

1 JONATHAN V. HOLTZMAN (SBN 99795)
RANDY RIDDLE (SBN 121788)
2 DAVID KAHN (SBN 98128)
ALBERT YANG (SBN 281265)
3 RENNE SLOAN HOLTZMAN SAKAI LLP
350 Sansome Street, Suite 300
4 San Francisco, CA 94104
Telephone: (415) 678-3800
5 Facsimile: (415) 678-3838

6 Attorneys for Respondent
7 CITY OF SAN JOSE

8
9 BEFORE THE ATTORNEY GENERAL
10 OF THE STATE OF CALIFORNIA

11 SAN JOSE POLICE OFFICERS'
ASSOCIATION,
12
13 Plaintiff-Relator,
14 vs.
15 CITY OF SAN JOSE, and CITY OF SAN
JOSE CITY COUNCIL
16 Defendants.
17

Case No.:
EXEMPT FROM FEES (GOV. CODE § 6103)
**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
SJPOA'S APPLICATION FOR LEAVE TO
SUE IN *QUO WARRANTO*; SHOWING OF
GOOD CAUSE WHY LEAVE TO SUE
SHOULD NOT BE GRANTED**

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I. INTRODUCTION

Defendants City of San Jose and City of San Jose City Council (“City”) oppose the application by Relator San Jose Police Officer’s Association (“SJPOA”) for leave to sue in *quo warranto* and hereby show good cause why the application to sue in *quo warranto* should be denied.

SJPOA fails to meet the first fundamental precept of *quo warranto* by showing a disputed issue of fact or law. SJPOA can not contest the fact that the City engaged in 9 months of intense negotiations and mediation with SJPOA, during which the parties met for a total of 21 meetings, and the City made increasingly favorable proposals to SJPOA. Moreover, SJPOA seeks to transform the *Seal Beach* requirement of reasonable negotiations prior to the City’s approving a Charter amendment ballot measure into a requirement that the City engage in perpetual and indefinite negotiations once impasse is mutually agreed. *Seal Beach* requires no such thing. It follows that the City’s lengthy negotiations with SJPOA to impasse and mediation present no disputed factual or legal issue on compliance with the *Seal Beach* requirement. On this ground alone leave to sue should be denied.

Furthermore, the SJPOA application fails to meet the second fundamental requirement for *quo warranto* relief – that granting the application would serve the overall public interest. Before granting leave to sue in *quo warranto*, the Attorney General must find that the litigation would serve a public interest rather than merely a private interest. Just the opposite is true here. If SJPOA’s argument prevails, it would discourage a public employer from ever implementing a concession or mediating after impasse; this is directly contrary to the public interest.

Moreover, SJPOA and other unions are currently litigating the issues related to Charter Measure B in multiple forums, including Santa Clara County Superior Court and the Public Employment Relations Board, and if they are successful would obtain the same relief requested in the *quo warranto* complaint: invalidation of Measure B. Precedent compels the AG to deny, or at minimum defer, allowing the *quo warranto* complaint to proceed when the issues raised are subject to resolution in other forums.

II. STATEMENT OF FACTS

In addition to the factual summary provided below, the City has submitted a separate statement of undisputed facts, underscoring SJPOA’s failure to show a contested issue of fact or law.

1 **A. NEGOTIATIONS OVER A SUCCESSOR MEMORANDUM OF AGREEMENT**

2 The City and SJPOA commenced negotiations over a successor Memorandum of Agreement
3 (MOA), on January 11, 2011. [Statement of Undisputed Facts ¶ 1.] The City and SJPOA reached a
4 Tentative Agreement for a successor MOA on June 3, 2011, which included re-opener Side Letters on
5 several issues, including to continue meeting and conferring on pension and retiree healthcare benefits
6 for current and future employees. [Statement of Undisputed Facts ¶¶ 2-3.]

7 On June 9, 2011, prior to completion of the City/POA Tentative Agreement ratification process,
8 the City received a joint letter from the Presidents of SJPOA and the International Association of
9 Firefighters, Local 230 (hereinafter, “IAFF, Local 230”) requesting to commence joint bargaining over
10 “a second tier of retirement benefits,” SJPOA “opt-in proposal,” and “a broad discussion that can lead
11 to a mutually agreeable plan to lawfully modify benefits for existing plan participants as well.”
12 [Declaration of Alex Gurza in Opposition to SJPOA’s Application for Leave to Sue in *Quo warranto*
13 (Gurza Decl.) ¶ 12, Exh. B.]

14 **B. THE CITY’S BALLOT MEASURE PROPOSAL**

15 On May 13, 2011, Mayor Chuck Reed and several councilmembers issued a memorandum on
16 “Fiscal Reforms,” which suggested, *inter alia*, that the City Council approve a ballot measure
17 addressing retirement and pension benefits for current and new employees. [Statement of Undisputed
18 Facts ¶ 6.] On May 24, 2011, the City Council approved the Mayor’s recommendation and directed
19 City staff to contact the City’s unions to bargain over such a ballot measure. [Statement of Undisputed
20 Facts ¶ 7.] Although the Council initially targeted a November 2011 date for an election on the ballot
21 measure, the Council delayed the election to March 2012, and later moved the election to June 2012, to
22 allow additional time for collective bargaining. [Gurza Decl. ¶ 11.]

