

EXHIBIT A



COUNCIL AGENDA: 03-06-12
ITEM:

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Debra Figone

SUBJECT: REVISED BALLOT
MEASURE

DATE: February 21, 2012

RECOMMENDATION

1. Discussion and consideration of repeal of Resolution No. 76087 and consideration of a revised Retirement Reform ballot measure for a June 5, 2012 election;
2. If Council wishes to proceed, repeal Resolution No. 76087 and adopt a resolution of the Council:
 - a) calling for a special municipal election to be held on June 5, 2012, and, on its own motion, giving notice of the submission to the electors of the City of San Jose, of the following measure at that election:

PENSION REFORM

To protect essential services: neighborhood police patrols, fire stations, libraries, community centers, streets and parks, shall the Charter be amended to reform retirement benefits of City employees and retirees by: increasing employees' contributions; establishing a voluntary reduced pension plan for current employees and pension cost and benefit limitations for new employees; reforming disability retirements to prevent abuses; temporarily suspending retiree COLAs during emergency; and requiring voter approval for increases in future pension benefits?

- b) directing the City Clerk to take all other actions previously approved on December 6, 2011, necessary to facilitate the Special Municipal Election.

BACKGROUND

The Mayor's March 2011 Budget Message, that was approved by the City Council, directed the City Manager to develop a Fiscal Reform Plan to save \$216 million in General Fund Savings by Fiscal Year 2015-2016, and to reduce retirement costs to the Fiscal Year 2010-2011 level. The Fiscal Reform Plan is available here:

<http://www.sanjoseca.gov/budget/FY1112/05MBA/MBA01-FiscalReformPlan.PDF>.

HONORABLE MAYOR AND CITY COUNCIL

Subject: Revised Ballot Measure

February 21, 2012

Page 2 of 8

At the May 24, 2011, City Council meeting, the City Manager's *Fiscal Reform Plan* was agendaized for discussion as item 3.4. For this agenda item, in a memorandum dated May 13, 2011, Mayor Reed, Vice Mayor Nguyen and Councilmembers Herrera and Liccardo, recommended an amendment to the City Charter in order to limit retirement benefits and to require voter approval of increases in retirement benefits. This was approved by the City Council, which directed staff to return with a proposed ballot measure.

To allow time to meet and confer with the City's bargaining units, this item was deferred and, per a memo submitted by the Mayor on November 18, 2011, consideration of the proposed ballot measure was agendaized for City Council consideration at the Council meeting on December 6, 2011. On December 6, 2011, the City Council adopted Resolution 76087 and approved a ballot measure (Attachment B) for the June 2012, election, but directed staff not to submit the ballot measure language to the Registrar of Voters to allow time for the City Administration to ask the bargaining units to re-engage in mediation on all retirement issues, including the related ballot measure, in an attempt to reach an agreement on the ballot measure language that would be submitted to the Registrar of Voters.

Timeline

When the direction for a ballot measure was first approved in May 2011, it was intended for consideration for the November 2011 election. However, to give additional time for negotiations with the City's bargaining units, it was postponed until the March 2012 election. On December 6, 2011, the City Council voted again to delay the ballot measure to the June 2012 election.

The City Council must approve putting a ballot measure before the voters 88 days in advance of the election. March 9, 2012, is 88 days prior to the June 2012 election. Although the City Council approved ballot measure language on December 6, 2011, the language was not submitted to the Registrar of Voters to allow additional time for mediation. The final ballot measure language must be submitted to the Registrar of Voters by March 9, 2012.

If the revised ballot measure is not approved by the City Council, absent other action by the City Council, the City Clerk has been directed to submit to the Registrar of Voters the ballot measure approved by the City Council on December 6, 2011.

ANALYSIS

Meet and Confer with the City's Bargaining Units

As was explained in a memo (Attachment C) dated November 22, 2011, for the December 6, 2011 meeting, the meet and confer process over a ballot measure is somewhat different than the traditional meet and confer process and is referred to as "Seal Beach Bargaining." "Seal Beach Bargaining" is a labor term that comes from a court case involving the City of Seal Beach, California, and the Seal Beach Police Officers' Association. It refers to bargaining or negotiating over a proposed ballot measure prior to it being placed on a ballot for consideration by voters during an election. This is only done when a proposed ballot measure affects matters within the scope of representation.

HONORABLE MAYOR AND CITY COUNCIL

Subject: Revised Ballot Measure

February 21, 2012

Page 3 of 8

Because the proposed ballot measure affects retirement benefits, the City engaged in "*Seal Beach Bargaining*" with all 11 of its bargaining units, although the level of participation varied by each bargaining unit. In all cases, the City provided advance notice to every bargaining unit and an opportunity to bargain.

Although significant changes were made to the ballot measure based on comments the City received from the bargaining units, no agreement was reached with any bargaining unit during negotiations. Because of this, impasse procedures were invoked. Under the Employer-Employee Relations Resolution 39367, mediation is triggered by a declaration of impasse. The City offered mediation to all bargaining units, even those who had declined or failed to participate in bargaining regarding the ballot measure.

Prior to December 6, 2011, the City and 11 bargaining units engaged in mediation, but those efforts did not result in an agreement. Although the City Council approved moving forward with the ballot measure dated December 5, 2011, for a June 2012 election, they asked that the City negotiators ask the bargaining units to re-engage in mediation in an attempt to reach an agreement.

On December 7, 2011, the City Administration contacted all 11 bargaining units to gauge their interest in re-engaging in mediation in a coalition setting. Although the City asked that the 9 bargaining units that represented employees in the Federated City Employees' Retirement System meet in a coalition setting, they were not interested in doing so.

The following chart represents the coalitions that were formed for mediation and the numerous mediation sessions and meetings that ensued since December 6, 2011.

Federated City Employees' Retirement System		Police and Fire Department Retirement System
Association of Building, Mechanical and Electrical Inspectors Association of Legal Professionals Confidential Employees' Organization, AFSCME Municipal Employees' Federation, AFSCME Operating Engineers, Local #3	IFPTE Local 21 Association of Engineers and Architects City Association of Management Personnel Association of Maintenance Supervisory Personnel	San Jose Fire Fighters, IAFF Local 230 San Jose Police Officers' Association
Wednesday, December 21st Wednesday, January 4th Friday, January 6th Friday, January 13th Monday, January 30th Monday, February 13th	Friday, January 6th Monday, January 9th Thursday, January 19th Tuesday, January 24th Thursday, January 26th Wednesday, February 8th Thursday, February 9th	Thursday, December 22nd Monday, January 9th Thursday, January 12th Tuesday, January 17th Wednesday, January 18th Monday, February 6th Friday, February 10th

The mediation process itself is confidential. If an agreement is not reached in mediation, the City may maintain its position prior to mediation, which was the approved December 5, 2011, ballot measure, or it may make additional movement consistent with its positions in mediation. In other words, even without an agreement, the mediation process may result in additional changes to the ballot measure.

Despite a total of approximately 20 meetings, an agreement was not reached with any of the bargaining units.

Ballot Measure

During the last 7 months, the City made numerous and significant changes to the ballot measure and provided the following revised drafts to the bargaining units:

- July 5, 2011 (Original Draft Proposed Ballot Measure)
- September 9, 2011
- October 5, 2011
- October 20, 2011
- October 27, 2011
- December 5, 2011

HONORABLE MAYOR AND CITY COUNCIL

Subject: Revised Ballot Measure

February 21, 2012

Page 5 of 8

Although mediation did not yield an agreement with any of the bargaining units, I am recommending additional changes to the ballot measure from the December 5, 2011, version which was approved by the City Council on December 6, 2011. The attached (Attachment A) reflects all of the recommended changes to the previous version of the ballot measure. These changes are a combination of clarifying language and substantive changes after mediation discussions. It is important to note that through the negotiation process, 10 of the City's 11 bargaining units at one time during the process proposed an opt-in program, which is also referred to as a voluntary election program.

The following highlights some of the recommended changes to the ballot measure since the December 5, 2011, version that was approved by the City Council. It is important to read the attached revised ballot measure which clearly identifies all of the proposed changes.

Vesting Language (Sections 2 and 5)

The revised ballot measure includes clarifications to the language regarding the City's ability to modify benefits in the future in Sections 2 and Section 5 to be consistent with the provisions in the City Charter.

Current Employees (Section 6)

The revised ballot measure includes the following changes to the compensation adjustment through additional retirement contributions for those employees who elect to stay in the current level of benefits (Tier 1).

Provision	December 5, 2011 Ballot Measure	Recommended Revision
Compensation Adjustment Increments per Fiscal Year	5% of pensionable pay	4% of pensionable pay
Compensation Adjustment Maximum	25%, but no more than 50% of the unfunded liability	16%, but no more than 50% of the unfunded liability
Compensation Adjustment Start Date	June 24, 2012	June 23, 2013

The compensation adjustments through additional retirement contributions will be in increments of 4%, with a maximum of 16% of pensionable pay. The unfunded liability serves as a limitation on the compensation adjustment employees would receive through additional retirement contributions. The adjustments are not required to be exactly in increments of 4% because they are dependent on the limitation of 50% of the pension unfunded liability.

Below is an example using the pension unfunded liability contribution rate for Fiscal Year 2012-2013 for an employee in the Federated City Employees' Retirement System. It should be noted that this is only an example and the unfunded liability contribution rate is adjusted every year based on an actuarial valuation completed by the Board's actuary. The pension unfunded

liability contribution rate for Fiscal Year 2012-2013 (which is currently 100% City paid) will be 26.37%. 50% of this contribution rate is 13.185%.

The revised ballot measure reduces the cap on the compensation adjustment through additional retirement contributions to 16% of pensionable pay, but no more than 50% of the unfunded liability to be adjusted in 4% increments rather than 5%. The chart below provides an example of the compensation adjustment for future years if the pension unfunded liability contribution rate remained at 26.37% for an employee who elects to stay in the current level of retirement benefits.¹

Fiscal Year	Example Compensation Adjustment Increment	Example Total Compensation Adjustment
Fiscal Year 2013-2014	4%	4%
Fiscal Year 2014-2015	4%	8%
Fiscal Year 2015-2016	4%	12%
Fiscal Year 2016-2017	1.185%	13.185%

In any year where the pension unfunded liability contribution rate decreases, the decrease could occur in more or less than 4% increments. For example, after the phase in example above, if the pension unfunded liability contribution rate decreased to 15% (50% of that is 7.5%), an employee's compensation adjustment through additional retirement contributions would decrease to 7.5% for that year.

If the Voluntary Election Program is not implemented for any reason, the compensation adjustment will apply to all employees. When the Voluntary Election Program is implemented, the only employees who will not have the compensation adjustment are those that opt into the Voluntary Election Program defined in the ballot measure.

Voluntary Election Program (Section 7)

In the current level of benefits (Tier 1), an employee can retire at any age after reaching 30 years of service. If an employee elects to opt into the Voluntary Election Program (VEP), in the December 5, 2011 ballot measure, the eligibility to retire at thirty (30) years of service regardless of age would increase by 6 months annually on July 1 of each year. This phase in would start the first July 1 after the Voluntary Election Program was implemented. In the revised ballot measure, this phase in would not start until July 1, 2017.

¹ These numbers are only an example, the actual unfunded liability for each Fiscal Year will be determined by the Boards' actuary.

Future Employees- Limitation on Retirement Benefits- Tier 2 (Section 8)

The ballot measure itself does not define what the retirement benefit will be for new employees, rather, it sets parameters around the Tier 2 benefit. The revised ballot measure increases those parameters as follows:

Benefit Parameter	December 5, 2011 Ballot Measure	Recommended Revision
Cost of Living Increase Maximum	1% maximum based on the Consumer Price Index (CPI)	1.5% maximum based on CPI
Benefit Accrual Rate Maximum	1.5% per year of service	2% per year of service with a 65% maximum

In addition, the December 5, 2011, ballot measure states that all costs for the Tier 2 plan be shared 50/50 between the City and employees, but that the City contributions would not be less than 6.2% nor greater than 9% of base salary.

In the revised ballot measure, the City's cap on costs of 9% would be removed for a defined benefit plan and regardless of the costs of the defined benefit plan, they would be shared 50/50 between employees and the City. Below is a comparison of this cost sharing arrangement:

Benefit Parameter	December 5, 2011 Ballot Measure	Recommended Revision
Defined Benefit Plan with a Total Cost of 20% of payroll	City Cost: 9% Employee Cost: 11%	City Cost: 10% Employee Cost: 10%

However, the revised ballot measure adds that the City may contribute to a defined contribution or other retirement plan only when and to the extent the total City contribution does not exceed 9% and that 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. For example, if the City's share of the costs for a defined benefit plan is 10%, no contributions would be allowed into a defined contribution plan. If the City's share of the costs for a defined benefit plan is 8%, the City could, but is not required to, contribute up to 1% (for a total of 9%) towards a defined contribution plan for the employee.

It is important to note that because the ballot measure only sets parameters for a second tier, the actual design of the second tier is subject to the negotiations process with the bargaining units. The City and the bargaining units have also reached impasse on this topic and engaged in mediation, which did not result in an agreement.

Savings (Section 14)

This section was modified to limit the application of the section to the situation in which it is determined that the City is not able to adjust compensation through additional retirement contributions, then the City would, to the extent permitted by law, adjust compensation through pay reductions.

The ballot measure will also include section numbering to be consistent with the City Charter.

CONCLUSION

The proposed ballot measure includes many significant changes and movement from earlier drafts. This movement is the result of many hours of negotiations and mediation with the City's bargaining units and consideration of the many dimensions of the difficult issue of Retirement Reform.

The proposed revised ballot measure is a critical step towards reducing retirement costs "in a manner that protects the City's viability and public safety" and "at the same time allowing for the continuation of fair post-employment benefits for its workers," as stated in the attached Retirement Reform Ballot Measure.

COORDINATION

This memo has been coordinated with the City Attorney's Office.



DEBRA FIGONE
City Manager

Attachments:

- A: February 21, 2012, Revised Ballot Measure
- B: December 5, 2011, Ballot Measure Approved by the City Council on December 6, 2011
- C: November 22, 2011, Council Memorandum (without attachments)



February 21, 2012

**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 ~~Employee Fair Pay and Sustainable Retirement Benefits and Compensation Act.~~*"

Section 1: 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.

February 21, 2012

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 2: 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.

February 21, 2012

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.

~~This Act is not intended to grant any vested rights to any post employment benefit. 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.; provided, however, nothing in the Act shall be construed to require the forfeiture of any contribution made by an employee toward a pension plan benefit.~~

February 21, 2012

Section 3. ~~Measure~~ 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, ~~as well as all 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 ~~June~~ September 30, 2012.

Section 4. 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 ~~no~~ 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 5. 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 ~~measure~~ 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 ~~to amend, change or repeal any retirement or other~~

February 21, 2012

~~post-employment benefit program subject to the terms of this measure~~Act.

Section 6. 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 ~~reduced~~adjusted by sharing 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 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) A Current Employee’s share of the cost to amortize pension unfunded liabilities shall be 5% of pensionable pay starting June 24, 2012, and increased by 5% every fiscal year until the employee’s proportionate share of the cost reaches 50% of the amortized pension unfunded liabilities, with each employee’s share capped at 25% of the employee’s pensionable pay.~~

~~(d)~~ The starting date for an employee’s compensation adjustment under this Section shall be June ~~24~~23, 2012~~2013~~, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the

February 21, 2012

compensation adjustments shall apply to all Current Employees.

(ed) The compensation adjustment through additional employee contributions for Current Employees' share of the cost to amortize any unfunded liabilities shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(fe) The additional retirement contributions 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 7: 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 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

February 21, 2012

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 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

February 21, 2012

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~~on July 1 of each year.~~
 - (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 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

February 21, 2012

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.

- (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

February 21, 2012

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 8: 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 City contributions shall not be less than 6.2% nor greater than 9% of base salary, excluding premiums or other additional compensation. In no event shall the City contribution to such plan exceed 50% of the cost of the Tier 2 plan (both normal cost and unfunded liabilities).~~ 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 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

February 21, 2012

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 1.52% per year of service, not to exceed 65% of final compensation.
- (f) For any defined benefit plan, an employee will be eligible for a full year of service credit upon reaching 2080 hours

February 21, 2012

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 9: 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:

February 21, 2012

(i) An employee cannot do work that they did before; and

(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

February 21, 2012

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.

Section 10: 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 11: 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

February 21, 2012

in addition to the benefits authorized herein shall not be funded from plan assets.

Section 12: 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 13: 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

February 21, 2012

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 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:

- 1) 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
- 2) 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:

- 1) the funding objectives and actuarial assumptions of the plans; and

February 21, 2012

- 2) 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.

Section 14: Savings

~~(a) In the event Section 7 or 10 (as that Section applies to Current Employees), of this Act is determined to be illegal, invalid or unenforceable as to Current Employees, then the Current Employees' share of the costs to amortize any unfunded liabilities shall be 50% of the plan covering the respective employees.~~

~~(b) In the event Section 6 (b) and (c), and/or the employee payment of the unfunded liability referenced in Section 14(a), 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 ~~54%~~ 54% of compensation each year, capped at a maximum of ~~25.16%~~ 25.16% of pay or the equivalent of what would be 50% of the amortized pension unfunded liability.~~

Section 15: 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

February 21, 2012

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.

(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.

December 5, 2011

**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 Employee Fair Pay and Sustainable Benefits Act.*"

Section 1: 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.

December 5, 2011

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 2: 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.

December 5, 2011

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.

This Act is not intended to grant any vested rights to any post employment benefit. The City expressly retains its authority to amend, change or terminate any retirement or other post employment benefit program provided by the City; provided, however, nothing in the Act shall be construed to require the forfeiture of any contribution made by an employee toward a pension plan benefit.

Section 3. Measure 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, as well as all ordinances, resolutions or other enactments.

December 5, 2011

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 June 30, 2012.

Section 4. Reservation of Voter Authority

The voters expressly reserve the right to consider any change in matters related to pension and other post employment benefits. The City Council shall have no 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 5. 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 measure, to make any and all changes to retirement plans necessary to ensure the preservation of the tax status of the plans, and to amend, change or repeal any retirement or other post employment benefit program subject to the terms of this measure.

Section 6. 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 reduced by sharing 50% of the costs

December 5, 2011

to amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future.

(c) A Current Employee's share of the cost to amortize pension unfunded liabilities shall be 5% of pensionable pay starting June 24, 2012, and increased by 5% every fiscal year until the employee's proportionate share of the cost reaches 50% of the amortized pension unfunded liabilities, with each employee's share capped at 25% of the employee's pensionable pay.

(d) The starting date for an employee's compensation adjustment under this Section shall be June 24, 2012, 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.

(e) Current Employees' share of the cost to amortize any unfunded liabilities shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees' Retirement System.

(f) The additional retirement contributions 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.

December 5, 2011

Section 7: 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 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.

December 5, 2011

- (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 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.
- (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.

December 5, 2011

- (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 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.

December 5, 2011

- (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.

- (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 8: 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:

December 5, 2011

- (a) The City contributions shall not be less than 6.2% nor greater than 9% of base salary, excluding premiums or other additional compensation. In no event shall the City contribution to such plan exceed 50% of the cost of the Tier 2 plan (both normal cost and unfunded liabilities). 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.
- (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% 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 pay of the highest three consecutive years of service. Final compensation shall be base pay only, excluding premium pays or other additional compensation.

December 5, 2011

- (e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 1.5% per year of service.
- (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 shall create a vested right to any benefit.

Section 9: 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.

December 5, 2011

(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

(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

December 5, 2011

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.

Section 10: 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% for employees in Tier 2.

December 5, 2011

Section 11: 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.

Section 12: 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 13: 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

December 5, 2011

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 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:

- 1) 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
- 2) 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:

December 5, 2011

- 1) the funding objectives and actuarial assumptions of the plans; and
- 2) 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.

Section 14: Savings

(a) In the event Section 7 or 10 (as that Section applies to Current Employees), of this Act is determined to be illegal, invalid or unenforceable as to Current Employees, then the Current Employees' share of the costs to amortize any unfunded liabilities shall be 50% of the plan covering the respective employees.

(b) In the event Section 6 (b) and (c), and/or the employee payment of the unfunded liability referenced in Section 14(a), 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 5% of compensation each year, capped at a maximum of 25% of pay or the equivalent of what would be 50% of the amortized pension unfunded liability.

Section 15: 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

December 5, 2011

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.

(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.



COUNCIL AGENDA: 12-06-11
ITEM: 3.4

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Debra Figone

SUBJECT: PROPOSED BALLOT
MEASURE

DATE: November 22, 2011

RECOMMENDATION

1. Discussion and consideration of a Retirement Reform ballot measure for a March 6, 2012 election;
2. If Council wishes to proceed, adopt a resolution of the Council calling a special municipal election to be held on March 6, 2012, and, on its own motion, giving notice of the submission to the electors of the City of San Jose, the following measure at that election:

To maintain essential City services, shall the Charter be amended to reform retirement benefits of City employees and retirees by, among others: (1) increasing current employees' contributions; (2) establishing a voluntary reduced pension plan for current employees; (3) establishing pension cost and benefit limitations for new employees; (4) limiting disability retirements; (5) temporarily suspending retiree Cost of Living adjustments; and (6) requiring voter approval to increase future pension benefits?

