

EXHIBIT F

SENT VIA EMAIL

February 11, 2015

Paul Kelly
President, POA
1151 N. Fourth Street
San Jose, CA 95112

Re: Measure B

Dear Paul:

As we have previously discussed, the City is looking forward to working with you in order to settle the issues surrounding Measure B. The City is committed to explore ways to achieve a global settlement involving both changes to Measure B and resolution of the related litigation and administrative actions, including an openness to working on a solution that would take place in 2015.

During the past five years, all City employees made sacrifices to help the City address its significant budget deficits, including reductions in total compensation. Despite these sacrifices, however, the City still had to reduce its workforce and its services significantly in order to bring the budget into balance. Measure B was intended to achieve additional savings to begin restoration of those services.

As you know, we have already achieved approximately \$18M in annual General Fund savings from the elimination of the Supplemental Retiree Benefit Reserve ("SRBR" or the "13th Check") as well as the implementation of a second tier of retirement benefits for new employees. In addition, changes in retiree healthcare have also provided the City with an approximate \$7M in additional General Fund savings. These savings have assisted in helping to bring our General Fund budget in balance and we have slowly begun to restore pay to City employees and make some limited investments in critical service areas. Unfortunately, however, there is limited capacity to make significant progress in service restoration to the levels the organization would like to provide and the community deserves.

With that reality, the City Council's goal continues to be to restore services to at least the levels as of January 1, 2011, in the areas of police, fire, community centers, libraries, and street maintenance. In addition, the City Council also adopted a Police Sworn Staffing Restoration Strategy as part of their adoption of the 2014-2015 Budget. Although there was no General Fund funding toward street maintenance at the time the January 1, 2011 goal was developed, significant additional funding is required to keep our pavement condition from further deterioration. As discussed at the January 20, 2015 and February 3, 2015, public Study Sessions, approximately \$83M is needed to meet these objectives:

Ongoing Funding Needs	
January 1, 2011 Service Levels	\$ 37 M
Police Sworn Staffing Restoration Strategy (12 additional positions to reach 1,250 sworn positions)	\$ 2 M
Street Maintenance	\$44 M
Total General Fund	\$ 83 M

The City currently estimates that if Measure B were fully implemented, there would be an additional \$49M in General Fund savings to help fund these services through the implementation of a Tier 1 additional contributions/opt-in program (after four years) (\$46 million in estimated savings) and instituting a disability workers' compensation offset (\$3 million in estimated savings).

However, in the interest of exploring ways to settle the issues surrounding Measure B, the City Council has significantly lowered the additional savings expectations from Measure B from \$46M to \$25M and is committed to exploring additional funding sources to make up the balance to \$83M. It is recognized that this will need to be a multi-year approach; it is not expected that the funding needed nor the service restoration can be achieved in one year.

If the current savings for retiree healthcare and the elimination of SRBR are continued, the following is one proposed solution:

Proposed Solutions to Address \$83 M in Funding Needs	
2016 ¼ % Sales Tax (<i>w/ potential sunset after 9 to 15 years</i>)	\$38 M
City Share for Streets from 2016 VTA Sales Tax Measure	\$10 M
Retiree Healthcare Cost Savings	\$ 5 M
Institute Disability Workers' Compensation Offset	\$3 M
Police Tier 2 Savings (<i>Discounted from Estimated \$3 Million</i>)	<u>\$ 2 M</u>
Proposed Other Solutions Subtotal	\$ 58 M
Target Additional Savings for Measure B Negotiations (In addition to the \$25M already achieved)	<u>\$ 25 M</u>
Subtotal	
Total Proposed Solutions to Address Funding Needs	\$83 M

We are committed to working collaboratively with our bargaining units to achieve this savings goal. We respectfully request and welcome for consideration additional ideas to achieve the savings and a global resolution. In addition to lowering the anticipated additional savings goal from Measure B, the City would also like to include the following topics as part of a global settlement of Measure B:

- A compromise regarding the revised definition of disability
- An agreement on an offset for Workers' Compensation for POA and IAFF employees who leave City service on a disability retirement, as already existing for non-sworn employees.
- Discussion regarding increasing the Tier 2 benefit
- Continue the elimination of the Supplemental Retiree Benefit Reserve (SRBR)
- Willingness to discuss foregoing the emergency provisions related to the Cost of Living Adjustment (COLA).
- Continue to address the significant issues surrounding Retiree Healthcare in hopes that we can achieve at least \$5M in General Fund savings.

These elements are open to discussion and we look forward to meeting with you at the bargaining table as we work together to achieve the global settlement all parties would like to see. Your input in this effort is critical.

We have received a request from the POA and IAFF to be allowed to speak to the City Council in closed session. As has been discussed with the attorneys for the bargaining units who made that suggestion, that is not a legal purpose for which the Council can meet in closed session.

An alternative is for the bargaining units to participate in in our Labor Negotiations Updates which occur every Tuesday morning in the Council Chambers prior to the City Council adjourning in closed session. We would also welcome your presence to speak and/or present at the Pension Study Session that is currently scheduled on March 16, 2015, at 1:30 pm, with an extended time period for comment and/or presentation.

As you know, there is currently a stipulation in place that holds in abeyance the additional 4% in wage reductions as well as the revised definition of disability for Tier 1 employees until July 1, 2015. The City is open to working towards a solution that could take place in 2015 and is willing to discuss options to do that as part of an overall agreement. However, we believe that these are very complex discussions and want to ensure that the parties have time to work through all issues. Therefore, the City is interested in extending the stipulation to delay the wage reductions and revised disability definition for Tier 1 until January 1, 2017. We believe extending this stipulation will lower the significant concerns on the part of our employees regarding a potential 4% pay decrease in July 2015.

We request the bargaining units who are subject to the litigation to agree to the extension so that we can avoid the 4% wage reduction to our workforce. We have received communication from Gregg Adam, the attorney for the POA, on behalf of the bargaining units who are part of the litigation, that the Unions will not agree to an extension of the stipulation. We ask that you reconsider the City's offer to extend the stipulation. We are open to considering extending the stipulation to any shorter length of time if you believe extending to January 1, 2017, is either unwarranted or unnecessary.

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February 11, 2015
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We look forward to beginning negotiations promptly in order to achieve a global settlement and put this litigation behind us. If there are any remaining issues that are preventing the bargaining units from beginning negotiations, please let us know so we can seek resolution as soon as possible.

Thank you for your consideration.



Norberto Duenas
Interim City Manager

c: Jennifer Schembri, Interim Director of Employee Relations
Charles Sakai, Labor Consultant
Gregg Adam, Carroll, Burdick & McDonough LLP

EXHIBIT G

SENT VIA EMAIL

March 11, 2015

Lamoin Werlein-Jaen
Business Agent
IFPTE Local 21

John Mukhar
President
Association of Engineers and Architects
(AEA), IFPTE Local 21

Steve Contreras
President
Association of Maintenance Supervisory
Personnel (AMSP), IFPTE Local 21

Kara Capaldo
President
City Association of Management Personnel
(CAMP), IFPTE Local 21

Paul Kelly
President
San Jose Police Officers' Association
(SJPOA)

Joel Phelan
President
San Jose Fire Fighters, IAFF Local 230

Yolanda Cruz
President
Municipal Employees' Federation (MEF)
AFSCME Local 101

LaVerne Washington
President
Confidential Employees' Organization (CEO),
AFSCME Local 101

Peter Fenerin
President
Association of Building, Mechanical and
Electrical Inspectors (ABMEI)

Mary Blanco
Business Agent
International Union of Operating Engineers,
Local No. 3 (OE#3)

Sal Ventura
Business Agent
International Brotherhood of Electrical
Workers, Local No. 332 (IBEW)

Vera Todorov
President
Association of Legal Professionals (ALP)

Charles Allen
Business Agent
AFSCME Local 101

Frank Crusco
Chief Steward
International Brotherhood of Electrical
Workers, Local No. 332 (IBEW)

RE: Measure B Settlement Discussions

I appreciate the recent letters, and the presentations made by counsel during public comment at the March 10, 2015 City Council meeting, clarifying your position on the *quo warranto* process. By this letter, I seek to reiterate the City's position with regard to negotiations over Measure B, and to lend clarity where accounts have varied from the City's written position, in the hope of finding common ground to begin the settlement discussions.

First, the Mayor and the Council are committed to resolving outstanding issues relating to pensions, disability, and other elements of Measure B this year, as part of a "global settlement" in 2015. Second, we are willing to make any and all reasonable efforts to reach and implement a settlement this year. Third, we are prepared to negotiate now, and have been ready to negotiate since we issued our proposed negotiating framework on February 11, 2015.

Finally, we continue to believe that all issues should be on the table for negotiations, although we have concerns with the *quo warranto* approach. As directed in Councilmember Rocha's March 6, 2015 Memorandum, the Council is willing to pursue settlement of Measure B litigation through a *quo warranto* process in 2015, contingent on the Council's satisfaction that the following conditions have been met before the *quo warranto* process begins:

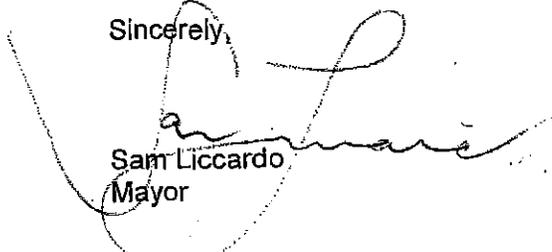
- Agreement on an alternative strategy to implement pension reform and replace Measure B. Such agreement must achieve all reform objectives that the Council deems necessary to the public interest, including improved city services, and the sustainability of our retirement plans.
- The *quo warranto* strategy is legally viable and can be carried out on a timeline that would allow the Council sufficient time to pursue a 2016 ballot measure should a *quo warranto* strategy fail.
- All bargaining units have agreed to pursue the *quo warranto* strategy.
- The Council is satisfied that the *quo warranto* strategy does not impair the public interest.

If an overall agreement is reached that contains a *quo warranto* strategy and that process is not successful for all City employees, the City Council and the unions would agree that the terms of the same agreement should be pursued through a 2016 ballot measure, if necessary. As you can see from the proposed five-year budget projections released last week, this city will need some combination of additional savings, service efficiencies, and new revenues if we are going to restore services to a level that our employees want to provide, and our residents deserve.

There is only one path to restoring services: beginning settlement discussions. We are pleased that the bargaining units are prepared to come to the bargaining table. We look forward to sitting down with you to begin discussions over a global settlement.

The City's negotiating team will be in touch regarding scheduling a meeting.

Sincerely,



Sam Liccardo
Mayor

cc: City Council
Norberto Dueñas, Interim City Manager
Jennifer Schembri, Interim Director of Employee Relations

EXHIBIT H



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3,
INTERNATIONAL UNION OF OPERATING
ENGINEERS,

Charging Party,

v.

CITY OF SAN JOSE,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-900-M

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2620,

Charging Party,

v.

CITY OF SAN JOSE,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-924-M

PROPOSED DECISION
(May 6, 2015)

Appearances: Jolsna M. John, Associate House Counsel, and Robert E. Jesinger, House Counsel, for Operating Engineers Local 3, International Union of Operating Engineers; Beeson, Tayer & Bodine by Teague Patterson and Vishtasp M. Soroushian, Attorneys, for American Federation of State, County and Municipal Employees, Local 2620; Renne Sloan Holtzman Sakai LLP by Charles D. Sakai and Steven P. Shaw, Attorneys, for City of San Jose.

Before Donn Ginoza, Administrative Law Judge.

INTRODUCTION

The two unions in this case charged the public employer with breaching the statutory bargaining obligation that arose from a proposal to reduce pension and retiree health care costs, some portion of which was to be achieved through a ballot measure. The unions advanced

common claims of surface bargaining, premature declaration of impasse, and the proposal of illegal terms in the ballot measure. After recitation and analysis of the parties' conduct during bargaining, including their exchanges both at the table and away from the table, the City will be found to have violated its duty to bargain as to the non-ballot provisions, but not the ballot provisions.