23 **C. NEGOTIATIONS OVER RETIREMENT REFORM AND THE PROPOSED BALLOT
24 MEASURE**

25 On June 20, 2011, the City and SJPOA met to begin additional negotiations on retirement
26 reform pursuant to the parties’ re-opener agreement. [Statement of Undisputed Facts ¶ 8.] That day,
27 the City and SJPOA agreed to a “framework” that provided ground rules for negotiations. The parties
28 agreed to negotiate over both the proposed ballot measure and non-ballot measure retirement reforms at

1 the same table. In addition, the parties agreed to conclude negotiations on October 31, 2011, and
2 submit any remaining dispute to impasse resolution procedures at that time. The impasse resolution
3 procedures included mediation, followed by interest arbitration under San Jose City Charter Section
4 1111, if necessary. The parties specifically agreed that the proposed ballot measure would not be
5 subject to interest arbitration. [Statement of Undisputed Facts ¶¶ 8-9.]

6 Between June 20 and October 28, 2011, the parties participated in thirteen (13) negotiation
7 sessions regarding retirement reform and the proposed draft ballot measure. [Statement of Undisputed
8 Facts ¶ 11.] During this time the parties exchanged numerous proposals. [Statement of Undisputed
9 Facts ¶¶ 12-13.] On October 31, 2011, the parties reached impasse under the terms of the ground rules.
10 [Statement of Undisputed Facts ¶ 14.]

11 On November 15 & 16, 2011, the parties participated in mediation over retirement reform and
12 the proposed ballot measure. [Statement of Undisputed Facts ¶ 15.] In an attempt to reach a mediated
13 settlement, the City proposed potential changes to the ballot measure that were virtually identical to
14 those presented to the San Jose City Council in the November 22, 2011, version of the draft ballot
15 measure. [Statement of Undisputed Facts ¶ 18.] Specifically, the City proposed improving the opt-in
16 benefit formula from 1.5% to 2.0%, decreasing the minimum retirement age for members of SJPOA
17 and IAFF, Local 230 from age 60 to age 57, and increasing the COLA from a maximum of 1.0% to a
18 maximum of 1.5%. SJPOA was provided the opportunity to explore these changes in mediation, but
19 ultimately the parties were unsuccessful in breaking the impasse. [Statement of Undisputed Facts
20 ¶ 16.]

21 The City informed SJPOA and all other City unions that the City Council would consider the
22 November 22, 2011 version of the ballot measure at its December 6, 2011 meeting. [Statement of
23 Undisputed Facts ¶ 19.] On December 6, 2011, the City Council approved a ballot measure
24 substantially similar to the one provided to SJPOA on November 22, 2011. [Statement of Undisputed
25 Facts ¶ 22.] At that same meeting, and at the behest of several of the City's bargaining units, including
26 SJPOA, the City Council postponed the planned March 2012 election until June 2012, postponed the
27 submittal of the final ballot language to the registrar of voters, and directed staff to invite all bargaining
28

1 groups to re-engage in mediation regarding all retirement issues, including the related ballot measure.

2 [Statement of Undisputed Facts ¶¶ 21, 23.]

3 SJPOA initially resisted a second attempt at mediation, insisting that the parties instead meet
4 without a mediator. [Statement of Undisputed Facts ¶ 24.] After two meetings in late December 2011
5 and early January 2012, the parties agreed to mediation. At the request of SJPOA, and at a significant
6 cost, the parties engaged an independent mediator rather than Paul Roose, Supervisor of the State
7 Mediation and Conciliation Service, who had previously served as the parties' mediator. [Statement of
8 Undisputed Facts ¶¶ 25-26.] The parties participated in mediation on January 17 & 18, 2012, and
9 February 6 & 10, 2012. [Statement of Undisputed Facts ¶ 27.]

10 In an attempt to reach a mediated settlement, the City proposed potential changes to the ballot
11 measure that were identical to those presented to the San Jose City Council in the February 21, 2012,
12 version of the draft ballot measure. Specifically, the City proposed postponing the additional retirement
13 contributions for current employees for one year, delaying the phase out of certain benefit features for
14 employees choosing to opt into a lower level of benefits and improving the Tier 2, increasing the new
15 employee benefit formula from 1.5% to 2.0%, and increasing the COLA from a maximum of 1.0% to a
16 maximum of 1.5%. SJPOA was provided the opportunity to explore these changes in mediation, but
17 ultimately the parties again were unsuccessful in breaking the impasse. [Statement of Undisputed Facts
18 ¶¶ 28-29.]

