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9 Attorneys for Defendant and Cross-Complainant  
City of San Jose

10 **IN THE SUPERIOR COURT FOR THE**  
11 **COUNTY OF SANTA CLARA**

12 **SAN JOSE POLICE OFFICERS**  
**ASSOCIATION,**  
13 **Plaintiff,**  
14 **v.**  
15 **CITY OF SAN JOSE, BOARD OF**  
**ADMINISTRATION FOR POLICE AND**  
16 **FIRE RETIREMENT PLAN OF CITY OF**  
**SAN JOSE, and DOES 1-10 inclusive,**  
17 **Defendants.**

18  
19 **AND RELATED CROSS-COMPLAINT**  
**AND CONSOLIDATED ACTIONS**  
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(ENDORSED)  
**FILED**  
JUL 8 - 2013  
DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY \_\_\_\_\_ DEPUTY

**S. VERA**

Case No. 1-12-CV-225926  
[Consolidated with Case Nos. 112CV225928,  
112CV226570, 112CV226574, 112CV227864,  
and 1112CV23360]

**DECLARATION OF ARTHUR A.**  
**HARTINGER IN SUPPORT OF**  
**DEFENDANT CITY OF SAN JOSE'S**  
**OPPOSITION TO PLAINTIFFS'**  
**MOTIONS IN LIMINE**

Date: July 12, 2013  
Time: 9:00 a.m.  
Dept.: 2

Complaint Filed: June 6, 2012  
Trial Date: July 22, 2013

**BY FAX**

1 I, Arthur A. Hartinger, declare:

2 1. I am one of the trial attorneys for the City of San Jose in the above-captioned  
3 matter. I make this declaration in connection with and to support the City's opposition to  
4 plaintiffs' motions *in limine*. The following facts are within my personal knowledge and, if called  
5 upon as a witness, I could and would testify competently with respect thereto.

6 2. The City filed a Request for Judicial Notice and a Supplemental Request for  
7 Judicial Notice in support of its Motion for Summary Adjudication. The Court *granted* the City's  
8 requests in its Order re: Motion for Summary Adjudication of Issues. See Order at 2:19. I have  
9 attached a true and correct copy of the Court's Order as Exhibit A hereto.

10 3. The exhibits challenged by Plaintiffs' Motion in Limine No. 1 (the City's proposed  
11 trial exhibits 5207, 5210, 5212, and 5213) were submitted as exhibits to the City's Supplemental  
12 Request for Judicial Notice in Support of Its Motion for Summary Adjudication ("Supplemental  
13 RJN") as Exhibits R, U, W, and X, and have already been judicially noticed. I have attached a  
14 true and correct copy of the City's Supplemental RJN as Exhibit B hereto (without exhibits).

15 4. I have attached the City's proposed trial exhibit 5207 (Letter from Edward  
16 Grossheider to Chairman of the Charter Revision Committee, dated September 1, 1964 regarding  
17 revision of wording pertaining to section 1601 of the City Charter) as Exhibit C hereto. This  
18 exhibit was judicially noticed by this Court as Exhibit R to the City's Supplemental RJN.

19 5. The San Jose Charter Revision Committee's September 1, 1964 minutes indicate  
20 that Mr. Grossheider's letter was received by the Committee (see bracketed section). I have  
21 attached these minutes as Exhibit D hereto. These minutes have already been judicially noticed by  
22 this Court as Exhibit S to the City's Supplemental RJN.

23 6. I have attached the City's proposed trial exhibit 5210 (Proposal on Retirement  
24 System by District Fire Chief Leonard Marks) as Exhibit E hereto. This exhibit was judicially  
25 noticed by this Court as Exhibit U to the City's Supplemental RJN.

26 7. The San Jose Charter Revision Committee's October 13, 1964 minutes indicate that  
27 Chief Marks' proposal was received by the Committee (see bracketed section on page  
28

1 SJRJN000501). I have attached these minutes as Exhibit F hereto. These minutes have already  
2 been judicially noticed by this Court as Exhibit V to the City's Supplemental RJN.

3 8. I have attached the City's proposed trial exhibit 5212 (Letter from Manager Edward  
4 Grossheider to George Starbird, Chairman of the San Jose City Charter Committee regarding  
5 recommendations for final draft of new proposed charter, dated October 27, 1964) as Exhibit G  
6 hereto. This exhibit was judicially noticed by this Court as Exhibit W to the City's Supplemental  
7 RJN.

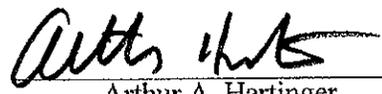
8 9. The San Jose Charter Revision Committee's November 10, 1964 minutes indicate  
9 that Mr. Grossheider's letter was read aloud to the Committee by Chairman Pro Tempore Pfeifle  
10 (see bracketed section on page 1). The City did not include these minutes in its previous requests  
11 for judicial notice. The documents will shortly be produced to plaintiffs as all parties have been  
12 engaged in the supplement production of documents. These minutes are attached as Exhibit H  
13 hereto.

14 10. I have attached the City's proposed trial exhibit 5213 (Letter from the Retirement  
15 Committee of the Municipal Employees Federation to Charter Revision Committee, dated  
16 December 4, 1964) as Exhibit I hereto. This exhibit was judicially noticed by this Court as  
17 Exhibit X to the City's Supplemental RJN.

18 11. The San Jose Charter Revision Committee's December 8, 1964 minutes indicate  
19 that Municipal Employees Federation's letter was read to the Committee by Chairman Starbird  
20 (see bracketed section on page SJRJN000508). I have attached these minutes as Exhibit J hereto.  
21 These minutes have already been judicially noticed by this Court as Exhibit Y to the City's  
22 Supplemental RJN.

23 12. On June 25, 2013, I sent a letter to Gregg Adam, counsel for the POA. I have  
24 attached a true and correct copy of my June 25th letter to this declaration as Exhibit K.  
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1 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
2 knowledge and that this declaration was executed this 8<sup>th</sup> day of July 2013 at Oakland, California.

3   
4 \_\_\_\_\_  
5 Arthur A. Hartinger

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On July 8, 2013, I served true copies of the following documents described as **DECLARATION OF ARTHUR A. HARTINGER ISO CITY OF SAN JOSE'S OPPOSITIONS TO PLAINTIFFS' MOTIONS *IN LIMINE*** on the interested parties in this action as follows:

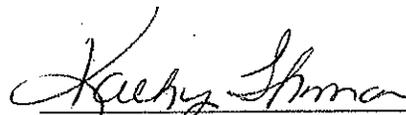
**SEE ATTACHED SERVICE LIST**

**BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address kthomas@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 8, 2013, at Oakland, California.

  
Kathy Thomas

SERVICE LIST

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<p>John McBride Christopher E. Platten Mark S. Renner WYLIE, MCBRIDE, PLATTEN &amp; RENNER 2125 Canoas Garden Ave, Suite 120 San Jose, CA 95125 Telephone: 408-979-2920 Fax: 408-989-0932 E-Mail: jmcbride@wmpirlaw.com cplatten@wmpirlaw.com mrenner@wmpirlaw.com</p>	<p>Attorneys for Plaintiffs/Petitioners, ROBERT SAPIEN, MARY MCCARTHY, THANH HO, RANDY SEKANY AND KEN HEREDIA (Santa Clara Superior Court Case No. 112CV225928)</p> <p>AND</p> <p>Plaintiffs/Petitioners, JOHN MUKHAR, DALE DAPP, JAMES ATKINS, WILLIAM BUFFINGTON AND KIRK PENNINGTON (Santa Clara Superior Court Case No. 112CV226574)</p> <p>AND</p> <p>Plaintiffs/Petitioners, TERESA HARRIS, JON REGER, MOSES SERRANO (Santa Clara Superior Court Case No. 112CV226570)</p>
<p>Gregg McLean Adam Jonathan Yank Gonzalo Martinez Jennifer Stoughton Amber L. West CARROLL, BURDICK &amp; MCDONOUGH, LLP 44 Montgomery Street, Suite 400 San Francisco, CA 94104 Telephone: 415-989-5900 Fax: 415-989-0932 E-Mail: gadam@cbmlaw.com jyank@cbmlaw.com gmartinez@cbmlaw.com jstoughton@cbmlaw.com awest@cbmlaw.com</p>	<p>Attorneys for Plaintiff, SAN JOSE POLICE OFFICERS' ASSOC. (Santa Clara Superior Court Case No. 112CV225926)</p>
<p>Teague P. Paterson Vishtap M. Soroushian BEESON, TAYER &amp; BODINE, APC Ross House, 2nd Floor 483 Ninth Street Oakland, CA 94607-4050 Telephone: 510-625-9700 Fax: 510-625-8275 E-Mail: tpaterson@beesontayer.com; vsoroushian@beesontayer.com;</p>	<p>Plaintiff, AFSCME LOCAL 101 (Santa Clara Superior Court Case No. 112CV227864)</p>

