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15 and Kirk Pennington

16 **IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
17 **IN AND FOR THE COUNTY OF SANTA CLARA**

18 SAN JOSE POLICE OFFICERS' ASSOCIATION,

19 Plaintiff,

20 vs.

21 CITY OF SAN JOSE AND BOARD OF
22 ADMINISTRATION FOR THE POLICE AND FIRE
23 DEPARTMENT RETIREMENT PLAN OF CITY OF
24 SAN JOSE,

25 Defendants.

26 and Consolidated Actions

27 CITY OF SAN JOSE,

28 Cross-Complainant,

vs.

SAN JOSE POLICE OFFICERS' ASSOCIATION, *et*
at.

Cross-Defendants.

Case No. 1-12-CV-225926
(and Consolidated Actions 1-12-CV-
225928, 1-12-CV-226570, 1-12-CV-
226574, and 1-12-CV-227864)

**REQUEST FOR JUDICIAL NOTICE FOR
PLAINTIFFS AND CROSS-
DEFENDANTS ROBERT SAPIEN,
MARY KATHLEEN MCCARTHY, THAN
HO, RANDY SEKANY, KEN HEREDIA,
TERESA HARRIS, JON REGER,
MOSES SERRANO, JOHN MUKHAR,
DALE DAPP, JAMES ATKINS, WILLIAM
BUFFINGTON AND KIRK PENNINGTON**

Date: March 5, 2013
Time: 9:00 a.m.
Dept: 8
Judge: Hon. Peter H. Kirwan

1 Pursuant to the provisions of Sections 452 and 453 of the Evidence Code, plaintiffs
2 and cross-defendants Robert Sapien, *et al.*, (Case No. 112CV225928), Teresa Harris, *et*
3 *al.*, (Case No. 112CV226570) and John Mukhar, *et al.*, (Case No. 112CV226574) request
4 that the court take judicial notice of the of:

5 1. The provisions of portions of Title 3 of the City of San Jose Municipal Code
6 as follows:

7 a. Section 3.24.730. attached hereto as Exhibit 1.

8 b. Sections 3.28.010, 3.28.100, 3.28.110, 3.28.340, 3.28.385, 3.28.710,
9 3.28.850, 3.28.880, 3.28.1210, 3.28.1260, 3.28.1270, 3.28.1950 and 3.28.2000, attached
10 hereto as Exhibit 2.

11 c. Sections 3.36.010, 3.36.300, 3.36.310, 3.36.320, 3.36.575, 3.36.580,
12 3.36.900, 3.36.970, 3.36.980, 3.36.1520, 3.36.1900 and 3.36.2000, attached hereto as
13 Exhibit 3.

14 d. Sections 3.44.150 and 3.36.160, attached hereto as Exhibit 4.

15 2. The initiative measure entitled Measure B approved by voters on June 5,
16 2012 attached hereto as Exhibit 5.

17 3. City of San Jose Ordinance No. 22263, attached hereto as Exhibit 6.

18 4. City of San Jose Ordinance No. 26536, attached hereto as Exhibit 7.

19 5. The Amicus Curiae Brief filed on behalf of San Jose Police and Fire
20 Department Plan by the San Jose City Attorney in the Appellate case of *Claypool v.*
21 *Wilson*, Third Appellate District Court of Appeal, No. 3 Civ. C011580, attached as Exhibit 8.

22 Dated: January 31, 2013

23 WYLIE, McBRIDE,
24 PLATTEN & RENNER

25 
26 JOHN McBRIDE

27 Attorneys for Plaintiffs and Cross-Defendants
28 Robert Sapien, Mary Kathleen McCarthy, Than
Ho, Randy Sekany, Ken Heredia, Teresa Harris,
Jon Reger, Moses Serrano, John Mukhar,
Dale Dapp, James Atkins, William Buffington and
Kirk Pennington

EXHIBIT 1

3.24.1570;

B. Any person who became a member of the retirement system prior to the effective date of this Part 8, and such member's contributions, shall continue to be governed by the provisions of Part 7 of this chapter and not by the provisions of this Part 8, if he is not given the option specified in Section 3.24.1560, or if he is given such option but refuses or fails to exercise the same in the manner and within the time specified in Section 3.24.1570.

(Prior code § 2904.83h.)

3.24.710 Normal rate of monthly contributions.

All members of the system to whom this Part 8 applies shall be required to make normal monthly contributions to the system. The normal monthly contribution which shall be required of a member for each month from and after July 1, 1971, shall be a percentage of the compensation earned by him in such month. Said percentage is hereinafter referred to as the member's "normal rate of monthly contribution."

(Prior code § 2904.83i.)

3.24.720 Normal contributions - Initial rate.

A. Until amended or revised by the board in accordance with Section 3.24.160, the normal rate of monthly contribution required of members on and after July 1, 1971 shall be three and eight-five one-hundredths percent of earned compensation.

B. The normal rate of monthly contribution set forth in this section is based on the interest and mortality tables used by this retirement system on July 1, 1971, and, subject to other provisions of this part, shall be adjusted by the board from time to time, in accordance with the provisions of Section 3.24.160 of this Code.

(Prior code § 2904.83k.)

3.24.730 Normal contributions - Rate.

For each member of the system to whom the provisions of this part apply, the normal rate of monthly contribution required on or 3.24.750 after July 1, 1971, or on or after the date he enters the system if he enters after July 1, 1971, shall be such that the amount of normal monthly contribution paid by him when added to all normal monthly contributions paid by other members of the system for the same period, will be sufficient to pay 3/11ths of the cost of all pensions and other benefits which are or will become payable to members on account of current service rendered by members on and after July 1, 1971; provided and excepting, however, that whenever a normal rate of monthly contribution for members is adopted or from time to time amended, the new or amended rate shall not include any amount designed to thereafter recover from members or return to members the difference between the amount of normal contributions theretofore actually required of members and any greater or lesser amount which, because of amendments to the system changing the time at which members may retire, or changing the benefits members will receive, or as a result of experience under the system, said members would have theretofore been required to pay in order to make their normal contributions equal 3/11ths of the cost of all pensions and other benefits which are or will become payable to members on account of current service rendered prior to the effective date of the new or amended rate.

(Prior code § 2904.83j.)

EXHIBIT 2

- 3.28.030.21 "Part-time service."
- 3.28.030.22 "Plan year."
- 3.28.030.23 "Prior service".
- 3.28.030.24 "Regular interest".
- 3.28.030.25 "Retirement board".
- 3.28.030.26 "Retirement fund".
- 3.28.030.27 "Retirement system".
- 3.28.030.30 "Mandatory reduction in paid working time"
- 3.28.040 Use of masculine or feminine gender.
- 3.28.050 Overtime excluded in computing compensation.
- 3.28.060 Notices - Deemed effective when.
- 3.28.070 Termination of plan.

3.28.010 Plan established - Name - Scope.

A. There is hereby established a retirement plan for all persons, hereinafter in this chapter specified, who may become members thereof pursuant to the provisions of this chapter. This plan shall be known as the "1975 Federated City Employees Retirement Plan," and includes all provisions of this Chapter 3.28.

B. Notwithstanding any provision of the code to the contrary, the elements of the retirement plan as set out in Chapters 3.16, 3.20, 3.24 and 3.28 are components of a single retirement system known as the Federated City Employees Retirement Plan.

C. Contributions made by the city and the members of the plan to the retirement fund described in Part 3 of this chapter shall be made for the purpose of distributing to such members or their beneficiaries the corpus and income of the fund in accordance with the terms of this plan.

D. The Federated City Employees Retirement Plan is established as a qualified governmental defined benefit plan pursuant to Sections 401(a) and 414(d) of the Internal Revenue Code or such other provision of the Internal Revenue Code as applicable and applicable treasury regulations and other guidance of the internal revenue service. The board shall be authorized to adopt rules and regulations which are appropriate or necessary to maintain the qualified status of the plan.

(Prior code § 2904.1000; Ords. 27838, 28885.)

3.28.020 Effective date of Chapter 3.28 provisions.

The effective date of this Chapter 3.28 and of this retirement plan is and shall be the first day of July, 1975, and the words "effective date of this chapter" or "effective date of this system," as used in this

- 3.28.250 Power to administer oaths, issue subpoenas.
- 3.28.260 Retirement board - Annual report.
- 3.28.270 Direct transfers of eligible rollover distributions.
- 3.28.275 Review of proposed amendments.
- 3.28.280 Direct trustee-to-trustee transfers.

3.28.100 Retirement board - Designated.

The retirement system established by the provisions of this Chapter 3.28, and the retirement fund provided for in this chapter, shall be managed, administered and controlled by that certain board of administration entitled "board of administration for federated city employees retirement system" which has been established by and pursuant to the provisions of Sections 2.08.1000 through 2.08.1090, inclusive, of the San José Municipal Code.

(Prior code § 2904.1050.)

3.28.110 Retirement board - Powers and duties.

The retirement board shall have all the powers and duties given it by the provisions of this Chapter 3.28, including but not limited to, the powers and duties specified in this Part 2. Notwithstanding anything in this part to the contrary, the retirement board shall not engage in a transaction prohibited by Section 503(b) of the Internal Revenue Code.

(Prior code § 2904.1051; Ord. 28885.)

3.28.120 Retirement board - Accounts and recordkeeping required.

A. The retirement board shall keep or cause to be kept any and all records and accounts reasonably necessary for the management, administration or control of this retirement system, including but not limited to records of all contributions made by any and all members of the system or made by the city, and records of all moneys in the retirement fund and of the investment and distribution of such moneys.

B. In particular, the board shall keep such records and accounts as may be necessary to show:

1. The total accumulated normal contributions of members;
2. The total accumulated prior service contributions of members;
3. The accumulated contributions of the city held for the benefit of members on account of current service;
4. All other accumulated contributions of the city, which shall include the amounts available to meet the obligation of the city on account of prior service of members.
5. The names of all persons receiving benefits under the retirement system, the nature of such benefits and the amounts paid to each person therefor.

all benefits or allowances payable to any member or person under this retirement system shall be paid from said fund. Said fund is known as and shall continue to be known as the "San José Federated City Employees Retirement Fund".

B. At no time prior to the satisfaction of all liabilities with respect to members of this plan and their beneficiaries shall any part of the corpus or income of the retirement fund be used for, or diverted to, purposes other than for the exclusive benefit of the members and their beneficiaries.

(Prior code § 2904.1100; Ords. 25092, 27838.)

3.28.310 Retirement board administration and investment authority.

The board has the exclusive control of the administration and investment of the retirement fund.

(Prior code § 2904.1101; Ord. 25092.)

3.28.320 Custodian of retirement fund - Payments.

A. Except as provided in subsection B., the city director of finance is the custodian of the retirement fund, subject to the exclusive control of the board as to administration and investment. All payments from the fund shall be made in the manner required for the disbursement of other public funds, but only upon authorization of the board.

B. The board may enter into contractual arrangements with California banks or with national banking associations to provide master custody services with respect to the assets of the retirement fund. Such contracts shall be entered into in the name of the board of administration for the federated city employees retirement system.

(Prior code § 2904.1102; Ord. 25092.)

3.28.330 Deposit of funds.

The board shall deposit, to the credit of the retirement fund, all amounts received by it under this chapter in the city treasury or in such custodial accounts as are established with the custodian bank.

(Prior code § 2904.1104; Ord. 25092)

3.28.340 Disposition of earnings.

A. Definitions. For the purpose of this Section 3.28.340, the terms listed herein shall have the following meanings:

1. "Income account" means the account established in the general reserve pursuant to subsection B. below.

2. "Interest crediting rate" means the interest rate determined by the Board for crediting the employee contribution reserve.

B. Retirement fund reserves. There shall be established in the retirement fund the following reserves:

1. The employee contribution reserve.

a. The board shall credit to the employee contribution reserve all contributions made by members of the retirement system and all interest payable pursuant to subsection C. below.

b. Moneys in the employee contribution reserve shall be available for the payment of benefits and for the return of contributions pursuant to Section 3.28.780.

2. The supplemental retiree benefit reserve.

a. The board shall credit to the supplemental retiree benefit reserve all interest payable pursuant to subsection C. below and that portion of the excess earnings determined pursuant to subsection D. below.

b. Distributions from the supplemental retiree benefit reserve shall be made in accordance with subsection E. below.

3. The general reserve.

a. The board shall establish an income account and shall credit the income account with all rents, interest, dividends, realized gains and losses, unrealized gains and losses, and all other income other than employer contributions, received during the fiscal year. The board shall pay from the income account all expenses and administrative costs as they are incurred.

b. The board shall credit to the general reserve all contributions made by the city, all interest payable pursuant to subsection C. below, and that portion of the excess earnings determined pursuant to subsection D. below.

c. Moneys in the general reserve shall be available for the payment of benefits and for the payment of the expenses and administrative costs of the retirement system.

4. Such other reserves as the board may determine from time to time.

C. Credit to contributions and reserves. All interest credited pursuant to this subsection C. shall be deducted from the income account.

1. Interest shall be credited to the employee contribution reserve on a semi-annual basis, or more frequently if authorized by the board, at the interest crediting rate.

2. Interest shall be credited to the supplemental retiree benefit reserve at the actuarially assumed annual rate of return adopted by the board pursuant to Section 3.28.200 or at the actual rate of return earned by the retirement fund during the applicable fiscal year, whichever is lower. Interest credited to the supplemental retiree benefit reserve shall be calculated as though the transfer of excess earnings required by subsection D. had been made on July 1 of the calendar year, regardless of the actual date such transfer is made.

3. Interest shall be credited to the general reserve as follows:

a. Interest at the actuarially assumed annual rate of return adopted by the board pursuant to Section 3.28.200 or at the actual rate of return earned by the retirement fund during the applicable fiscal year, whichever is lower; plus

b. Interest calculated as the difference between (i) the interest that would have been credited to the employee contribution reserve had the employee contribution reserve been credited at the actuarially assumed annual rate of return adopted by the board pursuant to Section 3.28.200 or at the actual rate of return earned by the retirement fund during the applicable fiscal year, whichever is lower,

and (ii) the interest actually credited to the employee contribution reserve pursuant to subsection C.1. above; provided, however, that there shall be no offset to the general reserve in any case where this difference is a negative number.

4. Interest shall be credited to any other reserves established by the board in the same manner as interest is credited to the supplemental retiree benefit reserve.

D. Excess earnings.

1. Within ninety days from and after receipt of audit reports for each fiscal year, the board shall determine the balance remaining in the income account after crediting of interest as provided in subsection C. above, and after payment of administrative costs and expenses of the retirement system for the applicable fiscal year.

2. If the balance remaining in the income account is greater than zero, the board shall by written resolution declare that balance to be the excess earnings for the applicable fiscal year, shall transfer ten percent of the excess earnings to the supplemental retiree benefit reserve, and shall transfer the remaining ninety percent of the excess earnings to the general reserve. If the balance remaining in the income account is less than or equal to zero, the board by written resolution shall declare that there are no excess earnings and shall adjust the general reserve to reflect any negative balance in the income account so that the balance in the income account is zero as of the beginning of each fiscal year.

E. Distributions from the supplemental retiree benefit reserve.

1. The supplemental retiree benefit reserve shall be used only for the benefit of retired members, survivors of members, and survivors of retired members.

2. Upon the request of the city council or on its own motion, the board may make recommendations to the city council regarding the distribution, if any, of the supplemental retiree benefit reserve to retired members, survivors of members, and survivors of retired members. The city council, after consideration of the recommendation of the board, shall determine the distribution, if any, of the supplemental retiree benefit reserve to said persons.