PROCEDURAL HISTORY

On November 23, 2011, Operating Engineers Local Union No. 3 (OE-3) filed an unfair practice charge against the City of San Jose (City) under the Meyers-Miliias-Brown Act (MMBA or Act).¹

On February 1, and October 17, 2012, American Federation of State, County and Municipal Employees, Local 2620 (AFSCME) filed an unfair practice charge and amended charge, respectively, against the City under the MMBA. On February 25, 2013, AFSCME withdrew the allegation that the City violated the MMBA per se by failing to provide information, while reserving its right to present evidence that its conduct constituted indicia of bad faith bargaining.

On March 8, 2013, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint in OE3's case alleging that the City failed to meet and confer in good faith by: (1) engaging in surface bargaining regarding successor memorandum of agreement (MOA) negotiations in 2011; (2) implementing its last, best, and final offer (LBFO) without completing negotiations; and (3) engaging in surface bargaining regarding retirement reform and the related ballot measure. This conduct was

¹ The MMBA is codified at Government Code section 3500 et seq. Hereafter all statutory references are to the Government Code unless otherwise indicated.

alleged to violate sections 3503, 3505, 3506.5, and 3506, and PERB Regulation 32603, subdivisions (a), (b), and (c).²

Also on March 8, 2013, the Office of the General Counsel issued a complaint in AFSCME's case alleging that the City failed to meet and confer in good faith by: (1) engaging in surface bargaining regarding retirement reform and its related ballot measure; (2) preconditioning mediation concerning the ballot measure on a waiver of MMBA section 3505.4 rights; and (3) adopting a resolution approving the ballot measure to change retirement benefits without completing negotiations. This conduct was alleged to violate sections 3503, 3505, 3506.5, and 3506, and PERB Regulation 32603, subdivisions (a), (b), and (c).

On April 4, 2013, the City filed answers to the complaints, denying the material allegations and raising affirmative defenses.

On December 6, 2013, OE-3's motion to bifurcate its case and consolidate the retirement reform claims with AFSCME's case was granted.

On April 4, 2014, OE-3 withdrew the bad faith bargaining charges in case number SF-CE-900-M related to the MOA negotiations.

On January 13, 14, and 15, and March 27 and 28, 2014, a formal hearing was conducted in Oakland.

On September 3, 2014, the matter was submitted for decision following the submission of post-hearing briefs.

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

FINDINGS OF FACT

OE-3 and AFSCME are “employee organizations” within the meaning of MMBA section 3501, subdivision (a), and each is an “exclusive representative” of a bargaining unit of public employees within the meaning of PERB Regulation 32016, subdivision (b). The City is a public agency within the meaning of section 3501, subdivision (c).

OE-3’s bargaining unit of machine operators, mechanics, plumbers, and other maintenance workers has approximately 670 employees. AFSCME represents two bargaining units. The Municipal Employees Federation (MEF) unit of library employees, parks and recreation staff, dispatchers, and administrative aides has approximately 3,000 employees and is the City’s largest unit. AFSCME’s Confidential Employees Organization (CEO) unit of human resources department and the City Attorney employees has approximately 200 employees.

The City is the third most populous city in the state. It is a charter city operating under a council-manager form of government. The Mayor and City Council establish policy for the City. The City Council is comprised of 10 members and the Mayor.

The City’s Rising Pension Obligations

In the events leading up to the bargaining dispute here, the City became a focal point for the nationwide debate concerning the need for reform of public employee retirement benefits. The City’s mayor, Chuck Reed, spearheaded a reform movement based on the ballot measure involve here, known as Measure B. The measure presented a legal test case for the constitutional contract clause’s protection of vested retirement benefits because it compelled significantly greater employee contributions that could only be avoided if employees agreed prospectively to reduce the value of their pension benefits through reduced accrual formulae

and higher minimum retirement eligibility ages. The proposal rested on the notion that only that portion of future benefits already earned on the basis of years of service was fully vested. By making these changes the City hoped to restore financial health to its balance sheet, particularly in regard to unfunded liabilities for pension benefits and for other post-employment benefits (OPEBs) as well.

In certain respects the genesis of California's pension obligation woes can be traced to the California Legislature's passage of Senate Bill No. 540 in 1999, which authorized the California Public Employees Retirement System (CalPERS), the state's bell-weather public employee pension fund, to grant enhanced benefits to employees in its member plans, including those employed by local municipalities providing benefits through the statewide fund. In the 1980s and 1990s investment returns in the equity markets had led Senate Bill No. 540 sponsors to believe the enhanced benefits were affordable over the long term. However, the decade of the 2000s was punctuated by two major market downturns, in 2002 and 2008, resulting in rapidly escalating unfunded liabilities. Although the City had opted to create a stand-alone pension fund, over roughly the same period of time the City's plans improved pension benefits similar to, and perhaps even more generous, than those of municipalities in CalPERS.³ CalPERS set the climate for optimistic forecasts of ability to pay.

Most of the City's employees are eligible to participate in one of the City's two independently operated pension plans – one for police and fire employees known as the Police

³ Municipalities in CalPERS are able to offer enhanced benefits under terms dictated by the fund. The City is the only municipality in Santa Clara County operating stand-alone pension plans. A noted advantage for the City is the flexibility of adjusting components of the plan; a potential risk is the level of investment expertise. Typical of the experience throughout the state, stand-alone plans attempt to remain competitive with other plans for recruitment and retention purposes. In addition, Santa Clara County is situated in a high wage market.

and Fire Department Retirement Plan (police and fire plan) and another for all other employees known as the Federated City Employees' Retirement System (Federated Plan). The City also provides OPEBs, including retiree health benefits, survivor benefits, and disability benefits. City employees are exempted by the Internal Revenue Service (IRS) from Social Security withholdings in exchange for the promise of the retirement plans. Each of the plans has an independent governing board composed of members appointed by the City Council. The City's Department of Retirement Services provides staff services to the two retirement boards.

Employees in the charging parties' bargaining units participate in the Federated Plan, which was established in 1961. The AFSCME units comprise the largest union represented group in the Federated Plan. In its early years the Federated Plan provided for a five-year vesting period, with minimum retirement age of 55 or following 30 years of service. The benefit formula was 2.5 percent of the retiree's final compensation, multiplied by the total years of service. Final compensation was defined as the highest average during any three consecutive years of service. The plan provided a Consumer Price Index-based (CPI), cost-of-living adjustment (COLA), capped at three percent year. In 1986, the plan was amended, establishing the Supplemental Retiree Benefit Reserve (SRBR) to provide up to one additional pension payment per year if the pension fund's investment earnings generated a surplus. In 2001, the final compensation formula was changed to highest single year (consistent with CalPERS plans). In 2006, the COLA was increased to a guaranteed three percent per year.⁴

⁴ A Santa Clara County grand jury report noted that the basic benefits of the Federated Plan were the same as the CalPERS miscellaneous employees' plan, but with notable differences in terms of CalPERS's lower variable COLA "not to exceed" two percent per year, employee contribution rate (eight percent), and the absence of a supplemental retiree benefit reserve. Both plans employed the same discount rate of 7.5 percent for calculating the unfunded liability.

The Federated Plan's board employs actuaries from a company named Cheiron. Each year Cheiron produces an actuarial valuation of the plan's assets, compares the plan's recent experience with its prior actuarial assumptions, and modifies the assumptions as necessary. The plans require payment of the full annual required contribution (ARC), which includes the normal cost and the amortized portion of the unfunded liability. The plan's assumptions are based on an actuarial valuation rather than market valuation, thus smoothing contribution levels for the plan's unfunded actuarial accrued liability.

Employees in the Federated Plan have historically contributed approximately four percent of their salary toward the plan.⁵ Based on the existing rules the employees had no obligation to contribute toward the unfunded liability. Their contribution of the normal cost of the plan was 27 percent, compared to 73 percent for the City. As to the retiree health care unfunded liability, the City implemented a plan in 2007 to pre-fund its future obligation through a five-year phased-in period as a result of negotiations with its labor unions.

In fiscal year 2011-2012, the year of the alleged violations here, the City had a total budget of \$2.8 billion, with \$906 million coming from the general fund. It ended the 2010-2011 year with a \$118 million deficit, of which \$52 million was attributed to increased retiree benefit costs. Going into the 2011-2012 year, the City projected a deficit of \$115 million, of which \$61 million was attributed to retiree costs. \$15.5 million of that amount was attributed to the Federated Plan.

Between 1999 and 2005, the total contribution of the City to retiree benefits was between \$50 and \$60 million and the contribution of employees was close to \$25 million. In

⁵ Police and fire employees contribute approximately nine percent. The 1965 City Charter provided that the ratio of employee contributions to employer contributions to the ARC would not exceed three-to-eight.

2006, the City's contribution increased to over \$75 million. In 2008, it rose to over \$100 million, before declining slightly but continuing over that threshold through 2010. The market crash in 2008 shed \$500 million from the market valuation of the funds. For the 2011-2012 fiscal year, the City projected the total pension unfunded liability to be \$1.435 billion and the retiree health care liability to be \$1.309 billion. The retirement contributions were projected to increase to significantly higher levels between 2010 and 2016. A significant factor was Cheiron's negative revised actuarial assumptions based on amortization of the 2008 market losses, a shrinking City workforce contributing less to the fund assets, rich benefits⁶, a doubling of salaries over time, and an increasing number of retirees.⁷ The smaller workforce, resulting from deficit control measures in the past, left the City with 5,500 positions, down from 7,500, resulting in comparatively low staffing levels in relation to population.⁸ Throughout this period the rate of employee contributions remained unchanged.

Expressed differently, City contributions to retirement and OPEBs were expected to rise to from 17 percent of general fund expenditures in 2010-2011 to 25 percent in 2014-2015, both figures up from 6.0 percent in 2000-2001. The City was particularly alarmed at the

⁶ The minimum guaranteed pension for the Federated Plan accounted for 44 percent of the total cost of the retirement payout. 26 percent was attributed to the COLAs, four percent to the one-year final average salary, four percent to the SRBR, and 22 percent to other benefits.

⁷ The City had a history of early retirements and longer retiree life expectancy. Coupled with the fewer current employees, the ratio of active employees to retirees had declined from five-to-one to one-to-one over 30 years. In addition, payouts to retirees were increasing. Over a 20 year period, payouts increased by 150 percent for the Federated Plan and 175 percent for the police and fire plan. In dollar amounts, the payouts from the funds (pension and health care) rose from \$257 million in 2009-2010 to \$342 million in 2012-2013. This pressure to liquidate the corpus compounded the challenges to management of the funds.

⁸ The City had 5.6 residents per employee compared to its historical average of 7.2. The current ratio was lower than comparable large cities in the state.

increasing percentage the City paid in retiree contributions as a share of total pensionable compensation. The City projected that these percentages would rise from 30 percent in 2010-2011 to 45 percent in 2014-2015 for Federated Plan members and from 44 percent to 75 percent for police and fire employees over the same period. As outlined below, the City's conclusion that the current vested retiree benefits were "unsustainable" was mainly a function of this metric.

According to figures cited by an August 2012 report by the California State Auditor, the combined funding ratio for both pension funds had fallen from 92 percent in 2006-2007 to 75 percent in 2011. The auditor stated that "no single level of funding" demarcates "healthy" from "unhealthy," but as guidance stated that over 70 percent could be considered adequate and under 60 percent to be weak. By comparison, the report indicated that the CalPERS fund was at 78 percent in 2009-2010. At the time of the hearing, the Federated Plan funding ratio had fallen to 62 percent.