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<p>Harvey L. Leiderman Jeffrey R. Rieger REED SMITH, LLP 101 Second Street, Suite 1800 San Francisco, CA 94105 Telephone: 415-659-5914 Fax: 415-391-8269 E-Mail: hleiderman@reedsmith.com; jreiger@reedsmith.com</p>	<p>Attorneys for Defendant, CITY OF SAN JOSE, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE (Santa Clara Superior Court Case No. 112CV225926).</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1961 SAN JOSE POLICE AND FIRE DEPARTMENT RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV225928)</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE 1975 FEDERATED CITY EMPLOYEES' RETIREMENT PLAN (Santa Clara Superior Court Case Nos. 112CV226570 and 112CV226574 )</p> <p>AND</p> <p>Necessary Party in Interest, THE BOARD OF ADMINISTRATION FOR THE FEDERATED CITY EMPLOYEES RETIREMENT PLAN (Santa Clara Superior Court Case No. 112CV227864)</p>
<p>Stephen H. Silver, Esq. Richard A. Levine, Esq. Jacob A. Kalinski, Esq. Silver, Hadden, Silver, Wexler &amp; Levine 1428 Second Street, Suite 200 P.O. Box 2161 Santa Monica, California 90401</p>	<p>Attorneys for Plaintiffs/Petitioners SAN JOSE RETIRED EMPLOYEES ASSOCIATION, HOWARD E. FLEMING, DONALD S. MACRAE, FRANCES J. OLSON, GARY J. RICHERT AND ROSALINDA NAVARRO (Santa Clara Superior Court Case No. 1-12-cv-233660)</p>

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# **EXHIBIT A**

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(ENDORSED)  
**FILED**

JUN 21 2013

Order Issued  
on Submitted Matter

DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY NAOMI MATAU DEPUTY

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SANTA CLARA**

SAN JOSE POLICE OFFICERS'  
ASSOCIATION,  
Plaintiff,

vs.

CITY OF SAN JOSE, et al.,  
Defendants.

Case No. 1-12-CV-225926 (Consolidated  
with 1-12-CV-225928, 1-12-CV-226570, 1-  
12-CV-226574, 1-12-CV-227864, and 1-12-  
CV-233660)

ORDER RE: MOTION FOR SUMMARY  
ADJUDICATION OF ISSUES

AND CONSOLIDATED ACTIONS AND  
RELATED CROSS-COMPLAINT.

Defendants City of San Jose and Debra Figone, in her official capacity, have made the following motions for summary adjudication: 1) in 112CV225926 against San Jose Police Officers' Association ("SJPOA") as to the first cause of action for impairment of contract, the second cause of action for taking of private property, and the third cause of action for taking of private property without due process under the California Constitution; 2) also in 112CV225926 on each of the three causes of action in the cross-complaint for declaratory relief (that sections 1506-A, 1512-A and 1511-A of Measure B do not violate the contracts clause, the takings clause,

1 and the due process clause of the United States Constitution); 3) in 112CV225928 against  
2 Plaintiffs Robert Sapien, Mary Kathleen McCarthy, Thanh Ho, Randy Sekany and Ken Heredia  
3 (“Sapien Plaintiffs”) as to the second cause of action for impairment of contract, the third cause  
4 of action for substantive due process, and the fourth cause of action for taking under the  
5 California Constitution; 4) in 112CV226570 against Plaintiffs Teresa Harris, Hon Reger and  
6 Moses Serrano (“Harris Plaintiffs”) as to the second cause of action for impairment of contract,  
7 the third cause of action for substantive due process, and the fourth cause of action for taking  
8 under the California Constitution; 5) in 112CV226574 against John Mulchar, Dale Dapp, James  
9 Atkins, William Buffington and Kirk Pennington (“Mukhar Plaintiffs”) as to the second cause of  
10 action for impairment of contract, the third cause of action for substantive due process, and the  
11 fourth cause of action for taking under the California Constitution; and 6) in 112CV227864  
12 against American Federation of State, County and Municipal Employees Local 101  
13 (“AFSCME”) as to the first cause of action for impairment of contract, the third cause of action  
14 for taking of private property, and the fourth cause of action for taking of private property  
15 without due process under the California Constitution, and the eighth cause of action for  
16 promissory estoppel and equitable estoppel.

17 The matter came on for hearing before the Honorable Patricia M. Lucas on June 7, 2013,  
18 at 9:00 a.m. in Department 2. The parties presented argument, and the matter was submitted.

19 Requests for judicial notice are granted. The objections by SJPOA to the declaration of  
20 Alex Gurza are OVERRULED. All other evidentiary objections failed to comply with California  
21 Rules of Court, rule 3.1354, subdivision (c) and, on that basis, the Court declines to rule on those  
22 objections.

23 I. DEFENDANTS MAY PROPERLY MOVE FOR SUMMARY ADJUDICATION OF  
24 THE VALIDITY OF DISTINCT SECTIONS OF MEASURE B.

25 The Court is asked to address, as a preliminary matter, whether Defendants may properly  
26 move for summary adjudication of the issues identified given the causes of action pled in these  
27 consolidated cases. This issue concerns the concept of primary rights: “The cause of action is  
28 based on the injury to the plaintiff, and not the particular legal theory of the defendant’s  
wrongful act.” (4 Witkin, California Procedure (5th ed. 2008) Pleading, §36, p. 101.) “As far as

1 its content is concerned, the primary right is simply the plaintiff's right to be free from the  
2 particular injury suffered. [Citation.] It must therefore be distinguished from the legal theory on  
3 which liability for that injury is premised.' [Citation.] 'The manner in which a plaintiff elects to  
4 organize his or her claims within the body of the complaint is irrelevant to determining the  
5 number of causes of action alleged under the primary right theory.' [Citation.] The violation of a  
6 single primary right still gives rise to only one 'cause of action,' even if a plaintiff seeks various  
7 forms or theories of relief. [Citation.]" (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 103 –  
8 104.)

9 Sections 1506-A, 1512-A, and 1511-A of Measure B, as alleged, give rise to multiple  
10 injuries as opposed to a single injury. If the most salient characteristic of a primary right is that it  
11 is indivisible, the injuries caused by Measure B are readily divisible even though all the  
12 provisions of Measure B were enacted at the same time. Under a primary rights theory, each  
13 provision of Measure B could be alleged as a separate cause of action. Therefore, summary  
14 adjudication is available here. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th  
15 1848; *Hindin v. Rust* (2004) 118 Cal.App.4th 1247.)

16 II. DEFENDANTS HAVE NOT MET THEIR INITIAL BURDEN  
17 AS TO SJPOA AND THE SAPIEN PLAINTIFFS.

18 The taking and due process arguments largely rely on the same facts and legal principles  
19 as the impairment of contract argument, and are addressed together. The Sapien Plaintiffs stand  
20 in the same shoes as the SJPOA: all affected employees are members of the retirement plan for  
21 police officers and firefighters.