(Prior code § 2904.1103; Ords. 20596, 22263, 22486, 23087, 25092, 27436.)

3.28.350 Investment of funds - Conditions and limitations.

The board shall invest and reinvest the moneys in the retirement fund in accordance with the following standards:

A. The assets of the retirement plan are trust funds and shall be held for the exclusive purposes of providing benefits to members of the plan and their beneficiaries and defraying reasonable expenses of administering the plan. The assets of the retirement plan must not revert, and no contributions shall be permitted to be returned to the employers, except as permitted by Revenue Ruling 91-4.

B. The board shall discharge its duties with respect to the plan solely in the interest of, and for the exclusive purposes of providing benefits to, members of the plan and their beneficiaries, maintaining the actuarial soundness of the plan, and defraying reasonable expenses of administering the plan. The board's duty to the members and their beneficiaries shall take precedence over any other duty.

C. The board shall discharge its duties with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of like character and with like aims.

shall be reasonable and ascertainable. At the time the city makes a contribution to the medical benefits account, the city shall designate in writing that such contribution is solely for the medical benefits account.

C. Contributions to provide for the payment of benefits for sickness, accident, hospitalization, dental or medical expenses of persons receiving monthly allowances under the provisions of this plan, and earnings and interest attributable to such contributions may be made to the medical benefits account or to the trust established by Chapter 3.52.

D. All funds in the medical benefits account shall be used only for the payment of benefits and expenses allowed under Internal Revenue Code Section 401(h) and the regulations promulgated thereunder. The medical benefits account shall be used to provide medical and dental benefits in accordance with Parts 16 and 17 of this chapter. Prior to the satisfaction of all liabilities under this plan to provide such benefits, no funds in the medical benefits account shall be used for, or diverted to, any other purpose.

E. All benefits provided through the medical benefits account, plus any life insurance protection provided under the plan, shall be subordinate to the retirement and survivors' benefits provided by the plan. Accordingly, at all times after the date on which the medical benefits account is established, the aggregate of the city's contributions to the medical benefits account shall not exceed twenty-five percent of its total aggregate contributions to the plan (other than contributions to fund prior service). For the purpose of this limitation, city contributions include any contributions which are "picked-up" pursuant to Internal Revenue Code Section 414(h).

F. Upon the satisfaction of all liabilities under this plan to provide the benefits described in this section, any amount remaining in the medical benefits account shall be paid to the city.

G. In the event that a member's interest in the medical benefits account is forfeited prior to the termination of the plan, an amount equal to the forfeiture shall be applied as soon as practicable to reduce the city contributions, if any, to the medical benefits account.

H. City and member contributions to the medical benefits account shall be made on the same periodic basis as city and member contributions are made to the retirement fund. City contributions and member contributions to the medical benefits account may be paid on different payment schedules.

(Ords. 27838, 28332, 28885, 28914.)

3.28.385 Contribution rates for medical and dental benefits.

Contribution rates to fund the benefits for sickness, accident, hospitalization, dental or medical expenses shall be established by the board as determined by the board's actuary and shall be borne by the city and the members of the plan as follows:

A. Contributions for dental benefits shall be made by the city and the members in the ratio of eight-to-three.

B. Contributions for medical and dental insurance premiums costs attributable to the early retirement incentive programs described in Parts 18, 19, and 20 of this chapter shall be borne by the city.

C. Contributions for other medical benefits shall be made by the city and the members in the ratio of one-to-one.

(Prior code § 2904.1250.)

3.28.710 Normal rate of contribution - Determination.

The normal rate of contribution required of members shall be such that, based on interest and mortality tables and other relevant actuarial data, the total amount of normal contributions which will be required of members under the provisions of this chapter will be sufficient to pay, when due, three-elevenths of the amount of all pensions, allowances and other benefits which are and will become payable under this system on account or because of current service rendered on or after July 1, 1975; provided and excepting, however, that if and when, from time to time, the members' normal rate of contribution is hereafter amended or changed, the new rate shall not include any amount designed to thereafter recover from members or return to members the difference between the amount of normal contributions theretofore actually required to be paid by members and any greater or lesser amount which, because of amendments hereafter made to this system or as a result of experience under this system, said members should have theretofore been required to pay in order to make their normal contributions equal three-elevenths of the abovementioned pensions, allowances and other benefits which are or will become payable on account or because of current service rendered on or after July 1, 1975, and before the effective date of the new rate.

(Prior code § 2904.1251.)

3.28.720 Normal rate of contribution - Initial rate.

A. Until amended, revised or changed by the retirement board in accordance with other provisions of this Chapter 3.28, the members' normal rate of contribution on or after July 1, 1975, shall be four and seventy-nine hundredths percent of earned compensation, or of "compensation earnable" when so required by other provisions of this chapter.

B. The normal rate of contribution set forth in this section is based on interest and mortality tables and other actuarial data in possession of the city on the date of enactment of this section, and is subject to change from time to time by the retirement board pursuant to other provisions of this chapter.

(Prior code § 2904.1252.)

3.28.730 Prior service rate of contribution - Described - Amount.

Except as may be otherwise provided elsewhere in this Chapter 3.28, all members of this system must make monthly (or biweekly, if compensation is paid biweekly by the city) prior service contributions to this system. The prior service contribution required of a member for each month (or for each two weeks, if compensation is paid biweekly by the city) shall be a percentage of compensation earned, or of "compensation earnable" when so required by other provisions of this chapter, by him in such period. Such percentage is hereinafter referred to as members' "prior service rate of contribution." Said rate shall be the same for all members.

(Prior code § 2904.1253.)

3.28.740 Prior service rate of contribution - Determination.

The members' prior service rate of contribution shall be such that, based on interest and mortality tables and other relevant actuarial data, the total amount of prior service contributions which will be required of members will be sufficient to pay, when due, forty-two percent of the difference between:

- 3.28.940 Time of payment of city contributions.
- 3.28.950 Administrative costs of system.
- 3.28.955 Offset to city for additional employee contributions.

3.28.850 Regular current service rate - Described - Amount.

Except as otherwise provided by other provisions of this Chapter 3.28, the city must make, after July 1, 1975, monthly (or biweekly if members contribute biweekly) current service contributions to this system. The current service contributions required of the city for each such period shall be a percentage of compensation earned, or of "compensation earnable" when so required by other provisions of this Chapter 3.28, by members in such period. Said percentage shall consist of the sum of two rates, the first being the one which is hereinafter referred to as "city's regular current service rate of contribution," and the second being the one which is hereinafter referred to as "city's current service deficiency rate of contribution."

(Prior code § 2904.1300.)

3.28.860 Regular current service rate - Determination.

The city's regular current service rate of contribution shall be such that the amount of contributions paid by the city under such rate for each month (or two weeks, if members contribute biweekly) of current service for which the rate is imposed, as compared to the amount of normal contributions required of members for each such period of current service, shall be in the ratio of eight for the city to three for members.

(Prior code § 2904.1301.)

3.28.870 Regular current service rate - Initial rate.

A. Until amended, revised or changed by the retirement board in accordance with other provisions of this Chapter 3.28, the city's regular current service rate of contribution, on and after July 1, 1975, shall be twelve and seventy-seven hundredths percent of earned compensation, or of "compensation earnable" when so required by other provisions of this Chapter 3.28.

B. The initial rate established by this section is based on interest and mortality tables and other actuarial data in possession of the city on the date of enactment of this section and is subject to change from time to time by the retirement board pursuant to other provisions of this Chapter 3.28.

(Prior code § 2904.1303.)

3.28.880 Current service deficiency rate - Determination.

The city's current service deficiency rate of contribution shall be such as may hereafter be necessary to make up, over a period of thirty years, any existing deficiency in the amounts of current service contributions theretofore contributed by members and by the city for the payment of the cost of all allowances and other benefits which are or will become payable to members on account of current service rendered before the effective date of the latest deficiency rate, such deficiency being that resulting from amendments hereafter made to this system or as a result of experience under this system. Until the amount accumulated in the retirement fund from contributions of members and the city on account of current service equals the present value of all amounts thereafter payable from the

retirement fund on account of current service, the city shall make monthly (or biweekly, if members contribute biweekly) contributions, to make up any deficiency, at the current service deficiency rate established by the retirement board. Such rate shall be established and from time to time changed by the retirement board, whenever necessary, to accomplish the above-specified objective.

(Prior code § 2904.1302.)

3.28.890 Prior service contributions - Described - Amount.

Except as may be otherwise provided elsewhere in this Chapter 3.28, the city must make monthly (or biweekly, if members contribute biweekly) prior service contributions to this system. The prior service contribution for each such period shall be a percentage of compensation earned, or of "compensation earnable" when so required by other provisions of this Chapter 3.28, in such period. Said percentage is hereinafter referred to as "city's prior service rate of contribution."

(Prior code § 2904.1304.)

3.28.900 Prior service contributions - Determination.

The city's prior service rate of contribution shall be such that, based on interest and mortality tables and other relevant actuarial data, the sum of the total amount of city's prior service contributions which will be required of the city under the provisions of this Chapter 3.28, plus the total amount of prior service contributions which will be required of members under the provisions of this chapter, plus the total amount of all prior service contributions made by the city pursuant to the provisions of the Chapter 3.24 retirement system, will be sufficient to pay, when due, all pensions, allowances and other benefits which are or will become payable under this system on account of prior service rendered prior to July 1, 1975.

(Prior code § 2904.1305.)

3.28.910 Prior service contributions - Initial rate.

A. Until amended, revised or changed by the retirement board in accordance with other provisions of this Chapter 3.28, the city's prior service rate of contribution, on and after July 1, 1975, shall be three and sixty-nine hundredths percent of earned compensation, or of "compensation earnable" when so required by other provisions of this chapter.

B. The initial rate established by this section is based on interest and mortality tables and other relevant actuarial data in the possession of the city on the date of enactment of this section and is subject to change from time to time by the retirement board pursuant to other provisions of this chapter.

(Prior code § 2904.1306.)

3.28.920 City contributions for certain former members of police and fire department retirement plan.

If a member who becomes such after July 1, 1975, becomes entitled to receive credit, pursuant to Section 3.28.650, for service formerly credited to him under a city police and fire department retirement plan specified in said Section 3.28.650, the city shall contribute to the retirement fund an amount equal to the sum of:

A. An amount which, when added to the amount of accumulated contributions of the member which are transferred from the police and fire department plan into the retirement system pursuant to

- 3.28.1330 Deductions - Recipient's earnings from outside occupation.
- 3.28.1340 Deductions - Recipient's earnings from nonfederated city service.
- 3.28.1350 Recipient's reentry into federated city service in position and class of positions other than that from which he or she was retired for disability.
- 3.28.1360 Member not to receive both service retirement and disability retirement.
- 3.28.1370 Medical examination of recipients - Allowance cancellation conditions.
- 3.28.1380 Reinstatement to duty.
- 3.28.1390 Refusal to accept reinstatement.
- 3.28.1400 Recipient attaining age fifty-five to be deemed permanently disabled.
- 3.28.1410 Failure or refusal to submit to medical examination.
- 3.28.1420 Situations where member is not entitled to disability retirement or disability retirement allowance.
- 3.28.1430 Payment of disability allowances to constitute return and withdrawal of contributions.
- 3.28.1440 Failure to reinstate recipient of a disability allowance to duty on cessation of disability.

3.28.1200 Eligibility.

No person shall be retired for disability under or pursuant to the provisions of this Chapter 3.28 unless he is eligible therefor under and pursuant to the provisions of this Part 10.

(Prior code § 2904.1450.)

3.28.1210 Definitions.

As used in this Part 10:

A. "Disability," "incapacity for the performance of duty" and "incapacitated for the performance of duty," when used as a basis for retirement under this system, mean disability of a member, short of death, of permanent or extended and uncertain duration, occurring while such member is an employee of the city in the federated city service of the city, as a result of injury or disease (except that in case of a mental derangement the cause thereof, for purposes of this section only, shall be disregarded), which renders the member physically or mentally incapable of continuing to satisfactorily assume the responsibilities and perform the duties and functions of the position then held by him and of any other position in the same classification of positions to which the city may offer to transfer him, as determined by the retirement board on the basis of competent medical opinion. It does not mean mere physical or mental inability to assume said responsibilities or perform said duties.

B. In addition, the member may submit a medical report from the member's own physician or surgeon. Where application for disability retirement is made by the member or on the member's behalf, a medical report by said member's private physician or surgeon may be submitted with the application. The board may require additional medical examinations or procure or require additional or other evidence before retiring a person for disability.

C. All medical information under the control of the city and the member, including reports in connection with workers compensation claims or proceedings to the extent permitted by law, shall be made available to the city's medical director and the retirement board upon their request.

(Prior code § 2904.1457; Ords. 19283, 26846.)

3.28.1260 Disability retirement - Conditions for granting.

If the medical reports and other available evidence and information show to the satisfaction of the retirement board that the member is incapacitated for the performance of his duty, and if such member is otherwise eligible to retire for disability pursuant to the provisions of this Part 10, the board shall forthwith retire him for disability.

(Prior code § 2904.1458.)

3.28.1270 Determination as to whether disability is service - connected.

If the medical examination and other available evidence and information show to the satisfaction of the retirement board that the disability is service-connected, it shall so find and declare. If the medical examination and other available information show to the satisfaction of the board that the disability is nonservice-connected, it shall so find and declare. Such finding and declaration shall govern in determining whether a disability is service-connected or nonservice-connected.

(Prior code § 2904.1459.)

3.28.1280 Service-connected disability retirement - Amount of allowance.

A. Subject to other provisions of this Chapter 3.28, a member who, while he or she is an employee of the city in the federated city service is disabled and incapacitated for the performance of duty, may be retired by the retirement board pursuant to the provisions of this section for such disability, and shall be so retired upon application being made therefor, if said disability is a service-connected disability.

B. Subject to other provisions of this chapter, any member retired pursuant to the provisions of this section because of a service-connected disability shall thereafter be paid from the retirement fund, while he or she is disabled and incapacitated for the performance of duty as a result of such service-connected disability, a service-connected disability retirement allowance in an annual allowance equal to forty percent of the member's final compensation, plus two and one-half percent of the member's final compensation for each year of federated city service for which the member is entitled to credit under the provisions of this system in excess of the first sixteen years of service; provided however, that in no event shall said allowance be more than seventy-five percent of the member's final compensation, less the amounts specified in Sections 3.28.1320 and 3.28.1330 of this chapter.

(Prior code § 2904.1460; Ord. 26846.)

3.28.1290 Nonservice-connected disability retirement - Eligibility.

3.28.1995 Limitation on funding provided to retirement fund for medical benefits.

3.28.1950 **Medical benefits for retired members.**

Subject to the provisions of this chapter, a member may be entitled to medical insurance coverage in an eligible medical plan as specified in Section 3.28.1970 if the member satisfies the requirements of subsection A., subsection B., or subsection C.:

A. The member is retired for service or disability under the provisions of this chapter and at the time of such retirement meets any of the following requirements:

1. Is entitled to credit for fifteen or more years of service; or
2. Receives an allowance equal to at least thirty-seven and one-half percent of the final compensation of such member; or
3. Would be receiving an allowance equal to at least thirty-seven and one-half percent of the final compensation of such member if the workers' compensation offset set forth in Section 3.28.1040 did not apply.

B. The member is entitled to credit for twelve or more years of service as of May 14, 1993, and the member is retired for service on or after May 14, 1993, but prior to June 20, 1993.