Many of these findings were included in a September 2010 City audit report presented to the City Council by City Auditor Sharon Erickson. As Erickson explained at the hearing, a principal finding of the report was that the City had overcommitted on pension promises and that these promises were not sustainable when considering the need to maintain existing levels of service. While acknowledging in a San Jose Mercury News op-ed piece that the City was facing up to its pension obligations "more so than many other jurisdictions," Erickson wrote that the City needed changes in the pension cost drivers of retirement ages, benefit levels, COLAs, and the definition of final average salary. AFSCME MEF President Yolanda Cruz countered with an April 2011 op-ed piece of her own, in which she contended that the City's alarmist view was formed at the lowest point of the cyclical financial market, ignored the

rebounding investment value of the funds, and was exacerbated by the City's unwillingness to ease its commitment to fully pre-fund retiree health care. Cruz urged recognition of the swings in portfolio value over the past decade and predicted a reduction by half in the unfunded liability by the end of the fiscal year.⁹

The Contemporaneous Contract Negotiations

In 2010-2011, the City closed a \$118 million deficit, in part through a 10 percent reduction in wages, five percent of which was a one-time savings. In November 2010, City Manager Debra Figone recommended to Mayor Reed and the City Council that further compensation reductions be made in order to address 2011-2012 deficit, anticipated at the time to be \$70 million. Figone recommended that the City seek a minimum of a permanent 10 percent reduction in compensation from all of the City's 11 bargaining units with the exception of the police unit (which had been reduced less and would be less going forward). In addition, the AFSCME units were targeted for an additional two percent reduction, as a result of rolling back a negotiated increase in 2010-2011. Figone also recommended "meaningful retirement reform," identifying a second tier pension and retiree health care plan for new hires, "options" for current employees, and elimination of the SRBR. The City Council adopted the wage concession recommendations and directed continued study of retirement reform. In a January 2011 memorandum to Mayor Reed and the City Council, Figone noted that the City would continue its attempt to implement the pre-funding plan for retiree health care, as well as develop strategies to reduce the unfunded liability.

⁹ The funds lost \$1 billion in 2008 and 2009, gained \$500 million in 2010, gained \$681 million in 2011, lost \$110 million in 2012, and gained \$412 million in 2013. While the net gain or loss over the period is not important, more critical is the ability to sustain gains on a yearly basis equal to the discount rate.

AFSCME's MEF bargaining unit engaged in contract negotiations with the City in the spring of 2011. Dr. Charles Allen was AFSCME's chief negotiator. OE-3 also engaged in negotiations with the City. Business Representative William Pope was OE-3's chief negotiator. Neither of the negotiations was fruitful. The City met with AFSCME approximately 11 times and with OE-3 approximately 14 times. The City imposed its LBFOs on all three units effective June 26, 2011. The unions claimed that the City failed to bargain in good faith in the negotiations, which resulted in significant take-backs. For AFSCME, the concessions included the 12 percent base pay reduction, a reduction in the City's premium contribution rate for the lowest cost plan from 90 percent to 85 percent, and a reduction of step increases from five percent to 2.5 percent. OE-3's imposed terms were virtually the same, but with only a 10 percent reduction in base pay. In neither set of negotiations did the City present proposals on retirement reform, despite contemporaneous plans to reign in retiree costs, as described immediately below. In both impositions, the City included a side letter with a reopener for "pension and retiree healthcare benefits for current and future employees," including modification of the medical and dental plans for current employees. The side letter pledged the City's participation in impasse procedures as to these issues. AFSCME contended the City's insistence on the side letter was evidence of piecemeal bargaining. PERB agreed the conduct was potentially unlawful. (*City of San Jose* (2013) PERB Decision No. 2341-M.) AFSCME requested a proposal from the City on retirement benefits, but the City said it had none other than the side letter.

Development of the Pension Reform Plan

In January 2011, the City staff made a presentation to the City Council projecting the rise in retirement costs through 2015-2016. This was followed by a Budget Study Session on

February 14 containing a similar report. During that session, the Director of Retirement Services Russell Crosby stated that the actuarial assumptions were in need of correction, and if all the corrections were made, the projected costs could rise to \$650 million. This figure was reported frequently in the press, typically following public statements by the Mayor.¹⁰

In his March 11 Budget Message, Mayor Reed directed Figone to develop a Fiscal Reform Plan. On May 2, Figone issued the Fiscal Reform Plan.

On May 13, 2011, Mayor Reed and three councilmembers presented a memorandum to the full council recommending a declaration of a “fiscal and public safety” emergency. The declaration would require the City to prepare a document justifying the need for fiscal reforms to avoid a “fiscal disaster,” prevent substantial degradation of public safety and essential city services, and maintain the fiscal integrity of the retirement system. In addition, Mayor Reed recommended adoption of Figone’s Fiscal Reform Plan, together with direction for Figone to present proposals by June for changes to the City Charter setting maximum limits on retiree benefits, together with a Tier 2 plan for new hires with Social Security and either a defined benefit or defined contribution component, measures to slow the accrual rate for current employees to 1.5 percent per year, increasing the age of eligibility for service retirement and retiree health care vesting, slowing the rate of COLAs, requiring current employees not opting into a modified pension plan to share 50-50 with the City toward the unfunded liability and the cost of retiree health care, and calculation of highest salary on three consecutive years. The ballot measure language was to be placed on the November 2011 ballot. The staff was also

¹⁰ One year later, a City fact sheet was issued to disavow the \$650 million figure.

directed to prepare a voter survey to determine if implementation of these reforms would increase support for a tax increase.¹¹

On May 24, 2011, the City Council approved the recommendations in the Fiscal Reform Plan and the May 13 memorandum. Staff was directed to proceed with necessary steps for implementation, including meeting and conferring with the City's unions. Three council members voted against the recommendation. Action to declare a fiscal emergency was deferred.

City's Request and Offer for Negotiations

Deputy City Manager Alex Gurza directed the City's Employee Relations Department. Gurza chose to assign himself the lead negotiator role for the retirement reform bargaining with the police and fire bargaining units. Gurza assigned the lead negotiator duties for the units under the Federated Plan to Deputy Director of Employee Relations Gina Donnelly. Gurza reviewed all proposals and correspondence from both sides and received regular reports from Donnelly throughout the course of these negotiations.

On June 3, in response to the City Council's May 24 action and under direction from Gurza, Donnelly forwarded the Council's May 13 memorandum to Pope, AFSCME MEF President Cruz, and AFSCME CEO President LaVerne Washington. In the meantime, during a closed session on June 7 the City Council heard concerns from the bargaining units regarding the ballot measure. In response the City Council directed staff to consider deferring the November 2011 ballot measure. However, the notes of the June 7 meeting recited the

¹¹ The City has one of the lowest per capita sales tax revenue rates of cities in the county.

Council's intention that any bargaining process adopted would ensure a resolution in time to begin the 2012-2013 budget process.

The City's goal from the outset was to present one ballot measure that applied to all the bargaining units. Accordingly, as Gurza testified, it had always been his hope that all nine units covered by the Federated Plan would negotiate with the City at one table over the issues of retirement reform. By letter dated June 8, Donnelly wrote to six of the unions covered by the Federated Plan: Association of Building, Mechanical and Electrical Inspectors (ABMEI), International Brotherhood of Electrical Workers (IBEW), Association of Legal Professionals (ALP), OE-3, and the two AFSCME units. These units would call themselves the "coalition." Two other Federated Plan representatives, International Federation of Professional and Technical Employees (IFPTE) and the Association of Engineers and Architects, and Association of Maintenance Supervisory Personnel, had chosen to bargain over Mayor Reed's initiative separately from the other units, claiming a more sincere interest in bargaining toward a "legally defensible pension reform agreement" that would also preserve City services. IFPTE disagreed with the position taken by Cruz in her op-ed piece.

Donnelly proposed a June 13 meeting with the coalition units in order to report back to the City Council by June 21. Teague Paterson, counsel for AFSCME, responded in a June 12 letter setting forth a formal demand for bargaining pursuant to *People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 (*Seal Beach*). Paterson also expressed concern that Mayor Reed's proposal for declaration of a fiscal emergency signaled a

plan to seek exemption from bargaining based on the language section 3504.5, subdivision (b).¹²

June 13 Coalition Meeting

On June 13 the parties met for the first time. As would be the pattern throughout the subsequent meetings, AFSCME was represented by Allen, Washington and Cruz. OE-3 was represented by Pope. Donnelly and Aracely Rodriguez comprised the City, with Donnelly serving as spokesperson.

Both the City and AFSCME entered bargaining notes into the record.¹³ These notes indicate that Donnelly explained the direction the team had received from the City Council. She provided a document with seven bullet points. The thrust of the document was the City's desire to agree on timelines that accommodated both the unions' desire for flexibility and the City's goal of completing ballot negotiations for implementation in 2012-2013. Brian Doyle, representing ALP, dominated the discussion from the union side. He opened firmly with the statement his union had no intention of bargaining over what it perceived as the non-mandatory subjects in the Mayor's ballot plan, calling it an "illegal challenge to California Law." Similarly, Tom Brim, representing ABMEI, offered that his union would negotiate over

¹² The proposed declaration prompted an inquiry by Assembly Member Paul Fong to the Attorney General's office seeking an opinion on the City's ability to declare a fiscal emergency under the Emergency Services Act. A letter from the Attorney General's office voiced doubts about the City's proposal. Although the City never directly disavowed the motive attributed by Paterson, the City Attorney responded to the Attorney General in a September 15 letter, explaining that the declaration was not sought for purposes related to the Emergency Services Act, but was in furtherance of the City's police powers.

¹³ Bargaining notes are regarded as business records in labor cases and may be received into the record as substantive evidence of what occurred at bargaining meetings. (*Continental Can Co.* (1988) 291 NLRB 290, 294 [hearsay exceptions]; *Mack Trucks, Inc.* (1985) 277 NLRB 711, 725 [same, and weight needs to be judged].)

anything that was legal. When Donnelly acknowledged the City's meet and confer obligation regarding the ballot measure, Doyle confirmed that his purpose was to conduct *Seal Beach* negotiations. Donnelly offered to propose ground rules and emphasized the City's desire for agreement on a timeline for completing negotiations by October. Cruz raised the issue of distrust between the parties, a seeming reference to the unilateral imposition of the City's recent LBFO. The meeting lasted approximately 45 minutes.

On June 16, Donnelly forwarded proposed ground rules to the coalition members. Included was an agreement to negotiate simultaneously on "the issues of retirement reform and a proposed ballot measure." Retirement reform issues included pension and retiree healthcare benefits for current and future employees, the SRBR, an "opt-in" program for lower pension benefits. Also included was a proposal that the parties complete the negotiation process by October 31, 2011, and thereafter proceed to mediation as provided by the local rules on impasse resolution.

On June 17, Donnelly responded to Paterson's June 12 letter, assuring AFSCME of the City's intention to fulfill its *Seal Beach* obligations.

On June 20, Cruz responded with a ground rules proposal on behalf of the coalition.¹⁴ These rules retained the proposal for simultaneous negotiations. It began with a proposal for a broad-based "working group" to arrive at a "foundation of understandings" over a 60 day period prior to negotiations. It stipulated that the City would submit a written proposal on changes to retiree healthcare benefits, the SRBR, an opt-in plan, and "other items the parties wished to explore." It did not include the October 31 requirement for completion of

¹⁴ ALP apparently withdrew from the coalition because it was engaged in ongoing contract negotiations with the City.

negotiations. Cruz described the principal changes as requiring that negotiations be public and a mutual agreement that the parties proceed on the basis of cost savings supported by data and analysis.

In a June 22 memorandum to the City Council, Mayor Reed's coalition, now including four councilmembers,¹⁵ explained that the pension reforms related to current employees were created with a goal of achieving savings roughly equivalent to the forecasted \$125 million deficit going into 2012-2013. The memorandum also described the nature of the proposal to be presented to the unions in bargaining. It centered on the opt-in program or Voluntary Election Program (VEP), by which current employees could avoid contributing to the unfunded liability by accepting a reduced pension benefit. Significantly increased retiree contributions would be imposed on employees not opting in. The entire plan would achieve an aggregate savings needed to return to the City's 2010-2011 contribution levels for both pension and retiree health care. The negotiations direction allowed for alternatives offered by the unions "that achieve equivalent savings under the same assumptions."

Also on June 22, Donnelly responded to the coalition's ground rules, in separate letters to MEF, CEO, and OE-3, objecting to the two month delay in commencement of negotiations as frustrating the City's ability to move forward with its ballot initiative. Donnelly noted that the police and fire unions and three others had agreed to the October 31 goal. Donnelly implied that the City would move forward with submission of proposals on the ballot measures despite the lack of agreement on ground rules.

¹⁵ The Mayor's coalition included Vice Mayor Madison Nguyen and Councilmembers Rose Herrera, Pete Constant, and Sam Liccardo.