22 A. *Section 1506-A: Additional retirement contributions to amortize unfunded liabilities*

23 The relevant portion of section 1506-A provides that employees who do not opt into the  
24 VEP shall have their compensation adjusted through additional retirement contributions in  
25 increments of 4% of pensionable pay per year, up to a maximum of 16%, but not more than 50%  
26 of the costs to amortize any pension unfunded liabilities. Plaintiffs claim that section 1506-A  
27 impairs the obligation of contracts and is a taking in violation of the California Constitution.  
28

1 Defendants argue that there is no contractual provision which restricts the City from requiring  
2 employees to pay for unfunded liabilities.

3 "The ultimate questions of whether vested contractual rights exist and whether  
4 impairments are unconstitutional present questions of law subject to independent review. The  
5 question whether there is an impairment is a mixed question of fact and law." (*Board of*  
6 *Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1129; see also *Teachers' Retirement*  
7 *Board v. Genest* (2007) 154 Cal.App.4th 1012, 1028.) As moving parties, Defendants bear the  
8 initial burden to make a *prima facie* showing that there are no triable issues of material fact.  
9 Since the ultimate question is one of law, Defendants bear the burden of showing, as a matter of  
10 law, that vested contractual rights do not exist and/or that any impairment is not unconstitutional.  
11 General principles of contract interpretation apply. (*Retired Employees Association of Orange*  
12 *County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171.)

13 As stated in *Walsh v. Board of Administration* (1992) 4 Cal.App.4th 682, 696 – 697, there  
14 must first be a valid contractual right to be impaired. (See also *San Diego City Firefighters,*  
15 *Local 145 v. Board of Administration* (2012) 206 Cal.App.4th 594, 606, fn. 10: "When a claim is  
16 presented under the contract clause [(U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. 1, § 9)], it  
17 must first be determined 'whether there is a valid contract to be impaired.'") Defendants contend  
18 the reservation of rights included in sections 1500 and 1503 of the City Charter precludes the  
19 creation of vested contractual rights. However, the existence of this language alone does not  
20 preclude the creation of vested contractual rights: it is a "well settled principle that: 'A public  
21 employee's pension constitutes an element of compensation, and a vested contractual right to  
22 pension benefits accrues upon acceptance of employment. ...'" (*International Association of*  
23 *Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300 (*IAF*.) Although Plaintiffs rely on  
24 *Legislature v. Eu* (1991) 54 Cal.3d 492, that case involved legislation that contemplated the  
25 complete termination of the benefit scheme in question, rather than a modification or adjustment  
26 to pension rights.

27 Defendants argue that there is no contract restricting the City from requiring that  
28 employees pay for unfunded liabilities, and in particular relies on section 1504(b) of the Charter

1 and its references to current and prior service and service benefits. However, that section also  
2 states that the Council may provide by ordinance for minimum benefits, and section 3.36.1520 of  
3 the Municipal Code specifically provides that “[r]ates for current service shall not include any  
4 amount required to make up any deficit resulting from the fact that previous rates of contribution  
5 made by the city and members were inadequate to fund benefits attributable to service rendered  
6 by such members prior to the date of any change of rates....” (City’s Request for Judicial Notice  
7 (“RJN”), at Ex. D.) Thus it appears that it is the obligation of the City to make up unfunded  
8 actuarially accrued liabilities (“UAAL”). Defendants have not identified any language that  
9 imposes an obligation on employees to pay for unfunded liabilities.

10 On a motion for summary adjudication, Defendants bear the burden of demonstrating that  
11 Plaintiffs do not have a vested contractual right. Defendants have not met their burden in that  
12 regard.

13 B. *Section 1512-A: 50% of retiree health care*

14 Section 1512-A requires that incumbents and new employees must contribute a minimum  
15 of 50% of the cost of retiree health care, including both normal cost and unfunded liabilities.  
16 Defendants argue that Plaintiffs cannot establish that they have a vested right to have the City  
17 pay for all unfunded liability related to retiree health care. In opposition, SJPOA correctly points  
18 out that this issue is not framed by the pleadings: i.e., Plaintiffs did not allege that the City was  
19 solely obligated to pay for the unfunded liability related to retiree health care. Instead, SJPOA  
20 alleges that section 1512-A impairs a vested contractual right to have a 10% cap on contributions  
21 and a right to bargain separately from the Federated City Employees Union for a low-cost plan.  
22 The City has not addressed either of these allegations.

23 “The pleadings serve as the ‘outer measure of materiality’ in a summary judgment  
24 motion, and the motion may not be granted or denied on issues not raised by the pleadings.”  
25 (Weil & Brown, CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2012)  
26 ¶10:51.1, p. 10-19 citing *Government Employees Ins. Co. v. Superior Court* (2000) 79  
27 Cal.App.4th 95, 98, et al.) Consequently, Defendants are not entitled to summary adjudication  
28 with regard to section 1512-A.

1 C. Section 1511-A: Discontinuation of SRBR

2 Section 1511-A provides that the supplemental retirement benefit reserve ("SRBR") shall  
3 be discontinued and the assets returned to the appropriate trust fund. Defendants argue that,  
4 given the discretionary nature of the SRBR, plaintiffs cannot claim a *vested* right to receipt of the  
5 SRBR. "A benefit is deemed 'vested' when the employee acquires an irrevocable interest in the  
6 benefit. The vesting of retirement benefits must be distinguished from the 'maturing' of those  
7 benefits, which occurs after the conditions precedent to the payment of the benefits have taken  
8 place or the benefits are otherwise within the control of the employee." (*Retired Employees*  
9 *Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189, fn. 3  
10 (*REAOC*)). "Vesting remains a matter of the parties' intent." (*REAOC, supra*, 52 Cal.4th at p.  
11 1189.) "[U]nless and until vested rights to retirement ripen into vested contractual rights, the  
12 Legislature may modify conditions of employment without violating vested pension rights which  
13 have become protected under the contract clauses of the Constitutions." (*City of San Diego v.*  
14 *Haas* (2012) 207 Cal.App.4th 472, 490.)

15 Regarding the SRBR for police and firefighters, while there are specified exceptions, the  
16 plain language of the Municipal Code makes distributions mandatory. Defendants rely, in part,  
17 upon *Allen v. Board of Administration* (1983) 34 Cal.3d 114, but the *Allen* court reached its  
18 result finding no impairment of contract because: "The essential and critical factor is that ...  
19 respondents could [not] expect under the terms of their employment contract to obtain retirement  
20 allowances computed on the basis of the unique salary increase accomplished by the  
21 constitutional revision of 1966 *which expressly negated such expectations*." In other words, the  
22 fact that the constitutional revision expressly excluded the former legislators is clear intent that  
23 the former legislators could not assert an impairment of a contract right. If there was an intent  
24 that SRBR cease distributions in the face of unfunded liability, it is not apparent from the face of  
25 the Charter or the Municipal Code.

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1 III. DEFENDANTS HAVE NOT MET THEIR INITIAL BURDEN AS TO AFSCME,  
2 THE HARRIS PLAINTIFFS AND THE MUKHAR PLAINTIFFS.

3 Defendants' motion as to these Plaintiffs involves some differences because these City  
4 employees are not police officers or firefighters and are members of different retirement plans  
5 subject to different provisions of the Charter and Municipal Code.

6 A. *Section 1506-A: Additional retirement contributions*

7 Defendants argue that the Charter does not assign UAAL to either of the two pension  
8 contribution categories: current service/current service benefits or prior service/prior service  
9 benefits. Therefore, it follows, Defendants argue, that the Charter does not impose all the  
10 obligation to pay UAAL on the City and cannot preclude the City from requiring employees to  
11 contribute toward UAAL. However, the language of section 3.28.710 (City's RJN, at Ex. A)  
12 suggests the contrary: that the burden of funding UAAL is on the City.

13 B. *Section 1512-A: Retiree health care*

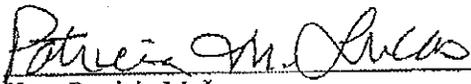
14 Similar to the discussion above, the allegations concerning section 1512-A are not limited  
15 to the issue of payment for unfunded liabilities, but includes other issues. (See paragraph 98 of  
16 AFSCME's First Amended Complaint.) Failing to address these other allegations, Defendants  
17 have not met their burden.

