if the Board would be giving such new direction on retirees only.

Chair Sedell replied yes.

Trustee Roberts noted that when he had requested reconsideration of the Alameda implementation Resolution in this way, it had failed in an 8 to 1 vote. Thus, it was clear that reconsideration of the Resolution item was not desirable to the Board.

Chair Sedell said at the time, they had not reached that delta point related to the difference between the refund of flex credit contributions versus the overpayment of benefits, and it was a way to move things forward.

Trustee Grass said he believed VCERA should continue to pay retirement benefits with the inclusion of the flex credit, and within the usual 30-to-60 day timeframe so that members were not waiting a few months to receive their retirement checks. He asked that the Board be provided with a report regarding the retirement applications that were still pending.

Ms. Webb replied that no members had been waiting to be put on the retirement payroll, though some may have deferred their retirement until the flex credit issue was resolved.

Trustee Grass then asked if he could make a motion that retiree benefits continue to be paid with inclusion of flex credit because the proposed Resolution was voted down.

Ms. Webb said a motion was not necessary for that because it was currently included, and in absence of alternate direction from the Board, that would continue.

Trustee Grass asked if was correct that there would then be no more delay in adding retirees to payroll as there would be no back-and-forth retirement benefit calculations.

Ms. Webb said she did not understand the delay Trustee Grass was referring to because retirees currently were being added on time.

Trustee Grass asked if there were members who were indeed waiting more than 60 days to receive their retirement benefit after filing.

Ms. Webb said there was no delay in processing retirement benefits as evidenced by the Consent Agenda reports. Such requests were being processed at a steady pace and without delay, but there was a delay in filling estimate requests because of the dual manual calculations now involved. If any trustees had spoken to members that said they were waiting for months to receive their retirement benefit check to contact her, as staff reported no such delays.

Trustee Grass then asked if the Board could request a report of all the members who had filed retirement applications and had been waiting more than 60 days to receive their first retirement checks.

Ms. Webb replied that staff could provide that information, and that on average there were about 25 members retiring every month, but in February about 35.

Following the vote on the item and additional discussion, the Board returned to agenda item V.A., "Receive Annual Investment Presentation from Adam Street, Dave Brett, and Scott Hazen."

IX. CLOSED SESSION

A. CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION (Government Code section 54956.9(a)) Name of Case: Ventura County Employees' Retirement Association v. County of Ventura, et. al, Case No.: VENCI00546574.

The Board went into Closed Session at 12:18 p.m.

Following Closed Session, Chair Sedell returned to Open Session at 2:25 p.m.

Ms. Nemiroff reported that the Board had taken no reportable action in Closed Session.

Following the Closed Session meeting, the Board then returned to agenda item VIII.A. "Consideration of Adoption of Further Resolution on Implementation of Supreme Court Decision in *Alameda*".

X. INFORMATIONAL

None.

XI. PUBLIC COMMENT

None.

XII. STAFF COMMENT

Mr. Gallagher recounted that Eaton Vance (EV) held ownership stakes in two of VCERA's investment management firms, Parametric and Hexavest. EV owned a controlling interest in Parametric, and a minority stake in Hexavest.

On October 7, 2020, Morgan Stanley signed an agreement to acquire EV, including all of its investment manager interests. To continue the relationship with Parametric under the new corporate parent, VCERA was required to, and subsequently did, consent to the change of control of Parametric from EV to Morgan Stanley. However, because only a minority interest in Hexavest was changing hands, no change in control would occur, and thus such a consent was not necessary.

Since the acquisition, Hexavest had announced that it bought back its minority interest from Morgan Stanley, making it now 100% employee owned.

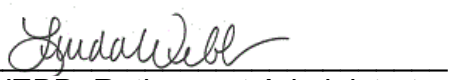
XIII. BOARD MEMBER COMMENT

None.

XIV. ADJOURNMENT

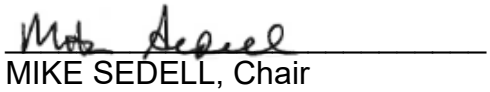
The Chair adjourned the meeting at 4:30 p.m.

Respectfully submitted,



LINDA WEBB, Retirement Administrator

Approved,



MIKE SEDELL, Chair