C. The member voluntarily resigns from city service and satisfies all of the following requirements:

1. The effective date of the voluntary resignation is on or after May 14, 1993, but prior to June 20, 1993; and
2. As of the effective date of the resignation, the member is entitled to credit for at least twelve years of service; and
3. The member elects to continue membership in this system by allowing all of his or her accumulated contributions to remain in the retirement fund; and
4. The member is not reinstated to city service prior to the member's retirement; and
5. The member retires for service under the provisions of Section 3.28.1110.

(Ords. 21763, 22245, 24347.)

3.28.1960 **Medical benefits for survivors of members.**

Subject to the provisions of this chapter, if a surviving spouse, surviving domestic partner, child and/or children, as those terms are defined in Sections 3.28.1460, 3.28.1560, and 3.28.1750 of this chapter, whichever is applicable, is receiving a monthly survivorship allowance pursuant to Part 11, Part 12 or Part 14 of this chapter or is receiving an optional settlement allowance pursuant to Part 13 of this chapter because of the death of a member, then said surviving spouse, surviving domestic partner, child and/or children may be entitled to medical insurance coverage in an eligible medical plan as specified in Section 3.28.1970 if the following conditions are satisfied:

A. The member either died before receiving retirement pay or was retired either for service or

- 3.28.2000 Dental benefits for retired members.
- 3.28.2010 Dental benefits for survivors of members.
- 3.28.2020 Requirements for participation in dental insurance plan.
- 3.28.2030 Costs of dental insurance.
- 3.28.2040 Eligible dental plan.
- 3.28.2045 Limitation on funding for dental benefits.

3.28.2000 Dental benefits for retired members.

Subject to the provisions of this chapter, if a member of this system is retired for service or disability and at the time of such retirement is (i) entitled to credit for five or more years of service, or (ii) is receiving an allowance equal to at least thirty-seven and one-half percent of the final compensation of said member, or (iii) would be receiving an allowance equal to at least thirty-seven and one-half percent of the final compensation of said member if the workers' compensation offset set forth in Section 3.28.1040 did not apply, then said member may be entitled to dental insurance coverage in an eligible dental plan as specified in this part.

(Ord. 22261.)

3.28.2010 Dental benefits for survivors of members.

Subject to the provisions of this chapter, if a surviving spouse, surviving domestic partner, or surviving child and/or children, as those terms are defined in Sections 3.28.1460, 3.28.1560, and 3.28.1750 of this chapter, whichever is applicable, is receiving a monthly survivorship allowance pursuant to Part 11, Part 12 or Part 14 of this chapter or is receiving an optional settlement allowance pursuant to Part 13 of this chapter because of the death of a member of this system, then said surviving spouse, surviving domestic partner, or surviving child and/or children may be entitled to dental insurance coverage in an eligible dental plan as specified in this part if the following conditions are satisfied:

A. The member either died before receiving retirement pay or was retired for either service or disability; and

B. Such member was at the time of death:

1. Entitled to credit for five or more years of service; or
2. Was receiving an allowance equal to at least thirty-seven and one-half percent of final compensation; or
3. Would have been receiving an allowance equal to at least thirty-seven and one-half percent of final compensation if the workers' compensation offset set forth in Section 3.28.1040 did not apply.

(Ords. 22261, 23736, 27521.)

3.28.2020 Requirements for participation in dental insurance plan.

EXHIBIT 3

- 3.36.030 Use of masculine or feminine gender.
- 3.36.040 Effective date of this chapter.
- 3.36.050 Notices or orders deemed effective when.
- 3.36.060 Biweekly references to contributions and membership.
- 3.36.070 Grounds for termination of allowances or benefits.
- 3.36.080 Benefits exempt from execution.
- 3.36.090 Claimant to bear burden of proof.
- 3.36.100 Invalidity of portion of chapter.
- 3.36.110 Identification of system.
- 3.36.120 Termination of plan.
- 3.36.130 Plan year.
- 3.36.140 Limitation year.

3.36.010 Establishment - Name - Scope.

A. There is hereby established a retirement plan for all persons, hereinafter in this chapter specified, who may become members thereof pursuant to the provisions of this Chapter 3.36. This plan shall be known as the "1961 police and fire department retirement plan," and includes all provisions of this chapter.

B. The 1961 police and fire department retirement plan is established as a qualified governmental defined benefit plan pursuant to Sections 401(a) and 414(d) of the Internal Revenue Code or such other provision of the Internal Revenue Code as applicable and applicable treasury regulations and other guidance of the Internal Revenue Service. The board shall be authorized to adopt rules and regulations which are appropriate or necessary to maintain the qualified status of the plan.

(Prior code § 2903.50; Ord. 28886.)

3.36.020 Definitions and construction of terms.

Unless the context otherwise requires, the definitions and general provisions set forth in this Part 1 govern the construction of this Chapter 3.36.

(Prior code §§ 2903.51 - 2903.63; Ords. 24094, 24200, 25914.)

3.36.020.1 "Accumulated contributions".

"Accumulated contributions" means the sum of all contributions made by a member and standing to the credit of a member's individual account.

- 3.36.340 Retirement board - Secretary - Retirement and benefits administrator duties.
- 3.36.350 Rules and regulations - Scope.
- 3.36.360 Duties of other city officers.
- 3.36.370 Determination of employee eligibility and determination and modification of benefits.
- 3.36.380 Medical service and advice.
- 3.36.385 Authority to secure other contractual services.
- 3.36.400 Actuarial evaluation and investigation - Interest rates.
- 3.36.410 Mortality, service and other tables - Revision of rates of contribution.
- 3.36.420 Determination of age, service or compensation where records are inadequate.
- 3.36.430 Accounts and recordkeeping.
- 3.36.440 Annual report.
- 3.36.450 Hearings - Authorized when.
- 3.36.460 Power to administer oaths and issue subpoenas.
- 3.36.470 Hearings - Rules and procedures.
- 3.36.480 Direct transfers of eligible rollover distributions.
- 3.36.485 Review of proposed amendments.
- 3.36.490 Direct trustee-to-trustee transfers.

3.36.300 Retirement board - Administration and control authority.

The retirement system established pursuant to the provisions of this Chapter 3.36 and the retirement fund provided for in this Chapter 3.36 shall be managed, administered and controlled by that certain board of administration entitled "board of administration for police and fire department retirement plan" which has been established pursuant to the provisions of Chapter 2.08, Part 12 of the San José Municipal Code.

(Prior code § 2903.100.)

3.36.310 Retirement board - Powers and duties.

The retirement board shall have all the powers and duties given to it in this Chapter 3.36, including

but not limited to, the powers and duties specified in this Part 3. Notwithstanding anything in this part to the contrary, the retirement board shall not engage in a transaction prohibited by Section 503(b) of the Internal Revenue Code.

(Prior code § 2903.101; Ord. 28886.)

3.36.320 Retirement board - Additional powers and duties.

The retirement board shall have any and all other powers imposed upon or granted to it by the provisions of Article XV of the Charter of the city, or by any other provisions of this Chapter 3.36.

(Prior code § 2903.113.)

3.36.330 Retirement board - Meetings - Quorum - Voting.

The retirement board shall hold regular meetings monthly at a time and place to be determined by the board. Special meetings may be held at any time and place upon the call of its president or of a quorum of the members of the board. Until at least seven seats on the board are filled for the first time after adoption of the ordinance increasing the board to nine members, four members of the board shall be necessary to constitute a quorum for the board to take action, although a lesser number may adjourn from time to time. Once seven seats on the board have been filled for the first time after adoption of the ordinance increasing the board to nine members, a majority of the total number of member seats, filled or vacant, shall be necessary to constitute a quorum, although a lesser number may adjourn from time to time. The board shall act by resolution, order or motion. All meetings shall be open and public.

(Prior code § 2903.114; Ord. 28787.)

3.36.340 Retirement board - Secretary - Retirement and benefits administrator duties.

The director of retirement services shall be the secretary of the retirement board. The director shall keep a record of all proceedings of the board in the same manner as is required for the keeping of records of all proceedings of the city council.

(Prior code § 2903.115; Ords. 21624, 26034.)

3.36.350 Rules and regulations - Scope.

Subject to the provisions of this Chapter 3.36 and to all applicable provisions of the Charter of the city, the board may make and enforce reasonable rules and regulations for the administration, management and control of the provisions of this chapter and of the retirement system and fund provided for herein; and each member of this system, each person retired thereunder and each person or estate entitled to or receiving any benefits under the provisions of this chapter is and shall be subject to the provisions of this chapter and to said rules and regulations.

(Prior code § 2903.102.)

3.36.360 Duties of other city officers.

The city treasurer and the city auditor shall perform such duties with respect to this retirement system and the retirement fund as the board of administration may from time to time direct, and all such other duties as may be required of such officers by other provisions of this chapter or by the Charter of the city. No additional compensation shall be received by any of said officers for said services.

Notwithstanding any provisions in this Code to the contrary, whenever any check drawn against the retirement fund in payment of accumulated contributions or any benefits remains unclaimed or the claimant cannot be found, the proceeds of such check shall be redeposited in the retirement fund and held for the claimant without any further accumulation of interest, and such redeposit shall not operate to reinstate the membership of the claimant in this system. If such proceeds, whether heretofore or hereafter redeposited, are not claimed within four years after the date of redeposit, they shall revert to and become a part of the accumulated contributions of the city, held in the retirement fund to meet the liabilities of the city to the retirement system. The board may at any time, after revision of said proceeds to the city, and upon receipt of proper information satisfactory to it, return such proceeds so held for the city, to the credit of the claimant, to be administered in the manner provided under this system.

(Prior code § 2903.130; Ord. 25084.)

3.36.570 Investment counseling - Restrictions.

A. The board may enter into contractual arrangements with any person or persons or association or associations, who meet the requirements of subsection B. or C., to provide counsel to the board with respect to the board's policies of investing and reinvesting of moneys in the retirement fund. Such contracts shall be entered into in the name of the board of administration for the police and fire department retirement plan.

B. Any person or association who provides services to the board with regard to financial securities:

1. Shall be a person or association whose principal business consists of investment counseling services; and
2. Shall be registered as an investment adviser under such laws as may require such registration.

C. With respect to real estate advisors, the board shall enter into contractual arrangements only with persons or associations whose principal officers are engaged in the business of advising and evaluating commercial, industrial or residential real estate investments, mortgage banking, or property management, and which are licensed as real estate brokers by the State of California.

(Ords. 21607, 25084, 25553.)

3.36.575 Separate medical benefits account.

A. There is hereby established as of July 1, 1995, the medical benefits account as a separate account within the retirement fund. The medical benefits account shall be maintained in compliance with Internal Revenue Code Section 401(h) and the regulations promulgated thereunder. Monies in the medical benefits account may be commingled with other monies in the retirement fund solely for the purposes of investment.

B. All contributions made to the retirement fund to provide for the payment of benefits for sickness, accident, hospitalization, dental or medical expenses of persons receiving monthly allowances under the provisions of this plan, and all earnings and interest attributable to such contributions, shall be placed in the medical benefits account. All contributions to the medical benefits account shall be reasonable and ascertainable. At the time the city makes a contribution to the medical benefits account, the city shall designate in writing that such contribution is solely for the medical benefits account.

C. Contribution rates to fund the benefits for sickness, accident, hospitalization, dental or medical expenses shall be established by the board as determined by the board's actuary and shall be borne by

the city and the members of the plan as follows:

1. Contributions for dental benefits shall be made by the city and the members in the ratio of three-to-one.
2. Contributions for other benefits provided through the medical benefits account shall be made by the city and the members in the ratio of one-to-one.

D. All funds in the medical benefits account shall be used only for the payment of benefits and expenses allowed under Internal Revenue Code Section 401(h) and the regulations promulgated thereunder. The medical benefits account shall be used to provide medical and dental benefits in accordance with Parts 14 and 15 of this chapter. Prior to the satisfaction of all liabilities under this plan to provide such benefits, no funds in the medical benefits account shall be used for, or diverted to, any other purpose.

E. All benefits provided through the medical benefits account, plus any life insurance protection provided under the plan, shall be subordinate to the retirement and survivors' benefits provided by the plan. Accordingly, at all times after the date on which the medical benefits account is established, the aggregate of the city's contributions to the medical benefits account shall not exceed twenty-five percent of its total aggregate contributions to the plan (other than contributions to fund prior service). For the purpose of this limitation, city contributions include any contributions which are "picked-up" pursuant to Internal Revenue Code Section 414(h).

F. Upon the satisfaction of all liabilities under this plan to provide the benefits described in this section, any amount remaining in the medical benefits account shall be paid to the city.

G. In the event that a member's interest in the medical benefits account is forfeited prior to the termination of the plan, an amount equal to the forfeiture shall be applied as soon as practicable to reduce the city contributions to the medical benefits account.

H. City and member contributions to the medical benefits account shall be made on the same periodic basis as city and member contributions are made to the retirement fund. City contributions and member contributions to the medical benefits account may be paid on different payment schedules.

(Ords. 27768, 28332, 28886.)

3.36.580 Supplemental retiree benefit reserve.

A. Establishment and Purpose.

1. The board shall establish a reserve in the retirement fund to be known as the supplemental retiree benefit reserve or SRBR.

2. The purpose of the SRBR shall be to provide a source of funding for benefits to supplement those benefits otherwise provided by this plan or the Chapter 3.32 plan to former members of such plans who are receiving benefits, survivors of such former members, and survivors of members who die prior to receiving benefits from this plan.

B. Funding.

1. The initial amount allocated to the SRBR shall be ten percent of the plan's prefunded actuarial accrued liability as of June 30, 1999, as determined by the board's actuary. The board's actuary shall calculate the initial funding amount without regard to any plan amendments that became

effective after June 30, 1999.

2. Each June 30, beginning June 30, 2000, there shall be allocated to the SRBR the investment earnings attributable to the balance in the SRBR as of June 30 of the calendar year in which the allocation is made. Investment earnings credited to the SRBR shall be calculated as though the transfer required by paragraphs 3. and 4. of this Subsection B. had been made on the immediately following July 1 (first allocation on July 1, 2000) regardless of the actual date such transfer is made. In the event the investment earnings for the retirement fund are less than zero, no investment earnings shall be allocated to the SRBR and no reduction shall be made to the SRBR balance except as provided in Subsection C. below.

3. The board shall determine the excess earnings for the twelve months ending June 30, 2000, and for the twelve months ending June 30, 2001, and shall transfer to the SRBR ten percent of the excess earnings for each such twelve-month period.

4. Within ninety days from and after receipt of audited financial statements for each fiscal year, commencing with the year 2002, the board shall determine, and by written resolution declare, the excess earnings as of June 30 in each such year, and shall transfer ten percent of such excess earnings to the SRBR. The excess earnings shall be added to the SRBR principal and shall not be available for distribution under Subsection D.

C. Reduction of SRBR Balance.

1. If the city's contribution rate, as determined by the board's actuary during any actuarial valuation performed after June 30, 1999, will increase as a result of poor investment earnings in the retirement fund, there shall be transferred from the SRBR to the regular retirement fund and the cost-of-living fund an amount equal to ten percent of the city's increased contributions for the first twelve months following the increase in the contribution rates. Such transfers shall be limited to those situations where the increase in the city's contribution rate is attributable to poor investment earnings; no such transfer shall be made for any increase in the city's contribution rate that is due to any factor other than poor investment earnings including, but not limited to, increases in medical or dental premium costs, enhancements to benefits provided under the plan, or changes in the actuarial assumptions.

2. Notwithstanding Paragraph 1. of this Subsection C., the amount transferred from the SRBR because of the increase in the city's contributions shall not exceed five percent of the accrued balance in the SRBR as of the date of the actuarial valuation.