18 C. *Section 1511-A: SRBR*

19 Regarding the SRBR for other city employees, Plaintiffs are correct that the City's  
20 discretion with regard to distributions is distinct from having discretion to abolish the SRBR  
21 altogether.

22 For the above stated reasons, Defendants' motion for summary adjudication of issues is  
23 DENIED.

24  
25 Dated: June 20, 2013

  
26 Hon. Patricia M. Lucas  
27 Judge of the Superior Court  
28

# **EXHIBIT B**

1 Arthur A. Hartinger (SBN: 121521)  
ahartinger@meyersnave.com  
2 Linda M. Ross (SBN: 133874)  
lross@meyersnave.com  
3 Jennifer L. Nock (SBN: 160663)  
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7 Oakland, California 94607  
8 Telephone: (510) 808-2000  
Facsimile: (510) 444-1108

9 Attorneys for Defendant and Cross-Complainant  
10 City of San José and Defendant Debra Figone

11  
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **COUNTY OF SANTA CLARA**

14 **SAN JOSÉ POLICE OFFICERS**  
15 **ASSOCIATION,**

16 **Plaintiff,**

17 **v.**

18 **CITY OF SAN JOSÉ, BOARD OF**  
19 **ADMINISTRATION FOR POLICE AND**  
20 **FIRE RETIREMENT PLAN OF CITY OF**  
21 **SAN JOSÉ, and DOES 1-10 inclusive.,**

22 **Defendants**

23 **AND RELATED CROSS-COMPLAINT**  
24 **AND CONSOLIDATED ACTIONS.**

Case No. 1-12-CV-225926

[Consolidated with Case Nos.  
112CV225928, 112CV226570,  
112CV226574, 112CV227864,  
112CV233660]

**DEFENDANT AND CROSS-**  
**COMPLAINANT CITY OF SAN JOSE'S**  
**SUPPLEMENTAL REQUEST FOR**  
**JUDICIAL NOTICE IN SUPPORT OF**  
**REPLY TO MOTION FOR SUMMARY**  
**ADJUDICATION OF ISSUES**

Date: June 7, 2013  
Time: 9:00 a.m.  
Dept.: 2  
Judge: Hon. Patricia M. Lucas

Complaint Filed: June 6, 2012  
Trial Date: July 22, 2013

**FILED**  
(ENDORSED)  
MAY 24 2013  
DAVID H. YAMASAKI  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY \_\_\_\_\_ DEPUTY  
**S. VERA**

1 Defendant City of San José hereby requests that the Court take judicial notice pursuant to  
2 California Evidence Code Sections 450 *et seq.*, and in accordance with California Rules of Court  
3 3.1113(l), 3.1306(c), and 3.1350(c)(5) of the following material, true and correct copies of which  
4 are attached hereto:

- 5 Exh. Q The City of San Jose Charter Committee meeting minutes dated May 26,  
6 1964.
- 7 Exh. R Letter from Manager Edward A. Grossheider to the Chairman of the Charter  
8 Revision Committee dated September 1, 1964 regarding revision of  
9 wording pertaining to Section 1601 of the City Charter.
- 10 Exh. S The City of San Jose Charter Committee meeting minutes dated September  
11 1, 1964.
- 12 Exh. T The City of San Jose Charter Committee meeting minutes dated October 13,  
13 1964.
- 14 Exh. U Memorandum of Fire and Police Retirement Plan presented by District  
15 Chief Leonard Marks of San Jose Fire Department, dated October 13, 1964.
- 16 Exh. V The City of San Jose Charter Committee meeting minutes dated October 20,  
17 1964.
- 18 Exh. W Letter from Manager Edward A. Grossheider to George Starbird, Chairman  
19 of the San Jose City Charter Committee regarding recommendations for  
20 final draft of new proposed charter, dated October 27, 1964.
- 21 Exh. X Letter from Retirement Committee of the Municipal Employees Federation  
22 to Charter Revision Committee dated December 4, 1964, "Inclusions of  
23 basic retirement benefits now in existence for the Federated City Employee  
24 Retirement System."
- 25 Exh. Y The City of San Jose Carter Committee meeting minutes dated December 8,  
26 1964.
- 27 Exh. Z Memorandum from City Manager Thomas Fletcher to City Council, dated  
28 May 12, 1971, "Definition of Prior Service - Police and Fire Retirement  
Plan."
- Exh. AA City of San Jose Resolution No. 40059, "A Resolution of the Council of the  
City of San Jose Requesting Board of Administration for Police and Fire  
Retirement Plan to Adjust Rates of Contribution for City and for Fire  
Department Members and Police Department Members of Police and Fire  
Department Retirement Plans," adopted July 12, 1971."

- 1           Exh. BB       City of San Jose Ordinance No. 19690, "An Ordinance of the City of San
- 2                            Jose Amending Topic 9 of Part 3A of Chapter 9 of Article II of the San Jose
- 3                            Municipal Code by Amending Section 2903.279 and Section 2903.280 to
- 4                            provide for increasing City's contribution for services rendered by members
- 5                            or persons prior to increase in the contribution rates," passed July 3, 1979.
- 6           Exh. CC       Letter from Actuary E. Allen Arnold, and Associate Actuary Christine
- 7                            Nelson to Retirement and Benefits Administrator Edward Overton re:
- 8                            Police & Fire Contribution Rates, dated August 16, 1978.
- 9           Exh. DD       Lawrence Mitchell & Associates, Inc. Consulting Actuaries' Actuarial
- 10                           Investigation and Valuation for the City of San Jose Police and Fire
- 11                           Department Retirement Plans as of June 30, 1979.
- 12           Exh. EE       Memorandum from Sr. Deputy City Attorney Susan Devencenzi to Board
- 13                           of Administration Police and Fire Department Retirement Plan, "Allocation
- 14                           of Actuarial Gains and Losses," dated December 29, 1997.
- 15           Exh. FF       City of San Jose Ordinance No. 29174, "An Ordinance of the City of San
- 16                           Jose Amending Various Sections of Chapter 3.28 of Title 3 of the San Jose
- 17                           Municipal Code to Clarify the City Charter Supersedes the Federated City
- 18                           Employees Retirement Plan in Event of Conflict, Clarify the Definition of
- 19                           Tier 2 Member, Discontinue the Supplemental Retiree Benefit Reserve,
- 20                           Clarify Actuarial Soundness is Determined Consistent with the California
- 21                           Constitution, and Make Additional Requirements for Mandatory Medicare
- 22                           Enrollment, to be Effective January 4, 2013," passed November 6, 2012.
- 23           Exh. GG       City of San Jose Ordinance No. 29198, "An Ordinance of the City of San
- 24                           Jose Amending Various Sections of Chapters 3.32 and 3.36 of Title 3 of the
- 25                           San Jose Municipal Code to Clarify the City Charter Supersedes the City of
- 26                           San Jose Police and Fire Retirement Plan in Event of Conflict, Discontinue
- 27                           the Supplemental Retiree Benefit Reserve, and Clarify Actuarial Soundness
- 28                           is Determined Consistent with the California Constitution, to be Effective
- March 1, 2013," adopted January 29, 2013.
- Exh. HH       "Stipulation and Order re: Implementation of Measure B in Connection
- with Trial Set for June 17, 2013," ordered March 26, 2013.
- ///
- ///
- ///
- ///
- ///

1 Exhibits AA, BB, FF, and GG are properly subject to judicial notice under California  
2 Evidence Code sections 453 and 452(b) (providing that courts may take judicial notice of  
3 "legislative enactments issued by or under the authority of the United States or any public entity in  
4 the United States"). See *Trinity Park, L.P. v. City of Sunnyvale*, 193 Cal. App. 4th 1014, 1027  
5 (2011) ("The Evidence Code also expressly provides for judicial notice of a public entity's  
6 legislative enactments and official acts. Thus, we may take notice of local ordinances and the  
7 official resolutions, reports, and other official acts of a city.").