19 On February 21, 2012, City Administrator Debra Figone issued a staff report to the City Council
20 recommending that the Council consider a revised Retirement Reform Ballot Measure for the June 5,
21 2012 election. [Statement of Undisputed Facts ¶ 30.]

22 On March 2, 2012, twenty-one days after mediation ended, SJPOA submitted a retirement
23 reform proposal. This proposal was in some regards a step backwards, as it included a proposal from
24 September 2011 to close the San Jose Police and Fire Department Retirement Plan and move to
25 CalPERS while maintaining a 90% maximum benefit level. [Statement of Undisputed Facts ¶ 32.]
26 SJPOA's March 2, 2012 proposal was almost identical to the one rejected by the City before mediation.
27 The City explained its reasons for rejecting SJPOA's March 2 proposal in a letter dated March 5, 2012.
28 [Statement of Undisputed Facts ¶ 33.]

1 On March 6, 2012, the Council approved those changes and submitted the revised measure,
2 designated Measure B, to voters on the June 5, 2012 ballot. [Statement of Undisputed Facts ¶ 34.]

3 On June 6, 2012, San Jose voters adopted Measure B by a 69.5% to 30.5% margin. [Statement
4 of Undisputed Facts ¶ 35.]

5 The projected retirement costs utilized during and throughout the negotiation and mediation
6 process with SJPOA were the most up-to-date information provided by the Retirement Board's
7 independent actuary, Cheiron, dated July 20, 2011. At no time did the City's bargaining team ever
8 refer to or use \$650 million as a projected future retirement cost. [Gurza Decl. ¶ 32, Exh. I.]

9 **D. PENDING LITIGATION OVER MEASURE B**

10 There are a number of pending proceedings in court and before the Public Employment
11 Relations Board (PERB), which challenge both the substantive validity of Measure B and the City's
12 bargaining conduct in relation to Measure B. Each of these proceedings is potentially dispositive of the
13 issue presented in SJPOA's Application for Leave to Sue in *Quo warranto*.

14 On March 16, 2012, SJPOA filed a Verified Petition for Writ of Mandate and Complaint for
15 Declaratory and Injunctive Relief, Case No. 1-12-CV-220795, in the Santa Clara County Superior
16 Court. On March 26, 2012, SJPOA filed an Amended Verified Petition for Writ of Mandate and
17 Complaint. The basis for this amended petition and complaint was the City's alleged failure to meet
18 and confer in good faith under the MMBA. [Declaration of Jonathan V. Holtzman in Opposition to
19 SJPOA's Application for Leave to Sue in *Quo Warranto* (Holtzman Decl.) ¶ 4.]

20 On June 6, 2012, SJPOA filed a Complaint for Declaratory and Injunctive Relief, Case No. 1-
21 12-CV-225926, in the Santa Clara County Superior Court. This complaint alleges, *inter alia*, violation
22 of various constitutional rights and violation of the MMBA. [Holtzman Decl. ¶ 5.]

23 Also on June 6, 2012, various members of the San Jose Police and Fire Department Retirement
24 Plan filed a Complaint for Declaratory and Injunctive Relief and Petition for Writ of
25 Mandate/Prohibition, Case No. 1-12-CV-225928, in the Santa Clara County Superior Court. This
26 complaint alleges that Measure B violates various constitutional rights of the plan members.
27 [Holtzman Decl. ¶ 6.]
28

1 On November 23, 2011, OE Local 3 filed an Unfair Practice Charge, UPC No. SF-CE-900-M,
2 with PERB. This Charge alleges, *inter alia*, that the City failed to meet and confer in good faith with
3 regard to Measure B. [Holtzman Decl. ¶ 7.]

4 On February 1, 2012, AFSCME Local 101 filed an Unfair Practice Charge, UPC No. SF-CE-
5 924-M, with PERB. This Charge alleges, *inter alia*, that the City failed to meet and confer in good
6 faith with regard to Measure B. [Holtzman Decl. ¶ 8.]

7 On June 4, 2012, IAFF Local 230 filed an Unfair Practice Charge, UPC No. SF-CE-969-M,
8 with PERB. This Charge alleges that the City failed to meet and confer in good faith with regard to
9 Measure B. [Holtzman Decl. ¶ 9.]

10 **III. THERE IS GOOD CAUSE TO DENY SJPOA'S**
11 **APPLICATION TO SUE IN *QUO WARRANTO***

12 **A. THE ATTORNEY GENERAL HAS CONTROL OF A *QUO WARRANTO* COMPLAINT**
13 **AND SHOULD DENY THIS APPLICATION BECAUSE THE FUNDAMENTAL**
14 **PRECEPTS FOR *QUO WARRANTO* ARE NOT MET**

15 The *quo warranto* complaint procedure is authorized by California Code of Civil Procedure 803,
16 providing in relevant part:

17 An action may be brought by the attorney-general, in the name of the
18 people of this state, upon his [or her] own information, or upon a
19 complaint of a private party, against any person who usurps, intrudes into,
20 or unlawfully holds or exercises any public office, civil or military, or any
21 franchise, or against any corporation, either de jure or de facto, which
22 usurps, intrudes into, or unlawfully holds or exercises any franchise,
23 within this state.