3. Council discussion and consideration of permitting rebuttal arguments in the March 6, 2012 Voter's Sample Ballot, pursuant to Elections Code Section 9285, to be incorporated in the resolution calling the election.
4. Council discussion and consideration of a resolution authorizing an individual member or members of the City Council to submit an argument in favor of the City measure on the March 6, 2012 Voter's Sample Ballot, pursuant to Elections Code Section 9282, to be incorporated in the resolution calling the election.

BACKGROUND

At the May 24, 2011 City Council meeting, the City Manager's *Fiscal Reform Plan* was agendaized for discussion as item 3.4. For this agenda item, in a memorandum dated May 13, 2011, Mayor Reed, Councilmembers Nguyen, Herrera, and Liccardo, recommended an amendment to the City Charter in order to limit retirement benefits and to require voter approval of increases in retirement benefits. This was approved by the City Council for staff to return with a proposed ballot measure.

HONORABLE MAYOR AND CITY COUNCIL

Subject: Proposed Ballot Measure

November 22, 2011

Page 2 of 4

To allow time to meet and confer with the City's bargaining units, this item was deferred and, per a memo submitted by the Mayor on November 18, 2011, consideration of the proposed ballot measure was agendaized for City Council consideration at the Council meeting on December 6, 2011.

Timeline

When this item was first approved, it was intended for consideration for the November 2011 ballot. However, to give additional time for negotiations with the City's bargaining units, it was postponed until the March 2012 ballot.

The City Council must approve putting a ballot measure before the voters 88 days in advance of the election. The first Tuesday in March is March 6, 2012, and 88 days prior to that is December 9, 2011. Therefore, in order to put a ballot measure on for a March 6, 2012, election, the City Council must decide on December 6, 2011.

Meet and Confer

The meet and confer process over a ballot measure is somewhat different than the traditional meet and confer process and is referred to as "*Seal Beach Bargaining*." "*Seal Beach Bargaining*" is a labor term that comes from a court case involving the City of Seal Beach, California, and the Seal Beach Police Officers' Association. It refers to bargaining or negotiating over a proposed ballot measure prior to it being placed on a ballot for consideration by voters during an election. This is only done when a proposed ballot measure affects matters within the scope of representation.

Because the proposed ballot measure affects retirement benefits, the City engaged in "*Seal Beach Bargaining*" with all eleven of its bargaining units, although the level of participation varied by each bargaining unit. In all cases, the City provided advance notice to every bargaining unit and an opportunity to bargain. Although the City does not bargain with retirees or unrepresented employees, the first draft ballot measure and all revisions were sent to both retiree associations and the Executive Management and Professional Employees (Unit 99) forum.

It should be noted that in accordance with City Council direction, the City is also pursuing other changes to retirement benefits outside of the ballot measure.

For the Association of Engineers and Architects (AEA), IFPTE Local 21, Association of Maintenance Supervisory Personnel (AMSP), IFPTE Local 21, the City Association of Management Personnel (CAMP), IFPTE Local 21, San Jose Fire Fighters (LAFF Local 230) and the San Jose Police Officers' Association (SJPOA), the City and the bargaining units reached an agreement on a framework to conduct negotiations regarding the ballot measure and other retirement related issues concurrently, with a deadline date of October 31, 2011. If an agreement was not reached by October 31, 2011, the parties agreed they would be at impasse and would engage in the impasse procedures. The reason for the deadline date of October 31, 2011, was in recognition that the Council, within its discretion, has determined that it wished to hold a special

HONORABLE MAYOR AND CITY COUNCIL.

Subject: Proposed Ballot Measure

November 22, 2011

Page 3 of 4

election in early March, and that the deadline to place a measure on the ballot is 88 days before the intended election.

The City provided all 11 bargaining units with a draft proposed ballot measure dated July 5, 2011, and requested that the bargaining units commence bargaining. As noted above, the extent of participation varied significantly among the 11 bargaining units, with some bargaining units meeting regularly with the City to discuss the ballot measure drafts and others declining to meet. Regardless of the extent of participation, the City continued to engage the bargaining units in the ballot measure, sending them all drafts of the measure, continuing to request that they meet with the City, and emphasizing the deadlines necessary to meet the election timeline.

Based in part on comments and proposals received from the bargaining units who were engaging in bargaining, the draft ballot measure was revised extensively during the process. The dates of those revisions are as follows:

- July 5, 2011 (Original Draft Proposed Ballot Measure)
- September 9, 2011
- October 5, 2011
- October 20, 2011
- October 27, 2011

Although significant changes were made to the ballot measure based on comments received from the bargaining units, no agreement was reached with any of the bargaining units during negotiations. Because of this, impasse procedures were invoked, which under the Employer-Employee Relations Resolution 39367, is mediation. The City offered mediation to all bargaining units, even those who had declined or failed to participate in bargaining regarding the ballot measure.

The City and 10 bargaining units engaged in mediation, but the efforts to date have not resulted in an agreement. In the event an agreement is reached prior to December 6, 2011, a supplemental memo will be issued.

The bargaining units are being provided a copy of the attached ballot measure. Although we have not reached an agreement with any of the bargaining units thus far, this ballot measure also contains changes based on proposals, comments and feedback received from the bargaining units.

Ballot Measure Rebuttal Arguments

If the City Council wishes to allow rebuttal arguments to the ballot measure, then the resolution calling for the Special Municipal Election will provide for rebuttal arguments pursuant to Elections Code Section 9285. If allowed by the City Council, the City Clerk may accept rebuttal arguments from either the author(s) of a primary argument in support of or opposition to a ballot measure, or any other person(s) authorized in writing by the author(s) to submit a rebuttal argument. Rebuttal arguments may not exceed 250 words and may be signed by no more than 5 persons.

HONORABLE MAYOR AND CITY COUNCIL

Subject: Proposed Ballot Measure

November 22, 2011

Page 4 of 4

Councilmember Argument

If the Council wishes to permit an individual Councilmember or group of Councilmembers to submit an argument for or against the City measure, Elections Code Section 9282 requires the City Council provide specific authorization to do so.

COORDINATION

This memo has been coordinated with the City Attorney's Office.



DEBRA FIGONE
City Manager



EXHIBIT B

RESOLUTION NO. 76158

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE REPEALING RESOLUTION NO. 76087 AND CALLING AND GIVING NOTICE OF, ON ITS OWN MOTION, THE SUBMISSION TO THE ELECTORS OF THE CITY OF SAN JOSE, AT A SPECIAL MUNICIPAL ELECTION TO BE HELD ON JUNE 5, 2012, A BALLOT MEASURE PROPOSAL TO AMEND THE SAN JOSE CITY CHARTER TO ADD A NEW ARTICLE XV-A TO REFORM CITY PENSIONS AND BENEFITS PROVIDED TO CURRENT EMPLOYEES AND ESTABLISH REDUCED PENSIONS AND BENEFITS FOR NEW EMPLOYEES AND TO PLACE OTHER LIMITATIONS ON PENSIONS AND BENEFITS

WHEREAS, Charter Section 1600 authorizes the City Council to set the date for a Special Municipal Election; and

WHEREAS, the City Council adopted Resolution No. 76087 and approved a ballot measure for the June 5, 2012 election but directed the City Clerk not to submit the ballot measure to the Registrar of Voters to allow time for further negotiations on the ballot measure language; and

WHEREAS, the City Council now desires to submit to the electors of the City of San José at a Special Municipal Election a ballot measure proposal to amend the San José City Charter to add a new Article XV-A to reform pensions and benefits for current employees, to establish reduced pensions and benefits for new employees and to place other limitations on pensions and benefits; and

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

SECTION 1. Resolution No. 76087 is hereby repealed.

SECTION 2. A Special Municipal Election is hereby called and ordered to be held in the City of San José on June 5, 2012, for the purpose of voting on a ballot measure to

amend the San José City Charter to add a new Article XV-A to reform pensions and benefits for current employees and to establish different pensions and benefits for new employees and to place other limitations on pensions and benefits. The proposed City Charter amendment is attached to this Resolution as Exhibit A.

SECTION 3. The ballot measure will be placed on the ballot for the June 5, 2012 election in the following form:

PENSION REFORM

To protect essential services, including neighborhood police patrols, fire stations, libraries, community centers, streets and parks, shall the Charter be amended to reform retirement benefits of City employees and retirees by: increasing employees' contributions, establishing a voluntary reduced pension plan for current employees, establish pension cost and benefit limitations for new employees, reform disability retirements to prevent abuses, temporarily suspend retiree COLAs during emergencies, require voter approval for increases in future pension benefits?

YES	
NO	

SECTION 4. The City Council hereby requests the Board of Supervisors of the County of Santa Clara, California to permit the Registrar of Voters of Santa Clara County to render to the City of San José such services as the City Clerk of the City of San José may request relating to the conduct of the above-described Special Municipal Election with respect to the following matters:

Coordination of election precincts, polling places, voting booths, voting systems and election officers; Printing and mailing of voter pamphlets; Preparation of tabulation of result of votes cast.

SECTION 5. The City Council hereby requests that the Registrar of Voters of the County of Santa Clara consolidate the Special Municipal Election called and ordered to be held on June 5, 2012 with any other election that may be held on that date.

SECTION 6. The City Council hereby authorizes the Board of Supervisors of Santa Clara County, California to canvass the returns of the Special Municipal Election.

SECTION 7. The City Council hereby directs the City Clerk to reimburse the County of Santa Clara in full for any of the above-mentioned services which may be performed by the Registrar of Voters, upon presentation of a bill to the City, with funds already appropriated to the City Clerk for election purposes.

SECTION 8. The City Council hereby directs the City Clerk to take all actions necessary to facilitate the Special Municipal Election in the time frame specified herein and comply with provisions of the Elections Code of the State of California, City Charter, Ordinances, Resolutions and Policies with regard to the conduct of the Special Municipal Election.

SECTION 9. Pursuant to Section 12111 of the California Elections Code and Section 6061 of the California Government Code, the City Council hereby directs the City Clerk to (a) cause a synopsis of the proposed measure to be published in the San José Mercury News, a newspaper of general circulation within the City of San José; (b)

consolidate the Notice of Measure to be Voted with the Notice of Election into a single notice; (c) transmit a copy of the Measure to the City Attorney and cause the following statement to be printed in the impartial analysis to be prepared by the City Attorney: "If you would like to read the full text of the measure, see www.sanjoseca.gov/clerk/elections/Election.asp or call 408-535-1260 and a copy will be sent at no cost to you."; and (d) do all other things required by law to submit the specified measure above to the electors of the City of San José at the Special Municipal Election, including causing the full text of the proposed measure to be made available in the Office of the City Clerk at no cost and posted on the City Clerk's website.

SECTION 10. Pursuant to Sections 9282 and 9285 of the California Elections Code, the City Council hereby approves the submittal of arguments for and against the ballot measure, if any, and authorizes the Mayor to author and submit a ballot measure argument in favor of the ballot measure and also approves the submittal of rebuttal arguments in response to arguments for and against the ballot measure and authorizes any member or members of the City Council to author and submit a rebuttal, if any.

SECTION 11. The City Council hereby directs the City Clerk to transmit a copy of the measure qualifying for placement on the ballot to the City Attorney for preparation of an impartial analysis.

ADOPTED this 6th day of March, 2012, by the following vote:

AYES: CONSTANT, HERRERA, LICCARDO, NGUYEN,
OLIVERIO, PYLE, ROCHA; REED.

NOES: CAMPOS, CHU, KALRA.

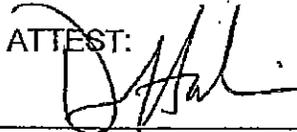
ABSENT: NONE.

DISQUALIFIED: NONE.



CHUCK REED
Mayor

ATTEST:



DENNIS D. HAWKINS, CMC
City Clerk

The foregoing instrument is
a correct copy of the original
on file in this office.

Attest:

TONI J. TABER
Acting City Clerk

Acting City Clerk of the City of San Jose
County of Santa Clara, State of California

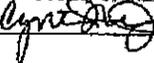
By  2/4/13, Deputy

EXHIBIT C

1 Gregg McLean Adam, No. 203436
Jonathan Yank, No. 215495
2 Jennifer S. Stoughton, No. 238309
CARROLL, BURDICK & McDONOUGH LLP
3 Attorneys at Law
44 Montgomery Street, Suite 400
4 San Francisco, CA 94104
Telephone: 415.989.5900
5 Facsimile: 415.989.0932
Email: gadam@cbmlaw.com
6 jyank@cbmlaw.com
jstoughton@cbmlaw.com

(ENDORSED)
FILED
APR 29 2013

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

J. McLean Adam

7 Attorneys for Relator-Plaintiff
8 San Jose Police Officers' Association

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA

11
12 THE PEOPLE OF THE STATE OF
CALIFORNIA *ex rel.* SAN JOSE
13 POLICE OFFICERS' ASSOCIATION,

14 Plaintiff,

15 v.

16 CITY OF SAN JOSE, and CITY
COUNCIL OF SAN JOSE,

17 Defendants.
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No. **113CV245503**

VERIFIED COMPLAINT IN *QUO WARRANTO*;
AND ATTACHED LEAVE TO SUE

[CODE CIV. PROC. § 803; CAL. CODE REG
TITLE 11, SECTION 2(A)]

Prepared April 23, 2013

CBM-SF/SF553503.3

VERIFIED COMPLAINT IN *QUO WARRANTO*

1 The People of the State of California *ex rel.* SAN JOSE POLICE OFFICERS'
2 ASSOCIATION complain of Defendants, and for cause of action allege as follows:

3 1. This action is brought pursuant to Section 803 of the Code of Civil
4 Procedure.

5 2. At all times herein mentioned, Defendant the CITY OF SAN JOSE ("the
6 City"), was a municipal corporation existing, qualifying, and acting under a charter
7 granted by the Legislature of the State of California and adopted pursuant to the
8 Constitution of the laws of the State of California.

9 3. At all times herein mentioned, Defendant the CITY COUNCIL OF SAN
10 JOSE ("City Council") was a municipal corporation existing, qualifying, and acting under
11 a charter granted by the Legislature of the State of California and adopted pursuant to the
12 Constitution of the laws of the State of California.

13 4. The relator in this action is the SAN JOSE POLICE OFFICERS'
14 ASSOCIATION ("SJPOA", "Plaintiff" or "Relator").

15 **The Parties and Their Collective Bargaining**
16 **Relationship Under the Meyers-Milias-Brown Act,**
 Government Code Section 3500 *et seq.*

17 5. Labor-management relations and the process of bargaining between the
18 SJPOA and the City are governed by the Meyers-Milias-Brown Act ("the MMBA" or "the
19 Act"), Government Code section 3500, *et seq.*

20 6. The SJPOA is, and was at all relevant times, a non-profit corporation
21 organized and existing under the laws of the State of California, with its principal place of
22 business in the County of Santa Clara. The SJPOA is the "recognized employee
23 organization" for all police officer classifications in Bargaining Units 11, 12, 13 and 14
24 (collectively "Police Officers") employed by the City of San Jose to work in the San Jose
25 Police Department, pursuant to the Meyers-Milias-Brown Act, Government Code section
26 3500 *et seq.* ("MMBA"). As one of its functions, the relator represents public employees
27 on matters related to their employment conditions, including wages and hours. Plaintiff's
28

1 approximately 1100 members perform all law enforcement functions for the nearly 1
2 million residents of the City of San Jose.

3 7. By reason of the facts stated in the prior paragraph, the SJPOA is
4 beneficially interested in the City's faithful performance of its obligations under the
5 MMBA. The SJPOA brings this action on behalf of itself and its members, having
6 standing to do so under the doctrine articulated by the California Supreme Court in
7 *Professional Fire Fighters v. City of Los Angeles* (1963) 60 Cal.2d 276, and *Int'l Assoc. of*
8 *Fire Fighters v. City of Palo Alto* (1963) 60 Cal.2d 295.

9 8. At all times relevant, the City is and has been the employer of the
10 SJPOA's members and a "public agency" within the meaning of the MMBA. As a charter
11 city, in addition to being bound by the MMBA in regard to its labor-relations with the
12 SJPOA, the City is governed by the San Jose City Charter.

13 9. The MMBA requires that the City meet and confer in good faith with the
14 SJPOA over the wages, hours, and other terms and conditions of employment for Police
15 Officers, including retirement benefits. (Gov. Code §§ 3504, 3505.) When negotiations
16 result in agreement between the parties, the MMBA requires that the agreement be
17 reduced to a mutually-signed writing known as a "memorandum of agreement" ("MOA").
18 (Gov. Code § 3505.1.)

19 10. The MMBA further states that "knowingly providing a recognized
20 employee organization with inaccurate information regarding the financial resources of
21 the public employer, whether or not in response to a request for information, constitutes a
22 refusal or failure to meet and negotiate in good faith." (Gov. Code § 3506.5(c).)

23 11. The MMBA also prohibits the City from taking unilateral action on
24 matters impacting wages, hours, and other terms and conditions of employment for Police
25 Officers without first providing the SJPOA with reasonable notice and an opportunity to
26 bargain, resolve any differences, and reach agreement prior to implementation. (Gov.
27 Code § 3504.5.) "The duty to bargain requires the public agency to refrain from making
28 unilateral changes in employees' wages and working conditions until the employer and

1 employee association have bargained to impasse.” (*Santa Clara County Counsel*
2 *Attorneys Assoc. v. Woodside* (1994) 7 Cal.4th 525, 537.) Thus, for example, it is well-
3 established that an MMBA-covered city is “required to meet and confer with [a union
4 representing impacted employees] before it propose[s] charter amendments which affect
5 matters within their scope of representation.” (*People ex rel. Seal Beach Police Officers*
6 *Assn. v. City of Seal Beach* (“*Seal Beach*”) (1984) 36 Cal.3d 591, 602.)

7 12. Where there is no imminent need to act prior to a deadline to place a
8 proposed measure on an election ballot, doing so without first satisfying the bargaining
9 obligation violates Government Code section 3504. (*Santa Clara County Registered*
10 *Nurses Assoc.* (2010) PERB Decision No. 2120-M, pp. 15-16.)¹ In order to demonstrate
11 that financial difficulties create a compelling operational necessity permitting unilateral
12 action prior to satisfying the bargaining obligation, the employer must demonstrate “an
13 actual financial emergency which leaves no real alternative to the action taken and allows
14 no time for meaningful negotiations before taking action.” (*Id.* at p.16.) “The mere fact
15 that [a public employer] thought the inclusion of the measure on the ... ballot was
16 desirable does not constitute a compelling operational necessity sufficient to set aside its
17 bargaining obligation.” (*Id.* at 17.)

18 13. Even after bargaining has reached a state of impasse, the bargaining
19 obligation does not end permanently. Rather, “impasse is always viewed as a temporary
20 circumstance and the impasse doctrine ... therefore, is not a device to allow any party to
21 continue to act unilaterally or to engage in the disparagement of the collective bargaining
22 process.” (*McClatchy Newspaper* (1996) 321 NLRB 1386, 1398-1390.) “An impasse
23 does not constitute a license to avoid the statutory obligation to bargain collectively where
24 the circumstances which led to the impasse no longer remain in status quo.” (*Kit*

25
26 ¹ The Public Employment Relations Board (“PERB”) is the California administrative
27 agency generally charged with construing and administering the MMBA. (Gov. Code §§
28 3501 and 3509.) While PERB does not have jurisdiction over cases involving labor
associations representing police officers (Gov. Code § 3511), Courts give great deference
to its construction of the MMBA. (*Banning Teachers Assn. v. Public Employment*
Relations Bd. (1988) 44 Cal.3d 799, 804-805.)

1 over the next few years, any ostensible bargaining impasse was broken. (See *Kit*
2 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*
3 (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition
4 breaks impasse].)

5 58. Undeterred, as recently as February 24, 2012, Mayor Reed was still
6 publicly estimating that the City's pension liability could reach \$650 million.

7 59. On February 28, 2012, five California State Assembly members and two
8 State Senators requested that the California Legislature's Joint Legislative Audit
9 Committee conduct an audit into the City's general finances and current and future
10 pension obligations ("the State audit request"). They asked that: "The audit should focus
11 on all projections used by the City and/or its elected officials that include, but may not be
12 limited to, \$400 million, \$431 million, \$570 million, and \$650 million."

13 60. On March 7, 2012, the State of California's Joint Legislative Audit
14 Committee ordered a state audit to determine, *inter alia*, whether the Mayor, City Council,
15 or other officials engaged in any wrongdoing or legal violations in referencing the false
16 \$650 million projection. The committee directed the state auditor to give the audit
17 priority status.

18 **The City Continued to Refuse to Bargain Even After Its So-Called "Fiscal State of**
19 **Emergency" Proved to be a Myth**

20 61. As noted above, on approximately February 21, 2012, the City revised its
21 estimate for the City's pension liability projection for Fiscal Year 2015-16 to
22 approximately \$310 million, less than half the level the City had consistently and
23 knowingly misrepresented. In light of the developments regarding the City's improved
24 financial condition and the dramatically-reduced projections of retirement related costs
25 over the next few years, any ostensible bargaining impasse was broken. (See *Kit*
26 *Manufacturing Co., Inc. and Sheet Metal Workers Int'l Assoc., Local 213, AFL-CIO*
27 (1962) 138 NLRB 1290, 1294-1295 [improvement in employer's financial condition
28 breaks impasse].)