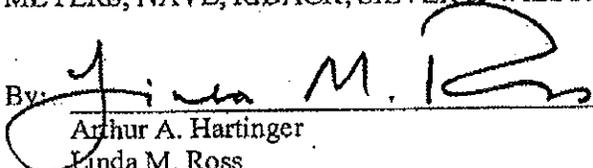
8 Exhibits Q to Z and CC to EE are properly subject to judicial notice as legislative history  
9 and governmental acts and records. Cal. Evid. Code §452(b), (c), & (h); *Kaufman & Broad*  
10 *Communities, Inc. v. Performance Plastering, Inc.*, 133 Cal. App. 4th 26, 31 (2005).

11 Exhibit HH is properly subject to judicial notice pursuant to Cal. Evid. Code §452(c) &  
12 (d).

13 For these reasons, the City respectfully requests that the Court take judicial notice of the  
14 above-listed documents.

15 DATED: May 24, 2013

MEYERS, NAVE, RIBACK, SILVER & WILSON

16  
17 By: 

Arthur A. Hartinger

Linda M. Ross

Jennifer L. Nock

Michael C. Hughes

Attorneys for Defendant and Cross-Complainant

City of San José and Defendant Debra Figone, in

her official capacity

22  
23 2084933.1  
24  
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28

**EXHIBIT Q**

SAN JOSE, CALIFORNIA

Tuesday, May 26, 1964

The City of San Jose Charter Committee convenes this day in Room 430, City Hall, at 4:00 o'clock p.m., and the Secretary Pro Tempore calls the roll.

Present: Members - Atkinson, Barrett, Coyle, Jorgensen, McKenna, Pfeifle, Roat, St. John, Sturges, Taketa and Starbird.

Absent: Members - Davidson, Ruffo, Ruiz and Sullivan.

#### OPPOSITION LITERATURE

Copies of "Statement in Opposition to the Proposed San Jose City Charter", printed arguments for and against the charter sent to the voters, and communication dated May 1, 1961, from the Citizens Committee against the proposed City Charter, are filed, and Chairman Starbird thanks Member Coyle for making the originals available for copying.

#### MINUTES

Minutes of the meeting held May 19, 1964, are considered. The City Attorney requests that changes be made to delete references in certain places that he recommended one thing or another. Upon unanimous consent, consideration of the Minutes of May 19 are deferred to June 2.

#### OBJECTIONS - 1961 CHARTER

Chairman Starbird suggests that controversial issues of the 1961 Charter be discussed, and requests the City Attorney to comment on statements contained in "Statement in Opposition to the Proposed City Charter". The City Attorney reviews such statements and comments on the contents thereof.

Member Ruiz now enters at 4:15 o'clock p.m.

The City Attorney states that the home rule provision does grant broad powers to the City, but that these are limited by the State Constitution and the terms of the Charter itself, and that in non-municipal affairs the City has only such powers as granted by the State Legislature.

Member Davidson now enters at 4:25 o'clock p.m.

Discussion is had on the City Manager vote of confidence sections, and upon question of Member Jorgensen the City Attorney advised that four votes of the Council can remove the City Manager at any time.

Member Ruffo now enters at 4:29 o'clock p.m.

#### ELECTED AUDITOR

Ferdinand P. Palla, City Attorney, describes functions of the present City Auditor, those of the auditor proposed in the 1961 Charter, and the proposed Director of Finance who would coordinate accounting, budget, purchasing, licensing, and other financial activities. Discussion is had on the question of whether the City Auditor should be appointed or elected, whether if appointed, he should be appointed by the Council or Manager, and whether or not minimum qualifications for the Auditor should be set forth in the Charter. Members Davidson and Ruffo recommend consideration of providing for the Department of Finance and an elected auditor who would perform post auditing functions. Member Coyle advises that both the County Executive and the County Controller are appointed, and Member Ruffo advises that the State Director of Finance is appointed and that the State Department of Finance has very broad powers but that these recommendations are reviewed and commented upon by the Legislative Analyst.

#### REFERENDUM, INITIATIVE AND RECALL

City Attorney states that the people's right to Referendum, Initiative and Recall are guaranteed by the State Constitution and would not be jeopardized even if not stated in the Charter, and that if a different procedure from that provided for in general law is desired, that it can be set forth in the proposed Charter. He warns the committee, however, to consider carefully the inclusion of too many variations from general law.

## **EXHIBIT C**



Municipal Employees Federation  
of the City of San Jose, a California Corporation  
776 Miller St. San Jose 10, California  
Telephone 286 5250

September 1, 1964

Chairman  
Charter Revision Committee  
City of San Jose, California

Dear Sir,

Since your Committee is discussing today, that portion of the previously proposed City Charter revision pertaining to Retirement, we submit for your consideration the following suggested wording for Section 1601:

Sec. 1601. The City Council in its discretion may at any time, or from time to time, by ordinance amend or otherwise change the retirement or pension plan or plans including but not limited to, previously established plans by parts 1, 2, 3, 3a and 4 of Chapter 9 of Article II of the San Jose Municipal Code provided that they shall not decrease the level of benefits now existing in all retirement plans.

By the foregoing, it is our intent to obtain the same existing retirement benefits for future as well as present employees.

Very truly yours,

MUNICIPAL EMPLOYEES FEDERATION  
of SAN JOSE

  
EDWARD A. GROSSHEIDER  
Manager

EAG:bls

MEMBER



5207

SJRJN000497

# EXHIBIT D

SAN JOSE, CALIFORNIA

Tuesday, September 1, 1964

The City of San Jose Charter Committee convenes this day in Room 430, City Hall, at 4:00 o'clock p.m. and the Secretary Pro Tempore calls the roll:

Present: Members: Atkinson, Coyle, Jorgensen, McKenna, Pfeifle, St. John, Takata and Starbird.

Absent: Members: Barrett, Davidson, Kast, Ruffa, Ruiz, Sturges and Sullivan

#### CONSIDERATION OF PENSION PLAN PROVISIONS

Leonard Marks of the Fire Department speaks for members of the Police and Fire Departments and states that they wish to retain the provisions in the present Charter so that the Council could add benefits but not remove any benefits, and that they do not favor the provision in the 1961 Charter revision giving the Council complete control. He requests that the rate of contribution be maintained for present and future employees and present benefits continued for new employees, but agrees to condensing the wording of the provisions. Chief of Detectives Bart Collins states that the Police Department will have difficulty in recruitment if benefits are decreased.

Edward A. Grasshider, speaking for the Municipal Employees Federation states that the Council has asked for an investigation of the two pension systems with the possibility of combining them both under the State system, and since the benefits under the State system are less than at present, this is the cause of the present concern. He files suggested wording for Section 1601 of the proposed Charter, providing for the retention of present provisions for existing and new employees which provide that benefits cannot be decreased.

Member Davidson enters at 4:35 o'clock p.m.

Mrs. Virginia Shaffer expresses her views on the subject, stating that in her opinion the retirement age for police and fire should be lower than other employees. Mr. Hathaway states the committee appointed to study the different plans is now meeting and they hope to present a proposal to the Council which would simplify retirement legislation and administration.

Member Barrett enters at 4:45 o'clock p.m.

In reply to question of Chairman Starbird, Mrs. Shaffer states that a decision to place the provisions in the Charter might hamper the Council, if it is found that the State system might be more desirable. In reply to question by Member Pfeifle, City Attorney Ferdinand Palla states that all Police and Fire Department employees are under the retirement provisions, except for clerical employees, who are covered by MBF.

Member Sturges enters at 5:15 o'clock p.m.

There is discussion of the contribution ratio, and service requirements of Municipal Employees Federation, and Police and Fire Retirement and Mr. Palla states the present plans provide greater benefits than the State system.

#### REPORT OF CITY CLERK ON REFERENDUMS

Francis L. Greiner, City Clerk, distributed to the members statistical data on recent referendum petitions, and explains referendum procedure. There is discussion on the voter-percentage requirements, and Mrs. Shaffer speaks against reducing the number of signatures on referendum, recall and initiative petitions.