24 California Code of Regulations, Title 11, Section 2 provides for the filing of the application for
25 leave to sue and that

26 the proposed defendant may, within the period provided in Section 3
27 hereof, show cause, if any he have, why "leave to sue" should not be
28 granted in accordance with the application therefore.

Quo warranto may be an appropriate method for challenging the adoption of a Charter provision by the
voters. (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591,
595.) But when the complaint is made by a private party and the Attorney General is requested to
authorize the action, the request must be denied when the fundamental precepts for a *quo warranto*

1 action are not met. (74 Ops.Cal.Atty.Gen. 77 (1991) [*San Diego Sheriff's Assoc*]). Leave to sue can
2 be granted only where the proposed relator establishes that there is a substantial question of law or fact
3 which requires judicial resolution, and where the action in *quo warranto* would serve the overall public
4 interest of the People of this state. (72 Ops.Cal.Atty.Gen. 15, 19 (1989).)

5 The Attorney General has denied applications to sue in *quo warranto* where even one of the
6 fundamental precepts is not met. In *San Diego Sheriff's Assoc, supra*, the Attorney General denied the
7 application where a charter amendment adopting a police citizen's review board was within
8 management prerogative and did not require judicial resolution of compliance with the MMBA.
9 Similarly, in 75 Ops.Cal.Atty.Gen. 70 (1992), the application to challenge a statewide initiative adopting
10 new pension levels was not subject as a matter of law to a *quo warranto* complaint. In addition, it was
11 held not to be in the public interest to grant the application because the same issues were pending before
12 PERB.

13 Although a *quo warranto* complaint may be initiated by a private party, the Attorney General has
14 control over both whether to initiate the action and whether to maintain or appeal the action. (*People ex*
15 *rel. Cage v. Petroleum Rectifying Co. of California* (1937) 21 Cal. App. 2d 289; *Oakland Municipal*
16 *Improvement League v. City of Oakland* (1972) 23 Cal. App 3d 165.) The City does not disagree with
17 SJPOA's assertion that the Attorney General does not have "arbitrary and uncontrolled discretion" (*Int.*
18 *Assoc. of Firefighters v. City of Oakland* (1985) 174 Cal. App. 3d 687), but the corollary is that, when
19 supported by the facts and law, the Attorney General should exercise her discretion in favor of denying
20 an application for *quo warranto*.

21 In this case, the City has shown good cause supporting a denial of SJPOA's application for *quo*
22 *warranto*. The proposed complaint does not present a prima facie case under the appropriate *Seal Beach*
23 analysis, nor does it establish questions of fact or law which need judicial resolution. Furthermore, the
24 analysis below demonstrates that approving the application is not in the public interest because
25 accepting SJPOA's argument would undermine effective labor relations, and because there is pending
26 litigation that would resolve the disputed Charter amendment issue without a *quo warranto* action.

27 The undisputed facts demonstrate that the City engaged in extended and exhaustive bargaining
28 with SJPOA for many months, up to impasse, and continued to meet its obligations by participating in

1 mediation and discussions with SJPOA for many more months. Indeed, the parties met on 13 occasions
2 for bargaining, participated in eight additional mediation and bargaining sessions, and the City
3 submitted at least 3 ballot proposals before finally placing Measure B on the ballot.

4 SJPOA's citation to 76 Ops.Cal.Atty.Gen. 169 (1993) (P and A's, page 6) that whether a charter
5 amendment is valid presents substantial questions of fact and law in complying with the MMBA
6 curiously omits the following sentence that explains why there was a substantial issue under those
7 particular facts:

8 Specifically, the issues here are whether the city was required to give
9 notice to the unions prior to adopting the resolution proposing the charter
10 amendment repealing the eight-city formula and whether it was required to
11 meet and confer with the unions after the resolution was adopted.

(76 Ops.Cal. Atty. Gen. 169 at 172.)

12 In sharp contrast to this situation where the city allegedly failed to even give notice to the union
13 that it was adopting a charter amendment, the pension issue and Measure B were negotiated to impasse
14 and mediated with SJPOA for a total of nine months before the City finally submitted the measure to the
15 voters. In short, there is no basis for the Attorney General to approve the application for *quo warranto*
16 under the facts of this matter.

17 **B. THE UNDISPUTED FACTS DEMONSTRATE THAT THE CITY HAS FULLY**
18 **COMPLIED WITH ITS OBLIGATION UNDER *SEAL BEACH***

19 The MMBA obligates local agency employers to meet and confer over proposed charter
20 amendments that would directly impact terms and conditions of employment for their employees. (*Seal*
21 *Beach Police Officers Ass'n, supra*, 36 Cal.3d at p. 594.) SJPOA claims that the City did not complete
22 the meet and confer process before placing Measure B on the ballot. The undisputed facts and settled
23 legal principles compel the conclusion that, as a matter of law, the SJPOA's position is without merit.
24 Accordingly, the Attorney General should decline to grant SJPOA permission to file its requested
25 complaint.