D. Distributions.

1. The Board shall make an initial distribution from the SRBR during calendar year 2002.

2. Beginning in calendar year 2003, the board shall make an annual distribution from the SRBR; except there shall be no distribution during calendar years 2010, 2011, 2012 or during calendar year 2013, prior to June 30, 2013.

3. The initial distribution from the SRBR shall be made solely to former members of this plan or the Chapter 3.32 plan who are receiving benefits as of June 30, 2001, and survivors (of such former members or of members who died prior to receiving benefits from this plan) who are receiving benefits as of June 30, 2001; provided, however, that if a member or former member died after June 30, 2001, but before the initial distribution, the survivor shall be deemed to have been receiving benefits as of June 30, 2001.

4. All subsequent annual distributions from the SRBR shall be made solely to former members of this plan or the Chapter 3.32 plan who are receiving benefits as of the June 30 immediately preceding

the distribution date and survivors (of such former members or of members who died prior to receiving benefits from this plan) who are receiving benefits as of said June 30.

5. The board shall develop a methodology for distributions from the SRBR such that supplemental benefits provide a greater benefit for those persons who have been in benefit status for a longer period of time and those persons receiving the lowest monthly benefit payments. Upon the approval of the methodology by the city council, the board shall make distributions in accordance with such methodology.

6. Except as required by Subsection C. or in the case of the termination of this plan, the board shall not transfer or distribute funds in the SRBR if such transfer or distribution would reduce the SRBR principal.

E. Definitions. For the purpose of this Section 3.36.580, the terms listed herein shall have the following meanings:

1. "Excess earnings" means the earnings of the retirement fund that remain after interest has been credited to the SRBR as provided in Paragraph B.2. and the actuarial assumed earnings rate adopted by the board (and in effect on June 30 of the year in which the SRBR calculation is performed) has been credited to other reserves.

2. "Former member" means a person who has retired under the provisions of this chapter or Chapter 3.32 or a person who separated from city service without retiring but left his or her contributions on deposit in the retirement fund.

3. "Investment earnings" means the earnings of the retirement fund during the twelve months ending June 30 as determined by the board's actuary using the same methodology used to determine the value of assets for the actuarial valuation. In the case of investment earnings attributable to the SRBR, the application of the methodology shall begin as of July 1, 1999.

(Ords. 26416, 26536, 28848, 28915, 29059.)

Part 5 SERVICE

Sections:

- 3.36.600 Definitions and construction of provisions.
- 3.36.610 Service defined.
- 3.36.615 Purchase of service credit for federated city service.
- 3.36.620 Military leave of absence.
- 3.36.625 Compliance with USERRA and the HEART Act.
- 3.36.630 Credit for holidays, sick leave, vacation, or leave of absence.
- 3.36.640 Suspensions.
- 3.36.650 Exclusions - Part-time service.

3.36.1130 Payment of disability allowances to constitute return and withdrawal of contributions.

3.36.1140 Failure to reinstate recipient of a disability allowance to duty on cessation of disability.

3.36.1150 Termination of disability retirement benefits for treason or conviction of felony.

3.36.900 Definitions.

As used in this chapter:

A. "Disability," "incapacity for the performance of duty," and "incapacitated for the performance of duty," as a basis for retirement, means disability of a member, short of death, of permanent or extended and uncertain duration, occurring while such member is a member of this system, as a result of injury or disease, which renders a person physically or mentally incapable of assuming the responsibilities and performing the duties of the position then held by him and of any other position in the same classification of positions to which the city may offer to transfer him, as determined by the retirement board, on the basis of competent medical opinion. It does not mean or include mere inability to assume said responsibilities or perform said duties.

B. 1. "Disability," "incapacity for the performing of duty," and "incapacitated for the performance of duty," as a basis for retirement, also means disability of a member, short of death, of permanent or extended and uncertain duration, occurring while such member is a member of this system, not as a result of injury or disease, which renders a person mentally incapable of assuming the responsibilities and performing the duties of the position then held by him and of any other person in the same classification of positions to which the city may offer to transfer him, as determined by the retirement board on the basis of competent medical opinion. It does not mean or include mere inability to assume said responsibilities or perform said duties; provided, however, that notwithstanding any other provisions of this Chapter 3.36, including Sections 3.36.990, 3.36.1000 and 3.36.1010, no member shall be deemed disabled or incapacitated within the meaning of this section unless at the time such disability occurs he shall be entitled to credit for at least ten years of service in this system.

2. The provisions of this section shall be deemed to cover any member of this system whose disability or incapacity for the performance of duty occurred on or after the first day of April, 1968; provided that no benefits shall be payable hereunder for any period prior to the filing of an application for disability retirement or prior to the date upon which the retirement board makes a motion pursuant to Section 3.36.940. If any person whose disability or incapacity for the performance of duty, as said terms are defined in this section, occurred on or after the first day of April, 1968, files or has filed an application for disability retirement prior to the effective date of this section, the retirement board may, subject to other provisions of this chapter, grant a disability retirement allowance commencing on the date of the filing of such application with the retirement board.

C. "Nonservice-connected disability" means disability of a member other than a "service-connected disability."

D. "Service-connected disability" means disability of a member as a result of injury or disease arising out of and in the course of such member's employment with the city.

(Prior code §§ 2903.200, 2903.200a, 2903.201, 2903.202.)

3.36.920 Situations where member is not entitled to disability retirement or disability

therefor being made by the member or any other person.

(Prior code § 2903.203.)

3.36.950 Disability retirement - By request or application.

A member who is eligible to retire for disability shall be retired for disability, pursuant to and subject to the provisions of this chapter, by the retirement board upon application being made therefor by any of the following persons:

- A. The city manager;
- B. The head of the office or department in which the member is or was last employed;
- C. The member, or any authorized person on his behalf.

(Prior code § 2903.204.)

3.36.960 Medical examinations.

A. The retirement board on its own motion at any time may, and upon receipt of an application for disability retirement shall, order a medical examination of a member to determine whether the member is disabled or incapacitated for the performance of duty, and to determine whether such disability or incapacity for performance of duty is a service-connected or nonservice-connected disability in those situations where the member's eligibility for disability retirement, or the amount of disability retirement allowance to which he or she may be entitled, is dependent upon such determination. Such medical examination shall be made by one or more physicians or surgeons appointed by the board.

B. In addition, the member may submit a medical report from his or her own physician or surgeon. Where application for disability retirement is made by the member or on his or her behalf, a medical report by the member's private physician or surgeon shall be submitted with the application unless otherwise authorized by the board. The board may require additional medical examinations, or procure or require additional or other evidence before retiring a person for disability.

(Prior code § 2903.205; Ords. 19282, 26901.)

3.36.970 Disability retirement - Eligibility.

If the medical reports and other available evidence and information show to the satisfaction of the retirement board that the member is incapacitated for the performance of his duty, and if such member is otherwise eligible to retire for disability pursuant to the provisions of this chapter, the board shall forthwith retire him for disability.

(Prior code § 2903.206.)

3.36.980 Determination as to whether disability is service-connected.

If the medical examination and other available evidence and information show to the satisfaction of the retirement board that the disability is service-connected, it shall so find and declare. If the medical examination and other available information shows to the satisfaction of the board that the disability is nonservice-connected, it shall so find and declare. Such finding and declaration shall govern in determining whether a disability is service-connected or nonservice-connected.

D. Participation in other qualified plans; aggregation of limits.

1. The 415(b) limit with respect to any member who at any time has been a member in any other defined benefit plan as defined in Section 414(j) of the Internal Revenue Code maintained by the city shall apply as if the total benefits payable under all such defined benefit plans in which the member has been a member were payable from one plan.

2. The 415(c) limit with respect to any member who at any time has been a member in any other defined contribution plan as defined in Section 414(i) of the Internal Revenue Code maintained by the city shall apply as if the total annual additions under all such defined contribution plans in which the member has been a member were payable from one plan.

(Ord. 28886.)

3.36.1510 Payroll deductions and other collections.

The retirement board shall furnish to the director of finance the rates of contributions for, and the amounts of any other contributions payable by each member or other person. The director of finance shall apply such rates of contribution to the compensation of each member, and deduct from such compensation the contributions so determined and payable by each member. All other contributions authorized to be made or required of members or other persons shall be paid by such members or persons to the director of finance. The director of finance shall furnish to the board, upon request therefor, a statement of such contributions so deducted or credited with respect to each member or other person, together with such other information as the board may require. All contributions shall be placed in the retirement fund.

(Prior code § 2903.276; Ord. 27768.)

3.36.1520 Current service contributions.

A. The retirement board shall determine and fix, and from time to time it may change, the amount of monthly or biweekly contributions for current service which must be required of the City of San José and of members of this plan to make and keep this plan and the retirement system at all times actuarially sound. For the purpose of this section, "contributions for current service" for members employed in the fire department shall mean the sum of the normal costs for each actively employed member in the fire department as determined under the entry age normal actuarial cost method, divided by the aggregate current compensation of such members, and "contributions for current service" for members employed in the police department shall mean the sum of the normal costs for each actively employed member in the police department as determined under the entry age normal actuarial cost method, divided by the aggregate current compensation of such members. Rates for current service shall not include any amount required to make up any deficit resulting from the fact that previous rates of contribution made by the city and members were inadequate to fund benefits attributable to service rendered by such members prior to the date of any change of rates, and shall not include any amount required for payment of medical or dental insurance benefits.

B. For the purposes of this section, the "entry age normal actuarial cost method" means the actuarial calculation which divides the actuarial present value of a member's future benefits determined as of the date of the member's employment by the actuarial present value of the member's future salaries determined as of the date of the member's employment in order to determine the member's normal cost rate. The current year normal cost for a member is the member's normal cost rate multiplied by the member's current compensation.

C. The City of San José and the members of this plan shall make and pay all such monthly or biweekly contributions as are found necessary and as are fixed by the retirement board; provided that

the monthly or biweekly contributions required of members, as compared to the monthly or biweekly contributions required of the city, shall at all times be in the ratio of three to eight.

D. With respect to monthly or biweekly contributions required of members, the retirement board shall determine and fix, and from time to time change, the rate of contribution as a percentage of a member's monthly or biweekly compensation. The rate of contribution may be different for members employed in the fire department and members employed in the police department depending on the benefits provided to such members, but it shall be the same percentage for all members in the fire department and shall be the same percentage for all members in the police department. The retirement board shall furnish such information to the director of finance so that payroll deductions may be made as provided in Section 3.36.1510.

(Prior code § 2903.280; Ords. 19690, 23432, 27721.)

3.36.1525 Additional employee contributions and employer contribution offset.

A. Notwithstanding any other provisions of this Part 10 or of Chapter 3.44, members of this plan who are not subject to the provisions of City Charter Section 1111 shall make such additional retirement contributions as may be required by resolution adopted by the city council or by executed agreement with a recognized bargaining unit.

B. Notwithstanding any other provisions of this Part 10, members of this plan who are subject to the provisions of City Charter Section 1111 shall make such additional retirement contributions for fiscal years 2010-2011 as may be required by executed agreement with a recognized bargaining unit or binding order of arbitration.

C. Notwithstanding any other provision of this Part 10, the city shall be entitled to an offset of a percentage, as is determined to be appropriate by the actuary for the police and fire department retirement plan, of the additional employee retirement contributions that are made under subsection A. of this Section 3.36.1525 against the retirement contributions that the city would otherwise be required to make under this Part 10.

(Ord. 28753.)

3.36.1530 Crediting of city contributions to city.

The city shall be credited with any and all contributions made by it to the retirement system or fund pursuant to this chapter.

(Prior code § 2903.278.)

3.36.1540 Crediting of members' contributions to individual accounts - Discharge of claims.

Each member's or other person's contribution deducted or otherwise paid to the director of finance shall be credited by the director of finance to an individual account of the member or other person for whom the contribution was made. Payment of salaries or wages less such contributions is in full discharge of all claims and demands whatsoever for the service rendered by the members during the period covered by such payment, except the benefits afforded by this chapter.

(Prior code § 2903.277; Ord. 25084.)

Sections:

- 3.36.1900 Medical benefits for retired members.
- 3.36.1910 Medical benefits for survivors of members.
- 3.36.1920 Requirements for participation in medical insurance plan.
- 3.36.1925 Reimbursement for Medicare Part B payments.
- 3.36.1930 Allocation of costs of providing medical insurance coverage to members or survivors.
- 3.36.1935 Payment of family coverage premiums in the case of guardianship of minor children.
- 3.36.1940 Eligible medical plan.
- 3.36.1950 Limitation on medical benefits.

3.36.1900 Medical benefits for retired members.

Subject to the provisions of this chapter, a member or former member may be entitled to medical insurance coverage in an eligible medical plan as specified in Section 3.36.1940 if the requirements of subsection A., B., C., or D. of this Section 3.36.1900 are satisfied:

A. The member is retired for service under Part 6 of this chapter or for disability under Part 7 of this chapter and at the time of such retirement either:

1. Is entitled to credit for fifteen or more years of service; or
2. Receives a retirement allowance equal to at least thirty-seven and one-half percent of such member's final compensation.

B. The member is retired pursuant to Section 3.36.760 of this chapter; or

C. The former member separates from city service on or after July 5, 1992, prior to retirement, and satisfies all of the following requirements:

1. At the time of separation from city service the former member is entitled to credit for twenty or more years of service; and
2. The former member elects to allow his or her accumulated contributions to remain in the retirement fund pursuant to Section 3.36.1640; and
3. The former member receives a monthly allowance pursuant to Section 3.36.1640.

D. The former member separated from city service prior to July 5, 1992, and prior to retirement, and satisfies all of the following requirements:

1. At the time of separation from city service the former member was entitled to credit for twenty or more years of service; and

2. The former member elected to allow his or her accumulated contributions to remain in the retirement fund pursuant to Section 3.36.1640; and

3. As of April 1, 2002, the former member was receiving a monthly allowance pursuant to Section 3.36.1640; and

4. The former member is receiving a monthly allowance pursuant to Section 3.36.1640 at the time the former member applies for medical insurance coverage.

(Ords. 21686, 23889, 24093, 25615, 26641.)

3.36.1910 Medical benefits for survivors of members.

Subject to the provisions of this chapter, the surviving spouse, surviving domestic partner, child and/or children, as those terms are defined in Section 3.36.1200 of this chapter, may be entitled to medical insurance coverage in an eligible insurance plan as specified in Section 3.36.1940 if the requirements of subsection A., B., or C. of this Section 3.36.1910 are satisfied:

A. The surviving spouse, surviving domestic partner, surviving child and/or children are receiving a monthly allowance pursuant to Part 8 of this chapter because of the death of a member and:

1. The member either died before receiving retirement pay or was retired for service under Part 6 of this chapter or for disability under Part 7 of this chapter; and

2. At the time of the member's death:

a. The member was entitled to credit for fifteen (15) or more years of service; or

b. The member was retired pursuant to Section 3.36.760 of this chapter; or

c. The surviving spouse, surviving domestic partner, surviving child and/or children were entitled to a survivorship allowance of at least thirty-seven and one-half (37.5) percent of the member's final compensation.

B. The surviving spouse, surviving domestic partner, surviving child and/or children are receiving a monthly allowance pursuant to Part 11 of this chapter because of the death of a former member who separated from city service on or after July 5, 1992, and who was entitled to credit for twenty (20) or more years of service at the time of such separation from service.

C. The surviving spouse, surviving domestic partner, surviving child and/or children are receiving a monthly allowance pursuant to Part 11 of this chapter because of the death of a former member who separated from city service prior to July 5, 1992, and who met all of the requirements of subsection D. of Section 3.36.1900.