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62. Despite these revelations, the City continued to refuse to meet and confer with the SJPOA regarding its proposed ballot measure.

63. At all times mentioned herein, the defendants were able to perform its obligations under the MMBA. Notwithstanding such ability, the defendants failed and refused to perform its statutory duty under the MMBA.

64. Instead, the defendants submitted to the electorate of the City of San Jose a ballot measure designed to dramatically reduces the pension benefits of SJPOA-represented Police Officers, over which there had been no bargaining.

65. As the ballot measure passed on June 5, 2012, commencing on or about June 6, 2012, defendants have undertaken to act under color of the above-described defective and invalid charter amendment and, in doing so, has usurped, intruded into, and unlawfully held and exercised powers not belonging to it.

PRAYER

WHEREFORE, Plaintiff prays for the following relief:

- 1. For judgment determining that the above-described charter amendment is null and void and of no legal effect;
- 2. For any and all actual, consequential, and incidental damages according to proof, including but not limited to damages that have been or may be suffered by members of the SJPOA and all costs incurred by the SJPOA in attempting to invoke the statutory rights of the association and its members;
- 3. For attorneys' fees pursuant to California Code of Civil Procedure § 1021.5, Government Code § 800, or otherwise;
- 4. For costs of suit herein incurred and other fines pursuant to California Code of Civil Procedure § 809; and

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5. For such costs and further relief as the Court deems just and proper.

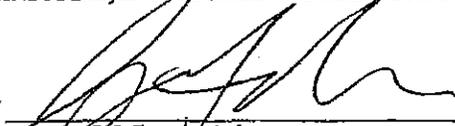
Dated: 4/25, 2013

KAMALA D. HARRIS
Attorney General of California
SUSAN DUNCAN LEE
Supervising Deputy Attorney General
MARC J. NOLAN
Deputy Attorney General

By 
MARC J. NOLAN
Deputy Attorney General
*Attorneys for the Attorney General of the
State of California*

Dated: April 23, 2013

CARROLL, BURDICK & McDONOUGH LLP

By 
Greg McLean Adam
Jonathan Yank
Jennifer Stoughton
*Attorneys for Relator-Plaintiff
San Jose Police Officers' Association*

1 VERIFICATION

2 I, Jonathan Yank, declare:

3 I am an attorney at law duly admitted and licensed to practice before all courts
4 of this State and I have my professional office at 44 Montgomery Street, Suite 400, San
5 Francisco, CA 94104.

6 I am one of the attorneys of record for Relator-Plaintiff SAN JOSE POLICE
7 OFFICERS' ASSOCIATION (SJPOA) in the above-entitled matter.

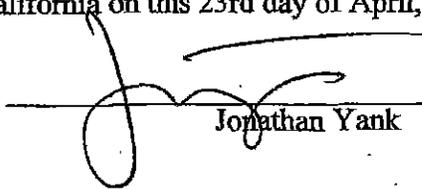
8 SJPOA is absent from the county in which I have my office and for that reason
9 I am making this verification on his behalf.

10 I have read the foregoing VERIFIED COMPLAINT IN *QUO WARRANTO*;
11 AND ATTACHED LEAVE TO SUE and know the contents thereof.

12 I am informed and believe that the matters stated therein are true and, on that
13 ground, I allege that the matters stated therein are true.

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

16 Executed at San Francisco, California on this 23rd day of April, 2013. .

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Jonathan Yank

1 KAMALA D. HARRIS
Attorney General of California
2 SUSAN DUNCAN LEE
Supervising Deputy Attorney General
3 MARC J. NOLAN
Deputy Attorney General
4 State Bar No. 160085
300 South Spring Street, Suite 1702
5 Los Angeles, CA 90013
Telephone: (213) 897-2255
6 Fax: (213) 897-7605
E-mail: Marc.Nolan@doj.ca.gov
7 *Attorneys for the Attorney General of the
State of California*

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11

12
13 THE PEOPLE OF THE STATE OF
14 CALIFORNIA *ex rel.* SAN JOSE POLICE
OFFICERS' ASSOCIATION,

Plaintiff,

15
16 v.
17

18 CITY OF SAN JOSE and CITY OF SAN JOSE
CITY COUNCIL,

19 Defendants.
20

Case No: _____

LEAVE TO SUE

21
22 As more fully set forth in Attorney General Opinion 12-506, a copy of which is attached
23 hereto, Leave to Sue is hereby granted to Relator-Plaintiff (Plaintiff) SAN JOSE POLICE
24 OFFICERS' ASSOCIATION, and to Plaintiff's attorneys Gregg McLean Adam, and Carroll,
25 Burdick & McDonough LLP, to file the original Verified Complaint in Quo Warranto and this
26 Leave to Sue. Plaintiff may use the name of THE PEOPLE OF THE STATE OF CALIFORNIA
27 *ex rel.* SAN JOSE POLICE OFFICERS' ASSOCIATION as plaintiff in this proceeding. No
28

Leave To Sue

1 amended complaint shall be filed unless it has been approved by the Attorney General. At any
2 time, the Attorney General may either dismiss or assume the management of this action. Upon
3 any adverse judgment, approval of the Attorney General must be obtained before Plaintiff may
4 file a notice of appeal. Copies of all documents filed in this action by any party must be served on
5 the Attorney General.

6 This Leave to Sue is granted upon the condition that neither the PEOPLE OF THE STATE
7 OF CALIFORNIA, nor the Attorney General, shall be liable for any damages, costs, charges, or
8 counsel fees in the proceeding. (Code Civ. Proc. § 810.) In this regard, this Leave to Sue has
9 been issued only upon Plaintiff's acknowledgement and agreement—accompanied by a deposit in
10 the sum of Five Hundred Dollars (\$500.00)—that, without limitation, any judgment for damages,
11 costs, charges, or fees that may be recovered against Plaintiff, and/or any associated costs and
12 expenses incurred in this action, will be borne and paid by Plaintiff.

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Dated: April 25, 2013

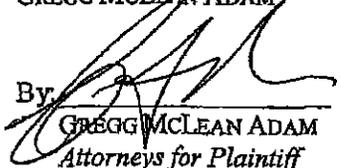
Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
SUSAN DUNCAN LEE
Supervising Deputy Attorney General
MARC J. NOLAN
Deputy Attorney General

By: 
MARC J. NOLAN
Deputy Attorney General
*Attorneys for the Attorney General of the
State of California*

Dated: April 23, 2013

CARROLL, BURDICK & McDONOUGH LLP
GREGG MCLEAN ADAM

By: 
GREGG MCLEAN ADAM
Attorneys for Plaintiff

Leave to Sue 12-506,041813

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

KAMALA D. HARRIS
Attorney General

OPINION	:	No. 12-605
of	:	April 15, 2013
KAMALA D. HARRIS	:	
Attorney General	:	
MARC J. NOLAN	:	
Deputy Attorney General	:	

THE SAN JOSE POLICE OFFICERS' ASSOCIATION has requested leave to sue the CITY OF SAN JOSE in quo warranto on the following question:

Did the City of San Jose fulfill its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits?

CONCLUSION

Leave to sue is GRANTED to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits.

ANALYSIS

We are once again asked to consider whether the enactment of a ballot measure addressing public employee pension reform gives rise to an action in quo warranto.¹ In this instance, voters of the City of San Jose (City) recently passed an initiative measure (Measure B) that amended the City's charter to add a new article entitled "The Sustainable Retirement Benefits and Compensation Act."² Among other things, Measure B increased retirement contribution levels for current City employees who do not change to an alternative and less expensive retirement plan, and lowered pension benefits and increased retirement contributions and minimum retirement ages for new City employees.

Noting that its peace officer members are City employees whose compensation and benefits are affected by the enactment of Measure B, Proposed Relator the San Jose Police Officers' Association (SJPOA) now seeks our permission to sue the City in quo warranto on the question whether the City sufficiently met and conferred with SJPOA—as it is required to do under the Meyers-Milias-Brown Act (MMBA)³—before the City Council voted to place Measure B on the ballot. While the City acknowledges as a general matter that an action in quo warranto may be the appropriate means by which to test whether a given charter amendment was validly enacted, it maintains that we should deny SJPOA's request in this instance because the City bargained with SJPOA to impasse over the contents and terms of Measure B and that no further bargaining was legally required. The City also argues that leave to sue should be denied both on public policy grounds and to avoid a multiplicity of legal actions addressing the validity of Measure B.

The grounds for initiating a quo warranto proceeding are set forth in Code of Civil Procedure section 803, which provides in relevant part:

¹ See 95 Ops.Cal.Atty.Gen. 50 (2012) (quo warranto application submitted by organization representing retired employees of City and County of San Francisco); 95 Ops.Cal.Atty.Gen. 31 (2012) (quo warranto application submitted by Bakersfield Police Officers' Association).

² In the presidential primary election held June 5, 2012, Measure B was approved by 69.02 percent of the voters who voted on the question. The final tally was 95,716 voting "Yes," and 42,964 voting "No." City Clerk's Memo. to Mayor and City Council re Certification of the Results of Election held June 5, 2012 (Jul. 26, 2012). See http://www.sanjoseca.gov/clerk/Agenda/20120807/20120807_0207.pdf.

³ Govt. Code §§ 3500-3511.

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

Where, as here, a private party seeks to file an action in quo warranto, that party must obtain the Attorney General's consent to do so.⁴ In determining whether to grant an application to file a quo warranto action in superior court, we do not attempt to resolve the merits of the controversy. Rather, we decide whether the application presents a substantial issue of fact or law that warrants judicial resolution, and whether granting the application would serve the public interest.⁵ In a proper case, a quo warranto action may be authorized to resolve allegations that a charter city unlawfully exercised its power to amend its charter.⁶ For the reasons discussed below, we grant leave to sue.

The California Supreme Court has held that a charter city must comply with the MMBA's meet-and-confer requirements—which govern relations between local public agency employers and local public employee organizations—before placing an initiative measure on the ballot that would affect matters within the scope of the Act.⁷ “The MMBA has two stated purposes: (1) to promote full communication between public employers and employees; and (2) to improve personnel management and employer-employee relations within the various public agencies.”⁸ To achieve these purposes, “the MMBA requires governing bodies of local agencies to ‘meet and confer [with employee representatives] in good faith regarding wages, hours, and other terms and conditions of

⁴ See *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d 687, 693-698 (1985).

⁵ 95 Ops.Cal.Atty.Gen. at 51; 93 Ops.Cal.Atty.Gen. 144, 145 (2010); 86 Ops.Cal.Atty.Gen. 205, 208-209 (2003).

⁶ *People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach (Seal Beach)*, 36 Cal. 3d 591, 595 & n. 3 (1984); see *City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th 82, 89 (1999); *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d at 693-698; see also 95 Ops.Cal.Atty.Gen. at 32; 74 Ops.Cal.Atty.Gen. 77 (1991).

⁷ *Seal Beach*, 36 Cal. 3d at 602.

⁸ *Id.* at 597; see Govt. Code § 3500; *DiQuisto v. Co. of Santa Clara*, 181 Cal. App. 4th 236, 254 (2010).

employment' and to 'consider fully' such presentations made by the employee organizations,"⁹ and to do so "prior to arriving at a determination of policy or course of action."¹⁰

In *Seal Beach*, we granted city employee associations leave to sue the City of Seal Beach in quo warranto after Seal Beach voters passed a ballot initiative that amended the city's charter to require the immediate firing of any city employee who participated in a strike.¹¹ Before addressing the merits of the controversy, the California Supreme Court observed that using a quo warranto lawsuit to test the regularity of the initiative measure's enactment was "not questioned."¹² And, in a later case, the Court of Appeal held that quo warranto is the *only* legal mechanism for attacking the legitimacy of a charter-amending initiative alleged to have been placed on the ballot in violation of the MMBA.¹³

We now turn our attention to the particular allegations at issue to determine whether a quo warranto suit should be authorized in the present case. First, the parties generally agree that: (1) a quo warranto action may be the appropriate means by which to resolve allegations that a city charter amendment was improperly enacted; (2) the City was required to comply with the MMBA's collective bargaining requirements before placing an initiative measure on the ballot that would affect represented employees' wages, hours and other conditions of employment; and (3) Measure B was in fact such a measure. The parties differ, however, in that the SJPOA contends that the City did not fulfill its bargaining obligations under the MMBA before it placed Measure B on the ballot, while the City counters that it was not legally required to do any further bargaining on the issue because the parties had reached an impasse in their discussions and negotiations.

Examining this dispute in more detail, it is clear from the parties' submissions and recitations of the relevant facts that the parties did in fact meet and/or exchange proposals

⁹ *Seal Beach*, 36 Cal. 3d at 596 (quoting Govt. Code § 3505); see *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Rel. Bd.*, 35 Cal. 4th 1072, 1083 (2005); *Intl. Assn. of Firefighters Local Union 230 v. City of San Jose*, 195 Cal. App. 4th 1179, 1186 (2011).

¹⁰ Govt. Code § 3505.

¹¹ See *Seal Beach*, 36 Cal. 3d at 595.

¹² *Id.* at 595 & n. 3.

¹³ *Intl. Assn. of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d at 693-698; see also *City of Fresno v. People ex rel. Fresno Firefighters*, 71 Cal. App. 4th at 89.

on numerous occasions in 2011 and early 2012 regarding the terms of both a successor Memorandum of Understanding (or MOU) that would cover SJPOA members and the potential ballot initiative that would become Measure B. The City, however, contends that its MMBA obligations to meet and confer with SJPOA over the ballot measure ended on October 31, 2011, when, according to a June 2011 agreed-upon "framework" to its negotiations with SJPOA, the parties agreed to "utilize impasse resolution procedures . . . if the parties failed to reach agreement by [that date]." Since no agreement was reached by that date, the City maintains, no further bargaining was required under the MMBA or otherwise.

It is undisputed, however, that additional contact between the parties occurred during the time frame from October 31, 2011, through March 6, 2012, when the City Council voted to place Measure B on the June 2012 ballot. There were unsuccessful attempts at mediation; the SJPOA submitted proposals that it characterizes as "concessionary," but which the City contends were insufficient to break the impasse; and the City disseminated revised versions of the proposed ballot measure, which it says were designed to facilitate mediation (as opposed to negotiation, which it continued to maintain had reached an impasse as of October 31, 2011), but which the SJPOA argues were unilateral steps affecting its members' rights without a meaningful opportunity to bargain or negotiate.

Essentially, the City asserts that it had no further duty to bargain under the MMBA after October 31, 2011, and that nothing that occurred after that date ever revived such a duty. But the SJPOA maintains that its agreement to the above-referenced framework for negotiations was not an agreement to "prospectively stipulate" to an immutable state of impasse effective October 31, 2011, and that, in any event, the parties' subsequent proposals broke any ostensible impasse. In particular, the SJPOA complains that it had no opportunity to bargain with the City with regard to the revised versions of Measure B that the City disseminated, including the final version that was placed before the voters.

On the one hand, the MMBA's "duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse"¹⁴ On the other, an impasse may be broken, and the duty to bargain revived, by a change in circumstances that suggests that bargaining may no longer be futile.¹⁵ In these

¹⁴ *Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Empl. Relations Bd.*, 35 Cal. 4th 1072, 1083 (2005) (quoting *Santa Clara Co. Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 537 (1994)).

¹⁵ See *Pub. Empl. Rel. Bd. v. Modesto City Sch. Dist.*, 136 Cal. App. 3d 881, 899 (1982).

circumstances, then, was it reasonable, and in compliance with the MMBA, for the City to insist that negotiations reached an impasse on October 31, 2011, and that such an impasse was never broken, despite additional proposals from both parties? Was it reasonable for the SJPOA, having agreed at the outset of negotiations to utilize impasse resolution procedures if an agreement was not reached by October 31, 2011, to have any expectation that the City's duty to negotiate under the MMBA would continue after that date? Assuming the validity of declaring negotiations at an impasse, effective October 31, 2011, did any changed circumstances revive the duty to negotiate? In deciding whether a suit in quo warranto should be permitted to proceed, it is not our province to conclusively answer questions such as these, but only to determine whether such questions present substantial factual and legal issues and whether a suit in quo warranto is the proper forum in which to resolve them. We find this to be the case here.

Also at issue, we think, and interwoven with the question whether the parties' positions and actions were reasonable under the circumstances, is the parties' respective good faith toward the negotiations, the evaluation of which will depend on "primarily a factual determination based on the totality of the circumstances."¹⁶ We are not equipped (and it is not our role) to make such a determination at this juncture, but we find that a quo warranto proceeding will afford the parties an adequate opportunity to establish the validity of their positions before a neutral factfinder. Additionally, we find that resolving the question whether Measure B was validly enacted—in compliance with the MMBA's meet-and-confer requirements—is in the public interest.

In closing, we briefly address the City's contentions that leave to sue should be denied because (1) allowing the suit to proceed would in some sense punish the City for making what it views as concessionary proposals and therefore runs counter to a public policy that would encourage such concessions; and (2) other court proceedings and matters brought before the state Public Employment Relations Board (PERB) involve similar issues and allegations, and permitting this action will therefore result in a counterproductive multiplicity of proceedings. First, we have not adjudicated the merits of this dispute and express no view on whether a court will ultimately determine that, because of its own subsequent actions or other factors, the City had a duty to bargain with the SJPOA after it declared an impasse; thus, we have no occasion to consider a public policy argument such as the one articulated here, which is better addressed to the court that will address the merits. Second, we have reviewed the materials submitted to us concerning the other complaints and legal disputes involving Measure B, but those matters involve different complaining parties¹⁷ and/or different legal questions. Under the

¹⁶ *Placentia Fire Fighters v. City of Placentia*, 57 Cal. App. 3d 9, 25 (1976) (internal citation omitted); see 95 Ops. Cal. Atty. Gen. at 36.

¹⁷ PERB's jurisdiction over MMBA-related disputes involving local public employee

circumstances, we believe that the separate proceedings fail to present an adequate opportunity for these two parties to air their respective and opposing positions regarding the present MMBA-related dispute and have that dispute resolved.

Accordingly, leave to sue is GRANTED to determine whether the City of San Jose fulfilled its statutory collective bargaining obligations before placing an initiative measure on the June 2012 ballot that, after its passage, amended the City Charter so as to increase city police officers' retirement contributions and reduce their retirement benefits.

organizations does not extend to peace officer organizations, like the SJPOA. See Govt. Code §§ 3509, 3511.

EXHIBIT D

1 227864 is the American Federation of State, County, and Municipal Employees, Local
2 101("AFSCME"), representing employees who are members of the 1975 Federated City
3 Employees' Retirement Plan ("Federated Plan"). AFSCME was represented by Teague P.
4 Paterson and Vishtasp M. Soroushian of Beeson, Tayer & Bodine, APC. The plaintiffs in Case
5 No. 1-12-CV-225928 are Robert Sapien, Mary Kathleen McCarthy, Thanh Ho, Randy Sekany,
6 Ken Heredia ("Sapien Plaintiffs"), who are active and retired members of the Police and Fire Plan;
7 the plaintiffs in Case No. 1-12-CV-226570 are Teresa Harris, Jon Reger, and Moses Serrano
8 ("Harris Plaintiffs"), who are active and retired employees of the Federated Plan; and the plaintiffs
9 in Case No. 1-12-CV-226574 are John Mukhar, Dale Dapp, James Atkins, William Buffington,
10 and Kirk Pennington ("Mukhar Plaintiffs"), who are active and retired members of the Federated
11 Plan. The Sapien, Harris, and Mukhar Plaintiffs (collectively, "Individual Plaintiffs") were
12 jointly represented by Christopher E. Platten and John McBride of Wylie, McBride, Platten &
13 Renner. The plaintiff in Case No. 1-12-CV-233660 is the San Jose Retired Employees
14 Association ("SJREA"), represented by Stephen H. Silver and Jacob A. Kalinski of Silver,
15 Hadden, Silver, Wexler & Levine. Defendants City of San Jose ("the City") and Debra Figone,
16 City Manager (collectively, "Defendants"), were represented by Arthur A. Hartinger, Linda M.
17 Ross and Geoffrey Spellberg of Meyers Nave. Real parties in interest Board of Administration for
18 the Police and Fire Plan and the Federated Plan were represented by Harvey L. Liederman and
19 Kerry K. Galusha of Reed Smith, LLP.

20 The City filed a cross-complaint in Case No. 1-12-CV-225926. All Plaintiffs except
21 SJREA were named as Cross-defendants.

22 On October 10, 2013, the parties appeared to respond to additional questions from the
23 Court. On December 20, 2013, a Tentative Decision was filed. On January 31, 2014, the parties
24 appeared on objections to the Tentative Decision. On February 20, 2014, the Statement of
25 Decision was filed.