26 SJPOA argues that the parties did not reach a valid impasse. Plaintiff's Memorandum of Points
27 and Authorities, page 8, lines 5-9. That argument, however, is belied by the undisputed fact that the
28 "framework" signed by SJPOA and the City when they began bargaining over the proposed ballot

1 measure and non-ballot measure retirement reforms provided that the parties would utilize impasse
2 resolution procedures, i.e. impasse would occur automatically, if the parties failed to reach agreement by
3 October 31, 2011. It is beyond dispute that this is precisely what occurred: the October 31 deadline
4 passed without an agreement by the parties. Accordingly, under the ground rule set by the parties
5 themselves, impasse occurred and the parties began mediation.

6 After a bargaining impasse, “changed circumstances” may arise that show bargaining may no
7 longer be futile; in such circumstances, the duty to meet and confer is revived. (*Public Employment*
8 *Relations Bd. v. Modesto City School Dists.* (1982) 136 Cal.App.3d 881, 899.) However, in California’s
9 public sector, it is well-established that only a change in position by one of the parties which
10 demonstrates that agreement may now be possible – not a change in the background circumstances
11 related to the bargaining – is sufficient to break an impasse. (*State of California (Department of*
12 *Personnel Administration)* (2010) PERB Decision No. 2102-S, 34 PERC 62; *Rowland Unified School*
13 *District* (1994) PERB Decision No. 1053, 18 PERC ¶ 25126.) As PERB has explained, “[t]he
14 employer’s duty to resume negotiations following good faith completion of impasse arises *only if the*
15 *union’s proposals contained a concession* from its earlier position which demonstrates that
16 circumstances have changed and agreement may be possible.” (*State of California (Department of*
17 *Corrections & Rehabilitation)* (2010) PERB Dec. No. 2102-S, 34 PERC 62 [italics added].)

18 Here, the SJPOA’s claim is based on the fact that, during the three months the parties were
19 engaged in mediation, several events occurred that changed the circumstances: the City reported a \$10
20 million surplus in its budget, a television news report claimed the City misrepresented its projected
21 pension costs, and the Boards’ actuaries produced updated estimated pension costs lower than some
22 previous estimates the City provided to SJPOA and the media. However, SJPOA does not allege that
23 any of these events, or anything else for that matter, actually changed the positions of the parties such
24 that agreement became possible.

25 Indeed, SJPOA cannot credibly allege that it changed its position in a way that would indicate
26 further bargaining would not be futile. Moreover, the City continued to provide SJPOA with amended
27 ballot language during mediation – amendments that necessarily reflected discussions with all of its
28 unions, and amendments that SJPOA continuously rejected. Despite that continued movement,

1 SJPOA's final offer, made two days before the Council was to consider further amendments to the ballot
2 language prior to placing the measure on the ballot, was essentially the same pre-mediation offer the
3 City rejected in October 2011. That plan would, in many ways, actually have constituted an
4 *improvement* to current employees' pensions, rather than a cost-saving reduction, moving the parties
5 further apart. Accordingly, it was clear to the very end that SJPOA had not made any movement that
6 could break the impasse.

7 Any argument to the contrary is completely undercut by the fact that the parties participated in
8 mediation *after* the SJPOA made its proposals and were nonetheless unable to reach agreement.

9 Although the SJPOA argues that it was entitled to return to "negotiations" rather than "mediation" with
10 the City following its proposals of November 11, November 18, and December 1, 2011, this distinction
11 is meaningless because, in the public sector, mediation is merely a continuation of the bargaining
12 process utilizing a neutral third party, not a separate and distinct forum for resolving a labor dispute.
13 (*Rio School District* (2008) PERB Dec. No. 1986; *Modesto City Schools District* (1981) PERB Dec.
14 No. 291.)

15 Moreover, the fact that the parties attempted to reach agreement with the assistance of a neutral
16 mediator and were unable to do so establishes that the parties' revised proposals before mediation were
17 insufficient to break the impasse between them. Additionally, the failed mediation establishes that, even
18 if impasse was broken, the parties were once again at impasse by February 2012.

19 The Union makes much of the fact that the City proposed improvements (from the Union's
20 perspective) in the ballot measure over the months of mediation. Plaintiff's Memo of Points and
21 Authorities, page 8, lines 5-9. That shows the City was behaving with the ultimate in good faith: Even
22 though impasse had been reached and the City's legal obligations to negotiate had ended, the City chose
23 to go far beyond its legal obligations. What is equally clear based on the Union's public final offer to
24 the City following mediation is that the City's movement was not reciprocated.