(Ords. 21686, 23807, 23889, 24093, 26641, 27712.)

3.36.1920 Requirements for participation in medical insurance plan.

A. A member or former member, as specified in Section 3.36.1900, above, is eligible to participate in a medical insurance plan sponsored by the city provided that the member or former member satisfies the following requirements:

1. The member retires for service or disability pursuant to the provisions of this chapter and at

B. The portion of the premium required to be paid by the surviving spouse shall be deducted from the monthly allowances otherwise payable to the surviving spouse.

(Ord. 26566.)

3.36.1940 Eligible medical plan.

For purposes of this Part 14, members or their survivors may only be entitled to secure medical insurance coverage from an eligible medical plan with which the city has entered into a contract for the provision of hospital, medical, surgical and related benefits as part of the city's benefits to city employees.

(Ord. 21686.)

3.36.1950 Limitation on medical benefits.

A. It is intended that the medical benefits provided by this plan meet the requirements of Internal Revenue Code Section 401(h). Subject to the requirements of the Meyers-Milias-Brown Act (California Government Code Section 3500 et seq.) and Section 1111 of the San José City Charter, the City reserves the right to amend this Part to limit medical benefits as necessary to satisfy the requirements of said Section 401(h).

B. In the event the contributions required to fund the benefits provided by this Part 14 and the dental benefits provided by Part 15, as determined by the board's actuary, would exceed the contribution limit permitted by Internal Revenue Code Section 401(h) and the applicable regulations, the allocation of costs set forth in Section 3.36.1930 shall be adjusted as needed so that the contributions made to fund the portion paid from the medical benefits separate account comply with Section 401(h). The board, in consultation with its actuary, shall determine the adjustment to be implemented until this part is amended pursuant to subsection A. above.

(Ord. 26416.)

Part 15 DENTAL BENEFITS FOR RETIRED MEMBERS AND SURVIVORS

Sections:

- 3.36.2000 Dental benefits for retired members.
- 3.36.2010 Dental benefits for survivors of members.
- 3.36.2020 Requirements for participation in dental insurance plan.
- 3.36.2030 Costs of dental insurance.
- 3.36.2040 Eligible dental plan.
- 3.36.2050 Limitation on dental benefits.

3.36.2000 Dental benefits for retired members.

Subject to the provisions of this chapter, a member or former member of this plan may be entitled to dental insurance coverage in an eligible dental plan as specified in Section 3.36.2040 if the requirements of subsection A., B., C., or D. of this Section 3.36.2000 are satisfied:

A. The member became a member of this plan prior to July 1, 1998, and is retired for service or disability under the provisions of this chapter; or

B. The member became a member of this plan on or after July 1, 1998, and is retired for service under Part 6 of this chapter or for disability under Part 7 of this chapter and at the time of such retirement either:

1. Is entitled to credit for fifteen or more years of service; or

2. Receives a retirement allowance equal to at least thirty-seven and one-half percent of such member's final compensation; or

C. The former member separates from city service on or after July 5, 1992, prior to retirement, and satisfies all of the following requirements:

1. At the time of separation from city service, the former member is entitled to credit for twenty or more years of service; and

2. The former member elects to allow his or her accumulated contributions to remain in the retirement fund pursuant to Section 3.36.1640; and

3. The former member receives a monthly allowance pursuant to Section 3.36.1640.

D. The former member separated from city service prior to July 5, 1992, and prior to retirement, and satisfies all of the following requirements:

1. At the time of separation from city service the former member was entitled to credit for twenty or more years of service; and

2. The former member elected to allow his or her accumulated contributions to remain in the retirement fund pursuant to Section 3.36.1640; and

3. As of April 1, 2002, the former member was receiving a monthly allowance pursuant to Section 3.36.1640; and

4. The former member is receiving a monthly allowance pursuant to Section 3.36.1640 at the time the former member applies for dental insurance coverage.

(Ords. 22279, 24093, 25617, 26641.)

3.36.2010 Dental benefits for survivors of members.

Subject to the provisions of this chapter, the surviving spouse, surviving domestic partner, surviving child and/or children, as those terms are defined in Section 3.36.1200 of this chapter, may be entitled to dental insurance coverage in an eligible dental plan as specified in Section 3.36.2040 if the requirements of subsection A., B., C. or D. are satisfied:

A. The surviving spouse, surviving domestic partner, surviving child and/or children are receiving a monthly survivorship allowance pursuant to Part 8 of this Chapter because of the death of a member

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C. Earnings or losses from said investments shall be credited or debited to the respective cost-of-living fund from which such investments were made.

(Prior code § 2904.515.)

3.44.150 Chapter 3.36 police and fire plan - Effective February 1, 2002.

A. Notwithstanding the other provisions of this chapter to the contrary, effective February 1, 2002, the following provisions shall apply to those persons who receive monthly allowances pursuant to the provisions of the police and fire department retirement plan set forth in Chapter 3.32 or Chapter 3.36 of the San José Municipal Code:

1. "Subject year" shall mean the consecutive twelve months from February 1st of one calendar year to January 31 of the following calendar year, respectively, commencing with the twelve-month period from February 1, 2002, to January 31, 2003.

2. Each retirement allowance and each survivorship allowance which is payable under Chapter 3.32 or Chapter 3.36 in any subject year which begins on or after February 1, 2002, together with any increases or decreases in the amount of any such allowance which were previously made pursuant to this Chapter 3.44, shall be increased by three percent per annum in lieu of the increase otherwise provided in this chapter. The first such three percent increase shall be made on February 1, 2002.

3. Each increase shall become effective beginning with the allowance payable for the month of February in each subject year.

4. The accumulation of the excess of cost-of-living percentages as provided in Section 3.44.040 shall not apply.

B. The provisions of this Chapter 3.44 which are not inconsistent with the provisions of subsection A. shall continue to apply with respect to the persons described in subsection A.

(Ord. 26417.)

3.44.160 Federated city employees retirement system - Effective April 1, 2006.

A. Notwithstanding the other provisions of this chapter to the contrary, effective April 1, 2006, the following provisions shall apply to those persons who receive monthly allowances pursuant to the provisions of the federated city employees retirement system as set forth in Chapter 3.24 or Chapter 3.28 of the San José Municipal Code:

1. Each retirement allowance and each survivorship allowance which is payable under Chapter 3.24 or Chapter 3.28 any subject year which begins on or after April 1, 2006, together with any increases or decreases in the amount of any such allowance which were previously made pursuant to this Chapter 3.44, shall be increased by three percent per annum in lieu of the increase otherwise provided in this chapter. The first such three percent increase shall be made on April 1, 2006.

2. Each increase shall become effective beginning with the allowance payable for the month of April in each subject year.

3. The accumulation of the excess of cost-of-living percentages as provided in Section 3.44.040 shall not apply.

B. In the event the board's actuary determines that there is an increased cost to implement the change to a flat-rate three percent cost-of-living adjustment as provided in this section, such increased cost shall be calculated as a percentage of each member's earned compensation and that percentage rate shall be added to the contributions made by members pursuant to Section 3.44.100. The additional percentage rate imposed pursuant to this paragraph shall be the same for all members.

C. The provisions of this Chapter 3.44 which are not inconsistent with the provisions of Subsections A. and B. shall continue to apply with respect to the persons described in Subsection A.

(Ord. 27652.)

Chapter 3.48

EXHIBIT 5

FULL TEXT OF MEASURE B

**ARTICLE XV-A
RETIREMENT**

**PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO
ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS
WHILE PRESERVING ESSENTIAL CITY SERVICES**

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as:
"The Sustainable Retirement Benefits and Compensation Act."

Section 1501-A: FINDINGS

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter "Essential City Services").

The City's ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City's retirement plans is expected to continue to increase in the near future. In addition, the City's costs for other post employment benefits - primarily health benefits - are increasing. To adequately fund these costs, the City would be required to make additional cuts to Essential City Services.

By any measure, current and projected reductions in service levels are unacceptable, and will endanger the health, safety and well-being of the residents of San Jose.

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Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that post employment benefits be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that post employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

The Charter currently provides that the City retains the authority to amend or otherwise change any of its retirement plans, subject to other provisions of the Charter.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

Section 1502-A: INTENT

This Act is intended to ensure the City can provide reasonable and sustainable post employment benefits while at the same time delivering Essential City Services to the residents of San Jose.

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The City reaffirms its plenary authority as a charter city to control and manage all compensation provided to its employees as a municipal affair under the California Constitution.

The City reaffirms its inherent right to act responsibly to preserve the health, welfare and well-being of its residents.

This Act is not intended to deprive any current or former employees of benefits earned and accrued for prior service as of the time of the Act's effective date; rather, the Act is intended to preserve earned benefits as of the effective date of the Act.

This Act is not intended to reduce the pension amounts received by any retiree or to take away any cost of living increases paid to retirees as of the effective date of the Act.

The City expressly retains its authority existing as of January 1, 2012, to amend, change or terminate any retirement or other post employment benefit program provided by the City pursuant to Charter Sections 1500 and 1503.

Section 1503-A. Act Supersedes All Conflicting Provisions

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, ordinances, resolutions or other enactments.

The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act. The goal is that such ordinances shall become effective no later than September 30, 2012.

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Section 1504-A. Reservation of Voter Authority

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. Neither the City Council, nor any arbitrator appointed pursuant to Charter Section 1111, shall have authority to agree to or provide any increase in pension and/or retiree healthcare benefits without voter approval, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

Section 1505-A. Reservation of Rights to City Council

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this Act, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and at any time, or from time to time, to amend or otherwise change any retirement plan or plans or establish new or different plan or plans for all or any officers or employees subject to the terms of this Act.

Section 1506-A. Current Employees

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (Section 8).

(b) Unless they voluntarily opt in to the Voluntary Election Program ("VEP," described herein), Current Employees shall have their compensation adjusted through additional retirement contributions in increments of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs to

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amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future. These contributions shall be in addition to employees' normal pension contributions and contributions towards retiree healthcare benefits.

(c) The starting date for an employee's compensation adjustment under this Section shall be June 23, 2013, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(d) The compensation adjustment through additional employee contributions for Current Employees shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(e) The compensation adjustment shall be treated in the same manner as any other employee contributions. Accordingly, the voters intend these additional payments to be made on a pre-tax basis through payroll deductions pursuant to applicable Internal Revenue Code Sections. The additional contributions shall be subject to withdrawal, return and redeposit in the same manner as any other employee contributions.

Section 1507-A: One Time Voluntary Election Program ("VEP")

The City Council shall adopt a Voluntary Election Program ("VEP") for all Current Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of

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IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) acknowledging that the employee irrevocably relinquishes his or her existing level of retirement benefits and has voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for that prior service shall be preserved for payment at the time of retirement.

(b) Pension benefits under the VEP shall be based on the following limitations:

- (i) The accrual rate shall be 2.0% of "final compensation", hereinafter defined, per year of service for future years of service only.
- (ii) The maximum benefit shall remain the same as the maximum benefit for Current Employees.
- (iii) The current age of eligibility for service retirement under the existing plan as approved by the City

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Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 57 for employees in the Police and Fire Department Retirement Plan and the age of 62 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

- (iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually on July 1 of each year starting July 1, 2017.
- (v) Cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose - San Francisco - Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.
- (vi) "Final compensation" shall mean the average annual pensionable pay of the highest three consecutive years of service.
- (vii) An employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time

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worked (including paid leave, but not including overtime).

- (c) The cost sharing for the VEP for current service or current service benefits ("Normal Cost") shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan.
- (d) VEP Survivorship Benefits.
- (i) Survivorship benefits for a death before retirement shall remain the same as the survivorship benefits for Current Employees in each plan.
- (ii) Survivorship benefits for a spouse or domestic partner and/or child(ren) designated at the time of retirement for death after retirement shall be 50% of the pension benefit that the retiree was receiving. At the time of retirement, retirees can at their own cost elect additional survivorship benefits by taking an actuarially equivalent reduced benefit.
- (e) VEP Disability Retirement Benefits.
- (i) A service connected disability retirement benefit, as hereinafter defined, shall be as follows:
- The employee or former employee shall receive an annual benefit based on 50% of the average annual pensionable pay of the highest three consecutive years of service.

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- (ii) A non-service connected disability retirement benefit shall be as follows:

The employee or former employee shall receive 2.0% times years of City Service (minimum 20% and maximum of 50%) based on the average annual pensionable pay of the highest three consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

- (iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

Section 1508-A: Future Employees - Limitation on Retirement Benefits - Tier 2

To the extent not already enacted, the City shall adopt a retirement program for employees hired on or after the ordinance enacting Tier 2 is adopted. This retirement program - for new employees - shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

- (a) The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan. If the City provides a defined benefit plan, the City's cost of such plan shall not exceed 50% of the total cost of the Tier 2 defined benefit plan (both normal cost and unfunded liabilities). The City may contribute to a defined contribution or other retirement plan only when and to the extent

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the total City contribution does not exceed 9%. If the City's share of a Tier 2 defined benefit plan is less than 9%, the City may, but shall not be required to, contribute the difference to a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than the age of 55 in the Federated City Employees' Retirement System and the age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose - San Francisco - Oakland U.S. Bureau of Labor Statistics Index, CPI-U, December to December), capped at 1.5% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, "final compensation" shall mean the average annual earned pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 2% per year of service, not to exceed 65% of final compensation.

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- (f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours of regular time worked (including paid leave, but not including overtime).
- (g) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System or at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.
- (h) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan subject to this section shall create a vested right to any benefit.

Section 1509-A: Disability Retirements

- (a) To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.
- (b) An employee is considered "disabled" for purposes of qualifying for a disability retirement, if all of the following is met:
- (i) An employee cannot do work that they did before; and

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(ii) It is determined that

1) an employee in the Federated City Employees' Retirement System cannot perform any other jobs described in the City's classification plan because of his or her medical condition(s); or

2) an employee in the Police and Fire Department Retirement Plan cannot perform any other jobs described in the City's classification plan in the employee's department because of his or her medical condition(s); and

(iii) The employee's disability has lasted or is expected to last for at least one year or to result in death.

(c) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

(d) The City may provide matching funds to obtain long term disability insurance for employees who do not qualify for a disability retirement but incur long term reductions in compensation as the result of work related injuries.

(e) The City shall not pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to the service connected disability retirement allowance to eliminate duplication of benefits for the same cause of disability, consistent with the current provisions in the Federated City Employees' Retirement System.

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Section 1510-A: Emergency Measures to Contain Retiree Cost of Living Adjustments

If the City Council adopts a resolution declaring a fiscal and service level emergency, with a finding that it is necessary to suspend increases in cost of living payments to retirees the City may adopt the following emergency measures, applicable to retirees (current and future retirees employed as of the effective date of this Act):

(a) Cost of living adjustments ("COLAs") shall be temporarily suspended for all retirees in whole or in part for up to five years. The City Council shall restore COLAs prospectively (in whole or in part), if it determines that the fiscal emergency has eased sufficiently to permit the City to provide essential services protecting the health and well-being of City residents while paying the cost of such COLAs.

(b) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1.5% for Current Employees who opted into the VEP and 1.5% for employees in Tier 2.

Section 1511-A: Supplemental Payments to Retirees

The Supplemental Retiree Benefit Reserve ("SRBR") shall be discontinued, and the assets returned to the appropriate retirement trust fund. Any supplemental payments to retirees in addition to the benefits authorized herein shall not be funded from plan assets:

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Section 1512-A: Retiree Healthcare

- (a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.
- (b) **Reservation of Rights.** No retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision.
- (c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

Section 1513-A: Actuarial Soundness (for both pension and retiree healthcare plans)

- (a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.
- (b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually

February 8, 2012

through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.