On June 23, Paterson responded by letter asserting that the City was refusing to bargain over ground rules. Donnelly responded on June 28, denying any such refusal to bargain, repeated the City's desire to negotiate the ballot measure and retirement reform concurrently, and proposed the next meeting be on July 6. Gurza testified that despite the disagreement on the framework, the City was intent on proceeding to negotiate the substantive matters. Allen offered the following description of the unions' disagreement that developed with respect to the concept of concurrent bargaining:

A: At this stage, all that we've had is discussions that a ballot measure was a potential, so we operated in the framework that we know and are familiar with, that you work towards getting an agreement. And whatever the result is is what you move forward with. In this case, the result would probably be a ballot measure.

Q: But the substance of the negotiations would be what?

A: The substance of the negotiations would be what was on the table, which was retirement. And so we would be able to exchange proposals and negotiate over retirement issues.

Gurza testified that it remained his hope that the unions in the Federated Plan would agree to bargain together, noting that unions themselves traditionally prefer unitary pension plans for ease of employee movement between units. By way of contrast he noted his pleasure with agreement by the police and fire units to negotiate concurrently on the ballot measure and retirement reform and complete their negotiations by October 31. Despite the lack of agreement from the coalition on these points, the City intended to bargain on substance without established ground rules to avoid any charges of conditional bargaining. Gurza viewed "retirement issues" as being broader than the ballot measure because some features, such as the SRBR and the cost of retiree health care, were not embedded in the Charter, and hence a charter amendment was not needed to address them.

July 6 Coalition Meeting

The July 6 session began with Donnelly repeating the City's desire for concurrent negotiations and an October 31 deadline for negotiations on the ballot measure. Though expressing objection to October 31 as a "hard" deadline, Cruz agreed with getting started as early as possible. Allen asked for clarification. Donnelly stated the City Council was now intending on a March election for the ballot measure. She cited the requirement for submission of the measure to the City Clerk 88 days prior to the election. Donnelly confirmed that the ballot measure was needed to change the vested benefits for current employees. Attempting to bridge their disagreement, Donnelly explained the only difference between the October 31 proposals was that the City desired it as a deadline and the union as only a goal. At a later point Cruz stated that there were some retirement issues the coalition could address as a group as well as expressing a concern about discussing the ballot measure as a group because one of the coalition party's contract was not open. Cruz confirmed Donnelly's understanding that the unions would address "retirement reform" as a coalition and the ballot measure "individually." Donnelly then promised a draft of the ballot measure that would be based on Mayor Reed's May 13 recommendation to reduce retiree costs to 2010 levels, while also including some subjects outside the scope of bargaining. AFSCME again expressed interest in negotiating over the ballot measure, adding that Pope, who was not present, would be asked for his response. Restating AFSCME's position, Allen testified that it only made sense to negotiate over the substance of retirement reforms and craft a ballot measure from what developed. The session ended after 75 minutes. Gurza was "disappointed" and "confused" to learn of the parallel bargaining, because it would add more sessions to the process, but remained willing to accommodate the unions.

Later the same day, Donnelly forwarded a draft of the ballot measure to AFSCME and OE-3. Consistent with the Mayor's June 22 memorandum, the key provisions required: (1) adoption of a "safety net" ordinance that would restrict accruals of benefits beyond existing Charter minimum levels and imposition of 50 percent cost sharing of unfunded liabilities for current employees if an unfunded liability existed for the pension or health care costs greater than 2010 levels;¹⁶ (2) a voluntary election program (VEP), whereby current employees could join a "new and less costly" plan to avoid the 50 percent cost sharing; and (3) a Tier 2 pension plan with reduced benefits for new employees. For current employees opting for modified benefits (the "Modified Tier 1"), prospective pension accruals would be under a 1.5 percent multiplier, the eligible age for service retirement would increase by six months annually to a maximum of 65 years, a CPI-based COLA would be capped at one percent, and final compensation factor would be based on three years. The Tier 2 plan would cap City contributions at nine percent of base salary and 50 percent of the total cost. The plan would also include Social Security and either a defined benefit or defined contribution plan. Limits on the defined benefit would include a 1.5 percent multiplier, final compensation factor based on three years of highest salary, a CPI-based COLA capped at one percent, and no vested right to the benefit. The measure increased the vesting period for retiree health care rising incrementally for current employees to 20 years, and the same immediately for new employees. Employees would contribute a *minimum* of 50 percent of the cost. Current retiree COLAs would be capped at one percent, and no supplemental payments would be funded from plan assets. The proposed measure concluded with a "savings and severability" section which

¹⁶ The safety net provisions would prohibit payments of bonuses, increases, and supplemental payments to retirees except upon voter approval.

declared a forfeiture of “all benefit enhancements or increases . . . granted to retirees since the date of their retirement,” as well as an immediate 50 percent sharing of the amortized unfunded liability for employees not opting out of current retirement benefits, in the event of a court determination finding any provision to be illegal, invalid or unenforceable.

Thereafter, both AFSCME and OE-3 requested a meeting to address the ballot measure.

July 21 AFSCME Meeting

AFSCME’s two units met with the City apart from the coalition July 21 for what was ostensibly *Seal Beach* negotiations on the ballot measure. For this meeting, the City was accompanied by Jonathan Holtzman, a private attorney. Allen began the meeting by asserting that the *Seal Beach* negotiations were “putting the cart before the horse,” though he acknowledged the overlap in the two sets of negotiations. Holtzman responded that retirement reform issues were broader than the ballot measure, but because of the goal was to place the measure on the March ballot, the two subjects were “somewhat intertwined.” The City was willing to change the ballot measure in response to *Seal Beach* negotiations, and for that to occur in conjunction with the negotiation of non-ballot subjects, there needed to be concurrent negotiations. Holtzman presented the view that *Seal Beach* negotiations are different because the parties are not “bargaining over an agreement.” He did not elaborate on how that difference impacted bargaining as a practical matter, though Cruz did ask the question. Instead Holtzman recited *Seal Beach*’s language acknowledging the constitutional right to propose ballot measures and, notwithstanding that right, the City still had to “discuss it [with labor].” That comment prompted the following exchange between Washington and Holtzman:

[Washington:] [Y]ou also have to meet and confer not to just put it on the ballot, but *really* meet and confer, and talk to us. While you think the two are intertwined, I don’t [know] how you’ll separate those. Even though they are related I don’t know how

you can separate them. I don't want to talk to you about retirement issues and have you say you've met the *Seal Beach* requirement to meet with us. I do believe they are separate.

[Holtzman]: Let me see if I can put aside some of the concern. We don't think that *Seal Beach* means we have one meeting and we're done – it's *real meet* and confer. There's going to come a point where there's a time of urgency for getting in a ballot. Hopefully we would be at substantive issues by then so they line up. . . . We do understand that this could change and I don't want – I prefer that the two not be intertwined at all – but in reality you say something in one that causes us to change something in the ballot measure.

[Washington]: You may do that, but they are separate issues. I do not agree with intertwining them. If you had to, because of what you heard in retirement reform, then you set up a separate meeting.

[Holtzman]: I think we're on the same page.

Immediately after this somewhat confusing exchange on Washington's part, Holtzman elaborated with a hypothetical:

That's the nature of the negotiation – the council's desire to submit this to the voters – so there may be things that you don't agree about, but it doesn't mean the council can't submit those. We are here to listen to you in good faith and what you have to say. Let me give you an example: you may say we hate all of this, but we most hate section 7 and think it's unfair, and we may say – this is completely hypothetical – that yes, maybe we should wait on this maybe it should be [in] a separate measure, etc. The reality of ballot measures is that there may be things in it that you don't like but continue to be in the measure and some things you won't agree to.

Later, Washington raised the concern that the City might be including illegal subjects in the ballot measure. She added, “[I]t makes no sense to talk about this until we've talked about retirement reform. Until we do that I don't see why we would address the ballot measure.” Donnelly responded: “You may choose not talk about it, but the ballot measure will go forward.” Washington replied that the CEO unit “does not intend to discuss the retirement

parts of the measure if the city still wants to discuss retirement reform.” Cruz added that AFSCME was fully intending to negotiate retirement reform issues and asked what shape those negotiations would take. Donnelly stated the City would have proposals on retiree healthcare and SRBR. Donnelly also advised the union that the City would not be providing any proposals on retirement matters that were addressed in the ballot measure.

In response to a question about whether the City intended to retain actuarial experts, Holtzman indicated John Bartel would be hired. Holtzman noted that new numbers would be coming out regarding the Federated Plan and that the City would provide “all the numbers we have.” The meeting ended after 38 minutes.

July 29 OE-3 Meeting

OE-3 met with the City separately on July 29, again, ostensibly for *Seal Beach* negotiations. Pope opened the meeting stating that OE-3 thought that the ballot measure negotiations were premature. He criticized the City for attempting to use the ballot process to permanently eliminate subjects from bargaining. Pope also mentioned the “other process” for arriving at a ballot measure the unions could support. Holtzman responded that the ballot measure negotiations required an October 31 deadline to ensure a March vote. Holtzman expressed the view that the unions were just “circling” the ballot measure bargaining table instead of “sitting at it.” Carl Carey, OE-3’s other representative, complimented Donnelly for her professionalism, but decried the City for its punitive actions against OE-3 members. Pope added that the members had been “punched in the face” and “stuff shoved down their throat.”

July 29 Coalition Meeting

The coalition met on July 29 for a session that lasted two and one-half hours. Cruz, Washington, Allen, Pope, and Carey appeared for the charging parties. Holtzman appeared for

the City team. AFSCME invited Daniel Doonan, a labor economist and pension expert with actuarial experience. The coalition opened with a proposal on ground rules, containing two points: (1) each union having the ability to withdraw without prejudice from the coalition; and (2) negotiations would be open to the public. Doonan presented a substantive proposal for the unions for a Tier 2 plan. The proposal called for a limitation on COLAs by skipping them when the funding ratio fell below 75 percent, and an increase in employee contributions above the Charter rate to 50 percent of the normal cost, also when the funding ratio fell below 75 percent. The proposal would prevent any future contribution holidays by the City. As to payouts, the proposal raised the pension eligibility age to 60 with a minimum of five years of service and raised the retiree health care eligibility age to 60 with a minimum of 15 years of service. Final compensation would be based on the highest three years. An upper limit on pensionable pay would be set at the maximum Social Security taxable wage base (i.e., \$106,000).

The coalition also passed a written information request seeking: (1) updated actuarial calculations reflecting the effect of the recently imposed salary reductions; (2) an updated market valuation of the pension plan's assets reflecting market gains in 2011 and its effect on pension liabilities; (3) differences in the City's own actuarial consultant's analyses if different from the Plan's actuaries regarding the items above; (4) whether the unfunded liability triggering restrictions on accrued benefits and increased cost sharing of that liability (the June 30, 2010 figure) would be indexed to inflation; (5) whether an actuarial or market value would be used for the unfunded liability cost sharing obligation; (6) the respective shares of the retiree health benefit ARC as between current employees and retirees; (7) the respective shares of the phrase "cost of retiree healthcare" in the ballot measure attributed to active employees

versus retirees; (8) a clarification of the effect on each of the three groups of employees of the ballot measure's reservation of rights language which purported to render benefits not vested;¹⁷ (9) a clarification of how the already accrued benefits of those in the VEP would be calculated; (10) whether the cost sharing of the unfunded liability would be borne solely by those not entering the VEP or whether the VEP participants would be required to bear the share of the unfunded liability attributed to its accrued benefits, and (11) whether the City contemplated compensating current employees for the value of their accrued benefits diminished by imposing the increased retirement eligibility age.

At the same session, the City proposed: (1) eliminating the SRBR and using the funds in the reserve account toward the unfunded liability; and (2) amending the municipal code to increase the minimum hours for one year of service credit so as to prevent an employee working less than a full time employee from receiving a full year of credit. The City also proposed: (1) substituting a lower cost health plan with deductibles for the existing lowest cost plan as the plan determining the amount of the 85 percent City premium contribution; (2) requiring 20 years of service for new hire retiree health benefits and a City contribution rate of \$10 per month of service; and (3) Social Security together with a defined contribution plan with the City matching up to one percent with a five-year vesting period for the City's contribution.