25 The circumstances and conduct of the parties established by the undisputed facts here – and the
26 application of settled principles of law to these facts – stand in stark contrast to *Seal Beach*, as well as
27 other instances where the Attorney General has granted leave to sue *quo warranto*. Here, unlike those
28 situations, there is simply no factual or legal basis to grant leave to the SJPOA.

1 In *Seal Beach*, there was no effort whatsoever by the city to negotiate placement of the
2 challenged measure on the ballot. Rather, it was the position of the City that “the city council had the
3 absolute, unabridged constitutional authority to propose charter amendments to its electorate, which
4 authority could not be impaired or limited by the requirements of the MMBA.” (36 Cal.3d at 596.)

5 Similarly, this matter differs significantly from the recent decision of the Attorney General to
6 grant leave to sue in *quo warranto* to the Bakersfield Police Officers Association. (2012 WL 2184570
7 (June 11, 2012). In that matter, far from the material facts being undisputed, the Attorney General noted
8 that there was “sharp” disagreement between the parties. (See also 76 Ops.Cal.Atty.Gen. 169
9 (1993)[noting that *quo warranto* is appropriate where there are “substantial questions of fact and law”].)
10 Again, given the body of facts that cannot be credibly disputed here, that cannot be said to be the case in
11 this matter.

12 Finally, and critically, in determining whether to grant SJPOA’s request, it is imperative to
13 recognize the unique nature of *Seal Beach* bargaining. The City Council was not bargaining over an
14 MOU between a union and the City. Rather, the Council was proposing to the voters an amendment to
15 the San Jose Charter, which is the City’s constitution. (*Brown v. City of Berkeley* (1976) 57 Cal.App.3d
16 223, 231.) The views of all City Unions needed to be considered, and the thinking of the Council itself
17 evolved (in the direction of the Unions) through these negotiations. It was entirely appropriate for the
18 Council to actually incorporate changes proposed by the Unions, even though those changes were not
19 ultimately sufficient to reach an overall agreement.

20 Article XI, section 3 of the California Constitution recognizes that the amendment of the City’s
21 constitution is a legislative right reserved solely to the City’s voters, to be effectuated only through the
22 initiative process or proposal of the city council, and constrained by strict election deadlines. And
23 Article XI, section 5 of the California Constitution gives the voters the additional “plenary” authority to
24 exercise this right to establish employee compensation, including benefits.

25 In this case, 69.5% of San Jose voters exercised this right in favor of approving critically
26 important changes to their City constitution. Neither courts – nor the Office of the Attorney General –
27 should take action to question the exercise of this constitutional right unless the party challenging it has
28

1 affirmatively demonstrated its invalidity. (See *Associated Home Builders etc., Inc. v. City of Livermore*,
2 18 Cal.3d 582, 591.) Demonstrably, that simply has not happened here.

3 **C. SJPOA'S APPLICATION FAILS TO MEET THE *QUO WARRANTO* "PUBLIC
4 INTEREST" TEST**

5 **1. Leave For SJPOA To Sue In *Quo warranto* Should Be Denied Where It Will Result
6 In Multiple Proceedings**

7 As demonstrated above, SJPOA's Application For Leave To Sue in *Quo warranto* should be
8 denied because it fails to establish a substantial question of fact or law. Even if SJPOA could meet this
9 first fundamental requirement of *quo warranto*, the application should nevertheless be denied for failure
10 to demonstrate that approving the application would serve the overall public interest.

11 As stated in *City of Campbell v. Mosk* (1961), 197 Cal.App. 2d 640, the mere existence of a
12 justiciable dispute does not establish that the public interest requires a judicial resolution of the dispute
13 or that leave be automatically granted for the relator to sue in *quo warranto*. It is clear that the Attorney
14 General can deny an application to sue in *quo warranto* based on the failure to meet the "serve the
15 overall public interest" prong of the two-part test. (*City of Campbell v. Mosk* (1961) 197 Cal.App.2d
16 640; 73 Ops.Cal.Atty.Gen. 188 (1990).

17 More specifically, the Attorney General denied an application to sue to challenge a statewide
18 initiative affecting wages and working conditions of state employees where the same issue was pending
19 before an administrative agency, PERB. (75 Ops.Cal. Atty.Gen. 70 (1992).) The Attorney General
20 concluded "(w)here such alternatives have been undertaken, we do not deem it within the public interest
21 to try the same issues in multiple proceedings." The Attorney General has concluded that it is not in the
22 public interest to authorize multiple proceedings even when the issue in the *quo warranto* application is
23 not identical to the issue pending in another forum, provided that the underlying issue will be decided in
24 the other forum. (73 Ops.Cal.Atty.Gen. 188 (1990.)