- (c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:
- (i) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and
 - (ii) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.
- (d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:
- (i) the funding objectives and actuarial assumptions of the plans; and
 - (ii) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.

February 8, 2012

Section 1514-A: Savings

In the event Section 6 (b) is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 4% of compensation each year, capped at a maximum of 16% of pay.

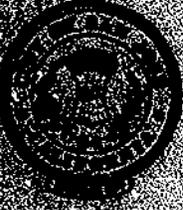
Section 1515-A: Severability

(a) This Act shall be interpreted so as to be consistent with all federal and state laws, rules and regulations. The provisions of this Act are severable. If any section, sub-section, sentence or clause ("portion") of this Act is held to be invalid or unconstitutional by a final judgment of a court, such decision shall not affect the validity of the remaining portions of this amendment. The voters hereby declare that this Act, and each portion, would have been adopted irrespective of whether any one or more portions of the Act are found invalid. If any portion of this Act is held invalid as applied to any person or circumstance, such invalidity shall not affect any application of this Act which can be given effect. In particular, if any portion of this Act is held invalid as to Current Retirees, this shall not affect the application to Current Employees. If any portion of this Act is held invalid as to Current Employees, this shall not affect the application to New Employees. This Act shall be broadly construed to achieve its stated purposes. It is the intent of the voters that the provisions of this Act be interpreted or implemented by the City, courts and others in a manner that facilitates the purposes set forth herein.

February 8, 2012

(b) If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective.

EXHIBIT 6



CITY OF SAN JOSE, CALIFORNIA

STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA)
CITY OF SAN JOSE)

I, Andrea M. Pavone, City Clerk and Ex-Officio Clerk of the Council of the and for the City of San Jose, in said County of Santa Clara, and State of California, do hereby certify that "Ordinance No. 22263," the original copy of which is attached hereto, was passed for publication of title on the 3rd day of June, 1986, was published in accordance with the provisions of the Charter of the City of San Jose, and was given final reading and adopted on the 17th day of June, 1986, by the following vote:

AYES: ALVARADO, BEALL, HAMMER, IANNI, LEWIS, PUTNAM, RYDEN, SAUSED, STABILE, WILLIAMS; McENERY

NOES: NONE

ABSENT: NONE

DISQUALIFIED: NONE

Said ordinance is effective on July 18, 1986

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the City of San Jose, this 20th day of June, 1986.

(SEAL)

Andrea M. Pavone
ANDREA M. PAVONE
CITY CLERK AND EX-OFFICIO
CLERK OF THE CITY COUNCIL

IRG:SD:ldw
04/17/86
p.5

ORDINANCE NO. 22263

AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING SECTION 3.28.340 OF CHAPTER 3.28 OF TITLE 3 OF THE SAN JOSE MUNICIPAL CODE TO PROVIDE FOR DISPOSITION OF EARNINGS OF THE FEDERATED EMPLOYEES' RETIREMENT SYSTEM FUND AND FOR THE ESTABLISHMENT OF A SUPPLEMENTAL RETIREE BENEFITS RESERVE AND AMENDING SECTION 3.28.950 OF CHAPTER 3.28 OF TITLE 3 OF THE SAN JOSE MUNICIPAL CODE REGARDING ADMINISTRATIVE COSTS OF THE SYSTEM.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Section 3.28.340 of Chapter 3.28 of Title 3 of the San Jose Municipal Code is hereby amended to read as follows:

3.28.340 Disposition of Earnings.

A. Definitions

For purposes of this Section 3.28.340, the terms listed herein shall have the following meanings:

1. "Actuarial rate" means the interest assumption rate determined by the Board after the most recent actuarial investigation made under the provisions of Section 3.28.160.
2. "Net earnings" means the earnings of the retirement fund after accounting for any direct investment losses recognized during the year, less the amounts taken from the earnings as specified in Section 3.28.950.
3. "Excess earnings" means net earnings which are in excess of earnings based upon the actuarial rate.

B. Credit to Contributions, Reserves and Accounts

1. Interest earned on any cash deposit made in a bank by the Director of Finance and income on other assets constituting a part of the fund shall be credited to the fund as received.

2. The Board may, in its discretion, apply to reduce the book value of securities purchased, all or part of the excess of the proceeds of the sale of securities over the book value of the securities sold, provided:

- a) The purchase of securities is made with those proceeds; and
- b) The terms of both securities from the date of sale or purchase, as the case may be, to the respective dates of maturity do not differ by more than three (3) years.

3. At the end of each fiscal year, interest and income shall be credited to contributions and reserves (except the Contingency Reserve described in subsection C and the Benefits Payable Reserve described in subsection E) at the actuarial rate or, if the actual rate earned during the fiscal year is less than the actuarial rate, at the actual rate earned by the fund.

C. Contingency Reserve.

1. Earnings of the retirement fund in excess of the total interest and income credited to contributions and reserves pursuant to subsection B shall remain in the fund as a reserve (the Contingency Reserve) against deficiencies in interest earnings, losses on investments, or payments made pursuant to subsection B.2., if applicable.

2. Within ninety (90) days from and after July 1st of each calendar year, commencing with the calendar year 1981, the Board shall determine, and by written resolution declare, the amount of money in the Contingency Reserve which is in excess of three percent (3%) of the total moneys of the retirement fund (excluding moneys in said Contingency Reserve) on said date.

3. Commencing with the calendar year 1986, the amount of money in the Contingency Reserve declared by the Board to be in excess of three percent of the total moneys in the retirement fund shall be applied as provided in subsections D and E.

4. No funds in the Contingency Reserve shall be available for the payment of benefits.

D. Supplemental Retiree Benefit Reserve

1. The Board shall establish a Supplemental Retiree Benefit Reserve in the retirement fund. The Supplemental Retiree Benefit Reserve shall be used only for the benefit of retired members, survivors of members, and survivors of retired members.

2. Commencing with the calendar year 1986, after crediting all accounts pursuant to Section 3.28.340 B and C, there shall be an annual transfer into the Supplemental Retiree Benefit Reserve of ten percent (10%) of the balance of excess earnings, as defined in subsection A.3.

3. Upon the request of the City Council or on its own motion, the Board may make recommendations to the City Council regarding the distribution, if any, of the Supplemental Retiree Benefit Reserve to retired members, survivors of members, and survivors of retired

members. The City Council, after consideration of the recommendation of the Board, shall determine the distribution, if any, of the Supplemental Retiree Benefit Reserve to said persons.

E. After the sequential application of Sections 3.28.340 B through D, remaining net earnings shall, without being credited to any contributions, be available in the retirement fund (as the Benefits Payable Reserve) for the payment of benefits payable from said fund. No amount other than the amount specified in subsections B and D shall be credited to the Supplemental Retiree Benefit Reserve.

SECTION 2. Section 3.28.950 of Chapter 3.28 of Title 3 of the San Jose Municipal Code is hereby amended to read as follows:

3.28.950 Administrative Costs of System.

All administrative costs of this system, as determined and approved by the Board, except staff salaries and indirect labor costs, shall be borne by and paid from the retirement fund.

PASSED FOR PUBLICATION OF TITLE this 3rd day of June, 1986, by the following vote:

AYES: ALVARADO, BEALL, HAMMER, IANNI, LEWIS, PUTNAM, RYDEN, SAUSEDI, STABILE, WILLIAMS; McENERY

NOES: NONE

ABSENT: NONE


THOMAS McENERY, Mayor

ATTEST:


ANDREA M. PAVONE, City Clerk

EXHIBIT 7



CITY CLERK

CITY OF SAN JOSÉ, CALIFORNIA

Office of the City Clerk
801 North First Street, Room 116
San José, California 95110
Telephone (408) 277-4424
FAX (408) 277-3285

STATE OF CALIFORNIA)
COUNTY OF SANTA CLARA)
CITY OF SAN JOSE)

I, Patricia L. O'Hearn, City Clerk and Ex-Officio Clerk of the Council of and for the City of San Jose, in said County of Santa Clara, and State of California, do hereby certify that "**Ordinance No. 26536**" the original copy of which is attached hereto, was passed for publication of title on the **11th day of December, 2001**, was published in accordance with the provisions of the Charter of the City of San Jose, and was given final reading and adopted on the **18th day of December, 2001**, by the following vote:

AYES: CAMPOS, CHAVEZ, CORTESE, DANDO, DIQUISTO, LeZOTTE
REED, WILLIAMS, YEAGER; GONZALES

NOES: NONE

ABSENT: SHIRAKAWA

DISQ: NONE

Said ordinance is effective as of **January 18, 2002**.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the City of San Jose, this **19th day of December, 2001**.

(SEAL) *Patricia L. O'Hearn*
PATRICIA L. O'HEARN
CITY CLERK AND EX-OFFICIO
CLERK OF THE CITY COUNCIL

ORDINANCE NO. 26536

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING
CHAPTER 3.36 OF TITLE 3 OF THE SAN JOSE MUNICIPAL
CODE BY ADDING SECTION 3.36.580 TO ESTABLISH A
SUPPLEMENTAL RETIREE BENEFIT RESERVE IN THE POLICE
AND FIRE DEPARTMENT RETIREMENT PLAN**

WHEREAS, the Police and Fire Department Retirement Plan provides benefits for police officers, fire fighters, and their beneficiaries; and

WHEREAS, the Board of Administration for the Plan has received a series of reports from its actuary regarding the implementation of a reserve within the retirement fund to provide benefits to supplement those provided by the Plan; and

WHEREAS, the Board of Administration has recommended that the Plan be amended to establish a Supplemental Retiree Benefit Reserve to provide such supplemental benefits; and

WHEREAS, the City, the San José Police Officers Association and International Association of Fire Fighters Local 230 concur in the Board's recommendation and have waived their rights to meet and confer on the matter;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSÉ:

SECTION 1. Part 4 of Chapter 3.36 of Title 3 of the San José Municipal Code is amended by adding a section to be numbered and entitled and to read as follows:

3.36.580 Supplemental Retiree Benefit Reserve.

A. Establishment and Purpose.

1. The Board shall establish a reserve in the retirement fund to be known as the Supplemental Retiree Benefit Reserve or SRBR.
2. The purpose of the SRBR shall be to provide a source of funding for benefits to supplement those benefits otherwise provided by this Plan or the Chapter 3.32 plan to former members of such plans who are receiving

benefits, survivors of such former members, and survivors of members who die prior to receiving benefits from this Plan.

B. Funding.

1. The initial amount allocated to the SRBR shall be ten percent (10%) of the Plan's prefunded actuarial accrued liability as of June 30, 1999, as determined by the Board's actuary. The Board's actuary shall calculate the initial funding amount without regard to any Plan amendments that became effective after June 30, 1999.
2. Each June 30, beginning June 30, 2000, there shall be allocated to the SRBR the investment earnings attributable to the balance in the SRBR as of June 30 of the calendar year in which the allocation is made. Investment earnings credited to the SRBR shall be calculated as though the transfer required by paragraphs 3 and 4 of this subsection B. had been made on the immediately following July 1 (first allocation on July 1, 2000) regardless of the actual date such transfer is made. In the event the investment earnings for the retirement fund are less than zero, no investment earnings shall be allocated to the SRBR and no reduction shall be made to the SRBR balance except as provided in subsection C below.
3. The Board shall determine the excess earnings for the twelve months ending June 30, 2000, and for the twelve months ending June 30, 2001, and shall transfer to the SRBR ten percent (10%) of the excess earnings for each such twelve-month period.
4. Within ninety days from and after receipt of audited financial statements for each fiscal year, commencing with the year 2002, the Board shall determine, and by written resolution declare, the excess earnings as of June 30 in each such year, and shall transfer ten percent (10%) of such excess earnings to the SRBR. The excess earnings shall be added to the SRBR principal and shall not be available for distribution under subsection D.

C. Reduction of SRBR Balance.

1. If the City's contribution rate, as determined by the Board's actuary during any actuarial valuation performed after June 30, 1999, will increase as a result of poor investment earnings in the retirement fund, there shall be transferred from the SRBR to the regular retirement fund and the cost-of-living fund an amount equal to ten percent (10%) of the City's increased contributions for the first twelve months following the increase in the contribution rates. Such transfers shall be limited to those situations where the increase in the City's contribution rate is attributable to poor investment earnings; no such transfer shall be made for any increase in the City's contribution rate that is due to any factor other than poor investment earnings including, but not limited to, increases in medical or dental premium costs, enhancements to benefits provided under the Plan, or changes in the actuarial assumptions.
2. Notwithstanding paragraph 1 of this subsection C, the amount transferred from the SRBR because of the increase in the City's contributions shall not exceed five percent (5%) of the accrued balance in the SRBR as of the date of the actuarial valuation.

D. Distributions.

1. The Board shall make an initial distribution from the SRBR during calendar year 2002.
2. Beginning in calendar year 2003, the Board shall make an annual distribution from the SRBR.
3. The initial distribution from the SRBR shall be made solely to former members of this Plan or the Chapter 3.32 plan who are receiving benefits as of June 30, 2001, and survivors (of such former members or of members who died prior to receiving benefits from this Plan) who are receiving benefits as of June 30, 2001; provided, however, that if a member or former member died after June 30, 2001, but before the initial

distribution, the survivor shall be deemed to have been receiving benefits as of June 30, 2001.

4. All subsequent annual distributions from the SRBR shall be made solely to former members of this Plan or the Chapter 3.32 plan who are receiving benefits as of the June 30 immediately preceding the distribution date and survivors (of such former members or of members who died prior to receiving benefits from this Plan) who are receiving benefits as of said June 30.
 5. The Board shall develop a methodology for distributions from the SRBR such that supplemental benefits provide a greater benefit for those persons who have been in benefit status for a longer period of time and those persons receiving the lowest monthly benefit payments. Upon the approval of the methodology by the City Council, the Board shall make distributions in accordance with such methodology.
 6. Except as required by subsection C or in the case of the termination of this Plan, the Board shall not transfer or distribute funds in the SRBR if such transfer or distribution would reduce the SRBR principal.
- E. Definitions. For the purpose of this Section 3.36.580, the terms listed herein shall have the following meanings:
1. "Excess earnings" means the earnings of the retirement fund that remain after interest has been credited to the SRBR as provided in paragraph B.2. and the actuarial assumed earnings rate adopted by the Board (and in effect on June 30 of the year in which the SRBR calculation is performed) has been credited to other reserves.
 2. "Former member" means a person who has retired under the provisions of this Chapter or Chapter 3.32 or a person who separated from City service without retiring but left his or her contributions on deposit in the retirement fund.

3. "Investment earnings" means the earnings of the retirement fund during the twelve months ending June 30 as determined by the Board's actuary using the same methodology used to determine the value of assets for the actuarial valuation. In the case of investment earnings attributable to the SRBR, the application of the methodology shall begin as of July 1, 1999.

PASSED FOR PUBLICATION OF TITLE this 11 day of December, 2001, by the following vote:

AYES: CAMPOS, CHAVEZ, CORTESE, DANDO, DIQUISTO, LeZOTTE, REED, SHIRAKAWA, WILLIAMS, YEAGER; GONZALES

NOES: NONE

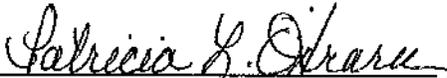
ABSENT: NONE

DISQUALIFIED: NONE



RON GONZALES
Mayor

ATTEST:



PATRICIA L. O' HEARN
City Clerk

SAN JOSE POST-RECORD

- SINCE 1910 -

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SAN JOSE CITY CLERK
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SAN JOSE, CA - 95110

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PROOF OF PUBLICATION

(2015.5 C.C.P.)