Gurza testified that the City appreciated the coalition's Tier 2 proposal but found it insufficient because there was no change to the accrual or COLA rates.

¹⁷ In a forward section, the measure stated broadly that the City Council retained authority to amend, change or repeal any retirement or OPEB program under the Charter, and repeated that more specifically thereafter.

In an August 2 letter, Cruz and Washington informed Donnelly that AFSCME proposed tabling the ballot measure negotiations in light of the productive discussion of retirement issues on the 29th without waiving any *Seal Beach* rights, and that the union was looking forward to the next coalition meeting on August 23.

Also on August 2, Donnelly wrote to the unions thanking them for AFSCME's Tier 2 proposal and asking if the normal cost of the plan could be provided.

August 3 AFSCME Meeting

AFSCME and the City met on August 3 for a meeting lasting one hour, of which 13 minutes was devoted to caucusing. Allen began by presenting AFSCME's August 2 letter, again proposing tabling of the ballot measure negotiations and "using any available time for retirement discussion that would allow for a more substantive ballot measure in the future." Allen acknowledged the City's "time limit" but maintained no waiver of rights by AFSCME. Holtzman did not object to addressing "a lot of the substantive discussion" at the coalition table. Holtzman requested a caucus. Upon returning, Holtzman reminded AFSCME of the City's preference for concurrent negotiations and noted the practical difficulty of the union's scenario given the City's October 31 deadline. Holtzman explained that it was the unions' choice to negotiate over the substance of the ballot measure, and if it chose to postpone, there would be that much less time to negotiate the ballot measure in light of the October 31 deadline. Holtzman hypothesized that without an agreement on how to save \$75 million, City services would be "all but routed" in the next fiscal year. In an oblique reference to the substantive proposals related to the VEP, divestment of future benefits, and contributions to the unfunded liability, Holtzman stated, "We can talk all we want about Tier 2 programs . . . and SRBR." He described the *Seal Beach* table, practically speaking, as the "Tier 1" table and the

coalition as the "Tier 2 table." Allen answered, "That actually does clarify things." Allen then agreed to reconsider the framework adopted by the other unions that would involve a pledge of cooperation with a softer October 31 deadline. The parties then returned to a discussion of the ground rules. The City noted the language of concurrent negotiations in the IFPTE ground rules agreement that listed the VEP as subject of concurrent negotiations. The parties digressed into a short discussion of the VEP proposal. Donnelly pointed out that the City's opt-in proposal had no details attached to it yet.

In an August 9 letter, the City responded to the coalition's information request. As to the requested revised actuarial valuation reflecting the reduced salaries (request no. 1), the City noted that the information would be forthcoming in the Federated Plan's next report following the July 2011 salary changes. As to market valuation (request no. 2), the City stated that it had contacted its Department of Retirement Services and figures as of July 1, 2011, were presently unavailable though anticipated in September. In the meantime, the City referred the union to the last quarterly investment report through March 2011 which was available on-line. As to differences in actuarial assumptions between the Federated Plan's actuaries and those retained by the City (request no. 3), the City responded that its actuaries were not directed to produce actuarial assumptions. As to whether the City intended to use an indexed calculation of the 2010 unfunded liabilities figure (request no. 4), the City answered that information was not presently available. As to whether the City intended to use a market value or actuarial value of assets calculation for cost sharing purposes (request no. 5), the City answered the actuarial value would be used. As to the method of allocating the retiree healthcare ARC as between current employees and retirees (request no. 6), the City answered it did not have the information readily available. As to whether current employees would be responsible for the

full 50 percent of the health care ARC including that attributable to retirees (request no. 7), the City answered that all employees were currently on a plan to prefund the benefits, which included the unfunded liability. As to the clarification on the reservation of rights language (request no. 8), the City reiterated the language of the measure, confirming that (except as otherwise preserved) “the benefits described in the ballot measure” would be unvested as to all employees. As to calculation of accrued benefits for VEP employees (request no. 9), the City answered that the ballot measure declined to define that point. As to the burden of unfunded liabilities on non-opting employees (request no. 10), the City answered that it had not yet defined the parameters of the VEP program and invited the unions to provide its ideas. As to the question of the supposed diminished value of already vested benefits for current employees (request no. 11), the City claimed it did not understand the question and requested clarification.

On August 22, the coalition wrote to Donnelly stating the unions had not retained an actuary because the City had not allowed access to demographic data despite outstanding requests. The unions reprised their proposal to use a common actuary to provide analysis for the negotiations.

August 23 Coalition Meeting

The coalition met on August 23 for a session lasting one hour. Allen opened the meeting with the presentation of a counterproposal from the unions on ground rules. The proposal was a shortened version of its June 20 proposal, which adopted some language to which the City had agreed. The unions did not agree to concurrent bargaining, nor did they specify the subjects to be negotiated. The language of an October 31 goal, which had been in the coalition’s June 20 proposal had been deleted. Allen announced acceptance of the City’s SRBR proposal. Donnelly thanked the unions for the concession. Allen asked for a

counterproposal from the City on the ground rules, and the City agreed to provide one. The parties closed the meeting by scheduling the next meeting.

On August 25, Donnelly responded to the August 22 letter on demographic data, disputing that the City had failed to be responsive to any outstanding information requests. Donnelly referred the unions to data available from Cheiron pertaining to actuarial valuations and the data supporting those valuations, and transmitted the actuary's 2010 experience study. A second letter from Donnelly on August 25 responded to cost questions from the July 29 session regarding the health insurance plan to which retiree health benefits would be pegged beginning in 2012.

On August 31, the coalition wrote to the Mayor and City Council, citing a letter from the Attorney General opining that the City lacked the legal authority to enact a state of emergency, and on that basis requested withdrawal of the ballot proposal. The coalition also asserted that unions had submitted a substantive proposal to deal with the unfunded liability.

On September 1, Mayor Reed recommended the City Council defer consideration of the declaration of a fiscal emergency. As a basis for the recommendation, Mayor Reed cited the fact that a number of the bargaining groups had agreed on October 31 as the end date for negotiations over cost savings to be implemented for 2012-2013.

August 31 OE-3 Meeting

Pope met with Holtzman and Rodriguez on August 31. Holtzman opened by noting the coalition's rejection of the October 31 deadline and reminded Pope of the City Council's intention to proceed with a March 2012 election. Holtzman reiterated the City's desire to have a unified proposal from the all six of the Federated Plan unions so as to avoid six different plans. When Pope responded that another county had five pension plans, Holtzman replied,

“Then clarify if [there is] no agreement [and] move forward.” After raising a concern about the ground rules, Pope shifted to concerns about the ballot measure, stating that there were legal issues with the VEP that would prevent OE-3 from bargaining. Pope also maintained that if vested benefits would be forfeited, the union required “something of equal value.”

Reminding Pope of the City’s *Seal Beach* obligation, Holtzman asked, “What is your input?” Pope responded that “there were some good things, but some things were premature.” When Pope questioned if the coalition framework could address the union’s concerns, Holtzman stated he was trying to get past the issue of timing. Pope responded that the coalition had made a substantive proposal, to which Holtzman replied: “You can lead a horse to water, but can’t make it drink.” Next Holtzman stated that it might be acceptable if the union waited on ballot negotiations, but that might also make it “too late.” Pope responded he recognized that possibility but that the two months remaining would be “enough time.” Holtzman answered that if OE-3 desired any additional comments on the ballot measure, “other than [that it was] premature,” he would be open to that. Pope stated he did not want to get “hung up on the ground rules,” and repeated the problem with vested rights and other issues with the opt-in. Holtzman believed the opt-in plan was more legally defensible than an across-the-board mandate to de-vest rights. Pope noted that the IRS could deny recognition to plan with an illegal opt-in feature.

September 7 Coalition Meeting

The parties met on September 7 for a meeting lasting approximately 30 minutes. Donnelly asked if there was anything with which the unions wished to raise to start the session. Little of substance occurred at this meeting. The parties began by discussing ground rules. The City passed a framework proposal with revisions to its August 3 proposal. Desiring the

language of the IFPTE agreement, the City substituted the word “concurrently” for “simultaneously” to describe the ballot measure and retirement reform negotiations.

Believing believed the unions were intent on negotiating the ballot measure issues individually, the City mailed a second version of the ballot measure separately to AFSCME and OE-3 on September 9. In both her cover letters, Donnelly stated the changes were in response to feedback from other unions. In the letter to AFSCME, Donnelly stated the City was “open to scheduling additional meetings to discuss the revised draft proposed ballot measure, including any proposed changes that you may have.” A similar letter to Pope invited proposed changes to the measure, sought to confirm a September 12 meeting, and offered an additional meeting time in September.

The revised draft offered a more transparent description of the VEP, noting the specific penalty for not opting in. There was a 50 percent cost sharing of the total pension liabilities, including the unfunded liability. In this iteration the penalty for not opting was softened by a phase-in period, rising in annual increments of five percent of pay, starting at a baseline of five percent. Also the amortized cost of the unfunded liability would be calculated separately for the police and fire plan and the Federated Plan. The incentive for opting into the modified Tier 1 plan would be retaining the 3/11ths ratio of contributions to the ARC and avoiding contribution to the unfunded liability attributed to past service. Implementation of the VEP was made contingent upon IRS approval with clarification that the change in benefit accrual would be prospective only. Terms of the less costly plan for VEP employees were restated as previously set forth. The authority for modifying the retiree health care plan to incrementally increase the vesting period for current employees to 20 years and require 20 years for new employees was removed. More specific requirements for actuarial analysis were included, and

objectives for the determination of required contributions and plan assumptions were defined. The punitive consequences for current employees not opting out of the Tier 1 plan when the unfunded liabilities greater than those in 2010 were removed. The one percent COLA limitation for current retirees was extended to include future retirees.

Neither union responded with a request for additional bargaining sessions on the ballot measure.

On September 20, Pope and Donnelly exchanged emails on the next ballot measure meeting. Pope stated such a meeting was probably unnecessary, even in light of the revision, because OE-3 would repeat that it was premature. Nonetheless, the parties agreed to meet.

Also on September 20, Gurza wrote to the coalition in response to the coalition's letter regarding the Attorney General's opinion. Gurza took issue with the statement that the coalition's proposal substantively addressed the unfunded liability, reduced volatility of funding requirements, or constituted a shared sacrifice, based on his understanding that the proposal only applied to new hires.

September 27 OE-3 Meeting

Donnelly and Rodriguez met with Pope on September 27. Pope asked questions about the savings generated by the ballot measure. Donnelly provided estimates of some of the components. Near the end of a short meeting, Donnelly asked Pope if the City could expect to receive a proposal, adding, "That is what we are looking for." Pope responded, "This is a train with steam going down the track. Little OE-3 is not going to change [the] City's change. [We] feel like we are [here] so [the] City can say it satisfied its *Seal Beach* bargaining." Donnelly replied, "[It's] not accurate to say we wouldn't change anything. I [disagree] with our assertion to [the] extent we get something from you [we] will consider and share [it] with

Council.” Pope stated, “Let me see what I can put together for [the next meeting].” OE-3 did not appear for that meeting, scheduled for September 30.

On October 5, Donnelly wrote to AFSCME and provided the union with the third version of the proposed ballot measure. Donnelly continued to extend an invitation to negotiate over the measure, and reminded the union of the City’s October 31 deadline. The second revision tightened elements of the plan into which current employees would opt, defined “lowest cost plan” for active employees for purposes of defining the premium contribution for retirees, and removed a forfeiture of benefit enhancements granted to retirees following the date of their retirement, which had been added to the first revision.

September 28 Coalition Meeting

The parties met next on September 28 for a coalition meeting that lasted 90 minutes. Donnelly again opened the meeting asking the coalition what it wished to discuss. Allen started out aggressively with a critique of the bargaining to date. He stated that much had been placed on the table, but that the parties had regressed to the point when bargaining began: there was no agreement on ground rules and out of nowhere a revised ballot measure had been transmitted. Allen believed the versions of the measure looked “essentially the same.” Allen was under the impression that for an opt-in program to be provided “something of comparable worth had to replace it.” Allen ended by expressing frustration that despite the union’s “strong” opening proposal on pension benefits and attempts to craft changes to address the City’s budget challenges, he was at a loss to understand what the City wanted from the unions.