City Attorney Palla cites the percentage requirements which apply in general law cities, and which differ from chartered cities and there is discussion on the different methods of determining percentage requirements. Mrs. Shaffer states that it is inequitable to require mere signatures on a petition overruling a Council decision than would be necessary to elect a Councilman.

Mr. Greiner refers to a suggestion previously made that a percentage of registered voters in the last general election be used, or the number voting in the last municipal election, which would be more definite than the Elections Code provisions using the number of voters registered on the day the petition is filed.

5208

SJRJN000498

# EXHIBIT E

PRESENTED BY: DISTRICT CHIEF LEONARD MARKS  
San Jose Fire Department  
October 13, 1964

add to: Art. XVI Retirement

FIRE AND POLICE RETIREMENT PLAN.

1. Council may exclude same persons as designated in 78 b (3) (non emergency persons.)
2. Must contain following provisions:
  - A. Members with 20 years service, and age 55 may retire, provided that the council may lower the retirement age.
  - B. Members shall be retired at age 65, provided that the council may lower the maximum age.
  - C. Members with 20 years service and disabled, may retire regardless of cause of disability.
  - D. Members retired under A, B, or C shall be entitled to 50% of average salary for three highest years; or  $\frac{1}{3}$  of current salary; or such increased benefit as may be provided by the council.
  - E. Proportionate shares of contribution for current service shall at all times be 8 parts for the City and 3 parts for the member, and the plan is to be actuarially sound, with an actuarial report at least every five years.
  - F. Anything to the contrary notwithstanding, the council may adopt, establish or provide new or different plans providing benefits in excess and additional to those herein provided.

5210

SJRJN000502

# EXHIBIT F

SAN JOSE, CALIFORNIA

Tuesday, October 13, 1964

The City of San Jose Charter Committee convenes this day in Room 430, City Hall, at 4:19 o'clock p.m. and the Secretary Pro Tempore calls the roll:

Presenting Members: Atkinson, Coyle, Jorgensen, Pfeifle, Root, Ruiz, St. John and Sturgeon and Starbird.

Absent: Members: Barrett, Davidson, McKenna, Ruffo, Sturges, Sullivan and Taketa.

City Attorney Ferdinand Palla states there are some basic issues to be decided upon by the Committee before he can proceed with drafting, such as Civil Service, etc.; and that there were relatively small decisions that could be made when the drafts are submitted. He presents to the committee members copies of a draft of the first five Articles of the proposed Charter, explaining that the underlined portions are those requiring approval of the committee.

The Chairman states that if there is no objection, the sections will be approved without the necessity for a vote.

ARTICLE I - INCORPORATION AND SUCCESSION.

Section 100 - Name, approved.

Section 101 - Boundaries, approved.

Member Davidson enters at 4:20 o'clock p.m. Member Sturges moves that this provision be written, amended by Member Sturges enters at 4:27 o'clock p.m.

Section 102 - Laws, Ordinances, etc., providing that ordinances adopted or approved by the electors may be repealed or amended by the Council, approved. Member Sturges suggests that this appear at the end of the Charter.

Section 103 - Succession, approved.

Section 104 - Continuance of Present Appointive Officers and Employees. Approved. Member Sturges suggests this also could be at the end of the Charter, and the Chairman agrees.

Section 105 - Continuity of Agencies. Approved as drafted with the following amendment: "...and shall have the power to continue any business, proceedings or other matter within the scope of its powers and duties under this Charter commenced by an office, department or agency by which such powers and duties were heretofore exercised."

Member McKenna enters at 4:52 o'clock p.m.

Section 106 - Pending Matters, approved.

ARTICLE II - POWERS OF THE CITY

Section 200 - General Powers. Approved as written in 1961 revision.

Section 201 - Special Powers. Approved. The section on annexation is omitted. Member Sturges questions the section on eminent domain and Mr. Palla states the City has to be given power to acquire property outside the City, as the courts do not always imply this authority by the City.

Section 202 - Procedures, approved.

Section 410 - When office becomes vacant. The City Attorney agrees.

SJR/JN000500

Chairman Starbird polls the members on the number of votes required for initiative, referendum, and recall, with the following recommendations being given:

Member Sturges: 5,000 plus 2% to 5% of registered voters.  
Member Coyle: As in 1961 revision.  
Member Jorgensen: Increase - about 10,000.  
Member St. John: Increase.  
Member Ruiz: Larger than they are talking about.  
Member Atkinson: 10% of electorate on referendum and initiative; 15% on recall.  
Member Pfeifle: Same as Member Atkinson.  
Member Root: Same as Member Atkinson.  
Member Davidson: As in 1961 revision.  
Member McKenna: 8,000 to 8,500 signatures--close to Member Sturges' recommendation.

There were eight in favor of increasing the requirements and three in favor of leaving them as in the 1961 revision. Chairman Starbird states that in his opinion the public should have a chance to initiate legislation with a very small number of signatures for a general election and about twice as many for a special election. Member Atkinson suggests 12% of the registered voters at the last municipal election for a recall petition; 8% on referendum; and on initiative, 5% for a general election and 8% for a special election. The Chairman asks the City Attorney to prepare a draft with these percentage requirements. In answer to question of City Attorney the committee agrees the percentages would be the same for recall of City Manager.

#### ELECTION OF AUDITOR

The City Attorney states the draft will allow for an outside audit but not a continuous audit. There is discussion of whether the auditor should be elected. Member McKenna states that in his opinion the auditor should have special qualifications and the people should be given a vote for him. The Chairman asks whether the committee prefers an elected Auditor with duties restricted to post audit, or an Auditor appointed by the Council with the right to direct his work outside of the normal regular work of the City with the Auditor conducting an internal post audit. Member Coyle states the Council cannot tell an elected Auditor what to do, and Member Sturges states you cannot elect as much competence as you can appoint. No vote was taken at this time.

#### POLICE AND FIRE DEPT. RETIREMENT SYSTEM

Leonard Marks of the Fire Department presents and files a proposal on the retirement system for Police and Fire Department employees. Members are supplied with a copy, and are asked to consider it for the next meeting.

#### ADJOURNMENT

The meeting adjourns at 11:10 o'clock p.m. to meet again Tuesday, October 20, 1964, at 4:00 o'clock p.m. in the Council office, to adjourn at 6:00 o'clock p.m. for dinner and reconvene at 7:00 o'clock p.m. in Room 430.

GEORGE A. STARBIRD,  
CHAIRMAN

FRANCIS L. GREINER  
SECRETARY PRO TEMPORE

By (Miss) Kay Pritz, Deputy

SJRJN000501

# EXHIBIT G



Municipal Employees Federation  
of the City of San Jose, a California Corporation  
776 Miller St. San Jose 10, California  
Telephone 286 5250

October 27, 1964

Mr. George Starbird, Chairman  
Charter Committee  
City of San Jose, California

Dear Mr. Starbird,

The Municipal Employees Federation offers the following recommendations for inclusion in your committee's thinking, discussions and hearings before the final draft of the new proposed Charter is completed:

CIVIL SERVICE COMMISSION

1. We feel that the provisions of the revised Charter (1962) regarding nominations by employees of at least two Commissioners should be placed in the new Charter. Each could be appointed by Council from a list of three, nominated by the employees. This practice is consistent with that prevailing in other jurisdictions; for example, the Personnel Board of the County of Santa Clara.
2. Since about 50% of public employees are female, the stipulation of "not more than four Commissioners shall be of the same sex" implies that only one shall be a woman. This, in our opinion, is discriminating.
3. The mandate of an attorney being one of the five Commissioners has no justification. For, under such a provision, this person normally is elected the Chairman, not because of his presumed extraordinary capabilities, but rather in deference to his professional status.
4. Commissioners should be limited to two terms.
5. We feel the office of Secretary to the Commission should be retitled to "clerk", and that the Personnel Director should not serve in this capacity since he is administrative advisor to the Commission and, in our

MEMBER



522

SJRJN000505

Mr. George Starbird, October 27, 1964, page 2

opinion, cannot function properly for both management and employees.