State of California)
County of Santa Clara) ss

Notice Type: GORSJ SAN JOSE ORDINANCE (1 PUB)

Ad Description: ORDINANCE NO. 26536

SJ#: 329871

ORDINANCE NO. 26536
An Ordinance of the City of San Jose
amending Chapter 3.36 of Title 3 of the
San Jose Municipal Code by adding
Section 3.36.590 to establish a
Supplemental Retiree Benefit Reserve in
the Police and Fire Department
Retirement Plan
Passed for publication of title this 11th
day of December, 2001, by the following
vote:
AYES: Campos, Chavez, Cortese, Dando,
DiQuisto, LaZotte, Reed, Shirakawa,
Williams, Yeager, Gonzales
NOES: None
ABSENT: None
DISQUALIFIED: None
RON BONZALES, Mayor
ATTEST:
Patricia L. O'Hearn, City Clerk
12/14/01

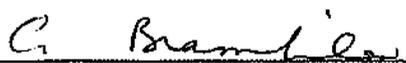
SJ- 329871#

I am a citizen of the United States; I am over the age of eighteen years, and not a party to or interested in the above entitled matter. I am the principal clerk of the printer and publisher of the SAN JOSE POST-RECORD, a newspaper published in the English language in the City of San Jose, and adjudged a newspaper of general circulation as defined by the laws of the State of California by the Superior Court of the County of Santa Clara, State of California, under date of February 3, 1922, Case No. 27,844. That the notice, of which the annexed is a printed copy, has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

12/14/2001

Executed on: 12/14/2001
At Los Angeles, California

I certify (or declare) under penalty of perjury that the foregoing is true and correct.



Signature

EXHIBIT 8

OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

PEGGY J. CLAYPOOL, et al.,

Petitioners,

v.

PETE WILSON, GOVERNOR
OF THE STATE OF CALIFORNIA,
et al.,

Respondents.

No. 3 Civ. CO11580

COPY

ON WRIT OF MANDAMUS

BRIEF OF NATIONAL CONFERENCE ON
PUBLIC EMPLOYEE RETIREMENT SYSTEMS AND
SAN JOSE POLICE AND FIRE DEPARTMENT
RETIREMENT PLAN
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

JOAN R. GALLO, City Attorney
SUSAN DEVENCENZI, Senior
Deputy City Attorney
Office of the City Attorney
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and

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(512) 246-5699 (Telecopier)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

PEGGY J. CLAYPOOL, et al.,

Petitioners,

v.

PETE WILSON, GOVERNOR
OF THE STATE OF CALIFORNIA,
et al.,

Respondents,

No. 3 Civ. C011580

TO THE HONORABLE ROBERT PUGLIA, PRESIDING JUSTICE AND TO THE
HONORABLE ASSOCIATE JUSTICES OF THE THIRD DISTRICT COURT OF
APPEAL:

STATEMENT OF THE CASE

This is an original proceeding in the Third District Court of Appeal, instituted by a Petition for Writ of Mandamus and Request for Stay filed July 30, 1991. Petitioners challenge the constitutionality of Assembly Bill 702, Statutes of 1991, chapter 83, which became effective June 1991, and request a stay order regarding the transfer of actuarial determinations and fiduciary duties to the Governor-appointed actuary.

INTEREST AND POSITION OF AMICI

The National Conference on Public Employee Retirement Systems (NCPERS) is an organization of some 400 individual member pension funds, comprised of municipal, county, and state pension entities, whose combined representative asset base is approximately \$500 billion and whose membership totals 5 million. NCPERS is an advocate of all representative members in the pursuit and preservation of pension assets for the benefit of plan participants and their beneficiaries. National Conference on Public Employee Retirement Systems, Position Paper on the Hostile Takeover of Public Pension Funds, presented at Sept. 9, 1991 conference in Washington, D.C.

The San Jose Police and Fire Department Retirement Plan (San Jose Plan) is a governmental plan and a member of the National Conference on Public Employee Retirement Systems. The Plan has an asset base in excess of \$588 million and has investments in national and international markets. It has more than 1,800 active public safety members and currently pays retirement and survivorship benefits to over 600 beneficiaries.

On the forefront of current issues impacting the public pension plan industry, none other is more threatening than the raid of pension assets by local and state governments. Both NCPERS and the San Jose Plan have an interest in the correct decision of the issues involving the interpretation and

validity of AB 702 and in that capacity have an interest in assisting the work of this Court.

Amici will address the issue of the dangerous precedent set for all California public pension funds, as well as the approximately 2,000 other retirement systems across the nation, if AB 702 is declared constitutional. In addition, Amici will argue that AB 702 and any similar government action may negatively impact the qualification status of public pension plans under the Internal Revenue Code. Amici also will address the conflict raised by adding to the retirement system's fiduciary duties the necessity of "minimizing employer costs of providing benefits." Mindful of their position as amici, NCPERS and the San Jose Plan will not repeat the constitutional arguments made by Petitioners and the Board of Administration of the Public Employees' Retirement System of the State of California; however, the arguments that follow are premised on those sound and well established constitutional and legal principles, which mandate invalidating AB 702. Amici therefore file this brief in support of the position of the Petitioners.

I. Upholding AB 702 Against Constitutional Challenges Establishes Dangerous Precedent for all Public Employee Pension Plans

A. Overview of Public Employee Retirement Systems

Membership in public pension funds is estimated to be over 15 million. Light, The Power of the Pension Funds, Bus. Wk., Nov. 6, 1989, at 154. There are 11.8 million participants (meaning current workers) and 3.7 million beneficiaries (meaning retirees and their survivors) receiving benefits in the 2,414 public retirement systems in the United States. "Employment Retirement Systems of State and Local Governments," Table 9 in 4 Government Finances (1987 Census of Governments, issued Dec. 1989). With accumulated assets of over \$720 billion, these retirement system funds are increasingly being looked to as a source of revenue by financially strapped states and local governments. Lantry & Williams, Contract Theory Prevents Government Raid on Pension Fund, at p. 1, to be published in N. Atl. Reg. Bus. L. Rev. (1991); see also "Employment Retirement Systems of State and Local Governments," supra, at Table 9. While assets of over \$500 billion seems huge, it translates into an average of \$7,402 annually for each of the 3.7 million retirees. "Employment Retirement Systems of State and Local Governments," supra, at "Findings," p. XII (based on 1987 figures).

Recently, a subcommittee of the House Committee on Education and Labor undertook a study of the issue of control over public employment pension plans. House of Representatives Committee on Education and Labor, Public Pension Plans: The Issues Raised Over Control of Plan Assets, p. vi (U.S. Gov't Printing Office 1990)(not officially adopted by committee or subcommittee). The Committee report concluded that over the last ten years, concerns regarding public pension plans have shifted from funding inadequacy to control of the \$720 billion in assets held in these public pension plan trust funds. The existence of these large funds have caused governments currently strapped for revenue to question the necessity of making contributions to well funded plans to pay future pensions. Id. at p. v.

There is a certain irony to the fact that the retirement systems' success has invited trouble. Investor's Daily, June 24, 1991, at 1. In the 1970's pension plans were subjected to scrutiny and criticized for being underfunded. Aided by the bull markets of the 1980's, public retirement systems addressed and corrected the underfunding problem and increased the assets of public pension funds from \$250 billion in the mid-1980's to over \$720 billion currently. However, those same public retirement systems now find themselves facing state and local governments who have not fared or managed as well economically and who therefore have substantial budget deficits, which severely constrain their spending abilities. House of

Representatives Committee on Education and Labor, Public Pension Plans, supra, at p. vi.

The result? A raid on the pension funds by numerous state and local governments -- the primary form of the raid being a reduction in employer contributions to the system. Through Assembly Bill 702, California rather uniquely -- and brazenly, as Petitioners note -- has combined reducing its contributions to the public retirement systems with actually appropriating funds from the control of the CalPERS Board, whose members are trustees of the PERS fund for the benefit of the plan participants and beneficiaries. This action, if allowed to pass constitutional muster by the California courts, sets a dangerous precedent of enormous magnitude. San Francisco Chronicle, August 20, 1991, at A14.

There are 201 state governments with public retirement systems and 2,213 local governmental entities with systems. "Employment Retirement Systems of State and Local Governments," supra, at p. XI. If it is constitutional for the major debtor of each of these 2,414 systems to attach or offset retirement funds to any extent, then not one of those retirement funds is secure. If it is constitutional to do what the California Governor and Legislature did in AB 702, then the next question is: when and where will these "appropriations" of retirement funds held in trust for workers and retirees stop; and, if they do not stop, what is the economic effect on the public pension fund system?

B. Economic Impact

There are two issues with regard to the economic impact of AB 702: (1) its effect on the integrity of the retirement system; and (2) its effect on the individual plan participants and beneficiaries or retirees.

1. Economic Impact on the Retiree

One certain economic impact on the individual retiree is that the COLA scheme provided under AB 702 is unlikely to provide the level of benefits with the same dependable regularity or to the same level as that of the IDDA/EPDA program. (Decl. of Ed Friend, p. 3, at Vol. II, p. 159 of Petitioners' Writ). In addition, if the inflation rate averages above 2% annually, the actual purchasing value of a pension benefit will gradually erode. (Decl. of Ed Friend, p. 4). For example, with a 5% inflation rate, an average pension of \$10,000 annually will erode to 75% of its original purchasing power in 12 years. (Decl. of Ed Friend, p. 5).

Inflation rates for the past few years have been hovering around 5%; however, historically, there have been peaks of inflation, up to 11% in 1974, 10.9% in 1979, and 14.3% in 1980. (Table I, attached as Exhibit 9 to the Decl. of Robert D. Walton, at Vol. II, p. 96 of Petitioners' Writ). If the inflation rate goes above 5%, the number of retirees who fall below the 75% purchasing power floor will greatly increase.

(Decl. of Ed Friend, p. 8). In the last 25 years, inflation has been above 5% in 13 of those years. (Decl. of Robert D. Walton, p. 3; Table I attached as Exhibit 9 to Petitioners' Brief, at Vol. II, p. 101 of Petitioners' Writ).

If inflation stays at 5% and if salaries do not increase and if investment returns remain at the high levels of the bull markets, then the effect of AB 702 may not be disastrous. However, if all those factors do not remain at the status quo level, then the potential is there for a devastating impact on the nearly 1 million CalPERS members and beneficiaries. (Decl. of Chris Nishioka, p.2, at Vol. II, p. 3 of Petitioners' Writ; Decl. of Gary M. Jones, p. 1, at Vol. II, p. 1 of Petitioners' Writ). Moreover, if assets are taken to address governmental budget deficits, retirees are left without any kind of hedge against inflation. Pensions & Investment Age, July 8, 1991, at 39.

Even if those factors remain the same, at the very least the integrity of the system is impaired, as is the members' sense of security with regard to their retirement futures. By analogy, the CalPERS participants and beneficiaries are like homeowners who invested well and have accumulated enough money to pay off their house mortgage in order to provide them with security in their golden years -- just as CalPERS has managed the fund well enough to build up enough reserve monies to fund cost of living adjustment accounts to provide their members with security. Then the State of California comes in and says,

"I know you have made yourselves secure for the future, but I need money right now; so I need to mortgage your house in order to get that money; but rest assured that I'll make the interest payments for you so you are not really out any money."

The State has taken that homeowner's assets and security -- although it is true that the homeowner's monthly cash flow is not immediately affected. Something perhaps far more important is gone. The State has tendered an I.O.U. -- which is an I.O.U. from an entity that for reasons of political pressure is not willing to make tough choices. Thus, the homeowner -- and by analogy, the pension assets -- are left in an extremely vulnerable position in the midst of uncertain economic times. That vulnerability is compounded when the State tenders its I.O.U. from the posture of a deficiency budget. This "appropriation" can have a destabilizing effect on public retirement funds for years and creates a situation that the taxpayers may ultimately have to bail out the government -- as they have had to do with the crisis in the savings and loan industry.

Even if this raid on pension funds does not have an immediate effect on current retirees, the state is borrowing from the future to pay for today's spending. Chicago Sun Times, Sept. 1, 1991. The short-term effect? Delaying or reducing employer contributions in order to balance the budget today simply postpones the day of reckoning. Those shortfalls will eventually have to be made up by taxpayers when

the number of retirees increases, as is certain to do. People over 65 make up the fastest growing segment of the American population, multiplying at more than twice the rate of the rest of the population. Clark, "The Aging of America: The Shape of Things to Come," in Employee Benefit Issues 553, 555 (1989). If the shortfall is not made up, it is inescapable that tomorrow's retirees will face large reductions in their benefits. Chicago Sun Times, Sept. 1, 1991; New York Times, July 21, 1991, sect. 1, p.1, col. 1.

2. Economic Impact on the Integrity of the System

The State's raid on the CalPERS fund may not have an immediate effect on current benefits, but the other 14 million state and local government employees are watching warily, worried about the effect on the long-term security of their pensions. New York Times, sect. 1, p. 1., col. 1.

Many public employees enter government service with the expectation of a pension which will be adequate to meet their retirement needs. Thus, many civil servants work for lower wages than they otherwise would as a trade-off for some retirement security. Lantry & Williams, supra, at p. 3.

Pensions are in effect pay withheld in order to induce long-term faithful services. Kern v. Long Beach, 179 P.2d 788 (1947). One of the main objectives in providing pensions is to induce competent persons to enter and remain in public employment. Id. Thus, retirement plans create greater

employee loyalty -- which results in a more stable and contented work force. Lantry & Williams, supra, at p. 16.

The court in Dadisman noted that its legislature was not the first to "yield to the temptation of diverting pension funds in hard economic times." Dadisman v. Moore, 384 S.E.2d 816, 823 (W. Va. 1988). However, the court found little merit to the argument that the State's gross underfunding of its pension fund was merely technical since current retirement benefits were being paid. The court said that even when a reduction in the fund does not result in out-of-pocket losses for plan participants, they still have a vested interest in the integrity of the fund to pay future benefits. Id.; see also Valdes v. Cory, 139 Cal. App. 3d 773 (1983).

The income of a public retirement fund generally comes from three sources: employer contributions, employee contributions, and investment earnings. Lantry & Williams, supra at 1. At present, 71% of the benefits currently being paid by CALPERS are financed by investment returns on the fund; 18%, by employer contributions; and 11%, by employee contributions. (Decl. of Ed Friend, p. 5) If the State is not going to contribute for the approximately 3 years that it will take to deplete the \$1.6 billion IDDA/EPDA account, that 18% must come from somewhere and that somewhere is the corpus of the trust, the retirement fund. Roughly \$500 million a year will be taken out in employer contributions, which means that the fund will be reduced by about 1% a year.

The loss through reduced or no employer contributions is compounded each year because no interest can be earned on money not in the fund. Pensions & Investment Age, August 19, 1991, at 2. Especially if there is a downturn in the securities market at the same time, this removal of funds from the trust corpus could jeopardize retirement benefits. Los Angeles Times, June 16, 1991, at 1, col. 2, part D. As Petitioners noted and Amici agree, a retirement system has to accumulate current contributions in order to generate sufficient reserves to make future benefit payments and preserve the structural integrity of the system. (Decl. of Stephen Young, at Vol. II, p. 183).