26 Plaintiffs challenged the following sections of the Sustainable Retirement and
27 Compensation Act, a ballot initiative that amended the San Jose City Charter, approved by the
28 electorate on June 4, 2012 as "Measure B" (hereafter "Measure B"):

- 1 ▪ Section 1504-A (Reservation of Voter Authority);
- 2 ▪ Section 1506-A (Current Employees);
- 3 ▪ Section 1507-A (One Time Voluntary Election Program ('VEP'));
- 4 ▪ Section 1509-A (Disability Retirements);
- 5 ▪ Section 1510-A (Cost of Living Adjustments);
- 6 ▪ Section 1511-A (Supplemental Retirees Benefit Reserve);
- 7 ▪ Section 1512-A (Retiree Healthcare);
- 8 ▪ Section 1513-A (Actuarial Soundness);
- 9 ▪ Section 1514-A (Savings); and
- 10 ▪ Section 1515-A (Severability).

11 Plaintiffs' challenges to these sections of Measure B were facial challenges, except that the
12 challenges to Sections 1512-A(a) and 1512-A(c) were both facial and as-applied. (See Statement
13 of Decision at 7:10-13.)

14 Now therefore, the Court enters judgment as follows, based upon the evidence and
15 argument presented, and consistent with the Statement of Decision, the order dated January 31,
16 2013, granting judgment on the pleadings on SJPOA's seventh cause of action for violation of the
17 Meyers Milius Brown Act ("MMBA"), and the order dated April 30, 2013, sustaining without
18 leave to amend the demurrer to AFSCME's seventh cause of action for illegal ultra vires tax, fee,
19 or assessment:

20 1. Sections 1504-A (Reservation of Voter Authority), 1509-A (Disability Retirement),
21 including 1509-A(b) (Definition of Disability) and 1509-A(c) (Expert Board), 1511-A
22 (Supplemental Retiree Benefit Reserve), 1512-A(b) (Retiree Healthcare – Reservation of Rights),
23 1512-A(c) (Retiree Healthcare – Low Cost Plan), 1513-A (Actuarial Soundness), 1514-A
24 (Alternative of Wage Reduction), and 1515-A (Severability) are valid, and judgment is entered in
25 favor of Defendants and against Plaintiffs, as to these Sections of Measure B, on each cause of
26 action challenging these Sections. (SJPOA first through eighth causes of action; AFSCME first
27 through eleventh causes of action; Individual Plaintiffs' first through fifth causes of action; SJREA
28 first through third causes of action, all counts.)

1 3. Section 1512-A(a) (Retiree Healthcare – Minimum Contributions) is valid with the
2 phrase “a minimum of” severed from the provision, so that Section 1512-A(a) shall read,
3 “Existing and new employees must contribute 50% of the cost of retiree healthcare, including both
4 normal cost and unfunded liabilities.” With the provision modified, judgment is entered in favor
5 of Defendants and against Plaintiffs, as to this Section of Measure B, on each cause of action
6 challenging this Section. (SJPOA first through third and sixth causes of action; AFSCME first,
7 third through sixth, and eighth through eleventh causes of action; Individual Plaintiffs’ first
8 through fifth causes of action; SJREA first through third causes of action, all counts.)

9 4. Sections 1506-A (Increased Pension Contributions – Current Employees), 1507-A
10 (One Time Voluntary Election Program), 1510-A (Cost of Living Adjustments) are invalid and
11 judgment is entered in favor of Plaintiffs and against Defendants, as to these sections of Measure
12 B, on the causes of action challenging these Sections based on unconstitutional impairment of
13 contract, Cal. Const., art. I, Section 9. (SJPOA’s first cause of action, AFSCME’s first cause of
14 action, Individual Plaintiffs’ second cause of action (as to Sections 1506-A and 1510-A only), and
15 SJREA’s first cause of action (Count I) and second cause of action (as to Section 1510-A only).)

16 5. Judgment is entered in favor of Defendants and against AFSCME on AFSCME’s
17 eighth cause of action, which claimed Promissory and Equitable Estoppel.

18 6. AFSCME has dismissed with prejudice its second cause of action, which claimed
19 Bill of Attainder. (Statement of Decision at 5:16-17.)

20 7. AFSCME’s seventh cause of action, which claimed Illegal *Ultra Vires* Tax, Fee, or
21 Assessment, is dismissed with prejudice pursuant to the order dated April 30, 2013, sustaining
22 Defendants’ demurrer without leave to amend.

23 8. Judgment is entered in favor of Defendants and against the SJPOA and AFSCME
24 on their respective claims for violation of the Freedom of Speech and Right to Petition Clauses,
25 Cal. Const., art. I, Sections 2, 3. (SJPOA’s fourth cause of action, AFSCME’s sixth cause of
26 action.)

27 9. Judgment is entered in favor of Defendants and against the SJPOA and AFSCME
28 on their respective claims for violation of the Bane Act, California Civil Code section 52.1.

1 (SJPOA's first, second, third, fourth, fifth, and eighth causes of action; AFSCME's first, second,
2 third, fourth, fifth, sixth, and seventh causes of action.)

3 10. Judgment is entered in favor of Defendants and against the SJPOA, AFSCME, and
4 the SJREA on their respective claims for violation of the Pension Protection Act, Cal. Const., art.
5 XVI, Section 17. (SJPOA's eighth cause of action, AFSCME's fifth cause of action, Count V of
6 the SJREA's first cause of action, and the Pension Protection Act provision of the SJREA's
7 second cause of action.)

8 11. SJPOA's seventh cause of action, which claimed violation of the MMBA, is
9 dismissed with prejudice pursuant to the order dated January 31, 2013, granting Defendants'
10 motion for judgment on the pleadings.

11 12. Judgment is entered in favor of Defendants and against the SJPOA and the SJREA
12 on their respective claims for violation of the Separation of Powers Doctrine. (SJPOA's fifth
13 cause of action, Count IV of the SJREA's first cause of action, and the SJREA's second cause of
14 action.)

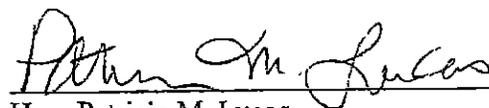
15 13. Judgment is entered in favor of Cross-Defendants and against Cross-Complainant
16 on the City's Cross-Complaint.

17 14. Declaratory relief and injunctive relief are granted, and Defendants are enjoined
18 from implementing or enforcing Sections 1506-A, 1507-A, and 1510-A, and the phrase "a
19 minimum of" in Section 1512-A, with respect to employees and retirees hired before June 5, 2012.

20 15. The Court finds that each party obtained some but not all of its litigation objectives,
21 and therefore concludes that there is no prevailing party. Accordingly, the Court exercises its
22 discretion and orders that each party is to bear its own costs. (Cal. Civ. Proc. Code §1032(a)(4)
23 ("the court, in its discretion, may allow costs or not").)

24 JUDGMENT IS SO ENTERED.

25 Dated: April 29, 2014


Hon. Patricia M. Lucas
Judge of the Superior Court

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27
28

EXHIBIT E

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 230,

Charging Party,

v.

CITY OF SAN JOSÉ,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-969-M

PROPOSED DECISION
(11/5/2014)

Appearances: Wylie, McBride, Platten & Renner, by Christopher E. Platten, Diane Sidd-Champion, Attorneys, for International Association Of Firefighters, Local 230; Renne Sloan Hotzman Sakai LLP, by Charles D. Sakai and Steven P. Shaw, Attorneys, for City of San José.

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative accuses a public agency of negotiating in bad faith over a proposed ballot measure to change employee retirement benefits. The agency denies any violation and maintains that it satisfied any existing bargaining obligations.

PROCEDURAL HISTORY

On June 6, 2012, International Association of Firefighters, Local 230 (Local 230) filed an unfair practice charge with Public Employment Relations Board (PERB or Board), against the City of San José (City) alleging a violation of the Meyers-Milias-Brown Act (MMBA) and PERB Regulations.¹ On March 8, 2013, the PERB Office of the General Counsel issued a complaint alleging that the City negotiated in bad faith by knowingly providing Local 230 with inaccurate financial information and by approving a ballot measure that would change

¹ The MMBA is codified at Government Code section 3500 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

employees' retirement benefits without completing good faith negotiations. On April 2, 2013, the City filed an answer to the complaint denying the substantive allegations and asserting that the ballot measure was approved after completing any required bargaining. It also asserted multiple affirmative defenses, including the defense that its actions were justified by operational need and business necessity.

An informal settlement conference was scheduled for July 9, 2013. That meeting was cancelled at the request of Local 230 and over the City's objection. The matter proceeded to formal hearing on February 10-12, 2014. This case was consolidated for the formal hearing only with another case, SF-CE-996-M, involving similar claims against the City by International Federation of Professional and Technical Engineers, Local 21 (Local 21). During the first day of hearing, the City, Local 230, and Local 21 agreed that the evidence submitted during the hearing would apply to both PERB case numbers SF-CE-969-M and SF-CE-996-M. The parties requested that PERB issue a separate decision for each case.

During the hearing, the City requested that PERB take official notice of a June 17, 2013 Order in Santa Clara Superior Court case number 1-12-CV-237635, involving the parties.² The assigned Administrative Law Judge (ALJ) admitted the Order as part of the record with the following caveat: "I don't think that the opinion reached by the Superior Court has any preclusive effect about the bargaining charges at issue here. However, if the parties want to argue otherwise, you're free to do so by referencing the [Order]."

The parties filed simultaneous closing briefs on May 12, 2014. In conjunction with its brief, the City also filed a second request for notice. In the second request, the City again

² The Order concerned the City's petition for writ of mandate and petition to compel interest arbitration in negotiations relating to the ballot measure. The court in that matter ordered the City and Local 230 to proceed to impasse arbitration.

asked PERB to take notice of the June 17, 2013 Santa Clara Superior Court Order. It also requested notice of a decision from the Sixth Appellate District Court, case number H039911, denying Local 230 writ relief or a request for stay of the Superior Court Order. On June 1, 2014, Local 230 filed its opposition to the City's request. It concurrently filed its own request for notice of the full record in those two court proceedings. The City filed a reply brief on June 11, 2014. The City stated that it did not oppose Local 230's request for notice. Local 230 filed a letter in response to the City's reply on June 16, 2014.

On July 25, 2014, the ALJ requested that the parties submit additional briefing over a claim raised in Local 230's brief that was not pled in the PERB complaint. The parties obliged and submitted those briefs on September 3, 2014. At that point, the record was closed and the case was considered submitted for decision.

THE PARTIES' REQUESTS FOR NOTICE

The City reasserts the request for notice of the June 17, 2013 Order in Santa Clara Superior Court case number 1-12-CV-237635. That request was already granted on February 10, 2014, and the parties offered no persuasive reason for revisiting that decision. I accordingly decline to change my earlier ruling. The City now requests notice of a related decision from the Sixth Appellate District Court. That request is also granted, as is Local 230's request for notice of the record from those cases. The persuasive weight of these documents will be discussed, as necessary, below.

FINDINGS OF FACT

The Parties

The City is a "public agency" within the meaning of MMBA section 3501(c) and PERB Regulation 32016(a). Local 230 is an "exclusive representative" within the meaning of PERB Regulation 32016(b). Local 230 represents the City's firefighters bargaining unit.

The City's Basic Governance Structure

The City's governing body is a Council of 11 publicly elected officials, including the Mayor and 10 Councilmembers. Chuck Reed was the Mayor during the incidents in this case. The Council makes decisions on behalf of the City by majority vote during its weekly meetings, typically held on Tuesday evenings. The Mayor, individual Councilmembers, or other City officials may draft memos to the Council, who may adopt, modify, or reject the recommendations in those memos. The City's fiscal year runs from July 1 until June 30.

The City's Pension System

The City has a defined benefit retirement plan, or pension system, for all its employees. The City's pension system is independent from other pension management agencies, such as California Public Employees Retirement System (CalPERS). The pension system has two basic plans: (1) a plan for police officers and firefighters (Police and Fire Plan); and (2) a plan for all other City employees (Federated Plan). Each plan is managed by a separate board of decision-makers (the Pension Boards) who are not directly affiliated with the City, the City Council, or any City unions. The Pension Boards are responsible for determining the City's annual contributions for each plan, based on projections from its independent actuary. The Pension Boards' actuary conducts annual valuations, typically around the end of the calendar year. Those valuations include five-year projections about the total cost of the pension plans

based on assumptions such as retirement age, the duration that retirees will continue receiving benefits, and investment returns. At all times relevant to this case, the Pension Boards used a company named Cheiron as its actuary. The bulk of the City's contributions are paid with money from its general fund.

The Police and Fire Plan

The key elements of the Police and Fire Plan include a benefit calculation of 3% of final compensation per year of service for every year over 20 years and with retirement eligibility at 55 years old with 20 years of service. The maximum pension benefit is 90 percent of final compensation. Final compensation is determined by the average base pay of the employee's highest 12 months of service. Benefits are also augmented by a guaranteed annual 3 percent Cost of Living Adjustment (COLA). Retirees may also receive Supplemental Retiree Benefit Reserve (SRBR) payments, which are payments calculated from investment returns in excess of expected amounts. Retirees also receive healthcare benefits.

The Federated Plan

The key elements of the Federated Plan include a benefit calculation of 2.5 percent of final compensation per year of service, retirement eligibility at 55 years or 30 years of service, and a maximum benefit of 75 percent of final compensation. As with the Police and Fire Plan, final compensation is determined by the average base pay of the employee's highest 12 months of service. The Federated Plan also includes a guarantees 3 percent COLA, SRBR, and retiree healthcare benefits.

The City's Employer-Employee Relations Resolution

City Resolution No. 39367 is its Employer-Employee Relations Resolution (EERR). It provides certain procedures for administering various aspects of personnel management.

EERR section 2, includes definitions of various terms. Relevant to this case, EERR section 2(l) defines "Impasse" as "a deadlock in discussions between a majority representative and the City over any matters concerning which they are required to meet and confer in good faith[.]" EERR section 23 provides for impasse procedures, which "may be invoked by either party after a bona fide effort has been made to meet and confer in good faith and such efforts fail to result in agreement." That main procedure in section 23 is mediation. If mediation is unsuccessful, the parties may agree to other dispute resolution mechanisms. Nothing in the EERR requires the parties to meet the section 2(l) definition of "impasse" before invoking the section 23 procedures.

The City's Economic Downturn

The City was one of a number of public agencies in California experiencing economic stress over the past decade. The City asserts that it operated at a deficit from fiscal year 2003-2004 through 2011-2012, meaning its expenses outpaced revenue. During that same timeframe, the City records indicate that it reduced the number of budgeted employee positions from over 7,000 to under 6,000. In 2010, the City conducted an audit to analyze the sustainability of its two pension plans. The audit concluded that pension benefits have increased every year and were expected to continue increasing. Contributions to the pension system also grew during that timeframe but, according to the study, benefit payments consistently exceeded pension contributions since 2001. That trend continued even during years when the City cut staff or when the pension plans experienced investment losses.

The City auditor expressed concerns about the City's pension liability, including the fear that the City's pension contributions would constitute an increasing proportion of the City's budget. The City auditor suggested that this may force the City to reduce the level or

quality of its services to pay its benefits costs. Another concern was the auditor's finding that pension benefit payments have outpaced both contributions and existing assets in the pension system, thereby creating a growing unfunded liability within the system.

These circumstances factored into the City's 2011 negotiations with its 11 bargaining units. Many units, including Local 230, agreed to a 10 percent reduction in base salary. Around the same time, in March 2011, the parties reached a side letter agreement to bargain further over "pension and retiree healthcare benefits for current and future employees" upon request from either side. They further agreed that bargaining would commence within 10 days from the date of the request.

In April 2011, City Mayor Chuck Reed issued a press release about the effects of pension costs on the City's budget. Although not made specifically clear for the record, the press release apparently had a wide distribution, including a posting on the City's website. The press release mentioned the 10 percent negotiated concessions, but expressed the City's intent to seek additional savings via retirement reform and benefits changes. The press release also estimated that under an "optimistic scenario," the City's retirement costs would equal \$400 million per year by 2015. The press release further stated that the director of the City's Retirement Services Department³ said that costs could rise to \$650 million per year during that same time period if certain assumptions, such as investment returns, are less favorable.

On or around April 14, 2011, Local 230 sent the City a letter informing the City that "Local 230 is prepared to begin discussions as per our [March 3, 2011 Side-Letter Agreement] at any time that is convenient for you and your team." On May 15, 2011, City Director of

³ Unlike the Pension Boards, which operate independently from the City, the City's Retirement Services Department is a City department that oversees matters relating to the City's pension obligations.

Employee Relations, Alex Gurza, replied to Local 230's letter stating that he would contact the union after City Manager Gina Figone completed a plan recommending City cost reductions.

The Fiscal Reform Plan

On May 2, 2011, Figone released a document entitled the Fiscal Reform Plan. The Fiscal Reform Plan recommended changes to achieve City savings and, ultimately, to restore City services to the levels that existed in January 2011. Among the recommendations made in the report were using SRBR funds to pay for retirement benefits, creating a second tier of retirement benefits for new employees, changing the benefits for both current employees and retirees, and increasing employees' obligation to share in pension costs. The Fiscal Reform Plan estimated that the savings from its various retirement plan recommendations equaled around \$216 million over five years. The Fiscal Reform Plan also estimated that pension costs could increase to \$400.7 million by the 2015-2016 fiscal year if no changes were made.

The Mayor's May 13, 2011 Memo

On May 13, 2011, Mayor Reed, along with three other Councilmembers issued a memo to the City Council. The memo included a "RECOMMENDATION" section where the authors recommended declaring a fiscal emergency due to what they perceived as urgency for fiscal reforms "to avert a fiscal disaster, prevent substantial degradation of public safety and other vital city services, and maintain the integrity of our retirement system[.]" The authors also recommended approving the Fiscal Reform Plan, including all proposed retirement reforms. The core recommendations included sharing unfunded pension costs with employees equally and limiting employees' retirement benefits. The authors also proposed what would later be referred to as "Safety Net" provisions, which limited the City's expenses if City services ever fell below what existed on January 1, 2011.

The May 13, 2011 memo also included a "BACKGROUND" section, which described the City's financial condition from the authors' perspective. In that section, the authors repeated the assertion from the Fiscal Reform Plan that retirement costs could increase to \$400 million by 2016. The memo also repeated the assertion from Mayor Reed's April 2011 press release that costs could rise to \$650 million by 2016 under different, less-favorable assumptions. It is undisputed that no actuary ever supported the \$650 million figure.

On May 24, 2011, the City Council adopted both the Fiscal Reform Plan and the May 13, 2011 memo. The Council deferred action on the recommendation to declare a fiscal emergency. The City Council further "direct[ed] staff to proceed with steps necessary to implement the [Fiscal Reform Plan], including meeting and conferring with the bargaining units, as applicable."

On May 25, 2011, Local 230 sent Gurza another letter, "to reaffirm Local 230's availability to begin meaningful discussions on retirement reform." In the letter, Local 230 President Robert Sapient, expressed his opinion that "we should begin as soon as possible."

Local 230's Demand to Bargain

On June 3, 2011, the City sent Local 230 a letter explaining its plan to propose a ballot measure concerning retirement reform issues. The letter further stated that the "terms of the proposed ballot measure are delineated in the enclosed [May 13, 2011] memorandum" that the City Council adopted. The City invited Local 230 to discuss the matter. Local 230 responded the same day stating that it had already requested to commence retirement reform negotiations earlier on April 14 and May 25, 2011. It further stated that "Local 230 is now demanding, in the politest sense of the word, that the City honor the provisions of the side letter agreement,

and commence negotiations immediately.” Mayor Reed also released another memo that day to the City Council, reiterating both the \$400 million and the \$650 million figures.

On June 7, 2011, the City Council delayed initial plans for a retirement reform ballot measure on its November 2011 ballot due to concerns from City unions. The City Council also stated that it was under a “tight timeframe” and expressed interest in resolving any issues with the proposed reform prior to the start of the 2012-2013 fiscal year.

Local 230 and the City’s police officers’ union decided to participate in bargaining jointly.⁴ They informed the City of that decision on June 9, 2011.

The Pledge of Cooperation

The parties discussed establishing a framework for their forthcoming retirement negotiations. It was understood that the City preferred to effectuate at least some parts of its retirement reform plans through a local ballot measure presented to City voters. It was further understood that under state election law, the City Council must approve any ballot measure at least 88 days before the election. (See Elec. Code, § 9255(b).) At the time, the City targeted March 6, 2012, for the election.

On June 20, 2011, the parties entered into and signed a “Pledge of Cooperation,” which outlined some basic concepts about the negotiations. Included in that document was that each party would use their own actuary to develop cost estimates. The parties also acknowledged that the Pension Boards’ own actuary provided the official numbers used by the pension plans.

The parties also agreed as follows:

⁴ The POA is not a party to either the present case, or its companion case involving Local 21, case number SF-CE-996-M. No POA witness testified during the hearing. For that reason, POA’s involvement in the parties’ negotiations will only be discussed as needed to address the issues raised by Local 230’s charge.

The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to procedures outlined in the [EERR section 23].

The Pledge of Cooperation also included the agreement that the City could exercise its constitutional authority to amend its charter through the ballot process at the conclusion of negotiations and impasse procedures and that neither side was waiving any legal rights.