Donnelly responded with the point that the City was getting “mixed signals” from the unions regarding their willingness to address both “retirement and [the] ballot measure.” Allen denied the claim: “[W]e have never said we would not negotiate over terms and conditions

that would affect us. If we can get some movement and agreement on retirement we would like to deal with it a step at a time. Simultaneously we get [a] letter telling us we need to meet on a more regular basis. Sure, we agree to that, but only if we're negotiating. If we keep getting unchanged proposals, I don't see how meeting multiple times helps us." Donnelly again directed the exchange to the ballot measure: "It was my understanding previously that everyone wanted to handle the ballot measures individually." Allen affirmed that understanding. When Donnelly asked if the unions had any proposals, Allen asserted the unions were waiting for a counterproposal from the City.

Donnelly responded with a revised Tier 2 proposal that included a defined benefit plan with a 1.5 percent multiplier, a maximum payout of 60 percent of final compensation, three years highest salary, and a one-percent-capped COLA. As Doonan testified, this was very close to the minimum benefit necessary to avoid triggering Social Security participation. But still it was movement off the July 29 proposal of Social Security and a defined contribution plan. Gurza explained this was one of the most significant changes made in response to input from the unions who strongly opposed going to Social Security. The proposal, which mirrored the ballot measure provision on the subject, capped the City's contribution at 9 percent of pay and required equal sharing of the unfunded liability. The proposal contained a non-vesting clause for both the pension and OPEBs.

Cruz objected that members would be infuriated by this proposal and asked how much the City would save by it. Donnelly responded, very little in the short term, given that it would depend on new hires. Cruz pointed out that Donnelly had previously asked AFSCME to cost out the savings of the unions' Tier 2 proposal. Donnelly responded that that was simply a query. Another AFSCME representative retorted, "So we say the same thing – nothing."

The City also passed a proposal on retiree healthcare benefits. It included a 15 year vesting requirement for new employees, thus moving the minimum eligibility provision from the ballot measure to the MOA. It decoupled the amount of the City contribution from the lowest cost plan for active employees, basing it on \$10 per month of service with a maximum payment of \$3,600. The benefit could not be claimed until age 65. The proposal clarified the ballot measure by setting the employee contribution ratio at 50 percent for both the ARC and unfunded liability (whereas the ballot measure stated a "minimum" of 50 percent). The City also proposed that all retirees receiving health care benefits be required to enroll in Medicare, under penalty of forfeiture of all payments pending compliance.

The meeting ended after discussion of the Medicare requirement. Cruz stated the unions wished to consider proposals submitted by IFPTE and the Police Officers Association.

On September 30, three City Council members recommended a study session to consider the unions' views on the fiscal implications of the reform proposals. The memorandum referenced the agreements for an October 31 deadline without noting that no such agreement existed with the coalition.

On October 5, Donnelly sent the third version to the ballot measure to both unions. This version: (1) clarified that an employee opting into the modified Tier 1 plan would be required to execute an irrevocable written waiver; (2) stipulated a minimum age of requirement 55 for service retirement in the Federated Plan and 50 in the police and fire plan; (3) eliminated the guarantee of survivor benefits for VEP employees; (4) identified the "lowest cost plan" for retiree health premium contributions as the plan with the lowest monthly premium available to any active employee in either the Federated or police and fire plans; (5) required separate

treatment of the unfunded liability for the two pension plans¹⁸; and (6) removed a forfeiture clause for all benefit enhancements previously granted to retirees in the savings and severability provisions. In the AFSCME letter, Donnelly invited “multiple sessions weekly” in October on the ballot measure; in the OE-3 letter, she invited bi-weekly meetings in the month of October.

Having received nothing after her October 5 letter, Donnelly wrote to OE-3 on October 11. Pope responded on October 18, stating he was amenable to meeting so long as the City included any agreed-upon proposals from the coalition meetings. Pope proposed an October 25 meeting. Donnelly wrote a similar letter to AFSCME on October 11 seeking a response and stating the City was available for bargaining.

October 12 Coalition Meeting

The parties met on October 12 for a coalition session lasting approximately one and one-half hours. Allen began the meeting with a request for a status report on the coalition’s “outstanding information request,” which caught Donnelly by surprise. Donnelly believed the City’s last response on “August 5” (i.e., August 9) completed the matter. She invited explanation of what was missing. Allen did not cite a specific pending request, but instead asked how difficult it would be to obtain individual records for all employees in the Federated Plan, separated by age, years of service, and salary. Rodriguez promised to submit the request. Allen stated that the unions were attempting to assess incentives that would lead to opting into a voluntary plan. Apart from that, the coalition only presented another proposal on ground

¹⁸ The previous version used the phrase “retiree healthcare.” “Unfunded liability” was more logical in terms of “separate treatment” with respect to the provisions for the 50 percent cost sharing for non-VEP employees, prohibitions on bonuses, COLAs, supplemental pension payments, actuarial soundness requirements, and the voter approval requirement for enhancements to compensation.

rules, acknowledging the City's deadline but maintaining insistence on the "sequence" of dealing with "retirement issues" first. After a brief discussion of ground rules, Allen announced that the coalition was working on a "comprehensive proposal." A discussion of the City's proposal for yearly hourly minimums for service credit was discussed. Donnelly also revisited the City's retiree health care proposal.

On October 20, Donnelly wrote to both unions, transmitting the fourth version of the ballot measure and repeating the City's availability for bargaining. This version: (1) added a legislative finding that the conditions prompting the measure constituted an emergency within the meaning of section 3504.5, which would excuse the City from any meet and confer obligation; (2) added to the Tier 2 plan a minimum age of 55 for service retirement (and 50 for police and fire); (3) revised the COLA limitation for current and future retirees specifying it would be a temporary suspension through 2017, with restoration to a maximum of three percent for non-VEP employee and retirees and a maximum of one percent for VEP employees and Tier 2 employees; and (4) clarified that separate treatment of the unfunded pension liabilities would result in the trigger of the safety net provisions with respect only to the fund meeting the trigger conditions.

On October 22, the coalition sent the City a proposal for its own opt-in plan designed to generate \$160 million in savings when coupled with its proposed Tier 2 plan.¹⁹ The plan would ensure fairness because it had no penalty for failing to opt in, operating strictly on incentives, which the unions felt was necessary to comply with IRS regulations. The elements

¹⁹ The coalition outlined the savings as follows: (1) \$67 million from "other gains" which include the reduction of payroll, asset gains, and other changes; (2) \$68 million from the opt-in plan; (3) \$7 million from Tier 2 plan savings; (4) \$18 million from eliminating SRBR; and (5) additional savings from later retirements for those opting in to the alternative plan.

of the opt-in plan included: (1) reducing the accrual rate from 2.5 percent to two percent per year; (2) raising the age of full retirement from 55 to 60 years; (3) eliminating the three percent guaranteed COLA and returning to a CPI-indexed COLA with a cap of three percent; (4) a benefit calculation based on three years of highest salary; (5) retaining the 3/11 contribution split for the ARC; and (6) eliminating the SRBR. The proposal also included other ideas for incentives for opting in, including restoring the payout for sick leave upon retirement. The coalition considered the proposal was responsive to both the City's ballot measure and its desire for reduced pension costs.

On October 24, Councilman Donald Rocha recommended deferring the ballot election to June 2012 and consideration of a counterproposal to the "significant" proposals from "almost every City bargaining unit." The counterproposal was to include enhancements to provisions in the ballot measure and elimination of some concessionary elements.

October 26 Coalition Meeting

The coalition parties met with the City on October 26 for approximately one and three-quarters hours. Donnelly began by providing a response to the unions' most recent request for employee records, with the exception of the employee's age, which the City Attorney advised could not be provided. Donnelly asked questions about the coalition's opt-in proposal, which were answered by Doonan. Doonan explained that the stated \$68 million estimated savings from the opt-in plan was based on a 100 percent opt-in rate. Donnelly explained that Cheiron had revised its estimates for 2011 after analyzing the recent rates of return, adjusting for the recent salary reductions, and lowering the discount rate to 7.5 percent. As a result, the retirement board was requiring the City's next contribution to increase by over \$10 million to \$103 million. Although Doonan contended that the City never provided the cost savings to be

achieved by Measure B, there is no evidence of a specific request for such information.

Doonan also conceded that he was unaware of AFSCME following up on any answers deemed unsatisfactory.

Donnelly then turned the discussion to retiree health care, stating the City had counteroffers. She passed proposals on pension and retiree healthcare benefits for new employees, and one on healthcare cost sharing. Cruz indicated the coalition had a concept on Medicare enrollment that it wanted the City to "run with." The discussion of retiree health care matters concluded when Cruz stated the coalition would get back to the City if there were any other questions. The parties scheduled the next meeting for November 2.

On October 27, Donnelly emailed the unions a fourth revision of the ballot measure. This draft: (1) added a provision guaranteeing the maximum benefit for the VEP to be the same as for employees not opting in; (2) amended the safety net provisions by authorizing graduated pay reductions, not to exceed 25 percent of pay or 50 percent coverage, for non-opting employees; and (3) authorized the City, in the event the cost sharing provisions for non-opting in employees were struck down judicially to obtain, "to the maximum extent permitted by law," an equivalent amount of savings through pay reductions, not to exceed five percent of compensation per year, up to a maximum of 25 percent of pay or the amount necessary to satisfy 50 percent of the amortized unfunded pension liability.

On October 31, Donnelly in letters to the unions recited the history of the ballot measure negotiations and announced that, as a result of the unions' failure to offer any proposals in response to the ballot measure and the City's deadline for concluding *Seal Beach* negotiations, the City was declaring impasse, or in the alternative deeming the union's inaction

as a waiver of the right to bargain. The City offered to participate in mediation and requested that the unions respond by November 3.

November 2 Coalition Meeting

The coalition met with the City on November 2 for a session lasting approximately 45 minutes. Cruz and Washington began by handing Donnelly a letter asserting disagreement with Donnelly's history of the parties' bargaining history. The AFSCME presidents claimed that the parties had agreed to table discussion of the ballot measure, charged that imposition of the October 31 deadline indicated lack of good faith, and urged use of the time on what they referred to as either "the retirement issue" or the "substantive issues." Pope had written a similar letter dated November 2, accusing the City of a "take it or leave it" approach and a "bargaining strategy which attempts to divide a so called 'ballot proposal' from 'retirement bargaining.'"

Donnelly asked if the parties wished to start with anything in particular. Allen responded no. Donnelly began by discussing the Medicare enrolment issue and the minimum yearly hours service requirement. She also asked questions about the Tier 2 formula. After stating that was all the City had, Donnelly asked for update on where the parties were. Allen stated the coalition would be happy to "throw back proposals," but asked if "they are going to be received." Donnelly responded that the parties were closest on reaching agreement on the Tier 2 plan. After Allen was reminded of the City's outstanding October 26 counterproposals, he said, "We'll work on that." The meeting ended shortly thereafter.

The following day, Donnelly responded to AFSCME in a letter stating that the City had been consistently clear that ballot measure negotiations were not being postponed due to the City's "immutable deadline." Allen testified that AFSCME disagreed with the City's

contention that it was forced to proceed with the ballot measure negotiations concurrently with retirement reform issues:

We had been making proposals all along. As I said earlier, about not putting the cart before the horse, trying to get an agreement, trying to come to some understanding on retirement and the various things that were comprised therein. And if it necessitated, which as I said earlier, presumably it did, a Charter change and a ballot measure, then that would be the end product.

On November 8, Donnelly wrote AFSCME clarifying any ambiguity as to the October 31 letter, advising that the City had "formally declared impasse or waiver" on the ballot measure as of that earlier date, and that due to the failure to accept the invitation for mediation, the meet and confer process regarding the ballot measure had concluded. AFSCME responded with a November 15 letter restating the claim that the City had agreed to table the ballot measure negotiations.