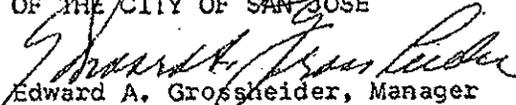
RETIREMENT

In our presentation before you regarding Section 1601 entitled "Authority to Amend Retirement System", we again offer the following:

Sec. 1601. The City Council in its discretion may at any time, or from time to time, by ordinance amend or otherwise change the retirement or pension plan or plans including, but not limited to, previously established plans by parts 1, 2, 3, 3a and 4 of Chapter 9 of Article II of the San Jose Municipal Code provided that they shall not decrease any benefits now existing in such retirement or pension plan or plans.

Very truly yours,

MUNICIPAL EMPLOYEES FEDERATION  
OF THE CITY OF SAN JOSE

  
Edward A. Grossneider, Manager

EAG:bls

SJRJN000506

# EXHIBIT H

The City of San Jose Charter Committee assembles this day in Room 430, City Hall, at 4:00 o'clock p.m., and the Secretary Pro Tempore calls the roll:

Present: Members Atkinson, Barrett, Jorgensen, Pfeifle, Root, Ruffo and Sullivan.

Absent: Members Coyle, Davidson, McKenna, Ruiz, St. John, Sturges, Taketa and Starbird.

A quorum is not present.

CHAIRMAN PRO TEMPORE

Member Pfeifle states that he is acting as Chairman Pro Tempore at the request of Chairman George Starbird.

CORRESPONDENCE

Chairman Pro Tempore Pfeifle reads and files the following communications:

1. Letter from John E. Thorne, Attorney at Law, on behalf of Public Employees Council 27 AFL-CIO and Firefighters Local #873-AFL-CIO, asking that copies of the proposed new charter be supplied, and a time scheduled for these organizations to meet with the Charter committee.
2. Letter from Mr. Anthony Vanella on the subject of Councilmen's salaries.
3. Letter from Municipal Employees Federation suggesting certain changes in the provisions covering the Civil Service Commission.

Chairman Pro Tempore Pfeifle requests that the Secretary Pro Tempore's deputy address replies to these communications to the effect that copies of the final draft of the proposed Charter will be available to the public, and that a public hearing will be held before the Charter is printed in final form for submission to the voters.

Member Coyle enters at 4:15 o'clock p.m. A quorum is now present.

There is discussion as to when the Charter will appear on the ballot, and the City Attorney states he will get a tentative date, and report at the next meeting.

Member McKenna enters at 4:20 o'clock p.m.

ARTICLE VIII - ADMINISTRATIVE ORGANIZATION

Section 306. Finance Department.

(a) Approved.

Member Davidson enters at 4:23 o'clock p.m.

(b) Approved, with the addition of "State" in the last sentence as follows: "...in accordance with the applicable State law;"

(c) Approved, with a change of wording in the last sentence as follows: "...to assure that expenditures will not exceed monies available."

Member Taketa enters at 4:30 o'clock p.m.

(d) and (e) It is agreed that these sections will be combined with (c) and reworded.

(f) There is discussion of the makeup of the Finance Department, and in answer to question of Member Coyle, City Attorney Palla states that the functions of purchasing and general services could be removed from this department. He states the functions of the Treasurer and Controller cannot be taken out of the department by the Council. Approved.

(g) and (h) Approved.

Section 307. Other Departments. There is discussion on combining Police and Fire Departments, and the City Attorney states that under this provision it cannot be done. Member Root states that the City's needs will change in the future so that it is impossible to spell out specific duties for departments now; Member Davidson suggests not naming the departments specifically at all. Approved as written.

Member St. John enters at 4:37 o'clock p.m.

ARTICLE IX - OFFICERS AND EMPLOYEES

Section 900. Enumeration. The City Attorney will change "ordinance" to "Council" in the last sentence: "...as may be provided by this Charter or by the Council."

Section 901. Appointment and Removal. The following addition will be made to the first sentence: "...at least four (4) members of the Council except as otherwise provided herein."

Section 902. Compensation. There is discussion of including both ordinance and resolution as a means of fixing compensation; the City Attorney will consider this when preparing the final copy.

Section 903. Oath of Office. Approved.

Section 904. Administering Oaths. Approved.

Section 905. Official Bonds. Approved.

Section 906. Prohibited Interests. Approved.

Section 907. Nepotism. The Chairman Pro Tempore takes a poll of the members.

Member Root states that in his opinion if this is deleted, it could be used as an objection; it is the consensus of the committee that it should remain. Chairman Pro Tempore Pfeifle suggests that it be tempered in some way. City Attorney Palla states he will reword the section with this in mind, and also states he would prefer omitting "department head", so that the last sentence will read "...nor shall any other officer having appointive power..."

Section 908. Discrimination. Approved.

Member Sturges enters at 5:11 o'clock p.m.

ARTICLE X - BOARDS AND COMMISSIONS

Section 1000. Planning Commission. It is agreed to change the last sentence in the first paragraph to read "...or their representatives, may meet..." rather than "shall meet". There is discussion on placing responsibility for the master plan, and Mr. Palla states in his opinion it should be the manager's responsibility to prepare the general plan, and asks the committee's opinion as to whether the manager should submit it to the Council or first submit it to the Planning Commission. At the present time, according to Mr. Palla, the Manager prepares the long-term general plan, making it mandatory for all departments to submit information to the Planning Department, who in turn would submit it to the Council through the Manager. Mr. Ruffo states the Planning Department is now primarily concerned with planning overall use of land. Member Davidson states that preparation of a master plan is a primary duty of the city manager. Member Coyle states the planning function and budgetary responsibilities are two separate functions and that the master plan must be reviewed annually. The City Attorney states that this section does not refer to the master plan. In reply to question of Member Taketa, there is discussion of the function of the Planning Commission. Member Barrett states he would like to have this subject discussed further, and states in his opinion the Planning Commission should present a five-year program through the City Manager, and states he will make a report at the next meeting. Member Coyle speaks about the ASPO report on planning recommendations to the Charter Committee (American Society of Planning Officials), and the Chairman Pro Tempore requests that the Secretary Pro Tempore obtain a copy of this report for the Committee's use. Member Root states that in his opinion the Manager should be charged with the overall responsibility for a plan prepared by the Planning Department approved by the Planning Commission; and Mr. Palla states that if the manager is given the power to prepare a budget, he is automatically given authority to prepare the work program. No decision is made on this section at this time.

Section 1001. Civil Service Commission. Chairman Pro Tempore polls the members on the six-year term. Members Coyle and Sturges approve a four-year term and Member Ruffo suggests a ten-year term. Chairman Pro Tempore expresses his opinion that the Civil Service Commission should be a very impartial group, and serve a longer term so they will be better qualified, and recommends no limit on the number of terms. Member Davidson moves that the six-year term be approved, seconded by Member Atkinson, and adopted by the following vote: Ayes: Members Atkinson, Davidson, Jorgensen, McKenna, Pfeifle, Root, Ruffo, St. John, Sullivan and Taketa. Noes: Members Barrett, Coyle and Sturges.

Member Ruffo moves that there be no limitation on the number of terms, seconded by Member Jorgensen and not adopted. Ayes: Members Jorgensen, McKenna, Ruffo and Sullivan. Noes: Atkinson, Barrett, Coyle, Davidson, Pfeifle, Root, St. John, Sturges and Taketa.

Member Davidson moves that a limit of two terms be placed on all Boards and Commissions, seconded by Member Coyle. There is discussion, and Member Sullivan states that in his opinion it takes a considerable period to become familiar with the responsibilities on the Commission, because they meet infrequently. Member Sturges questions whether the Civil Service Commission is unique and should require more time than any other. The motion is amended to refer to the Civil Service Commission alone, seconded by Member Coyle, and not adopted. Ayes: Members Barrett, Coyle, Davidson, Pfeifle, Root, St. John and Taketa. Noes: Members Atkinson, Jorgensen, McKenna, Ruffo, and Sullivan. Member Sturges abstains.

ADJOURNMENT

The meeting adjourns at 5:50 o'clock p.m., to meet again Tuesday, November 17, 1964, at 4:00 o'clock p.m., in the Council office, City Hall.