The City's Initial Proposal

On June 21, 2011, the City informed Local 230 that the May 13, 2011 memo was the City's "only actual proposal for a ballot measure." By July 6, 2011, the City sent Local 230 draft ballot measure language including most of the recommendations from the May 13, 2011 memo. Unlike the memo, however, the City's ballot language proposal did not reference the \$650 million figure, or any other cost estimate for that matter.

The City proposed creating a less costly retirement program, called the Voluntary Election Program (VEP). As its name implies, employees' participation in the VEP would be voluntary. The key features of the VEP included a slower benefits accrual rate, a higher retirement eligibility age, and longer years of service eligibility requirement for medical benefits. Employees that did not opt into the VEP would be responsible for 50 percent of the City's unfunded pension liability costs.

The City also proposed creating a new Tier 2 retirement plan for all new employees. Under Tier 2, the City's contributions to employee benefits would be between 6.2 and 9 percent and could not exceed 50 percent of the total cost of the new plan. The minimum retirement age would rise from 55 to 60 for employees previously eligible for the Police and Fire Plan, and from 60 to 65 for all other employees. The City also reserved the right to not

use a defined benefit plan for the newly created Tier 2 retirement plan. If the City elected to use a defined benefit plan, benefits would accrue at a rate of 1.5 percent of final salary per year of service with a maximum COLA benefit of 1 percent per year, to be determined by the Consumer Price Index (CPI). An employee's final salary, for purposes of determining the benefit amount, would be calculated based on the average of that employee's final three years of employment. Employees in the Tier 2 plan were eligible for retiree medical benefits after 20 years of service.

The City also proposed modifying both the existing Police and Fire Plan and the Federated Plan by reducing the future accrual rate for each plan to 1.5 percent of final salary per year of service, reducing COLA to a maximum of 1 percent, dictated by the CPI, and eliminating SRBR payments. It specified that any benefits earned and accrued in prior service would not be affected by the changes proposed. The City also proposed increasing employees' minimum retirement age by six months every year until the retirement age reached 60 for Police and Fire Plan employees and 65 for Federated Plan employees. It proposed a similar incremental increase for retiree medical benefits eligibility to a maximum eligibility of 20 years of service. Final salary, for determining benefit amounts, would be calculated based on the employee's final three years of employment. The City also proposed reducing existing retirees' COLA payments to a maximum of 1 percent per year, dictated by the CPI.

The City's proposal also included the "Safety Net" provisions described in the May 13, 2011 memo. Those provisions limited the City's ability to grant various types of compensation increases or other employee benefits and rights if the City had to reduce service levels below what existed on January 1, 2011.

Cheiron's Mid-Cycle Valuation

On July 20, 2011, the Pension Plans' actuary, Cheiron, conducted a study of its plans, including a five-year cost projection. Cheiron predicted that pension costs for both plans combined would reach \$431 million by 2016. The City Council received Cheiron's report in August 2011. Local 230 received the report on or around the same time.

The Parties' Pre-Mediation Negotiations

The parties' met 13 times between July 20 and October 31, 2011, but did not reach agreement. The following is a brief discussion of some of the more relevant events during those meetings.

The City's September 9, 2011 Proposal

On September 9, 2011, the City made a new proposal in the form of draft ballot measure language. Under the new proposal, employees that opted into the VEP would accrue benefits at a rate of 1.5 percent of final pay per year. COLA payments would cap at 1 percent, tied to the CPI. Final pay would be calculated using the average salary of an employee's three highest consecutive years.

The City also modified its proposal regarding employees who did not opt into the VEP. It dropped its proposal to modify the benefits accrual rate for those employees. It also proposed that employees share the City's unfunded pension liability costs by decreasing salaries by 5 percent each year until the reductions equaled 50 percent of the City's unfunded liability costs. The reductions could not exceed 25 percent of employees' pensionable income.

The City also proposed suspending COLA and SRBR payments to retirees if the City's unfunded liability costs rose above what existed on June 30, 2010. COLA payments could

only be restored by either voter approval or a return to 2010 funding levels for three consecutive years.

Local 230's September 2011 Actuarial Analysis and Proposal

On September 26, 2011, Local 230's actuary, Tom Lowman, created projections about the City's retirement costs. Lowman estimated that costs would rise to about \$320 million by the 2015-2016 fiscal year. Lowman also attempted to calculate how the City reached its own estimate of \$400 million in costs for the same time period. Lowman concluded that the City failed to account for decreases stemming from recent personnel reductions and the 2011 negotiated 10 percent salary concessions. Local 230 did not task Lowman with deriving the source of the \$650 million figure used by the City. According to Sapien, Local 230 had limited resources to spend on its actuary and that he "didn't want him to calculate \$650 million until he figured out \$400 million."

On September 27, 2011, Local 230 made a proposal including a three-tier retirement plan. All tiers were defined benefit plans. Tier I would be the existing plan, which Local 230 proposed to maintain at status quo on the essential elements of the benefits accrual rate, maximum benefit amount, retirement age, post-retirement COLA, and calculation of final compensation. Tier I would be closed off to new members.

Current employees could also opt into a Tier II benefit plan administered by CalPERS. Employees under Tier II would have a benefits accrual rate of 3 percent of final salary at age 55 with a maximum benefit of 90 percent of final salary. Tier II employees would also receive a maximum of a 3 percent COLA, tied to the CPI. Final salary would be calculated based on the average of an employee's highest paid 36 months. Tier II employees would not receive SRBR payments.

Local 230's proposal also included a Tier III plan for new employees, also administered by CalPERS. Tier III would have a 2 percent at age 50 benefit calculation with a maximum benefit of 90 percent of final salary. Local 230 also proposed a 2 percent maximum COLA, tied to CPI. Tier III employees would not be entitled to SRBR payments. Employees' final salary would be calculated based on the average of the employees highest paid 36 months. Local 230's actuary, Lowman, estimated that this proposal would save around \$277 million over five years based on the City's projected retirement costs.

October 14, 2011 Meeting

The CalPERS chief actuary, Alan Milligan, attended the parties' October 14, 2011 negotiation session at Local 230's invitation. The parties and Milligan discussed the impacts of moving some unit members to CalPERS plans with some remaining in the existing Police and Fire Plan. The City was concerned that Local 230's proposal closed off the existing Police and Fire Plan (Tier I under Local 230's proposal) to new members, and that it could not foresee the impacts of having a plan with a large number of beneficiaries and no new members. It also argued that much of the savings Local 230 expected from the move to CalPERS would merely push the City's same pension costs further into the future and would not actually reduce total costs. The City also had concerns about how to transfer assets between the Police and Fire Plan and CalPERS, should unit members opt into Local 230's proposed Tier II.⁵

⁵ Sapien testified that he never understood why the City was opposed to Local 230's CalPERS proposal, stating "I don't know that the City ever told me why they were opposed to the proposal." This assertion was inconsistent with the record as a whole. In bargaining notes submitted by the City, members of the City's negotiating team clearly expressed concerns similar to those described above. The City's note-taker, Arecely Rodriguez, testified that she attempted to have her notes reflect the actual conversations held during bargaining as accurately as possible. In a letter dated March 5, 2012 (discussed in more detail herein), the City expressed the same and other concerns about Local 230's proposal to have CalPERS administer aspects of the Police and Fire Plan.

The City's Request for Impasse Mediation

Additional meetings and proposals by the City did not yield an agreement before the October 31, 2011 deadline referenced in the Pledge of Cooperation. On October 28, 2011, the City sent Local 230 a letter about participating in mediation pursuant to the Pledge of Cooperation. The City did not use the term "impasse" in the letter and did not expressly indicate that the parties were deadlocked or that it believed that there could be no further progress made in negotiations.

The November 2011 Mediation Sessions and Post-Mediation Developments

The parties participated in two mediation sessions on November 15 and 16, 2011 facilitated by State Mediation and Conciliation Services (SMCS). At hearing, the parties agreed that the discussions in mediation, aside from proposals made, would not be admitted into the record. Neither party made a proposal during the 2011 mediation sessions.

Local 230's November 18, 2011 Proposal

On November 18, 2011, Local 230 sent the City a letter stating "[w]e are dropping our proposal to move to CalPERS in order to satisfy what we understand is a philosophical demand of the City." Local 230 also acquiesced to the City's demand that any modifications to retirement benefits be included in a proposed charter amendment. Local 230 also proposed continuing the earlier negotiated 10 percent salary reductions, transferring healthcare costs for an additional 5 percent savings, and limiting the maximum retirement benefit for its newer retirement tiers to 75 percent of final compensation. When asked about this proposal during the hearing, Gurza said "[e]ven though the proposal itself wasn't acceptable, at least we -- By them dropping their CalPERS proposal, we saw that as a positive sign."

The City's November 22, 2011 Draft Charter Amendment

On November 22, 2011, the City sent Local 230 a letter stating that because there was no agreement in mediation, the City would be transmitting its proposed ballot measure on retirement reform to the City Council for adoption and placement on the City's March 6, 2012 ballot. It attached a version of the ballot measure not previously submitted to Local 230 and not discussed either in negotiations or in mediation. Although not clear from the face of either the letter or the draft language itself, witnesses from both parties during the hearing described the November 22, 2011 draft as a new post-mediation proposal from the City.

The new draft contained some key changes from earlier versions. Those changes included increasing the benefits accrual rate for those who opted into the VEP from 1.5 percent to 2 percent of final compensation per year of service, increasing the COLA payment from a maximum of 1 percent to 1.5 percent per year, based on CPI. It also reduced the retirement age to 57 for Police and Fire employees and 62 for all others. The new version continued to include a suspension of COLA payments to retirees, but included less stringent criteria for restoring payments. The City also eliminated its previously proposed Safety Net provisions entirely. The City's negotiators described this new version as having "very significant changes" from earlier versions. City Manager Figone similarly described the new version as "far different from earlier versions" in an e-mail to City employees about the City's retirement negotiations.

On November 29, 2011, Local 230 sent the City a letter asserting that the City's November 22, 2011 proposal had not been discussed in negotiations or mediation and demanded bargaining. Local 230 also stated in the letter "[w]e assume by your letter, that irrespective of the ballot measure, the City is declaring impasse on pension reform." During

the hearing, Sapien said that Local 230 sent the letter because “we have now a new proposal in front of us that we had not discussed, and so we were asking for that opportunity.”

Local 230’s December 1, 2011 Proposal

On December 1, 2011, Local 230 submitted another new proposal. Whereas Local 230 had previously proposed a three-tiered plan, the new proposal included only two tiers. Tier I was still the existing plan and remained basically at status quo. New employees and current employees who opted in would be part of Tier II, and would have a benefit accrual rate of 2.5 percent of final salary per year of service with a maximum benefit of 75 percent of final salary.

The Recommendation to Delay the Election

On December 1, 2011, Figone issued a memo recommending that the City Council delay consideration of declaring a fiscal and service level emergency. In the memo, Figone reported that the Pension Boards’ actuary, Cheiron, produced a preliminary valuation with new and more favorable projections from its earlier July 2011 valuation. Cheiron’s new valuation projected that the City’s 2012-2013 pension contribution costs would be around \$55 million less than previously predicted. Mayor Reed and four Council Members made a similar recommendation in a separate memo. Mayor Reed also recommended moving the proposed election date for the ballot measure from March 6, 2012, to June 5, 2012.

The December 5, 2011 Draft Charter Amendment

On December 5, 2011, the City produced another version of its draft ballot measure. In that version, the City abandoned its plan to suspend retiree COLA payments until 2018. Instead, the City would have discretionary authority to suspend COLA payments for up to five years if the City declared a fiscal and service level emergency.

The City Council's Approval of Resolution No. 76087

On December 6, 2011, the City Council approved Resolution No. 76087, which ordered a June 5, 2012 City-wide election over the charter amendments proposed in the City's December 5, 2011 draft. At the same meeting, the City Council also deferred consideration of the earlier recommendation to declare a fiscal and service level emergency. The City never declared a fiscal and/or service level emergency at any time relevant to this case. At that point, the parties' negotiating teams had not discussed either Local 230's November 18 and December 1 proposals or the City's November 22 proposal or its December 5 draft charter amendments.

The City Council directed City staff to delay transmitting the draft charter amendments to the City registrar "to allow time for continued mediation, if requested by the bargaining units." The effect of this directive was that registrar would not immediately finalize the election materials for the June 5, 2012 election. However, it was understood that the election would proceed over the City's proposed charter amendments unless the City Council rescinded Resolution No. 76087. In order to satisfy state election law requirements, the City had to finalize charter amendments by March 9, 2012, to qualify for the June 5, 2012 ballot.

The City's Invitation for Further Mediation

On December 9, 2011, the City sent Local 230 a letter inviting it to re-engage in mediation "using the same framework" as the June 20, 2011 Pledge of Cooperation. The City also mentioned the need to submit the proposed charter amendments in Resolution No. 76087 to the registrar no later than March 9, 2012.

Local 230 responded on December 13, 2012. It stated that the City Council's approval of Resolution No. 76087 was illegal because the City did not satisfy its bargaining obligations

and did not declare impasse. Local 230 also stated that the parties had not discussed either parties' post-mediation proposals. Local 230 also took the position that any impasse in negotiations was broken due to Cheiron's newer, more favorable, cost valuations, as well as Local 230's willingness to move away from proposals involving CalPERS. Local 230 then stated that it would agree to resume mediation using a private mediator, as opposed to SMCS. Local 230 also stated that agreeing to further mediation did not waive its right to challenge the legality of the City's bargaining conduct.

On December 15, 2011, the City responded to Local 230's letter, indicating that impasse was "automatic" under the Pledge of Cooperation. Despite this disagreement, the parties agreed to continue mediation with a private mediator. Those sessions were held on January 17 and 18 and February 6 and 10, 2012.

The City's February 10, 2012 Proposal

On February 10, 2012, the City presented Local 230 with a new proposal. The City proposed increasing the accrual rate for any defined benefit plan for new employees from 1.5 percent to 2 percent of salary per service year. It also increased COLA benefits for new employees from a maximum of 1 percent to 1.5 percent, depending on CPI.

For current employees that did not opt into the VEP, the City continued proposing reducing compensation to account for the City's unfunded pension liability. The City improved its proposal to reduce the salary of employees electing not to opt into the VEP. Instead of reducing salaries by 5 percent of pensionable income per year to a maximum of 25 percent, the City proposed a decrease of 4 percent per year to a maximum of 16 percent of income. As with prior proposals, the reductions would not exceed 50 percent of the City's unfunded pension liability.

According to Sapien, the City told Local 230 that, if it did not adopt the February 10, 2012 draft ballot measure, then the City would place the charter amendments in Resolution No. 76087 on the June 5, 2012 ballot. Sapien described this as "almost an ultimatum" to accept the City's current proposal. Local 230 did not agree and mediation ended with no deal.

On February 21, 2012, the City sent Local 230 a letter confirming that no agreement was reached in mediation. It stated that the City Council would vote on replacing Resolution No. 76087 with the City's February 10, 2012 draft charter amendments. That day, City Manager Figone issued a memo to the City Council recommending repeal of Resolution No. 76087 and adoption of a new resolution consistent with the City's February 10, 2012 draft.

On February 28, 2012, Local 230 demanded bargaining over the City's new draft ballot language. According to Local 230's demand, there were "significant restrictions" placed on Local 230's acceptance of the February 10, 2012 draft language in mediation. Around this time, Mayor Reed discussed retirement reform issued on a local news program. During his discussion on the air, he mentioned the possibility that the City's pension costs could rise to \$650 million based on certain assumptions.

Local 230's March 2, 2012 Proposal

On Friday, March 2, 2012, Local 230 submitted a new proposal. Local 230 again proposed a three-tiered pension plan, two of which would be administered by CalPERS. Local 230 also proposed benefit structures similar to its earlier CalPERS proposals. One significant difference was Local 230's "performance guarantee," which would require all current employees to reduce their salary between 4 and 16 percent if fewer than 60 percent of employees opted into its Tier II plan. Under Local 230's proposal, the lower the number of enrollees into the Tier II plan, the greater the salary reduction. Local 230 said it expected at

least 66 percent of its members to opt into Tier II. On Saturday, March 3, 2012, Local 230 proposed meeting to discuss the proposal.

On Monday, March 5, 2012, the City responded to Local 230 by letter. The City stated its belief that Local 230's latest proposal was a "step backwards" because it returned to CalPERS. Among the problems the City identified were that moving aspects of the Police and Fire Plan to CalPERS would delay, not reduce, the City's pension liability, that redistributing the Police and Fire Plan's assets to CalPERS was uncertain, and the existing plan (Local 230's proposed Tier I), would have increased unfunded liability if it were closed off to new members. The City also stated that it did not expect to achieve significant savings from Local 230's proposal. The City said that the "performance guarantee" was unacceptable because the City also believed that a significant number of employees would opt into Tier II, but that Tier II would not generate enough savings.

The City Council's Approval of Resolution No. 76158

On March 6, 2012, the City Council voted to approve Resolution No. 76158. That resolution repealed Resolution No. 76087, and approved a City-wide election on June 5, 2012 concerning the proposed City's February 21, 2012 charter amendments. That matter became known on the City's ballot as Measure B. Measure B passed among the local electorate by a vote of roughly 70 percent to 30 percent.

The City's Petition to Compel Interest Arbitration

On June 12, 2013, and pursuant to the City's petition, the Superior Court of Santa Clara County issued an Order compelling the parties to participate in interest arbitration concerning their negotiations over retirement benefits. The court concurrently denied Local 230's cross

petition to stay the arbitration proceedings. On April 30, 2014, the Sixth Appellate District Court summarily denied Local 230's petition for review of the lower court's actions.

ISSUES

I. Did the City knowingly provide Local 230 with inaccurate information about its financial resources in violation of MMBA section 3506.5(c)?

II. Should PERB consider Local 230's previously unalleged claim that the City violated the MMBA by approving Resolution No. 76087 prior to completing bargaining? If so, did the City violate the duty to meet and confer in good faith?

III. Did the City violate the duty to meet and confer in good faith by approving Resolution No. 76158?

CONCLUSIONS OF LAW

I. Providing Local 230 With Allegedly Inaccurate Financial Information

The PERB complaint alleges that the City violated MMBA section 3506.5(c) by falsely claiming that its pension costs could rise to \$650 million by 2016 if certain unfavorable assumptions were used. MMBA section 3506.5(c) states in relevant part that:

knowingly providing a recognized employee organization with inaccurate information regarding the financial resources of the public employer, whether or not in response to a request for information, constitutes a refusal or failure to meet and negotiate in good faith.

The most straightforward understanding of this language is that a public agency violates the duty to meet and negotiate in good faith if: (1) it provides a recognized employee organization

with information about its financial resources; (2) the information is inaccurate; and (3) the public agency knew of its inaccuracy at the time it was provided.⁶

Under the facts of this case, it is reasonable to construe the City's references to the \$650 million pension cost estimate as information about the City's "financial resources" for the purposes of MMBA section 3506.5(c). The City referenced that figure in, among other documents, the May 13, 2011 memo provided to Local 230 at the outset of bargaining. The purpose of those documents was to draw a connection between the City's pension liability and its ability to provide services to the public. And the relationship between pension costs and City services featured prominently in the City's proposals. For that reason, I conclude that the documents with the \$650 million estimate relate to the City's financial resources.

The record about the remaining issues is less clear. For instance it is not readily apparent that information provided was inaccurate. The City stated in the May 13, 2011 memo pension costs could rise as high as \$650 million by 2016 under different, more adverse, circumstances. Subsequent references to the \$650 million figure were variations on that basic assertion. It is perhaps axiomatic that the results of an equation will change when one modifies the inputs to that equation. The facts of this case exemplify this principle. Local 230, the City, and the Pension Boards each retained their own actuary to estimate the City's future pension costs. Each reached different conclusions because each calculated their estimates using

⁶ Neither party cites any cases interpreting the relevant provisions of MMBA section 3506.5(c). Nor have I, in my own research, found a case interpreting either this language or similar language contained in Government Code section 3543.5(c). In addition, it is noted that MMBA section 3506.5(c) took effect on January 1, 2012, after some of the operative facts in this case occurred. However, because the Legislature indicated that MMBA section 3506.5(c) clarified existing law, there is no issue regarding retroactive application. (Assem. Bill No. 195 (2011-2012 Reg. Sess.) § 1; *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, p. 211, citation omitted.)

different assumptions. It is also worth noting that the City was also forthcoming, both with the public and with Local 230, that the City's actuary predicted costs rising only to \$400 million and that the Pension Boards' actuary predicted costs rising to \$431 million. This all gives some credence to the City's basic claim that cost projections may rise under less-favorable assumptions. In addition, the City was equivocal about the possibility that the City's costs could actually rise as high as \$650 million. Nothing in the record indicates that the City's costs could not rise to \$650 million under any circumstances. Based on the facts presented here, Local 230 has not sustained its burden of proving that the City provided Local 230 with false information about its financial resources.

Local 230 points out that the City never conducted any actuarial analysis to support its \$650 million cost estimate. Be that as it may, this is insufficient to establish that the City knowingly gave Local 230 false information. And MMBA section 3506.5(c) does not create liability solely on the basis of careless or even negligent disclosures of information. Therefore, Local 230 has not proven its claim that the City's reference to the \$650 million figure in-and-of-itself violated MMBA section 3506.5(c). That claim is therefore dismissed.