25 The relief that SJPOA prays for in its Verified Complaint in *Quo warranto* is for a judicial
26 determination that San Jose Charter Measure B adopted by the voters on June 5, 2012, is void and of no
27 effect. The plaintiff in this *quo warranto* application, the San Jose Police Officers' Association, has
28 previously filed on June 6, 2012, and is prosecuting its Complaint for Declaratory and Injunctive Relief

1 in Santa Clara Superior Court in the action *San Jose Police Officers Association vs. City of San Jose,*
2 *Board of Administration for Police and Fire Department Retirement Plan of City of San Jose et al.*
3 (Case No. 1-12-CV-225926.) Each of the causes of action in that lawsuit seeks invalidation of Measure
4 B. For example, the seventh cause of action in the complaint alleges a “Violation of MMBA” by
5 increasing employee retirement contributions and allegedly eliminating SJPOA’s ability to bargain with
6 the City over retiree health care benefits. SJPOA asks for a declaration and injunction prohibiting the
7 City from applying Charter Measure B to SJPOA members working for the City before June 5, 2012
8 (effectively the entire City police force as of the date of the vote on the Charter measure).

9 Consequently, SJPOA’s *quo warranto* complaint will be directly and dispositively affected by
10 the result of its pending Superior Court litigation over the legality of Charter Measure B. Approving
11 SJPOA’s application to sue in *quo warranto* would result in the exact multiple proceedings the Attorney
12 General has previously determined to not be in the public interest. (75 Ops.Cal.Atty.Gen. (1992).)

13 In addition, SJPOA filed and has pending in Santa Clara County Superior Court a Petition for
14 Writ of Mandate alleging the City’s failure to comply with the MMBA, Case No. 1-2-CV-220795.
15 Resolution of this writ of mandate action will be dispositive of SJPOA’s MMBA claim.

16 Furthermore, there is another judicial action pending that may also be dispositive of the claims in
17 SJPOA’s *quo warranto* complaint. In *Sapien et al. vs. City of San Jose*, Case. No. 1-12-CV-225928,
18 filed June 6, 2012, plaintiff members of the San Jose Police and Fire Department Retirement Plan are
19 seeking declaratory and injunctive relief that Charter Measure B cannot be applied because it violates
20 constitutional and vested contractual rights. It follows that the disposition of this pending litigation may
21 significantly impact the status and disposition of the *quo warranto* complaint, and would also result in
22 multiple judicial proceedings.

23 Finally, there are three matters pending before PERB that raise the exact issue SJPOA alleges in
24 its *quo warranto* complaint- whether the City complied with MMBA requirements prior to placing the
25 matter on the ballot. These were filed by OE#3, UPC 900-M, AFSCME, UPC 924-M, and IAFF, UPC
26 969-M. The Attorney General should follow the precedent established in 75 Ops. Cal. AG 70, Opinion
27 92-104, where application was denied based on the pending PERB review.

28

1 **2. Leave For SJPOA To Sue In *Quo Warranto* Should Be Denied Where It Would Be**
2 **Damaging To Public Policy To Grant The Application**

3 Mere demonstration of a question of law or fact does not by itself support Attorney General
4 approval of a *quo warranto* application. There must also be no other proceeding through which the
5 proposed relator could obtain relief, as shown above, and the issues for determination must serve the
6 overall public interest. SJPOA’s application to sue in *quo warranto* additionally fails the “overall public
7 interest” test. (72 Ops.Cal.Atty.Gen. 15, 19 (1989).)

8 SJPOA argues that leave to sue in *quo warranto* should be granted because “Measure B would
9 reduce pension benefits for current employees and retirees, it implicates benefits that are indisputably
10 subject to protection under the ‘contracts’ clause of the California State Constitution.” Plaintiff’s Memo
11 of Points and Authorities, page 10, lines 22-24. But this is not an issue that SJPOA’s allegations under
12 the MMBA can resolve. On the contrary, the constitutional impairment of contracts issue is what is
13 alleged and will be litigated in SJPOA’s other complaint currently pending in Santa Clara County
14 Superior Court, *San Jose Police Officers Association vs. City of San Jose, Board of Administration for*
15 *Police and Fire Department Retirement Plan of City of San Jose et al.*, Case No. 1-12-CV-225926.
16 Nowhere in SJPOA’s Verified Complaint is there any mention of constitutional impairment of contract
17 or that granting leave to sue will address or resolve any impairment of contract dispute. Thus, SJPOA’s
18 reliance on the public importance of the impairment of contract issue for the *quo warranto* complaint is
19 simply wrong, as it is not an issue raised in its *quo warranto* complaint and is in fact the subject of its
20 other currently filed and pending action in Santa Clara County Superior Court.

21 That leaves as the sole remaining overall public interest justification “whether the City satisfied
22 its obligations under the MMBA.” Plaintiff’s Memo of Points and Authorities, page 10, lines 18-20.
23 However, as demonstrated in the *Seal Beach* discussion above, there is no legitimate factual dispute
24 about whether or not the City satisfied its bargaining obligation prior to placing Charter Measure B on
25 the ballot in June, 2012.

26 SJPOA’s attempt to argue that this case is similar to the Bakersfield Police Officers Association
27 application to sue in *quo warranto* misses the mark for multiple reasons. That matter is, in fact, readily
28 distinguishable from the situation presented here.