November 15 Coalition Meeting

The coalition met with the City on November 15 for approximately one hour. The coalition presented a package proposal, self-titled, the "Grand Bargain." Allen explained that the proposal was "crafted to try to incorporate as many elements as possible that we felt affected retirement." The package proposal included a new lower level of retiree health benefits, reducing the reimbursement of 100 percent of the current lowest cost plan to 85 percent of the cost of the current baseline plan, or maintaining 100 percent of the City's new baseline plan (with high deductibles). Pension costs would be curtailed by creation of a voluntary modified benefit (two percent multiplier, three-year highest average salary for future service, a CPI-based COLA capped at three percent on future service, and five-year minimum service for retirement at 60 years, or 30 years total), which would be accepted by those current employees opting in for the purpose of receiving an unmodified retiree health plan. New

employees would participate in the unions' Tier 2 plan (2.5 percent multiplier; three-year highest average salary; three percent COLAs, but forfeited with increased contributions during periods the funding ratio falls below 75 percent; five-year minimum service for retirement at 60 years; cap on pensionable earnings; and prohibition on contributions holidays). The proposal stated the unions would support amending the charter to allow prospective changes to pension benefits so as to ensure future modifications were fully funded from day one (i.e., a cap on the current unfunded pension liability). The SRBR would be eliminated pursuant to the parties' tentative agreement. The proposal accepted the City's proposal to require Medicare eligible retirees pay the cost difference as a disincentive to non-enrollment. The proposal would be tied to a City sponsored one-quarter cent sales tax increase measure, creating collateral for City borrowing of \$600 million. Relying on the Mayor's earlier proposal to survey voter support for tax increases tied to reform, the coalition believed the tax measure was feasible and reasonable. The savings from the modified retiree health benefit together with the \$600 million bond proceeds would result in immediate full funding of retiree health benefits, up from the current 12 percent level based on the current phased-in contributions plan, and avoid any future renegeing on the commitment to full funding. The unions' actuaries predicted \$31.9 million in annual savings the first year (2013), rising to \$59.1 million in 2016 (or 13 percent and 21 percent of total compensation, respectively). Doonan testified that the proposal was not the unions' LBFO, and that it was the unions' attempt to solve the retiree healthcare issue.

The City asked, and the unions answered, that the proposal was something to be submitted to the voters. Donnelly stated that the City was unable to accept or consider the proposal because the parties had concluded bargaining over the ballot measure, while later

adding that she could not anticipate what the councilmembers would do with respect to the measure. Donnelly stated the City could continue to discuss non-ballot measure subjects such as retiree health issues.

Gurza testified that the City's fundamental objection to the Grand Bargain proposal was the lack of sacrifice by employees to share in the cost of the unfunded liabilities and merely shifting those costs to the taxpayers. Gurza believed the coalition's proposal was non-responsive to the changing content of the ballot measure and demonstrated insufficient movement as to the non-charter subjects that had been introduced at the coalition table through the City's proposals, as reflected in this exchange on direct examination,:

Q Well, let me ask you, the Grand Bargain also included a second-tier proposal and an opt-in, correct?

A It did, it did.

Q The second-tier proposal that was included in the Grand Bargain, how is that different from the original second-tier proposal the coalition made?

A That was the other thing that we noted is that there had been no movement made since their first second-tier, whereas you saw that the City had made movement. There was [] no movement also on their opt-in so we still had that, what we considered an undesirable difference between the opt-in and the second tier where somebody who opted in would get a lower accrual rate than a second tier. Because, you see, they just brought in, as was testified, elements of their prior proposals with no change. So that we saw, again, as problematic.^[20]

Q You said something about thinking that you were farther apart than ever.

A Yes.

²⁰ Gurza's principal concern about the unions' opt-in plan was that he doubted current employees would choose a plan that had lower accrual rates than for Tier 2 new employees.

Q What did you mean by that?

A Meaning that, our goal, by continuing to make, even though we weren't really getting counter-proposals on the ballot measure, by continuing to make changes was to hopefully reach an agreement and go onto the voters. Once we added elements of, geez why doesn't the City issue 600 million in bonds and sales tax revenues, that are, again, outside the scope of bargaining, that very clearly told us that we are further from where we were, not closer.

But despite that, we still wanted to try to reach – to go to mediation with it and we subsequently did.²¹

Gurza cited the fact that the tax bond measure did not achieve savings through any sacrifice by the bargaining units but simply shifted costs to the taxpayers.

As early as October, Bartel, the City's pension consultant, had emphasized to the City that its pension plans suffered from comparatively high volatility, owing to its more mature status (i.e., proportion of retirees drawing from the fund to current employees contributing to it). Based on data from the Federated Plan's governing board, Bartel priced the City's Tier 2 proposal. He conducted costing analyses of Measure B and union proposals, though not the Grand Bargain proposal. One of his primary observations about the Grand Bargain proposal was that the use of bond proceeds to pre-fund retiree health care would dilute the City's achievement of a commitment to future 50-50 cost sharing with the unions, and thus cause greater cost to the City than the status quo. Another was that the opt-in proposal would only appeal to employees close to retirement age who could suffer the reduced future accrual rates because they had already accrued most of their vested benefits, and thus savings to the City

²¹ Gurza did not believe the contents of the Tier 2 plan needed to be incorporated in the ballot measure because the ballot measure only set minimum guidelines for such plans. However, the coalition's proposal did contain elements conflicting with those in the draft ballot measure.

would diminish in the out years. The Tier 2 plan would provide savings in the out years, but little in the short term because it applied only to new employees. Overall the Grand Bargain proposal would increase the City's cost from 16 percent of total pay to 23 percent.²²

On November 17, Donnelly wrote to the coalition, thanking the unions for their package proposal and the effort reflected therein, but rejecting the proposal and declaring impasse on the "issues of retirement reform." These were identified as pension benefits for new employees, retiree healthcare benefits for new employees, Medicare enrollment, and healthcare plan design/cost sharing. Donnelly explained that the coalition's package offered no additional movement on Tier 2 accrual rates or the opt-in plan, provided insufficient savings, and was contingent upon passage of the sales tax ballot measure. Donnelly's letter invited the coalition to mediation sessions on the disputed "issues of retirement reform," namely, Medicare Part A and B enrollment, retiree healthcare benefits for new employees, healthcare plan design/cost sharing, and pension benefits for new employees.

November 17 and 22 Mediation Sessions

The coalition and the City met in two mediation sessions on November 17 and 22. Consistent with the statutory requirement of confidentiality, neither party attempted to describe what transpired in mediation.

On November 17, Councilmember Rocha issued a memorandum to the City Council recommending establishing December 16 as the target date for completion of mediation and January 10 as the date on which the council would take action on the ballot measure. He included specific revisions to the ballot provisions. Rocha expressed his view that the Grand

²² The City never established that Gurza and the City team actually relied on these criticisms at the time or conveyed them to the coalition.

Bargain proposal was a worthy of consideration. Rocha acknowledged that some of his colleagues might express skepticism about additional time for negotiations, a comment he made in a similar October 24 memorandum. Rocha was not one of the five councilmembers sponsoring the ballot measure in June.

On November 21, the coalition responded to Donnelly's November 17 letter, expressing disappointment, denying any waiver of bargaining or mediation rights while conditionally accepting the offer to participate in mediation. The unions asserted that only they had made movement on proposals, disputed the existence of impasse, and urged further negotiations.

On November 22, Donnelly forwarded a fifth revision of the ballot measure scheduled for a March 2012 election, stating the proposal would be considered by the City Council on December 6. Donnelly acknowledged that the parties had unsuccessfully participated in mediation regarding "retirement reform, including but not limited to, the proposed ballot measure." The new draft: (1) added a goal of adopting the necessary implementing ordinances effective June 30, 2012; (2) increased the VEP accrual rate from 1.5 percent to 2.0 percent; (3) lowered the eligibility age for both plans (from 65 to 62 for the Federated Plan); (4) increased the maximum COLA from one percent to 1.5 percent; (5) added an annual hours requirement for Tier 2 service credit, (6) increased by one year the suspension of COLAs; (7) removed a requirement for COLA restoration based on unfunded liabilities lower than 2010 levels; (8) specified that the SRBR would be discontinued and its assets returned to the funds; and (9) removed the safety net provisions prohibiting any compensation enhancements without voter approval based on the 2010 unfunded liability level.

On December 1, Mayor Reed and four councilmembers recommended extending the ballot election to June 5, 2012, in light of a recent report from Cheiron reflecting an improved

financial outlook for the funds. The report revised the 2012-2013 City retirement contribution obligation downward from \$160 million to \$105 million, due largely to the layoffs of safety employees and the 10 percent compensation reductions. Figone reported that the annual budget deficit would fall from \$80.5 million to \$25 million, but cautioned that the current pension obligations remained unsustainable.

Over a request by Councilmember Rocha and one other councilmember to defer adoption of the ballot measure, Mayor Reed, in a December 5 memorandum, recommended approval of the ballot measure by the City Council at its December 6 meeting but delaying its transmittal to the registrar to allow for further mediation over the ballot measure and other retirement related issues. An invitation for further mediation would demand the unions' waiver of "all other impasse procedures." The recommendation included a sixth revision of the ballot measure which: (1) removed the findings of a service level emergency in the current and subsequent fiscal year, and the fiscal emergency within the meaning of the MMBA; and (2) removed language mandating a 5.5-year COLA suspension while permitting City Council to suspend COLAs to retirees for up to five years based on a declaration of fiscal emergency. The proposed ballot measure for a June 5, 2012 election was approved as Resolution No. 76087 by the City Council on December 6.

On December 7, Donnelly wrote to all of the Federated Plan unions inviting continued mediation, per the council's direction. Both AFSCME and OE-3 rejected the offer. Based on subsequent correspondence from Donnelly on December 12, the request for waiver appeared to relate to the possibility of mediation continuing past January 1, 2012, when the factfinding procedures mandated by Assembly Bill No. 646 went into effect. Donnelly indicated changes to the measure could be made until February 21, 2012 (i.e., the 88 day advance submission

requirement mandated submission by March 9). On December 13, the coalition accepted the offer to continue mediation while continuing to assert that the City had prematurely declared impasse. According to a City Council memorandum, mediation sessions occurred on six occasions in December and January without resolution.

On February 21, 2012, Donnelly wrote to Cruz, including a seventh, and final revision to the ballot measure based on City proposals made in mediation. This version contained further softening of the harsher measures in the proposal: (1) for non-opting current employees, pension contributions annual adjustments would increase by four percent of compensation instead of five percent and were capped at 16 percent rather than 25 percent of compensation (up to 50 percent of the unfunded liability); (2) phasing in of six-month incremental additions to the 30 year service retirement eligibility requirement was postponed to July 2017; (3) increasing the Tier 2 COLA maximum from one to 1.5 percent and increasing the accrual rate maximum from 1.5 to two percent; (4) removal of the nine percent of compensation cap on City Tier 2 contributions and discretionary ability of the City to contribute the difference between the actual contribution level and nine percent to a defined contribution plan; and (5) removal of the right to impose 50/50 cost sharing of the unfunded liability in favor of a phased in reduction of compensation.

On March 6, the City Council approved the repeal of Resolution No. 76987 through Resolution No 76158, replacing the prior version of the ballot measure with the more recent one.

On June 5, 2012, Measure B was passed by the voters.

On April 30, 2014, the Santa Clara County Superior Court issued a judgment in a case in which AFSCME was a party, finding certain provisions of Measure B unlawful. The court

found that Measure B violated the vested rights of City employees, by, inter alia: (1) repudiating the City's obligation to contribute 100 percent of the unfunded liability and requiring employees not opting into the VEP to contribute up to 16 percent of compensation or a maximum of 50 percent of the total required contributions; (2) reducing pension benefits of employees opting into the VEP; (3) granting itself the ability to reduce COLAs in the event of the declaration of a fiscal and service level emergency, and limiting future restorations prospectively, including the lower COLAs for VEP employees; and (4) authorizing retiree healthcare contributions in excess of the 50/50 share (through use of the phrase "a minimum of 50 percent").²³ The court rejected the vested rights challenge to elimination of the SRBR. The City has appealed the judgment and an appellate decision is pending.