In establishing a retirement plan, a public employer is promising to pay benefits which will come due in the future. P. Zorn, Survey of State Retirement Systems Covering General Employees and Teachers 21 (1990); however, a raid on those funds is a breach of that promise. AB 702 amounts to a short-term raid on assets, with no attention to long-term liabilities. Los Angeles Times, June 19, 1991, at 1, col. 2, part D. Such short-sighted measures without regard to long-term obligations threaten the integrity of all retirement systems and the retirement security of the public servants of America, now victims of governmental economic crises.

D. Economic Impact on Secondary Capital Markets

If the raids on retirement funds continue, such will not only result in impairment of the relative health of these systems, but also this shrinking of fund assets will have a separate negative impact on the U.S. economy. In 1990, 50% of the venture capital generated for business development in the U.S. came from pension funds -- with 24% of that from public pension funds and 27% from private pension funds. Schutt, Fund-Raising Falls 45% in First Half, Venture Capital J. 20, 21 (Aug. 1991). Over the last few years when private venture capitalists grew risk averse, public funds have increasingly stepped in to make up the shortfall. Bonnanzio, Long Dismissed by Venture Capitalists, State Programs Are Gaining, Venture Capital J. 24, 24 (Aug. 1991). According to one business commentator, "pension funds remain the main engine" in the venture capital industry. Schutt, supra at 21. Consistent with a two-year decline, in the first half of 1991 there was a 45% reduction in the dollar value of venture capital. If state and local governments continue to raid these funds, there will be a very negative effect on the economy nationwide in terms of business development and new jobs for unemployed workers.

E. Precedential Effect of AB 702

At least 18 states have delayed or reduced payments to their pension plans in the last two economically troubled years

or are considering doing so. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1. State and local governments have commonly tried to reduce annual contributions to pension funds by stretching out payments or changing accounting methods and assumptions to calculate funds' long-term financial obligations. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1.

However, the California plan is unprecedented in scope and, if successful, could lead other states to raid pension funds -- thus, creating a domino effect. Los Angeles Times, June 19, 1991, at 1, col. 2, part D. The following highlights some of the activity in other jurisdictions:

Connecticut (teachers only)

State government has stretched out required pension contributions in future years.

Illinois (teachers only)

The Assembly has authorized the diversion of \$21 million from the public employee pension fund to general state spending accounts in an effort to help balance a \$50 million deficit in the Illinois budget for 1992. This action is exacerbated by the fact that the Illinois system is seriously underfunded. A class action lawsuit was just filed to delay that transfer of funds. Chicago Sun Times, Sept. 1, 1991; Pensions & Investments, July 8, 1991, at 39.

Maine

Reports are that Maine officials are looking to the pension fund to solve its budget deficiencies by deferring \$133 million that had been earmarked for pension contributions over the next few years. Telephones at the retirement system and governor's office were not being answered because all non-essential services had been shut down until some resolution of the deficit was reached. Pensions & Investments, July 8, 1991, at 39.

Vermont

Legislature appropriated teachers' retirement fund \$18 million less than it requested over the last two years. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1.

Philadelphia

Trustees of the municipal pension fund agreed to allow the city to defer its \$130 million pension contribution due in June. Although the trustees had considered suing for impairment of contract, they settled in order to save \$20 million in interest. Pensions & Investments, July 8, 1991, at 39.

Texas

The State Comptroller recently proposed a plan for Legislature's consideration which would slash contributions to the teacher's retirement fund from 7.6% to 6%. New York Times, July 21, 1991, at sect. 1, p. 1, col. 1. The plan also proposed a committee composed of the governor, lieutenant governor, and comptroller to oversee funding issues -- which is now the responsibility of individual state pension fund boards. Another feature of the plan was to allow the state to set retirement systems' budgets. Pensions & Investments, July 8, 1991, at 1, 39. Although the specially-called legislative session ended without action on the plan, many political observers see it as a "testing" of the waters.

In none of the other states has the constitutionality of this type "appropriation" of a reserve fund been tested. That is why this writ of mandamus assumes such importance to public employee retirement funds across the nation. Some jurisdictions, like Texas, have taken a "wait and see" approach. A California victory would embolden not just 50 governors, but also a multitude of local government entities, to use raids on pension funds as an alternative for raising taxes because it is not politically expedient for either state or governmental entities to make such hard decisions. If a direct taking of a reserve pension fund account and the

unilateral modification of a contract to the detriment of pension beneficiaries withstands constitutional muster, there will be nothing standing in the way of any governmental entity's free access to the pensions of 15 million current and former public servants.

II. The Legislated Plan Makes a Mockery of Internal Revenue Code Provisions Designed to Benefit Employees

A. Introduction

If not declared unconstitutional or invalidated on some other basis, the enacted plan would live, ironically, only to kill employee benefits. Unquestionably, a principal purpose of pension plans is to defer a portion of employees' compensation, in the form of employer contributions to the plan, until it and its earnings are distributed and taxed in later lower-income years. The legislation in question strips the plan of this integral benefit by virtually flouting the Internal Revenue Code requirements that are necessary to preserve it. As explained below, the statutory modification would bring about this result, under the Internal Revenue Code, by causing the plan to be disqualified from the exempt status that is essential to the employees' deferred tax benefit.

If the legislation stands, the public employees covered by this plan, whose compensation has consisted in part of temporary tax-free employer contributions and fund earnings, will be subject to present income taxation as if they had directly received the contributions as salary and as if they

had been in possession of their share of the plan's earnings. Moreover, the pernicious effect of this sudden, purpose-defeating tax liability would be drastically compounded by that aspect of the legislation that allows the plan's sponsor to invade the already-taxable fund with one hand and restore it with another for the purpose of evading its future contribution obligations.

Unless stricken, this plan would subject employees to taxation on compensation that not only did they not receive when the tax liability would have been incurred, but also that they could not receive until it was returned to the plan in the illusory form of the sponsor's future contributions. Perhaps the employees would be lucky enough not to be taxed on the same sum a second time -- when their employer re-contributes, the converted contribution for which the disqualification had already resulted in tax liability once.

B. The Legislation Creates a Plan that Could Not Qualify Under Internal Revenue Code § 401(a) and that Wrongfully Appropriates Vested Property Rights.

Section 401(a) provides that, under certain conditions, "a trust created or organized in the United States and forming part of a stock bonus, pension or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section." Section 402(a), titled "Taxability of beneficiary of employees' trust" provides that distributions from an exempt

trust are taxable to the employee in the year in which so distributed. Section 402(b), titled "Taxability of nonexempt trust," provides that contributions to a nonexempt trust "shall be included in the gross income of the employee."

The statutorily modified plan would eliminate deferred taxation for employees because, as enacted, it could not satisfy the condition for qualification under § 401(a)(2). For a pension trust to qualify under § 401(a)(2), it must be impossible for the corpus or income of the trust to be used for purposes other than the exclusive benefit of employees or their beneficiaries. As stated in the Federal Tax Regulations:

As used in section 401(a)(2), the phrase "if under the trust instrument it is impossible" means that the trust instrument must definitely and affirmatively make it impossible for the nonexempt diversion or use to occur, whether by operation or natural termination of the trust, by power of revocation or amendment, by the happening of a contingency, by collateral arrangement, or by any other means. Although it is not essential that the employer relinquish all power to modify or terminate the rights of certain employees covered by the trust, it must be impossible for the trust funds to be used or diverted for purposes other than for the exclusive benefit of his employees or their beneficiaries.

26 CFR 1.401-2(a)(2).

The "exclusive benefit" requirement even calls into question a pension plan trustee's consideration of whether to invest the plan's funds in securities issued by the sponsor, especially when the purchase of such securities would enhance the sponsor's ability to meet future contribution commitments. According to the Internal Revenue Service, even that kind of quid-pro-quo investment involvement with the plan's sponsor

would be violative of the "exclusive benefit" provision and thus would disqualify the plan, unless the following factors are satisfied:

(1) the cost must not exceed fair market value at the time of purchase; (2) a fair return commensurate with the prevailing rate must be provided; (3) sufficient liquidity must be maintained to permit distributions in accordance with the terms of the plan; and (4) the safeguards and diversity that a prudent investor would adhere to must be present.

Rev. Rul. 69-694, 1969-2 C.B. 88 (1969).

A sponsor's sale of securities to its plan presents a debatable "exclusive benefit" question, but the exempt status is protectable with safeguards. This plan is another matter altogether. A plan that permits its sponsor to convert a part of the corpus with no semblance of consideration would obviously not satisfy the "exclusive benefit" test and would result in a disqualified plan under § 401(a).

There is another reason why the statutory scheme deprives the plan of § 401(a) exempt status. A plan will be considered an exempt pension plan "if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits." See 26 CFR § 1.401-1(b)(1)(i). In transferring the actuarial determinations (including the assumption rate) from the trustee to a governor's appointee, the legislature created a plan that is violative of this rule of "definitely determinable benefit."

Because these changes destroy a pre-existing § 401(a) qualification, past contributions, which were intended to be

deferred compensation incurring tax liability only upon later distribution per § 402(a)(1), would not be treated that way at all. Moreover, independent of tax consequences, the state's appropriation of reserve funds attributable to prior contributions, for the purpose of irretrievable budget redirection, amounts to a wrongful modification of vested rights. See Valdes v. Cory, 139 Cal. App. 3d 773, 788-89, 189 Cal. Rptr. 212, 224 (1983).

C. The Legislation Creates a Plan that Requires the Trustees to Engage in Practices Prohibited by Internal Revenue Code § 503.

Even if the legislation did not disqualify the plan under § 401(a), it would destroy the employees' exemption, because, under § 503, it would destroy the trust's exemption. Section 501, titled "exemption from tax on corporations, certain trusts, etc." provides that an organization described in § 401(a) "shall be exempt from taxation unless such exemption is denied under Section 502 or 503." Section 503, titled "Requirements for exemption," provides in subsection (a)(1)(B) that "an organization described in § 401(a) which is referred to in § 4975(g)(2) or (3) shall not be exempt from taxation under § 501(a) if it has engaged in a prohibited transaction after March 1, 1954." Section 4975(g)(2) refers to "a governmental plan (within the meaning of § 414(d))." Section 414(d) defines the term "governmental plan" to mean "a plan established and maintained for its employees by the Government

of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

Thus, the plan in question would not be exempt from taxation if it engaged in a prohibited transaction covered by § 503. Subsection (b) lists the prohibited transactions, identifying five specific transactions and concluding with: "(6) engages in any other transaction which results in a substantial diversion of its income or corpus to ... the creator of the organization (if it is a trust) or a person who has made a substantial contribution to the organization." Consequently, the California Governor's plan renders itself non-exempt by virtue of its fundamental structure, which actively promotes a substantial diversion of the trust's income and corpus to its creator, the entity who has also made the most substantial contributions.

As a result of the diversion authorized by the legislature, the plan could not be exempt from taxation under § 501. Again, as a result of the plan's non-exempt status under § 503, § 402(b) requires that the contributions made to the plan by the employer be included in the gross income of the employee.

D. Conclusion

As revised by the California Legislature, the plan does far more than wreak havoc with employees' tax situations. It is a governmental taking of vested property rights -- the very antithesis of what an employee benefit plan is supposed to be.

III. AB 702 Eviscerates Trustees' Fiduciary Duty to Beneficiaries

One of the more disarming aspects of AB 702 is its schizophrenic treatment of fundamental notions of fiduciary duty. On the one hand, it incorporates the constitutionally-based "exclusive benefit" rule, which states that the "Public Employees' Retirement Fund is a trust fund created and administered ... solely for the benefit of the members and retired members of the system and their survivors and beneficiaries." Cal. Gov't Code Section 20200. The rule "imports into pension fiduciary law one of the most fundamental and distinctive principles of trust law, the duty of loyalty." Fischel & Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, 55 U. Chi. L. Rev. 1105 (1988). It places the trustee under a duty to administer the trust solely in the interest of those for whom the trust was created, and for the exclusive purpose of providing benefits to those participants and their beneficiaries.

A corollary to the rule provides that "[s]ince the assets of the employee benefit plan are to be held for the exclusive benefit of participants and beneficiaries, plan assets generally are not to inure to the benefit of the employer." Kwacher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957, 960 (1st Cir. 1989), quoting H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. &

Admin. News 5038, 5083. The corollary is designed to "keep as strict a separation as practicable between employers and the funds set aside to benefit employees." Kwacher, 879 F.2d at 960. In spite of this corollary, AB 702 contains a provision specifically designed to "inure to the benefit of the employer." Such legislation places the integrity of the system at grave risk by dividing the loyalty of the trustees.

The problem with AB 702 is that, by requiring the system trustees to minimize the employers' costs of providing benefits, it pits the trustees' obligations to the employer directly against their primary fiduciary obligation to participants and beneficiaries. Under this arrangement, if PERS trustees were to discharge their duty to the employer with perfect efficiency (i.e., "minimize" to the point of \$0.00 the employers' costs), they would necessarily jettison their primary mission to provide benefits to system participants and beneficiaries.

Moreover, if the "employers minimization" provision were held to authorize utilization of pension funds for purposes unrelated to provision of benefits (e.g., deficit reduction or revenue enhancement), the trustees would be subject to significant political pressure to "minimize" the extent to which concern for system beneficiaries guides their decisionmaking. AB 702 seemingly forces the trustees to consider and protect the enormous interests of the State of California, the system's major debtor, before discharging their

duties to the primary beneficiaries of the pension fund. See G. Bogert, The Law of Trusts & Trustees § 543 (2d ed. 1978) ("If permitted to represent antagonistic interests the trustee is placed under temptation and is apt to ... make decisions which favor a third person who is competing with the beneficiary.")

By positioning itself as one of two "masters" to whom the trustees owe fiduciary obligations, the State of California would have this Court abrogate a core principal of the law of trusts. See Restatement (Second) of Trusts § 170, subsection (1) (1959). The duties set forth in Article XVI, section 17 do not reach that far. "Any duty PERS has to minimize employer contributions may not take precedence over its duty to the beneficiaries of the system." City of Sacramento v. Public Employees Retirement System, 280 Cal. Rptr. 847, 861 (Cal. App. 3d Dist. 1991).

As evidenced by the Governor's divestment of actuarial control from the pension trustees, the threat of divided loyalties is not a purely academic concern. If the State of California has its way, decisions which once were motivated by exclusive loyalty to participants and beneficiaries will now be placed in the realm of the political marketplace. This Court should not sanction such an unconstitutional abrogation of the fundamental fiduciary obligations upon which the system was founded. See County of Skamania v. State of Washington, 102 Wash. 2d 127, 685 P.2d 576, 582 (Wash. 1984) (declaring unconstitutional statute whose primary purpose was to benefit third party at expense of trust beneficiaries).

V. Conclusion

The court in Dadisman v. Moore, 384 S.E.2d 816, 830 (W. Va. 1983), put it most succinctly:

The funds in the PERS trust are an equitable estate, property held in common for the benefit of each member and retirant, and dedicated to private ends. The trust funds are not taxpayers' money. The trust funds have been earned by public employees for the benefit of the trust, thus, the funds are not public property.

In derogation of constitutional principles and trust principles and the Internal Revenue Code, the State of California has treated the \$1.6 billion in the cost of living adjustment funds as their own property and not as funds held in trust for the benefit of those almost 1 million public servants in the CalPERS system. Such governmental action should be condemned and invalidated by this Court as violative of specific constitutional provisions, as well as general constitutional notions of fair play.

For the foregoing reasons, the National Conference on Public Employee Retirement Systems and the San Jose Police and Fire Department Retirement Plan as Amici Curiae urge this Court to exercise its original jurisdiction and order the relief prayed for.

Dated: September 9, 1991

Respectfully submitted,

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