II. Local 230's Claims Relating to Resolution No. 76087

Local 230 alleges that the City violated the duty to meet and confer in good faith when, on December 6, 2011, the City Council approved Resolution No. 76087 prior to completing negotiations. This allegation was not expressly referenced in the PERB complaint.

A. PERB's Review of Unalleged Violations

PERB has limited capacity to consider claims not described in the parties' pleadings. PERB may only consider such "unalleged violations" when the following criteria are met:

- (1) adequate notice and opportunity to defend has been provided the respondent;
- (2) the acts are intimately related to the subject

matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8 (*Lake Elsinore USD*), citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C (*Fresno Superior Court*); *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668 (*Tahoe-Truckee USD*)).) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Lake Elsinore USD, supra*, at p. 9, citing *Fresno County Superior Court*.) PERB must articulate its rationale for considering or rejecting an unalleged violation. (*County of Riverside* (2006) PERB Decision No. 1825-M, p. 10.)⁷

In *Lake Elsinore USD, supra*, PERB Decision No. 2241, the Board reviewed a union's claims that an employer took adverse actions against an employee because of protected conduct not described in the PERB complaint. (*Id.* at pp. 9-10.) The Board concluded that the employer lacked notice that the union was basing its retaliation claims on the unalleged conduct. The Board reached this conclusion despite the fact that the affected employee testified about that conduct at hearing. (*Ibid.*) The union in that case raised the new retaliation theory for the first time in its closing brief. (*Id.*, citing *City of Clovis* (2009) PERB Decision No. 2074-M, *Baker Valley Unified School District* (2008) PERB Decision No. 1993; see also *Escondido Union Elementary School District* (2009) PERB Decision No. 2019, p. 31; *Tahoe-Truckee USD, supra*, PERB Decision No. 668, p. 8.)

⁷ When interpreting the MMBA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act and California labor relations statutes with parallel provisions. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 616; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 13, fn. 4.)

The Board reached a different conclusion in *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M (*West Contra Costa Healthcare*). There, the Board found that the employer had adequate notice of a unilateral change allegation not plead in the PERB complaint because facts relating to the claim were discussed in the charging party's original charge, its opening statement, and its closing brief. (*Id.* at pp. 16-17.) The Board also concluded that alleged and previously unalleged claims concerned the same course of conduct and were fully explored during the hearing. (*Id.* at p. 17.) For similar reasons, in *Fresno Superior Court, supra*, PERB Decision No. 1942-C, the Board permitted a union to raise an unalleged unilateral change claim based on employees' job descriptions where both parties' witnesses testified extensively about the change, the job descriptions were related to the union's existing claims, and both parties discussed the job descriptions in their closing briefs. (*Id.* at pp. 15-17.) The Board also found that the new claim was timely after concluding that the union discovered the employer's conduct within six months of the original unfair practice charge. (*Id.* at p. 17; see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, pp. 11-12.)

In this case, Local 230 has met all the requirements for considering its unalleged violation. As a threshold matter, Local 230's allegation in this case is timely. Claims under the MMBA have a six month statute of limitations period. (*American Federation of State, County and Municipal Employees, Council 36 (Moore)* (2011) PERB Decision No. 2165-M, dismissal letter, pp. 1-2.) Here, it is undisputed that the City approved Resolution No. 76087 on December 6, 2011, which is within six months of June 6, 2012, the date Local 230 filed its original unfair practice charge. Local 230 has accordingly established that it raised those claims before PERB prior to the expiration of the statute of limitations period. (See *SEIU-*

United Healthcare Workers West (Scholink) (2011) PERB Decision No. 2172-M, warning letter, pp. 2-3.)

Local 230 has also satisfied all of the elements of PERB's unalleged violation standard. First, the City had adequate notice that Local 230 would be challenging the legality of Resolution No. 76087. As in *West Contra Costa Healthcare, supra*, PERB Decision No. 2145-M, Local 230 referenced the City's December 6, 2011 actions in its unfair practice charge, its opening statement, and its briefs. In its opening statement, for example, counsel for Local 230 stated "the facts will show that the City Council enacted a resolution known as Resolution Number 76087 in [sic] December 6, 2011, establishing provisions for a charter amendment for the June 2012 election ballot without good faith bargaining and without reaching impasse over the provisions of the measure adopted." Counsel for the City described Resolution No. 76087 in the City's own opening remarks, asserting that the resolution was the product of progress made in negotiations. Before the charge was filed, Local 230 asserted to the City in its December 31, 2011 letter that the "City Council's vote to approve a ballot measure was illegal" because the "City did not fulfill its obligation to meet and confer in good faith- a mandatory prerequisite before it could vote to place the ballot proposal on the June 2012 ballot." That letter was admitted into evidence as a joint exhibit. This record shows that Local 230 was explicit about its view that the City's approval of Resolution No. 76087 violated to the duty to bargain under the MMBA. This was sufficient notice to the City that the legality of Resolution No. 76087 would be an issue in this case.

Second, Local 230's unalleged violation concerning Resolution No. 76087 is closely related to the claims raised in the PERB complaint. Both claims assert that the City failed to reach lawful impasse prior to approving retirement benefits changes for the local June 2012

ballot. As in *West Contra Costa Healthcare, supra*, PERB Decision No. 2145-M, the City's conduct on December 6, 2011, was part of the same course of conduct as the claims explicitly referenced in the PERB complaint. It is undisputed that the City adopted Resolution No. 76087 during the same negotiations that gave rise to the unilateral change allegation described in the PERB complaint: In fact, it is undisputed that the City's approval of Resolution No. 76087 was discussed when the City made its final offer to Local 230 on February 10, 2012. Thus, the two claims sufficiently related.

The final two elements of PERB's unalleged violation analysis are also met. Local 230 premises its claim regarding Resolution No. 76087 on the theory that the parties were not at lawful impasse on December 6, 2011, when the City approved the resolution. This issue was litigated considerably throughout this case. As in *Fresno Superior Court, supra*, PERB Decision No. 1942-C, the City in this case had the opportunity and did question witnesses about the City's approval of Resolution No. 76087 and the parties' preceding bargaining. Both parties also submitted numerous joint and separate exhibits about that same conduct. Neither party was limited in its ability to question witnesses or introduce other evidence about the adoption of Resolution No. 76087. There was no showing that the record regarding Resolution No. 76087 is incomplete.

The City asserts that Local 230 is trying to "sandbag" the City by raising this unalleged violation in its post-hearing brief. It contends that considering this claim would violate the City's due process rights. This position is rejected. PERB's unalleged violation standards are designed to and do adequately protect the due process rights of the parties in a PERB hearing. (See *Santee Elementary School District (2006)* PERB Decision No. 1822, pp. 8-9.)

Local 230 has satisfied all the elements of PERB's unalleged violation standard. Therefore, it is appropriate to review Local 230's claim of whether the December 6, 2011 approval of Resolution No. 76087 violated the duty to bargain in good faith.

B. The Duty to Meet and Confer Over Proposed Charter Amendments

Local 230's unilateral change claims regarding Resolution No. 76087 beckons the question of what bargaining obligations a charter city has when seeking to change negotiable subjects via a charter amendment ballot measure. Both parties recognize that *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (1984) 36 Cal.3d 591 (*City of Seal Beach*) is controlling on this issue. That case involved a city council's approval of three proposed charter amendments for its local ballot relating to the treatment of employees who participated in a labor strike. The parties in that case agreed that all three charter amendments involved "terms and conditions of employment" within the meaning of MMBA section 3504. (*Id.* at p. 595, fn. 2) The court rejected the defendant city's argument that the "meet and confer" requirements in MMBA section 3505 conflicted with a charter city's authority under California Constitution, Article XI, section 3(b), to propose charter amendments to its local electorate. It instead found that:

No such conflict exists between the city council's power to propose charter amendments and *section* 3505. Although that section encourages binding agreements resulting from the parties' bargaining, the governing body of the agency – here the city council – retains the ultimate power to refuse an agreement and to make its own decision. [citation and footnote omitted] This power preserves the council's rights under article XI, *section* 3, *subdivision* (b) – it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise.

We therefore conclude that the meet-and-confer requirement of *section* 3505 is compatible with the city council's constitutional power to propose charter amendments.

(*Id.* at p. 601 (emphasis in original).) The court based its holding on the principle that “general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be deemed to be strictly municipal affairs, where the subject matter of the general law is of statewide concern.” (*Id.* at p. 600, quoting *Professional Firefighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, p. 292.) The court concluded uniform fair labor practices across the state, including the process by which labor disputes were resolved, was a matter of statewide concern. (*City of Seal Beach* at p. 600.)

MMBA section 3505 defines “meet and confer in good faith” as “the mutual obligation [to] personally meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals and to endeavor to reach agreements on matters within the scope of representation[.]” Section 3505 further requires the parties to reserve “adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.” (Emphasis supplied.) The California Supreme Court has previously interpreted section 3505 as precluding unilateral action from the employer until it has bargained with an exclusive or recognized bargaining representative until agreement or impasse. (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, p. 1083, citing *Santa Clara County Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, p. 537; see also *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, p. 670.) Changes to terms and conditions of employment “prior to reaching an impasse in negotiations or completion of statutory impasse resolution procedures are a “per se” violation of the duty to bargain in good faith. (*County of Sonoma* (2010) PERB Decision No. 2100-M, p. 12, citing *Rowland Unified School District*

(1994) PERB Decision No. 1053, *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.) The duty to bargain until agreement or impasse applies equally to a public agency's duty to bargain over proposed charter amendments concerning negotiable matters. (*County of Santa Clara* (2010) PERB Decision No. 2120-M, pp. 13-14.)

The City does not dispute that it has some bargaining obligation here. It argues that it is only obligated to undergo a "special bargaining process" that does not include the need to reach impasse or to exhaust any impasse procedures. This position is inconsistent with MMBA section 3505, which expressly requires the parties to reserve time during bargaining process for impasse resolution procedures. Nothing in the *City of Seal Beach, supra*, 36 Cal.3d 591 decision sets aside the impasse language in MMBA section 3505 when bargaining over proposed charter amendments. In fact, the court quoted section 3505 in its entirety, including the impasse provisions, as part of its rationale. (*Id.* at pp. 595-596, fn. 4.) In addition, the Board previously considered and rejected a similar argument in a case involving a proposed charter amendment for a prevailing wage measure. (*County of Santa Clara, supra*, PERB Decision No. 2120-M, p. 13.) There, the Board found that the requirements of MMBA section 3505 are only "satisfied if the parties either reach agreement or bargain to impasse and participate in any applicable impasse procedures." (*Ibid.*) Moreover, as the City admits in its post-hearing briefs, PERB has long found that participating in statutory impasse procedures is a "continuation of the bargaining process with the aid of neutral third parties." (*Modesto City Schools* (1983) PERB Decision No. 291, p. 36 [revd. on other grounds in *Compton Unified School District* (1987) PERB Order No. IR-50]; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p. 46; *Regents of the University of California* (1985) PERB Decision No. 520-H, p. 23.)

The City contends that the court in *City of Seal Beach, supra*, 36 Cal.3d 591, implied that there should be limits when bargaining over charter amendments because the court found that a city's meet and confer obligations should only create a "minimal" burden on that city's authority to amend its charter. (*Id.* at p. 599.) Placed in its proper context, the quoted language does not support the City's position. In that part of the decision, the court was addressing the defendant's argument that the MMBA's bargaining obligations violate California Constitution Article XI, section 3(b). In rejecting that argument, the court compared the matter to *District Election of Supervisors. Committee for 5% v. O'Connor* (1978) 78 Cal.App.3d 261, p. 267 (*O'Connor*), where local charter election procedures were invalidated because they conflicted with statewide election law.⁸ The court in *City of Seal Beach* found the meet and confer requirements in MMBA section 3505 to be "minimal" in comparison to *O'Connor*, because a city's bargaining obligations do not directly conflict with any city rule. (*Id.* at p. 599.) At no point, did the court expressly or impliedly conclude that cities are exempt from aspects of MMBA section 3505 when bargaining over proposed ballot measures.

The City finds further support for its position in the court's statement that a city "may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise." (*City of Seal Beach, supra*, 36 Cal.3d 591, at p. 601.) Again, nothing in the quoted portion of the decision states or implies that the court intended to excuse cities from the impasse provisions of MMBA section 3505. Furthermore, the City's argument is unsound

⁸ *O'Connor, supra*, 78 Cal.App.3d 261, concerned a conflict between a city's local charter provision, which required signatures from 5 percent of voters to qualify a charter initiative for the ballot and a section of the Government Code, which required 10 percent. (*Id.* at pp. 264-265.) The court in that case resolved the conflict in favor of the Government Code, after concluding that uniformity in the charter amendment process was a matter of statewide concern and that the legislative enactments superseded the city's charter. (*Id.* at p. 267.)

because participating in impasse procedures does not preclude a city from proposing charter amendments. As the court in *City of Seal Beach*, said, a city may propose such amendments unless it is persuaded to change course after participating in all of the meet and confer requirements under MMBA section 3505.

The City further asserts that negotiations of a City's proposed charter amendment are unique because at the end of negotiations, the City does not impose terms on affected bargaining units; it merely presents the proposed amendment to voters. However, there was no showing that this distinction requires a different approach to the meet and confer requirements in the MMBA. Nothing in the *City of Seal Beach, supra*, 36 Cal.3d 591 decision specifies that the parties' bargaining obligations should be treated differently in these cases. This argument is therefore unpersuasive.

The City also argues that complying with the impasse processes is impracticable because charter cities typically only create one charter amendment that will apply to multiple bargaining units. This position is unpersuasive for at least three reasons based on the record presented here. First, the City did not establish the need behind its decision to have only a single charter amendment for all of its 11 bargaining units. Nor was there evidence about the impracticability of having separate amendments for its various bargaining units or, at least, its two pension plans. The City should not be allowed to evade aspects of its bargaining obligations solely by the manner in which it crafts its charter amendment proposals.

Second, the exact situation described by the City actually arose in the *City of Seal Beach, supra*, 36 Cal.3d 591 case. The proposed charter amendments in that case applied to "any city employee who participated in a strike," (*Id.* at p. 595), but the court saw no reason to

exempt the defendant city from bargaining with the plaintiffs, as required by MMBA section 3505.

Third, the facts in this case appear to show the City's bargaining obligation to multiple bargaining units actually facilitated discussions about the proposed charter amendment in this case. The record shows that the City's units formed coalitions during bargaining with Local 230 and the POA sitting together at one table and Local 21 negotiated on behalf of three City bargaining units. In fact, City Director of Employee Relations Gurza testified that the City was able to use proposals developed in one set of negotiations during its negotiations with other unions. PERB has previously found coordinated bargaining among unions to be lawful. (*Compton Community College District* (1989) PERB Decision No. 728, proposed decision, pp. 62-63.) For all these reasons, the City's argument is rejected.⁹

Finally, the City asserts that it should not be required to bargain to and through impasse due to the strict statutory timelines required for qualifying a proposed charter amendment for an election. While it is conceivable that there might be some circumstances where a charter city may need to act on a charter amendment proposal within short period of time to capitalize on voter sentiment or some other kind of political tide, those circumstances must be proven with facts in the record. Facts supporting this argument were not presented here. Although

⁹ The City also argues that subjecting charter amendment negotiations to the City's own local impasse procedures impermissibly conflicts with existing state statutory schemes covering charter amendments. Setting aside the fact that the City never identifies which State statutes conflict with its local impasse rules, it is in any event true that nothing in the impasse procedures in either the MMBA or the City's EERR requires the City to reach agreement with any union or change its stance over any charter amendment. Just as the court in *City of Seal Beach, supra*, 36 Cal.3d 591 concluded that the bargaining obligations under the MMBA do not conflict with a city's authority to propose charter amendments, it is also true that the City may exercise its authority to amend its charter after completing the EERR impasse procedures in good faith.

measures must be placed on the ballot at least 88 days before the election, the City retained complete discretion over the election date it chose. There was no evidence that anything other than City's own preferences prevented it from selecting an election date far enough into the future in order to its bargaining obligations under MMBA section 3505. (See *Lucia Mar Unified School District* (2001) PERB Decision No. 1440, proposed decision, p. 47 [holding that self-imposed deadlines for making a final decision on negotiable subjects does not excuse a respondent's bargaining obligations].) The City's argument is accordingly rejected.

City of Seal Beach, supra, 36 Cal.3d 591 requires a charter City to satisfy its duty to meet and confer in good faith with affected unions before proposing the charter amendments concerning issues within the scope of representation. (See *Id.*, at p. 602.) The meet and confer requirements under MMBA section 3505 includes allowing for adequate time to resolve impasses. The City was therefore required to fulfill all the bargaining obligations under MMBA section 3505 prior to proposing a charter amendments concerning negotiable subjects in a local election.

B. The Prima Facie Case for a Unilateral Change

Local 230 alleges that the City approved Resolution No. 76087 prior to completing required bargaining. That resolution called for a City-wide election over charter amendments to change unit members' retirement benefits. It has long been held that a party commits a "per se" violation of the duty to meet and confer in good faith where the following elements are met: (1) the employer took action to change existing policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-*

Suisun Unified School District (2012) PERB Decision No. 2262, p. 9, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5; see also *Vernon Fire Fighters, Local 2312, IAFF v. City of Vernon* (1980) 107 Cal.App.3d 802 (*City of Vernon*), pp. 822-823; *County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 12-13.) These same principles apply when a public agency seeks to change matters with the scope of representation via ballot measure. (*County of Santa Clara, supra*, PERB Decision No. 2120-M, p. 9, citing *City of Seal Beach, supra*, 36 Cal.3d 591.)

There is no dispute that Local 230 satisfied the first three elements of the above-referenced unilateral change test. The City took official action to approve Resolution No. 76087 at its December 6, 2011 City Council meeting. The parties also do not dispute that the vanguard of the City's proposed charter amendments concern changes to contribution rates, retirement eligibility age, and post-employment benefits for current and future employees. Post-employment benefits for current and future employees are mandatory subjects of bargaining. (*County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 7, citing *Temple City Unified School District* (1989) PERB Decision No. 782, *Jefferson School District* (1980) PERB Decision No. 133.) It is also clear that the City's proposed changes were intended to apply on a continuing basis for employees once passed by the local electorate. (See *State of California (Departments of Veterans Affairs & Personnel Administration)* (2008) PERB Decision No. 1997-S, p. 18 [holding that a change has a generalized effect "where there is a change in policy that is generally acceptable to future situations"].) The parties dispute whether the City provided a sufficient amount of time and opportunity for bargaining prior to adopting Resolution No. 76087. That issue will be addressed below.

1. Effect of the Pledge of Cooperation

In most cases, the duty to bargain requires that the parties refrain from unilateral action on negotiable matters until the parties reach either agreement or impasse, unless a party has waived its right to negotiate the over those matters. (*County of Santa Clara* (2010) PERB Decision No. 2114-M, p. 13, citing *Omnitrans* (2009) PERB Decision No. 2001-M.) In this case, the parties disagree about whether they reached impasse in negotiations on or around October 31, 2011. Determination of a bona fide impasse in negotiations is a question of fact and is typically based on a variety of factors such as the number and length of negotiating sessions, the time period over which negotiations have occurred, the extent to which the parties have made or discussed proposals and reached tentative agreements, and the extent to which issues in negotiations remain unresolved. (PERB Regulation 32793(c); *County of Riverside* (2014) PERB Decision No. 2360-M, p. 14.) PERB defines impasse as the point at which further negotiations would be either “fruitless” or “futile” because the parties have each considered the other’s proposals and counterproposals in a good faith attempt to reach agreement, but nevertheless remain “deadlocked” in their respective positions. (*County of Riverside*, citations omitted.) City EERR section 2(l) defines impasse similarly.

In this case, neither party maintains that the parties met the definition of impasse used by PERB or the City’s EERR. Rather, the City asserts that impasse was an “automatic” function of the Pledge of Cooperation, which states in relevant part:

The parties agree to meet and confer in good faith and agree to complete the negotiation process by October 31, 2011. If the parties are unable to reach an agreement on retirement reform and/or related ballot measure(s) by October 31, 2011, the parties shall proceed to impasse, pursuant to procedures outlined in the [EERR section 23].

Local 230 contends, on the other hand, that the parties never agreed that negotiations would be at impasse on October 31, 2011; they only agreed to utilize the impasse procedures contained in the EERR. EERR section 23 does not require that the parties meet the EERR definition of impasse before they resort to its impasse procedures. It only requires that “a bona fide effort has been made to meet and confer in good faith and such efforts fail to resort in agreement.”

The MMBA has no strict timelines for completing the meet and confer process. Instead, MMBA section 3505 only requires that negotiations “continue for a reasonable period of time” and “include an adequate time for the resolution of impasses” through procedures that are either required or agreed upon by the parties. Neither party may avoid its bargaining obligations by unilaterally setting deadlines for completing negotiations. (*County of Riverside, supra*, PERB Decision No. 2360-M, p. 20, citations omitted.) On the other hand, the court in *Santa Clara County Correctional Peace Officers’ Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016 (*County of Santa Clara/CPOA*) recently found that parties “are free to agree in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement.” (*Id.* at pp. 1038-1039, review den. July 9, 2014.) In that case, the parties entered into an agreement permitting the county to convert employees’ existing schedules to either a 4/10 or a 5/8 schedule:

upon the giving of forty-five (45) calendar days’ advance notice of such change to the Association, which shall be afforded the opportunity to meet and confer on such a proposed change prior to implementation.