1 First, *Seal Beach* held only that that the MMBA and constitutional right to place a Charter
2 amendment on the ballot were not mutually exclusive and that there had to be a reasonable bargaining
3 effort prior to placing a ballot measure affecting subjects of MMBA bargaining. In the Bakersfield case,
4 the City first informed the union of a possible ballot measure on May 6, 2010, and set a meet and confer
5 date of June 16, 2010. The Council voted on June 9, 2010 to place the Charter measure on the ballot,
6 before a single meet and confer session with the union had taken place and approximately one month
7 after first providing notice of the ballot measure. The factual dispute in Bakersfield was over whether
8 the union was responsible for failing to meet and confer prior to the vote, and whether general
9 discussions about pension reform constituted met and confer over the ballot measure.

10 In direct contrast to the Bakersfield facts, SJPOA does not dispute that 1) it was provided with
11 notice of the possible ballot measure in July, 2011, almost one year prior to the election on the ballot
12 measure (Verified Complaint, para. 26); 2) SJPOA met, and conferred, 13 times with the City between
13 July 13, 2011 and October 20, 2011 (Verified Complaint, para. 30); and 3) the City continued to discuss
14 the ballot measure with SJPOA and participated in mediation and meetings 8 times from December
15 2011 through February, 2012. The public policy issue in Bakersfield was whether the City's not having
16 a single meet and confer session on the ballot measure was a breach of MMBA and *Seal Beach*. Where
17 the City of San Jose bargained a minimum of 21 times over the course of nine months prior to placing
18 the ballot measure, there is no overall public policy interest in enforcing meet and confer requirements
19 because they took place.

20 Furthermore, SJPOA's argues that – despite extensive meet and confer sessions and mediation
21 sessions occurring about the proposed ballot measure – the City's election after impasse to incorporate
22 some concessions in the ballot measure prevented Council action in adopting the ballot measure with
23 significant concessions in favor of SJPOA. The union's position is directly contrary to the public
24 interest in the collective bargaining process, and the intent of the Legislature in enacting the MMBA. If
25 SJPOA's argument is successful, a public employer reaching impasse with a union after extensive
26 bargaining about a ballot measure will be precluded from agreeing to further mediation or modifying the
27 ballot proposal to incorporate concessions favoring the employees because of the risk that it will then be
28 unable to move forward with the ballot measure. Such a result would not serve the overall public

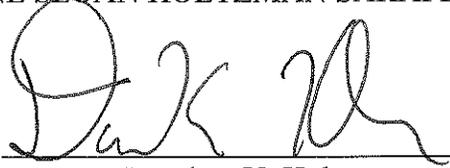
1 interest in permitting continued bargaining under the MMBA after impasse while moving forward with a
2 ballot measure after reasonable bargaining efforts have been made.

3 **IV. CONCLUSION**

4 The undisputed facts, settled legal principles, multiple pending complaints on the same issues in
5 other forums, and the lack of a demonstrated public interest compel the conclusion that the Attorney
6 General should deny SJPOA's request for leave to sue in *quo warranto*.

7
8 Dated: July 6, 2012

RENNE SLOAN HOLTZMAN SAKAI LLP

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11 By: 

Jonathan V. Holtzman
Randy Riddle
David Kahn
Albert Yang
Attorney for Defendant
CITY OF SAN JOSE

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RENNE SLOAN HOLTZMAN SAKAI LLP
Attorneys at Law

CERTIFICATE OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I, the undersigned, am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 350 Sansome Street, Suite 300, San Francisco, California, 94104.

On July 6, 2012, I served the following document(s) by the method indicated below:

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SJPOA'S APPLICATION FOR LEAVE TO SUE IN *QUO WARRANTO*; SHOWING OF GOOD CAUSE WHY LEAVE TO SUE SHOULD NOT BE GRANTED

- by placing the document(s) listed above in the sealed envelope(s) and by causing messenger delivery of the envelope(s) to the person(s) at the address(es) set forth below. I am readily familiar with the business practice of my place of employment with respect to the collection and processing of correspondence, pleadings and notices for hand delivery.
- by placing ALL document(s) listed above in a sealed envelope(s) and consigning it to an express mail service for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below.
- by placing the document(s) listed above in a sealed envelope(s) with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited in the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- by electronic transmission via e-mail attachment (agreed by the parties served in this matter)

Gregg McLean Adam, SBN 203436
Jonathan Yank, SBN 215495
Jennifer S. Stoughton, SBN 238309
CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery St, Suite 400
San Francisco, CA 94104
Telephone: (415) 989.5900
Facsimile: (415) 989.0932
Email: gadam@cbmlaw.com
jyank@cbmlaw.com
jstoughton@cbmlaw.com

Attorneys for Petitioner SAN JOSE POLICE
OFFICERS' ASSOCIATION

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 6, 2012, at San Francisco, California.

Rochelle Redmayne