WILLIAM S. PFEIFLE,  
CHAIRMAN PRO TEMPORE

FRANCIS L. GREINER  
SECRETARY PRO TEMPORE

By: Kay Pritz, Deputy

# EXHIBIT I



Municipal Employees Federation  
of the City of San Jose, a California Corporation  
776 Miller St. San Jose 10, California  
Telephone 286 5250

December 4, 1964

To: Charter Revision Committee  
Subject: Inclusions of basic retirement benefits  
now in existence for the Federated City  
Employee Retirement System

We understand that a specific proposal has been presented to your body for Police and Fire Retirement basic benefits.

After careful study of the matter, we would like to submit a similar proposal as it pertains to the Federated Retirement System.

In order to facilitate the inclusions of both Retirement Systems in the proposed Charter we suggest the following provisions:

- A. Members may retire at age 55 with 25 years of service.
- B. Mandatory retirement shall be at age 70.
- C. Members with 10 years of service may be eligible for disability retirement at 90% of service retirement benefit but not less than  $\frac{1}{2}$  pay.
- D. Members shall receive 2% of the highest 3 year average annual salary for each year of service. (This will equal 50% of  $\frac{1}{2}$  pay at 25 years of service.)
- E. Ratio for current service contributions shall be 8 parts for the City and 3 parts for members.
- F. The City Council may adopt any amended or new plan or plans, providing benefits in excess and additional to those herein provided.

Submitted by

Retirement Committee of the  
Municipal Employees Federation

MEMBER

ES:bls



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SJRJN000507

## **EXHIBIT J**

The City of San Jose Charter Committee convenes this day in Room 430, City Hall, at 4:15 o'clock p.m., and the Secretary Pro Tempore calls the roll:

Present: Members Atkinson, Barrett, Jorgensen, McKenna, Pfeifle, Rosc, St. John, Takefa and Starbird.

Absent: Members Coyle, Davidson, Ruffo, Ruiz, Sturges and Sullivan.

#### CORRESPONDENCE

Chairman Starbird reads and files a letter from the Municipal Employees Federation on retirement provisions. He states that the communication from Member Barrett will be considered by the committee at the proper time.

Member Coyle enters at 4:20 o'clock p.m.

#### ARTICLE XII - FISCAL ADMINISTRATION

Section 1224. Revenue Bonds. The City Attorney states that this section contains several points for the committee to consider and explains various kinds of revenue bonds which are actually reimbursable contracts. He asks if the committee wishes to limit the Council on the amount of revenue bonds issued on a particular project. His recommendation is that the section remain silent on revenue bonds other than for off-street parking, and that it contain a provision prohibiting public utility bonds. Member Barrett suggests that a definition of revenue bonds be included. Mr. Palla will redraft the section.

Member Davidson enters at 4:32 o'clock p.m.

Section 1212. Bid requirements. The City Attorney distributes a redraft, stating that he has included a provision covering public work done by a subdivider, developer or owner of real property. Member Davidson speaks of the danger of abuse with an unrealistic engineers' estimate in connection with the rejection of excessive bids by the Council. It is agreed to reword the last sentence of the first paragraph on Page 2, "...declares that the bids were excessive, it may after re-advertising, have..."

Member Sturges enters at 4:39 o'clock p.m.

#### ARTICLE XIV - FRANCHISES

Section 1400. Power to Require Franchises. The City Attorney states that some utilities have franchises under the Constitution, some by election, and that the City's franchise powers are very limited. He suggests giving the Council power to require franchises but giving them discretion in the use of such power. Upon inquiry of Member Sturges, he states that San Jose, as a Charter City, has more powers than it would have under State law. Approved.

Section 1403. Term of Franchise. Approved.

Section 1404. Purchase or Expropriation by City. Approved.

Section 1405. Adequate Compensation. The City Attorney states that this section could be deleted. He suggests the wording on compensation be changed to "such compensation as the Council may deem proper." It is agreed that the section be deleted.

Section 1406. Exercising Right Without Franchise. Approved.

Section 1407. Article Not Applicable to City. Approved.

Section 1408. Reservation of Rights. The City Attorney states this covers a situation where the Court's might inquire if the City had franchise power on a certain date. Approved.

#### ARTICLE XV - SCHOOL SYSTEM. Approved.

#### ARTICLE XVI - RETIREMENT

Section 1600. Duty to Provide Retirement System. Approved.

Section 1601. Exclusions. Approved.

Section 1602. Authority to Join Other Systems. Approved.

Section 1603. Continuance of Existing Retirement Systems. There is discussion on whether minimum benefits should be listed in the Charter as requested by employee organizations. In answer to question of Mr. Pfeifle, Mr. Palla states that Police and Firemen want a separate retirement system due to the nature of their work, and he states that the benefits they have, including much greater survivorship benefits, do not cost the City any more. He states also that the Council can exclude clerical employees from any new Police and Fire Department retirement plan. There is discussion of the State retirement system, and Mr. Palla points out that although under

the State system the Police and Fire benefits are higher than for other employees, they are not as high as the City now provides. Member Atkinson moved that Section 1603 be rewritten to include minimum benefits, seconded by Member Davidson, and unanimously adopted.

**ARTICLE XVII - ELECTIONS**

Section 1700. General Municipal Elections. Mr. Palla states the City Clerk should be consulted as to which Tuesday in May to designate for any second election. Approved.

Section 1701. Special Municipal Elections. Approved.

Section 1702. Election Procedures. Approved.

Section 1703. Initiative, Referendum, and Recall. Member Davidson questions the percentage figures and states that in his opinion they had not been formally adopted. Member Atkinson's motion that they be adopted is not seconded and no vote is taken. Following discussion, it is agreed to table this subject until the next meeting.

Section 1704. Removal of City Manager.

(a) The percentage figure is questioned by Member Coyle.

(b) After discussion, it is agreed to provide for a special election.

(c) and (c) approved.

**AGENDA**

Discussion with Planning Commission is scheduled for 5:00 o'clock p.m. on Dec. 15. General Provisions - ARTICLE XVIII will be considered, and Initiative, Referendum and Recall reviewed. Chairman Starbird outlines his plan to have two or three committee members prepare the Charter for printing as a preliminary draft. Member Takata moves that the Chairman proceed accordingly, seconded by Member Coyle, and unanimously adopted.

**ADJOURN**

The meeting adjourns at 6:00 o'clock p.m., to meet again Tuesday, December 15, 1964, at 4:00 o'clock p.m., in the City Council office.

GEORGE A. STARBIRD,  
CHAIRMAN

FRANCIS L. GREYNER  
SECRETARY PRO TEMPORE

By: Kay Fritz, Deputy

# **EXHIBIT K**

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Arthur A. Hartinger  
Attorney at Law  
ahartinger@meyersnave.com

June 25, 2013

Via Email and U.S. Mail

Gregg M. Adam  
CARROLL, BURDICK & McDONOUGH  
44 Montgomery Street, Suite 400  
San Francisco, CA 94104

Re: *POA. et al. v. City of San Jose*  
Case No. 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)  
MN File No. 135.023

Dear Gregg:

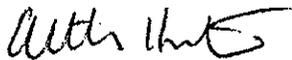
I write to respond to your letter dated June 18, 2013.

You have inquired about the City's intention to assert a defense based on a fiscal emergency. We believe you are referring to the doctrine permitting a legislative body to take emergency measures that would otherwise impair contract rights. One element of this defense includes the issue whether there is a true financial emergency. See *Home Building & Loan Association v. Blaisdell*, 42 U.S. 311 (1934); *Sonoma County Org. of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 305 (1979).

We do not intend to assert at trial that Measure B was a justifiable impairment of contract rights based on the existence of a fiscal emergency within the meaning of *Blaisdell* and *County of Sonoma*. We do anticipate that there will be evidence at trial relating to the economic crisis and conditions that led to placing Measure B on the ballot.

We trust this resolves your question and concern.

Very truly yours,



Arthur A. Hartinger  
AAH:kt

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