(*Id.* at p. 1024.) The court in that case rejected the county’s argument that the agreement amounted to a clear and unmistakable waiver of the right to meet and confer over schedule changes. The court instead concluded that the above-quoted language constituted a binding

agreement to complete negotiations 45 days. The court further found that the 45-day period was not an “arbitrary deadline” for finishing bargaining under the facts of that case, apparently a prerequisite to making such an agreement binding. (*Id.* at p. 1039.)

Notably, the court in *County of Santa Clara/CPOA, supra*, 224 Cal.App.4th 1016 also interpreted the parties’ agreement to cover all aspects of their meet and confer requirements. Thus, while the court believed that 45 days was a sufficient to complete for any pre-impasse bargaining, the court found it unreasonable to expect the parties to also complete county’s local impasse procedures set forth in that county’s local rules within that time period.¹⁰ The court accordingly concluded that “[i]t therefore appears that the parties did not intend the impasse resolution procedure to apply to this particular proposal,” finding instead that the parties agreed to “implementation of the County’s proposal 45 days after providing notice, regardless of whether the parties reach agreement or impasse on implementation in the interim.” (*Id.* at p. 1039.) In other words, the union under those facts “waive[d] any right to postpone implementation beyond 45 days by declaring impasse and compelling mediation.” (*Ibid.*)¹¹

PERB may review parties’ contracts only to the extent necessary to decide issues within its jurisdiction, such as unfair practice charges. (*County of Sonoma* (2012) PERB Decision No. 2242-M, p. 15, citing *Regents of the University of California (Davis)* (2010) PERB

¹⁰ The impasse procedure in the county’s local rules in *County of Santa Clara/CPOA, supra*, 224 Cal.App.4th 1016, provided for mandatory mediation, unless another procedure is agreed upon by the parties. (*Id.* at p. 1036.) The impasse mediation procedures in City EERR section 23, once invoked, do not allow the parties to agree to opt out of mediation.

¹¹ But see *Redwoods Community College District* (1996) PERB Decision No. 1141, proposed decision, pp. 12-15 [holding that parties subject to a different collective bargaining statute may not agree to opt out of statutorily required impasse procedures].)

Decision No. 2101-H, *County of Ventura* (2007) PERB Decision No. 1910-M.) When such review is warranted, PERB applies traditional principles of contract interpretation. Those principles include interpreting agreements in a manner that effectuates the parties' mutual intentions at the time of agreement and looking first to the plain language of the agreement when trying to determine its meaning. (*Id.*, citing Civ. Code, §§ 1636, 1638.) If the plain meaning of the contract language is clear and unambiguous, no further evidence is required to interpret the agreement. Furthermore, the language of the agreement must be read together as a whole. (*Id.* at pp. 15-16.)

In the present case, the parties agree that interpreting the Pledge of Cooperation is relevant to the status of the parties' negotiations at the end of 2011. The unambiguous language of the Pledge of Cooperation shows that the parties clearly intended to set parameters about the length of pre-mediation negotiations on retirement reform. According to the court in *County of Santa Clara/CPOA, supra*, 224 Cal.App.4th 1016, the parties were permitted to do so.¹² Local 230 argues that the reference to October 31 represented only a nonbinding "goal" to finish negotiations, but that interpretation cannot be squared with the plain language of the

¹² The court in *County of Santa Clara/CPOA, supra*, 224 Cal.App.4th 1016 notably did not reach the issue of whether the parties could stipulate beforehand when they will reach the legal status of "impasse" in negotiations. Nothing in the agreement in that case indicated anything about when they would reach "impasse." (*Id.* at p. 1024.) Likewise, in the present case, although the Pledge of Cooperation specifies that the parties shall proceed *to impasse*, i.e., to the impasse resolution procedures in City EERR section 23, nothing in the agreement dictates that the parties would be *at impasse*, i.e., at a deadlock in discussions regarding negotiable matters (EERR, § 2(I)), by a certain date. Moreover, that question is inconsequential to the decision in this case because the parties may agree to complete bargaining within a reasonable fixed time period, irrespective of impasse. Therefore, although it is unlikely that well-settled concepts of collective bargaining would allow parties to agree in advance when negotiations will be deadlocked or otherwise at loggerheads, it is unnecessary to decide that issue in this proposed decision.

agreement. The statement that “[t]he parties agree to meet and confer and good faith and agree to complete the negotiations process by October 31, 2011” is not subject to multiple interpretations. Therefore, while it is not technically correct that the parties reached “impasse” on October 31, 2011, I find that the parties clearly agreed to complete pre-mediation bargaining by that date.¹³

I also find that, unlike the parties in *County of Santa Clara/CPOA, supra*, 224 Cal.App.4th 1016, the parties in this case did not intend to waive their right to use the impasse mediation process under EERR section 23. To the contrary, the parties plainly agreed to use that process if no agreement was reached before October 31, 2011. The Pledge of Cooperation did not specify a time for completing impasse procedures.

While extrinsic evidence is not required to understand how the parties intended the Pledge of Cooperation to operate, outside evidence does explain why the parties selected October 31, 2011, as the operative date. The agreement refers to, but does not detail, the City’s interest in pursuing a ballot measure. Other documents and witness testimony show that the parties chose October due to statutorily mandated timelines for placing a proposed charter amendment on a local ballot. At the time of they signed the agreement, the City earmarked March 6, 2012, for the election, meaning the City Council had to approve the proposed

¹³ The City suggests in briefing that the issue of whether the parties reached impasse via the Pledge of Cooperation was conclusively decided by the Santa Clara Superior Court in its June 17, 2013 order compelling interest arbitration. However, the court in that case correctly recognized that it lacked jurisdiction to decide whether the parties had completed negotiations in good faith and expressly declined to rule on that issue. PERB has exclusive initial jurisdiction to decide whether an employer covered by the MMBA failed to satisfy its meet and confer obligations under MMBA section 3505. (*San Diego Municipal Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, p. 1457.) Thus, the court did not and could not determine whether the parties ever reached a bona fide impasse relieving them of any bargaining obligation.

amendments by December 9, 2011. The record shows that the parties selected October 31, 2011, to allow time for negotiations before December 9, 2011.

3. Reinstating the Duty to Bargain

Under normal circumstances, the duty to bargain in good faith is ongoing and continuous. (*County of Contra Costa, supra*, PERB Order No. Ad-410-M, pp. 23, 38, administrative determination, pp. 7-8, citing *Conley v. Gibson* (1957) 355 U.S. 41, p. 46; *NLRB v. Acme Indus. Co.* (1967) 385 U.S. 432, pp. 435-436.) Even impasse in negotiations is impermanent. As the court in *PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881 observed, “impasse is a fragile state of affairs and may be broken by a change in circumstances that suggest that attempts to adjust differences may no longer be futile.” (*Id.* at p. 899.) Once impasse is broken, the duty to bargain revives. (*Ibid.*; see also *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus CFPD I*), p. 13, fn. 14.) The Board discussed the reasoning behind this policy in *Modesto City Schools, supra*, PERB Decision No. 291. That case involved the parties’ duty to bargain after formal impasse procedures concluded under Educational Employment Relations Act (EERA). (*Id.* at p. 32.) The Board found the fundamental purpose behind the meet and confer requirement in the public sector is to encourage face-to-face meetings and ultimately bring about peaceful negotiated agreements. (*Modesto City Schools, supra*, PERB Decision No. 291 at pp. 34-35.) The Board cited language from EERA in support, stating that its purpose is “to promote the improvement of personnel management and employer-employee relations[.]” (*Id.* at p. 35, quoting Gov. Code, § 3540.)¹⁴ In a similar way, the Board found that formal codified

¹⁴ MMBA section 3500(a) and City EERR, section 1 both contain language nearly identical to the quoted portion of Government Code section 3540.

impasse procedures ensures that parties fully explore the possibility for concessions, compromises, and settlement before taking unilateral action such as imposition of terms, strikes, or lockouts. (*Id.* at pp. 36-37.) Thus, concluded the Board, reviving the duty to bargain in the face of “changed circumstances” was a necessary component of the duty to bargain in good faith. (*Id.* at p. 38, citing *Modesto City Schools District, supra*, 136 Cal.App.3d at p. 899.) The same principles apply in impasses occurring under the MMBA. (See *Stanislaus CFPD I, supra*, PERB Decision No. 2231-M, p. 13, fn. 14; see also *City & County of San Francisco* (2009) PERB Decision No. 2041-M, proposed decision, p. 27.)

In the present case, the parties entered into the EERR impasse mediation process pursuant to their agreement in the Pledge of Cooperation, not because the parties reached a bona fide impasse in negotiations. One issue presented in this case is whether the duty to bargain at the end of impasse procedures under these circumstances may “revive” in the same sense as it does had the parties actually bargained to impasse. There is good reason to view these two situations similarly. As the court found in *County of Santa Clara/CPOA, supra*, 224 Cal.App.4th 1016, parties may agree in advance on what constitutes a “reasonable period of time” for negotiations under MMBA section 3505. (*Id.* at pp. 1038-1039.) The parties in this case reached such an agreement, but nothing in the terms of that deal absolved the parties of the remainder of their bargaining obligations. Based on the unvarying precedent set in *Modesto City Schools District, supra*, 136 Cal.App.3d 881, *Stanislaus CFPD I, supra*, PERB Decision No. 2231-M, *City & County of San Francisco, supra*, PERB Decision No. 2041-M, and *Modesto City Schools, supra*, PERB Decision No. 291, the parties remained obligated to fully explore the possibility for agreement in order to avoid the disruption of valuable public services that may occur at the conclusion of all bargaining. (*City & County of San Francisco,*

supra, PERB Decision No. 2041-M, proposed decision, p. 27; *Modesto City Schools, supra*, PERB Decision No. 291 at pp. 34-35.) A key component of that obligation is the duty to consider how new circumstances affect the possibility for agreement. (*Modesto City Schools* at p. 38, citing *Modesto City Schools District, supra*, 136 Cal.App.3d at p. 899.) The alternative, i.e., allowing parties who have agreed to a bargaining schedule in advance to ignore how new information or circumstances might lead to agreement, is at odds with the core purpose of collective bargaining. Moreover, as the facts in this case show, new circumstances may alter the purpose behind the parties' negotiations timetable. Therefore, I conclude that the parties' duty to bargain in good faith may revive in the face of changed circumstances even though they agreed on a time limit for pre-mediation negotiations.

The facts of this case illustrate the merit of this conclusion. It is undisputed that the purpose of the timelines in the Pledge of Cooperation was to allow for negotiations ahead of December 9, 2011, when the City planned on finalizing its ballot for a March 6, 2012 election. As will be discussed in greater detail below, circumstances at the City changed in December 2011, causing the City Manager, the Mayor, and a majority of the City Council to move the election from March 6 to June 5, 2012. As Gurza put it, "the urgency of the matter to go in March lessened, and that was part of the reason the Council was willing to agree to move [the proposed charter amendment] to the June election." Put another way, the purpose behind the timelines in the Pledge of Cooperation was undercut by subsequent events.

In addition, nothing in the Pledge of Cooperation indicated a waiver of the right to either participate in the impasse process fully or to waive the right to subsequent bargaining should circumstances change. To the contrary, the parties expressly declined to waive any legal rights when signing the agreement. The City's EERR does not even allow the parties to

circumvent impasse mediation, once invoked. Under these facts, it is unreasonable to allow the parties to ignore any new developments when evaluating their ongoing bargaining obligations. Therefore, the City and Local 230 were obligated to consider how new events affected their ability to reach agreement.

3. The Existence of "Changed Circumstances" in This Case

The Board has defined "changed circumstances" as "those movements or conditions which have a significant impact on the bargaining equation." (*Modesto City Schools, supra*, PERB Decision No. 291, p. 35.) However, in *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S (*DPA*), PERB was reticent to conclude that the mere occurrence of supervening events is sufficient to revive the duty to bargain post-impasse. (*Id.* at proposed decision, pp. 8-9.) Rather, there must be "substantial evidence that a party is committed to a new bargaining position." (*Id.* at proposed decision, p. 8, citing *Serramonte Oldsmobile, Inc. v. NLRB* (D.C. Cir. 1996) 86 F.3d 227, p. 233.)

Most commonly, "changed circumstances" break impasse when significant bargaining concessions "open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions." (*Modesto City Schools, supra*, PERB Decision No. 291, p. 39, quoting *NLRB v. Webb Furniture* (4th Cir. 1966) 366 F.2d 314, p. 316 (*Webb Furniture*); *Modesto City Schools District, supra*, 136 Cal.App.3d at p. 899; *City of Santa Rosa* (2013) PERB Decision No. 2308-M, p. 6, fn. 2.) If one party makes a concession during impasse, the other party must consider the new proposal in good faith. (*Modesto City Schools*, p. 39; see also *Saddleback Valley Unified School District* (2013) PERB Decision No. 2333, p. 11, proposed decision, pp. 14-15.) Even if the conceding party's proposal is not fully acceptable, the reviewing party must attempt to determine whether concessions made were significant

enough to relieve the impasse and reinstate the duty to bargain. (*Modesto City Schools*, p. 39.) On the other hand, "either party is free to conclude that it has made all the concessions it can and further negotiations are futile." (*Ibid.*) Thus, in *Modesto City Schools*, the Board found that an employer violated the duty to bargain in good faith after it failed to review a neutral factfinders' report with recommendations for resolving their impasse and also refused to meet with the union and consider newly proposed concessions. (*Id.* at p. 44.)¹⁵ The proposed concessions in that case included acceding to the employer's position on the length of the agreement, minimum class sizes, and transfer policies, as well as other proposals recommended by the factfinding report. (*Id.* at pp. 39-40.) In contrast, in *Charter Oak Unified School District* (1991) PERB Decision No. 873, the Board held that an employer was not obligated to physically meet over the charging party's proposal to accept a factfinding panel's recommendations because the employer had already rejected those recommendations in a written dissent to the panel's report. (*Id.* at pp. 11-12.)

In this case, the parties completed pre-mediation bargaining around the end of October 2011. The parties then participated in two mediation sessions in November 2011, but concluded that process without making additional proposals or reaching agreement. After mediation ended, both parties made new proposals containing concessions. In its November 18, 2012 proposal, Local 230 acquiesced to the City's demand to bring any changes to retirement benefits before City voters. Local 230 also abandoned its proposal to move aspects of the Police and Fire plan to CalPERS. Both of these issues had been major stumbling blocks in prior meetings. The City's November 22, 2011 proposal also moved the parties closer to

¹⁵ The Board also found that the employer's conduct violated the duty to participate in impasse procedures in good faith. (*Ibid.*)

agreement. That proposal included more favorable retirement benefits accrual rates, a lower minimum retirement age, and an increase to maximum COLA payments. The City withdrew entirely its "Safety Net" provisions, which could have severely curtailed the City's ability to provide various types of discretionary salary increases and other employee benefits without voter approval. On November 29, 2011, Local 230 specifically demanded to bargain over the City's new proposal. The City did not reply to that demand. Both parties also made additional proposals in December 2011. The duty to bargain in good faith required that the parties at least consider whether these new developments created the possibility of further movement at the bargaining table. Yet, the parties never met or held other discussions on any of these proposals before the City adopted Resolution No. 76087 on December 6, 2011. It was not even made clear for the record the extent to which the City even considered Local 230's post-mediation proposals before it adopted Resolution No. 76087.

The City argues that the duty to bargain never revived because it was undisputed that none of the post-mediation proposals were mutually acceptable by the parties. However, the duty to bargain in good faith may reactivate even by concessions that do not wholly resolve the issues in dispute. Rather, "[e]ven if not fully acceptable, a good faith effort must be made to determine if the new proposals are significant enough to 'relieve the impasse and open a ray of hope with a real potentiality for agreement if explored in good faith bargaining sessions.'" (*Modesto City Schools, supra*, PERB Decision No. 291, p. 39, quoting *Webb Furniture, supra*, 366 F.2d 314.) During the hearing, the City's negotiators admitted that it viewed Local 230's new proposals as a "positive sign." The City also admitted that its own proposal contained "significant changes" from its earlier position. Thus, even if it were true that neither party's concessions completely resolved their disagreement, the parties nevertheless had the obligation

to consider the new proposals and explore whether there was some basis for progress in negotiations.

In addition to the parties' proposed concessions, Cheiron, the Police and Fire Plan actuary, released new pension cost projections on or around December 1, 2011. Cheiron projected that the City's 2011-2012 pension costs would be around \$55 million less than predicted earlier. Unlike in *DPA, supra*, PERB Decision No. 2102-S, the new valuation was not merely a new event with an uncertain impact on the parties' bargaining positions. The City admits that its bargaining position was based, in part, on its perceived urgency to put the issue before voters in March 2012. Yet, as Gurza later said, the "urgency of the matter to go in March lessened" after reviewing Cheiron's updated projections.

The duty to meet and confer in good faith under MMBA section 3505 obligated the parties in this case to explore whether the post-mediation events in 2011 provided some basis for believing "that attempts to adjust differences may no longer be futile." (*Modesto City Schools District, supra*, 136 Cal.App.3d at p. 899.) The evidence in this case shows that the City did not satisfy this obligation, despite Local 230's requests.

4. The City Council's Approval of Resolution No. 76087

The City Council approved of Resolution No. 76087 during its December 6, 2011 City Council meeting. The City acknowledges this fact but argues that the parties had fully exhausted any bargaining obligation by that point because the parties remained unable to reach agreement despite lengthy negotiations. It contends that, after this process, it was privileged to impose its last, best, and final offer. The City admits that the terms approved in Resolution No. 76087 were based on its December 5, 2011 draft, not its November 22, 2011 proposal. It further admits that the parties never met or discussed the December 5 draft. The City argues

that unilateral action was nevertheless justified because the terms imposed were reasonably comprehended within its November 22, 2011 proposal, what it now calls its last, best, and final offer.¹⁶ This argument is unpersuasive because the undisputed evidence in the record shows that the parties also never bargained or otherwise discussed the City's November 22, 2011 proposal. Furthermore, the City also adopted Resolution No. 76087 before considering whether either Local 230's own post-mediation concessions or Cheiron's more favorable cost valuations provided the opportunity for further progress in negotiations.

To the extent that the City defends its conduct by arguing that the terms of No. 76087 never took effect, that position was considered and rejected in *County of Sacramento* (2008) PERB Decision No. 1943-M. There, a county employer unilaterally changed the eligibility requirements for its retiree health care program. (*Id.* at pp. 7-8.) The employer later rescinded those changes prior to their effective date. (*Id.* at p. 9.) The Board dismissed the argument that the rescission defeated the union's unilateral change claim, holding instead that "[t]he fact that the County reversed its position and restored the status quo before the new policy went into effect, does not cure the unlawful unilateral change." (*Id.* at p. 12; see also *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M (*Stanislaus CFPD II*), p. 8.) The same result is required here. The City Council approved Resolution No. 76087 on December 6, 2011, before fully satisfying its duty to meet and confer in good faith. The fact that the City delayed action on that resolution and later repealed it is of no consequence. The parties stipulated that the proposed charter amendments from Resolution No. 76087 would have been placed on the City's June 5, 2011 ballot unless repealed by the City Council.

¹⁶ It is noteworthy that the City never informed Local 230 that the November 22, 2011 was its last, best, and final offer. In fact, it did not even label that draft as a proposal.

Equally unpersuasive is the claim that the City's willingness to continue bargaining after approving Resolution No. 76087 excused any violation. In *Anaheim Union High School District* (1982) PERB Decision No. 201 (*Anaheim UHSD*), the Board held that unilateral changes to employees' salaries and benefits were "official and legally effective" when the school employer's board approved those changes, not at some later effective date. (*Id.* at p. 11.) It accordingly rejected the argument that the unilaterally approved changes were merely the employer's "unofficial initial proposal." (*Ibid.*) According to the Board,

Were we to characterize an employer's action unilaterally reducing salaries as an "initial bargaining proposal" simply because it had a deferred effective date we would be legitimizing a tactic patently offensive to the statutory requirement of good faith bargaining.

(*Id.*; see also *Stanislaus CFPD II, supra*, PERB Decision No. 2231a-M, p. 8.) Likewise, in this case, the fact that the parties continued meeting after the City approved Resolution No. 76087 does not nullify the harm caused by the City's unilateral action.¹⁷

Local 230 has established all the elements of an unlawful unilateral policy change. Therefore, the adoption of Resolution No. 76087 violates the duty to meet and confer in good faith unless its conduct was excused. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 38; *County of Sacramento* (2009) PERB Decision No. 2045-M, p. 4.)

III. The City Council's Approval of Resolution No. 76158

¹⁷ But see *Omnitrans, supra*, PERB Decision No. 2001-M, where the Board found, at least for statute of limitations purposes, that a unilateral policy change occurs on the date a "charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent." (*Id.* at p. 6.) In that case, the Board held that a unilateral change did not occur on the date alleged by the charging party because the employer stated that it would not implement the alleged changes until after it received feedback from the charging party's members. (*Id.* at p. 7.) No such assurances were made by the City in the present case.

Local 230 also contends that the City violated the duty to meet and confer in good faith by approving Resolution No. 76158. According to Local 230, the City took this action prior to reaching bona fide impasse in negotiations. The City contends that, the parties simply could not reach agreement despite extensive negotiations, including mediation sessions after the City adopted Resolution No. 76087. The City cites as evidence the fact that each party's final proposal remained unacceptable to the other. As discussed below, the City's December 6, 2011 unilateral change impermissibly tainted the parties' later bargaining efforts and completely frustrated the parties' later bargaining.

The Board has held that "a bona fide impasse exists only if the employer's conduct is free from unfair labor practices; its right to impose terms and conditions at impasse is therefore dependent on prior good-faith negotiations *from their inception through exhaustion of statutory or other applicable impasse resolution procedures.*" (*City of San Jose* (2013) PERB Decision No. 2341-M, pp. 39-40 [emphasis in original], citing *Temple City Unified School District* (1990) PERB Decision No. 841 (*Temple City USD*).) In *San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo County CCD*), the Board detailed the corrosive effects one party's unilateral action has on bargaining. That case concerned an employer's unilateral imposition of a 6.25 percent salary reduction following "informal talks" with the union, but no actual bargaining. (*Id.* at pp. 7-8.) The Board described the employer's conduct as having a "destabilizing and disorienting impact on employer-employee relations." (*Id.* at pp. 14-15, citing *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203, p. 211.) This is because:

An employer's single-handed assumption of power over employment relations can spark strikes or other disruptions at the work place. Similarly, negotiating prospects may also be damaged as employers seek to negotiate from a position of

advantage, forcing employees to talk the employer back to terms previously agreed to. This one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract.

(*Id.* at p. 15; see also *Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, pp. 199-200; *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

In addition, an employer's "unilateral actions derogate the representative's negotiating power and ability to perform as an effective representative in the eyes of employees." (*San Mateo County CCD, supra*, PERB Decision No. 94, p. 15.) Such conduct undermines an exclusive representative's ability to fairly represent all of its bargaining unit. (*Id.*, citing *NLRB v. Katz* (1962) 369 U.S. 736, p. 744; see also *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

A third reason for disfavoring unilateral changes is that "[s]uch changes also upset the delicate balance of power between management and employee organizations painstakingly established by our statutes. '[T]he bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on negotiable matters.'" (*County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23, quoting *San Mateo County CCD, supra*, PERB Decision No. 94, p. 16.)

Finally, unilateral action "may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public." (*San Mateo County CCD, supra*, PERB Decision No. 94, p. 16; see also *County of Santa Clara, supra*, PERB Decision No. 2321-M, p. 23.)

In another case, the Board held that "where an employer unilaterally changes a working condition which is at the time a subject of negotiations, the required element of good faith on the part of the employer is destroyed." (*Antioch Unified School District* (1985) PERB

Decision No. 515, pp. 18-19, citing *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74; see also *Los Angeles Unified School District* (1990) PERB Decision No. 860, proposed decision, p. 26 ["As a practical matter, it is clear that . . . a unilateral action alters the balance of bargaining power held by the parties."].)

The Board's forceful denunciation of unilateral action is not mere hyperbole. As the court found in *City of Vernon, supra*, 107 Cal.App.3d 802, "the employer's fait accompli thereafter makes impossible the give and take that are the essence of labor negotiations." (*Id.* at p. 823.) Thus, later offers to bargain after the change cannot cure the defect. (*Stanislaus CFPD I, supra*, PERB Decision No. 2231-M, p. 13; *State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S, proposed decision, p. 22.) The Board explained the reasoning behind this position in *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a (*Dry Creek JESD*), a case involving the Board's review of an arbitration award. There, the arbitrator found that the employer violated sections of the parties' collective bargaining agreement by changing negotiated salary provisions. (*Id.* at pp. 2-3, 5.) The arbitrator ordered the parties to negotiate over salary issues, but declined to first reverse the imposed changes. (*Id.* at p. 7.) In its review of that award, the Board stated "PERB has made it clear--and now reiterates--that good faith negotiations cannot and should not proceed until the status quo is restored." (*Id.* at p. 8, citing *San Mateo County CCD, supra*, PERB Decision No. 94; *San Francisco Community College District* (1979) PERB Decision No. 105.) Thus, the Board concluded that the "arbitrator's remedy, which only directs that the parties enter into negotiations, would therefore require that the employees and their representative enter negotiations on the basis of first surrendering fundamental statutory rights to bargain in good faith." (*Id.* at p. 9.) The Board found that such an award was repugnant to

the very purposes of public sector collective bargaining,¹⁸ reasoning that the award, “if allowed to stand, would throw the parties negotiating relationship into an imbalance that would necessarily frustrate the Act’s intent that negotiations proceed in good faith.” (*Id.* at p. 9.) Using similar reasoning, the Board later held an employer is “not entitled to implement its ‘last, best and final’ offer, having already illegally altered the status quo during the negotiations process.” (*Temple City USD, supra*, PERB Decision No. 841; see also *Noel Corp.* (1994) 315 NLRB 905, p. 911 [“Although an employer who has bargained in good faith to impasse normally may implement the terms of its final offer, it is not privileged to do so if the impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations.”], enf. den. on other grounds at *Noel Foods v. NLRB* (D.C. Cir. 1996) 82 F.3d 1113, p. 1121.)

In the present case, it is undisputed that Resolution No. 76087 remained in place throughout the parties’ 2012 meetings. It was only rescinded when the City Council concurrently approved Resolution No. 76158. It is further undisputed that Resolution No. 76087 changed the status quo for the parties. The City states in closing brief that:

the December 2011 ballot measure was not a “condition”, but merely described the status quo that the measure adopted in December 2011 would go on the ballot unless something else were to occur to prevent this default action.

¹⁸ *Dry Creek JESD, supra*, PERB Order No. Ad-81a was decided under EERA. As explained above, both EERA and the MMBA share the central purpose “to promote the improvement of personnel management and employer-employee relations” in the public sector. (See MMBA, § 3500(a); Gov. Code, § 3540.) Moreover, both EERA and the MMBA are part of the Legislature’s effort to create uniform, statewide practices for resolving labor disputes. (See *City of Seal Beach, supra*, 36 Cal.3d at p. 600; *International Federation of Professional & Technical Engineers v. Bunch* (1995) 40 Cal.App.4th 670, p. 676.)

(City's Closing Brief, § B(4), p. 26, lines 21-23.) As the Board found in *County of Santa Clara, supra*, PERB Decision No. 2321-M and *San Mateo County CCD, supra*, PERB Decision No. 94, the City's unilateral change to the status quo upset the delicate balance established through the MMBA's the meet and confer requirements. The City's failure to repeal Resolution No. 76087 prior to commencing subsequent bargaining ensured that the balance remained in the City's favor throughout the 2012 mediation sessions. This environment was not conducive to good faith bargaining, because "good faith negotiations cannot and should not proceed until the status quo is restored." (*Dry Creek JESD, supra*, PERB Order No. Ad-81a, p. 8.) The record in this case shows that the City leveraged its advantage in its one and only offer in the subsequent meetings. It informed Local 230 that the City could place less favorable terms (from Resolution No. 76087) on the June 5, 2012 ballot unless Local 230 agreed to the relatively more favorable terms of the City's February 10, 2012 offer.

The damage in this case was not reduced by the fact that the City merely imposed proposed ballot measure language, instead of actual changes to unit members' retirement benefits. Unilateral changes are disfavored not only because of actual changes to employees' working conditions but also because of the harm to the bargaining process itself. (See *San Mateo County CCD, supra*, PERB Decision No. 94, pp. 14-16.) This harm exists even in cases where the implemented policy has not even taken effect. (*County of Sacramento, supra*, PERB Decision No. 1943-M, p. 12; *Anaheim UHSD, supra*, PERB Decision No. 201, p. 11.) The negotiations in this case were over the City's proposed ballot measure. The City improperly assumed control over those negotiations by unilaterally approving the draft measure in

Resolution No. 76087. Requiring Local 230 to participate in later negotiations from this fundamentally disadvantaged position is anathema to good faith negotiations.

The City correctly points out that it made additional concessions after it unilaterally adopted Resolution No. 76087, but as explained above, later bargaining does not unravel the harm from one party's unilateral action. (*Stanislaus CFPD I, supra*, PERB Decision No. 2231-M, p. 13. Likewise, in *Modesto City Schools, supra*, PERB Decision No. 291, the Board concluded that an employer's concessions offered as part of a *fait accompli* were not sufficient to overcome its earlier unlawful bargaining conduct. (*Id.* at pp. 42-43.) Here, the City made its February 10, 2012 offer already knowing that it achieved the changes it sought. At this point, it cannot be determined what progress might have been made in negotiations had the parties' 2012 negotiations started from status quo. (See *Temple City USD, supra*, PERB Decision No. 841, proposed decision, pp. 31-32 [holding that after an employer's unilateral change "the mutual dispute resolution process by definition ends because the employer loses incentive to participate in the process since it has already imposed terms it deemed satisfactory"].)

Accordingly, I conclude that any subsequent meetings after the City approved Resolution No. 76087 could not have occurred in good faith. The parties were therefore not at bona fide impasse at the time the City unilaterally approved Resolution No. 76158. This conduct therefore violates the duty to negotiate in good faith unless the City's bargaining obligations were excused. (*City of Sacramento, supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento, supra*, PERB Decision No. 2045-M, p. 4)

Local 230 asserts other arguments in support of its bargaining claims. These include the assertion that the City's reference to the \$650 million figure was misleading, the claim that

the February 10, 2012 offer in mediation differed from what the City approved as part of Resolution No. 76158, and the argument that the City failed to meet with Local 230 over its March 2, 2012 proposal. However, in light of the conclusion that good faith bargaining could not and should not have even begun until the City rescinded Resolution No. 76087, it is unnecessary to fully evaluate the strength of these other arguments. Therefore, these other claims will not be addressed further.

IV. The City's Defense

The City defends both its unilateral approval of both Resolution No. 76087 and Resolution No. 76158 by arguing that it was excused from any bargaining obligations due to what it described as the “practical and legal requirement of a statutory deadline for submission of a ballot initiative.” The City cites in support *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), which outlined that an employer, “prior to agreement or exhaustion of impasse procedures, may implement a *nonnegotiable* decision after providing reasonable notice and a meaningful opportunity to bargain over the [negotiable] effects of that decision.” (*Id.* at p. 14 (emphasis supplied).) That test was approved of and restated by the Board recently in *Trustees of the California State University* (2012) PERB Decision No. 2287-H. In that later case, the Board reiterated that the test allows for implementation of a “non-negotiable decision” prior to completing effects bargaining, when:

(1)[the] implementation date [is] based on immutable deadline or important managerial interest, (2) notice of [the] decision and implementation date [is] given sufficiently in advance of implementation date to allow for meaningful negotiations prior to implementation, and (3) the employer negotiates in good faith prior to implementation and continues to negotiate afterwards on unresolved issues.

(*Id.* at p. 12, citing *Compton CCD*.)

The test from *Compton CCD, supra*, PERB Decision No. 720 does not apply here because it only appertains to an employer's implementation of *nonnegotiable* decisions. (*Id.* at p. 14; see also *Trustees of the California State University, supra*, PERB Decision No. 2287-H p. 12.) This test originates from Board Member Craib's dissenting opinion in *Lake Elsinore School District* (1988) PERB Decision No. 696 (*Lake Elsinore SD*). (*Compton CCD*, p. 15.)¹⁹ The purpose of the test, according to Craib, is to prevent "[t]he indefinite postponement of implementation [of a nonnegotiable decision, which] would effectively undermine the employer's right to make the decision and would blur the distinction between decision and effects bargaining." (*Lake Elsinore SD*, Craib dissent, p. 24.) That reasoning is not relevant in the present case because it is undisputed that the parties' negotiations concerned *negotiable* matters such as post-employment benefits for current and future employees. The City's authority to make *nonnegotiable* decisions is not at issue.

Moreover, even if the test from *Compton CCD, supra*, PERB Decision No. 720 applied, the City would not have satisfied the elements of that test. The City contends that the statutory timelines required for placing a charter amendment on its local ballot created an "immutable deadline" under the first element of the test. A similar argument was considered and rejected in *County of Santa Clara, supra*, PERB Decision No. 2120-M. There, a county employer argued that statutory timelines for ballot measures created an imminent need to approve a prevailing wage measure without completing negotiations. It argued that further bargaining would have prevented the county from including that issue in its preferred election date. (*Id.* at pp. 16-17.) The Board rejected that argument because there was no evidence about the need to

¹⁹ Board Member Craib was the lead author in *Compton CCD, supra*, PERB Decision No. 720.

proceed on the chosen election date. The mere fact that the employer favored a particular election date was not sufficient to excuse the county's bargaining obligations. (*Id.* at p. 17; see also *County of Santa Clara, supra*, PERB Decision No. 2114-M, pp. 15-16.)

In the present case, it is undisputed that the City Council needed to approve of any charter amendments by March 9, 2012 in order to qualify for the June 5, 2012 election. But the City never explained the need for proceeding with the election in June 2012, as opposed to some later date after fulfilling any bargaining obligations. Without this evidence, I cannot conclude that the City had an immutable deadline or other important interest to act unilaterally. In addition, the test in *Compton CCD, supra*, PERB Decision No. 720 serves to excuse an employer from completing bargaining; it does not excuse bad faith conduct earlier in the negotiations process. For the reasons discussed in greater detail above, the City has also not established that it bargained with Local 230 in good faith prior to approving either Resolution No. 76087 or Resolution No. 76158. Thus, the City has failed to satisfy the third element of the test from *Compton CCD*.

The City also argued in its answer to the PERB complaint that its bargaining obligation was excused under PERB's business necessity doctrine. It raised no arguments supporting that defense in its closing briefs and for that reason it is considered to be abandoned. Even if that was not the case, the City did not demonstrate that it faced an "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Calexico Unified School District (1983)* PERB Decision No. 357, proposed decision, p. 20, citing *San Francisco Community College District, supra*, PERB Decision No. 105; see also *City of Davis (2012)* PERB Decision No. 2271-M, proposed decision, pp. 24-25.) Although the City clearly expressed a general interest in stemming the

growth of its pension costs as soon as possible, there was no evidence that this concern rose to emergency proportions when it approved Resolution No. 76087 on December 6, 2011, or when it approved Resolution No. 76158 on March 6, 2012. It also did not prove the existence of any emergency by the June 5, 2012 election date. In fact, the evidence suggests to the contrary. In early December 2011, the Pension Plans' actuary projected lower pension costs and the very people within the City that supported the charter amendments also recommended delaying the election and delaying any declaration of a fiscal and/or service level emergency. No emergency was ever declared at the times relevant to this case. No evidence was presented about the need to place the retirement reform issues on the City's June 2012 ballot. Under the facts presented in this case, the City's generalized concern about pension costs was not sufficient to qualify as an emergency that excused its bargaining obligations. (*City of Long Beach* (2012) PERB Decision No. 2296-M, p. 26-28.)

After reviewing the record as a whole, I conclude that the City did not satisfy its obligations meet and confer in good faith with Local 230 prior to approving either Resolution No. 76087 or Resolution No. 76158. The City has not established that any valid defense excusing its duty to bargain. Therefore, the City's conduct violates the duty to meet and confer in good faith under MMBA sections 3503, 3505, 3506, and 3506.5(a), (b), and (c) as well as PERB Regulations 32603(a), (b), and (c). (*City of Sacramento, supra*, PERB Decision No. 2351-M, p. 38; *County of Sacramento, supra*, PERB Decision No. 2045-M, p. 4.)

REMEDY

MMBA section 3509(b) authorizes PERB to order "the appropriate remedy necessary to effectuate the purposes of this chapter." (*Omnitrans* (2010) PERB Decision No. 2143-M, p 8.) This includes an order to cease and desist from conduct that violates the MMBA. (*Id.* at p. 9.)

PERB's remedial authority includes the power to order an offending party to take affirmative actions to effectuate the purposes of the MMBA. (*City of Redding* (2011) PERB Decision No. 2190-M, pp. 18-19.)

PERB also has the authority to order the City to restore the status quo ante and rescind any unilaterally adopted policy changes. In *California State Employees' Association v. PERB* (1996) 51 Cal.App.4th 923, p. 946, the court found:

Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. This is usually accomplished by requiring the employer to rescind the unilateral change and to make the employees "whole" from losses suffered as a result of the unlawful change.

(Citations omitted; see also *County of Sacramento, supra*, PERB Decision No. 2045-M, pp. 3-4, citing *County of Sacramento, supra*, PERB Decision No. 1943-M.) Based on this authority, rescission of the unilaterally adopted resolutions is appropriate in this case with two important caveats. First, it is undisputed that the City rescinded Resolution No. 76087 before it took effect. Therefore, it is unnecessary to order rescission of the policies in that resolution. (See *County of Sacramento, supra*, PERB Decision No. 1943-M, pp. 12-13.)

Second, in *City of Palo Alto* (2014) PERB Decision No. 2388-M, the Board recently addressed its remedial authority in cases involving a city's violation of the MMBA in the context of a charter amendment election.²⁰ The Board found:

We do not believe our remedial authority extends to ordering the results of an effective municipal election to be overturned. Such

²⁰ At that time this proposed decision issues, the Board's decision in *City of Palo Alto, supra*, PERB Decision No. 2388-M was subject to judicial review pursuant to MMBA section 3509.5. Nevertheless, the decision is the best example of PERB's position on the issue of remedies in cases involving the charter amendment process.

remedy lies with the courts. (*Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 574, 583; *LAFF v. City of Oakland* (1985) 174 Cal.App.3d 687, 698 [quo warranto writ is the exclusive remedy to attack procedural regularity by which charter amendments are put before electorate]; *City of Coronado v. Sexton* (1964) 227 Cal.App.2d 444, 453.) Based on the remedial authority which we do exercise under the MMBA, to wit, finding the City violated the MMBA and directing the City itself to rescind its July 18, 2011 resolution referring to voters the ballot measure, other persons, including the charging party here, may choose to seek such quo warranto relief.

(*Id.* at pp. 49-50.) In other words, when a city approved a ballot measure without bargaining in good faith, the Board has the authority to order it to rescind approval of that resolution. The Board however lacks the authority to rescind the results of the election that followed the resolution. Applying that reasoning to this case, the City is directed to rescind its March 6, 2012 approval of Resolution No. 76158. Local 230, or other affected entities or individuals, may thereafter pursue judicial remedies, as appropriate.

Additional appropriate remedies in this case include an order to cease and desist from conduct that violates the MMBA as well as an order to post a notice of this order, signed by an authorized representative of the City. These remedies effectuate the purposes of the MMBA because employees are informed that the City has acted in an unlawful manner, is required to cease and desist from such conduct, and will comply with the order. (*City of Selma* (2014) PERB Decision No. 2380-M, proposed decision, pp. 14-15.) The notice posting shall include both a physical posting of paper notices at all places where members of Local 230's bargaining unit are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the [City] to communicate with its employees in the bargaining unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento, supra*, PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the City of San José (City) violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3505, 3506, and 3506.5(a), (b), and (c) and California Code of Regulations, title 8, sections 32603(a), (b), and (c). The City violated the MMBA by approving Resolution Nos. 76087 and 76158 without satisfying its duty to meet and confer in good faith with International Association of Firefighters, Local 230 (Local 230). However, Local 230's claim that the City also violated Government Code section 3506.5(c) by knowingly providing Local 230 with inaccurate financial information resources is dismissed.

Pursuant to section 3509(b) of the Government Code, it hereby is ORDERED that the City, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with Local 230 prior to adopting ballot measures involving changes to retirement benefits for current or prospective employees.
2. Interfering with Local 230's right to represent the members of its bargaining unit in employment relations with the City.
3. Interfering with the right of bargaining unit members to be represented by the employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind the City's March 6, 2012 approval of Resolution No. 76158, concerning changes to retirement benefits for the Police and Fire bargaining unit.

2. Within 10 workdays of the service of a final decision in this matter, post copies of the Notice, attached hereto as an appendix, at all work locations where notices to employees in Local 230's bargaining unit customarily are posted. The Notice must be signed by an authorized agent of the City, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the City to communicate with employees in Local 230's bargaining unit.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 230.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case No. SF-CE-969-M, *International Association of Firefighters, Local 230 v. City of San José*, in which all parties had the right to participate, it has been found that the City of San José (City) violated the Meyers-Miliias-Brown Act (MMBA), Government Code section 3500 et seq. by approving Resolution Nos. 76087 and 76158 without satisfying its duty to meet and confer in good faith with International Association of Firefighters, Local 230 (Local 230).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to meet and confer in good faith with Local 230 prior to adopting ballot measures involving changes to retirement benefits for current or prospective employees.
2. Interfering with Local 230's right to represent the members of its bargaining unit in employment relations with the City.
3. Interfering with the right of bargaining unit members to be represented by the employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

Rescind the City's March 6, 2012 approval of Resolution No. 76158, concerning changes to retirement benefits for the Police and Fire bargaining unit.

Dated: _____

CITY OF SAN JOSÉ

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.