ISSUES

Did the City fail to meet and confer in good faith over the ballot measure and retirement issues by:

- (1) refusing to engage in meaningful *Seal Beach* negotiations with AFSCME and circumventing its obligation through its "two-table" approach;
- (2) adopting the proposal for a ballot measure on May 24, 2011, prior to providing the OE-3 notice and an opportunity to meet and confer;
- (3) engaging in surface bargaining by: (a) devoting insufficient time to negotiations; (b) insisting on a pre-determined deadline for completing bargaining; (c) failing to provide information; (d) proposing unlawful terms in the ballot measure; (e) failing to respond or make

²³ On June 5, 2012, the City caused to be filed a declaratory relief action seeking a declaration that Measure B was constitutional over alleged claims by unions that the measure was illegal, and seeking expedited trial status in order to permit the City to move forward with adoption of implementing ordinances. AFSCME incurred substantial legal fees defending against the lawsuit, which was ultimately dismissed.

counterproposals to the coalition's proposals; (f) maintaining an inflexible position in bargaining; (g) employing negotiators lacking authority; (h) engaging in piecemeal bargaining; (i) prematurely declaring impasse and holding to that declaration; and (j) engaging in post-impasse conduct indicative of bad faith and ignoring its obligation to resume negotiations as a result of modifying its last, best, and final offer;

(4) adopting Measure B provisions that permanently denied OE-3's right to meet and confer over retirement benefits and required wage reductions if the cost sharing provisions were declared illegal, invalid, or unenforceable?

CONCLUSIONS OF LAW

As noted at the outset, both complaints allege that the City violated the duty to meet and confer in good faith by engaging in surface bargaining. Both surface bargaining allegations cite the same indicia of bad faith: (1) maintaining an inflexible position; (2) failing to respond or make counterproposals; and (3) prematurely declaring impasse. Due to the commonality within the complaints, the surface bargaining allegations will be addressed together. By the language of PERB complaints raising this claim, a charging party alleging surface bargaining is not limited to proving the indicia listed in the complaint. Here, additional indicia raised by the unions differ, as will be noted and separately discussed.

The unions also assert differing per se claims, either included as indicia of the surface bargaining or as stand-alone violations. Again, the analysis will identify the union advancing each claim. Since the pleading leeway afforded surface bargaining claims does not apply to per se violations, the test for unalleged violations must be satisfied. The City objects to all unalleged violations. The unions have satisfied these requirements as to all of the claims raised, with two exceptions, noted below. The City had notice of the claims through the unfair

practice charges. The unalleged violations were intimately related to the subject matter of the complaints and were part of the same course of conduct. The parties had an opportunity to dispute the evidence and the matters were fully litigated. If the unalleged violations were not described in the charges, they involved pure issues of law that were or could have been addressed in the post-hearing briefing, which included reply briefing, and therefore were fully litigated. (*West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M; *County of Riverside* (2010) PERB Decision No. 2097-M.)

Refusal To Engage in Seal Beach Negotiations

AFSCME contends that the City failed to meaningfully engage in *Seal Beach* negotiations based on the City's statements and conduct which indicated that such negotiations would involve something less than the normal meet and confer duty.

MMBA section 3505 requires public agencies and recognized employee organizations to meet and confer in good faith over wages, hours, and other terms and conditions of employment. *Los Angeles County Civil Service Commission v. Superior Court* (1978) 23 Cal.3d 55, 61-62, stated:

Thus a public agency must meet with employee representatives (1) promptly on request; (2) personally; (3) for a reasonable period of time; (4) to exchange information freely; and (5) to try to agree on matters within the scope of representation. Though the process is not binding, it requires that the parties seriously "attempt to resolve differences and reach a common ground." [Citation.] The public agency must fully consider union presentations; it is not at liberty to grant only a perfunctory review of written suggestions submitted by a union.

These guidelines obviously apply to section 3505 in terms of negotiating a collective bargaining agreement (sec. 3505.1), and though the statute was adopted prior to *Seal Beach*,

supra, 36 Cal.3d 591, nothing in that case expressly provides for any lesser standard in cases of ballot measure proposals triggering the duty to meet and confer.

In *Seal Beach*, *supra*, 36 Cal.3d 591, the court held a public agency is required to comply with the MMBA's meet and confer duty before proposing a ballot initiative, which if adopted by the voters, would result in new terms and condition of employment for represented employees. (*Id.* at p. 601.) There the charter amendment would have required the City to terminate any employee participating in a strike, a matter directly concerning the employment relationship. (*Id.* at p. 595.)

Seal Beach rejected the employer's argument that it had "absolute, unabridged constitutional authority to propose charter amendments to its electorate, which authority could not be impaired or limited by the requirements of the MMBA." (*Seal Beach*, *supra*, 36 Cal.3d at p. 596; see Cal. Const., art. XI, sec. 3, subd. (b).) Under principles of preemption, *Seal Beach* construed section 3505 to require harmonization with the city council's constitutional right to propose initiative legislation. (*Id.* at pp. 598-601.) As a result, the court held that a meet and confer process must take place *before* the vote and implementation of a charter amendment if requested by the union. (*Id.* at p. 602.) Distinguishing prior cases of city charter preemption by the MMBA as a result of direct conflict between the substance of local legislation and the requirements of the statute, *Seal Beach* described its application of MMBA preemption in ballot measure cases as only a *procedural* overlay on the local legislative activity; one that does not directly interfere with the city's constitutional right to determine *substantive* terms and conditions of employment. (*Id.* at pp. 597-599; see *Baggett v. Gates* (1982) 32 Cal.3d 128, 139.) Thus, under both the language and reasoning of *Seal*

Beach, section 3505 would logically define the nature of the bargaining obligation in the context of proposed ballot measures.

Furthermore, the city's within-scope proposal in *Seal Beach*, coupled with the voters' approval of the charter amendment without prior notice and opportunity to negotiate, amounted to an unlawful unilateral change, though not described in the court's opinion as such. The fact that the electorate must approve the proposed ballot measure in order to complete the unilateral change does not alter the consequence to the bargaining unit in terms of implementation. In this sense, the scope of the duty to meet and confer over ballot measures would again appear to be indistinguishable from traditional bargaining. (See *County of Santa Clara* (2010) PERB Decision No. 2114-M, p. 9; *County of Santa Clara* 2321-M, pp. 23-25.) Logically, too, the mere proposal by the city, without voter approval, amounts to no change in terms and conditions. (But see *Folsom-Cordova Unified School District* (2004) PERB Decision No. 1712, pp. 2-3.) This distinction as well as other aspects of *Seal Beach* charter amendments do suggest finer questions concerning preemption, most of which have never been addressed by the courts or PERB following the seminal case, including ones presented here.

AFSCME contends that the City interpreted *Seal Beach* in a manner that diluted the scope of the duty to meet and confer based on its statements distinguishing *Seal Beach* bargaining from contract bargaining. These include statements principally by Holtzman, but also Gurza, suggesting that *Seal Beach* negotiations are *sui generis* because they arise out of a delicate accommodation of the public agency's constitutional right to enact local legislation and the MMBA's duty to meet and confer. As a result, AFSCME maintains, the City never came to the negotiations with a "genuine desire to reach agreement" or ever engaged in "a

serious attempt to resolve differences and reach a common ground.” (See *San Francisco Fire Fighters v. Board of Supervisors* (1979) 96 Cal.App.3d 538, 547-548.)

Here, the City reserved retirement issues for negotiations subsequent to the 2011 MOU negotiations which had just concluded over protest by the unions. The City then opened negotiations over retirement issues generally, including those germane to the recently adopted fiscal reform plan and the resulting ballot measure proposal. The unions specifically demanded *Seal Beach* negotiations, and the City agreed. The City proposed simultaneous or concurrent negotiations over both sets of issues, but was unable to obtain the coalition’s consent to that format. This led to the dispute over the October 31 deadline for completion of the *Seal Beach* negotiations, primarily because the coalition demanded that those negotiations follow completion of the non-ballot measure issues. As a result of Cruz confirming the unions’ desire to engage in *Seal Beach* negotiations “individually,” the City arranged for separate meetings. Following transmission of the first draft of the ballot measure, AFSCME (as well as OE-3) met as separate unions. Holtzman appeared at the first two meetings with both AFSCME and OE-3. At the July 21 meeting, following Allen’s objection to the cart preceding the horse, Holtzman explained his views about the nature of *Seal Beach* bargaining.

Holtzman asserted that *Seal Beach* negotiations are different from traditional negotiations because those negotiations proceed in the context of the uncertainty that the voters will even approve the governing body’s proposed amendment. He construed the upshot of *Seal Beach* negotiations to be the unions’ attempt to convince the City to change its proposal by, for example, removing certain sections. As AFSCME notes, Holtzman explained that *Seal Beach* required the City to “discuss” the subject matter and acknowledged that its team was “here to listen in good faith and hear your suggestions.” Gurza testified that the City invited “input”

and “feedback” from the unions, while adding that they failed to make any proposals “that the City could accept.”²⁴ While Holtzman’s hypothetical about removing particular provisions from the measure could be construed to suggest that the City did not wish to negotiate over the language of particular provisions, he never stated that opinion.

Extending Holtzman’s expressed thoughts even further, the City’s post-hearing brief states that *Seal Beach* bargaining is “fundamentally” different in several respects, relying on the following language of the case:

Although [section 3505] encourages binding agreement resulting from the parties’ bargaining, the governing body of the agency – here the city council – retains the ultimate power to refuse an agreement and make its own decision. . . . This power preserves the council’s rights under article XI, section 3 (b) – it may still propose a charter amendment *if the meet-and-confer process does not persuade it otherwise.*

(36 Cal.3d at p. 601, original italics.) The City construes this language in conjunction with another statement of the court – that the “burden [of the meet and confer process] on the city’s democratic functions is minimal” (*id.* at p. 599) – as a basis for concluding that *Seal Beach* bargaining is fundamentally different. Yet the City also observes that “*once [the Seal Beach negotiations] are completed, the City Council retains unfettered authority to place matters on the ballot*” (citing *id.* at p. 601, italics added).

The City argument reads too much into the *Seal Beach* opinion. By stating that the burden was “minimal,” the court did not hold that the MMBA imposed any less of a duty to meet and confer. Rather, it explained that the judicial act of imposing a duty to meet and confer was minimal because it was a *procedural* requirement not impinging on the

²⁴ Gurza’s statements were made at the hearing and deserve less weight than those of Holtzman, who was present at the table.

constitutional right to propose legislation in *substantive* terms. But Holtzman conceded as much when he stated on July 21 that nothing he had said was meant to suggest that the negotiations were anything less than “real” meeting and conferring and that the City would fully consider proposals to alter the substance of the measure.

AFSCME’s reliance on the quoted statements at the bargaining table to establish something less than a willingness to lawfully meet and confer on the City’s part is unavailing. Holtzman’s statements ultimately only amounted to legal posturing. It is sufficient that the City was open to negotiating over the substance of the proposal. A fair reading of the July 21 meeting exchange between Holtzman and Washington, quoted verbatim above, was that the City had presented a fully drafted ballot measure and did not intend to exchange counterproposals as to provisions within it, but was willing to remove objectionable items and possibly substitute ones offered by the unions. And, as its serial revisions demonstrated, the City was willing to compromise on the substantive elements within the measure related to retirement benefits. The coalition never formally proposed alternatives to elements of the ballot measure because it assumed its right to negotiate non-ballot subjects prior to the ballot measure. Even the Grand Bargain was never concretely described as an alternative to the ballot measure. Washington disputed that the retirement reform and the ballot measure could be conjoined, meaning that the coalition would only negotiate the two sequentially. Despite the City’s posturing on the scope of *Seal Beach* bargaining, none of its conduct demonstrated an unwillingness to engage in meaningful bargaining, and it never disputed the obligation to bargain over the substance of ballot measure.

In its post-hearing briefing, AFSCME further asserts that the City created a false dichotomy between the two sets of bargaining in order to assert a waiver as to those retirement

subjects contained in the ballot measure, whether or not a charter amendment was actually required as to them, while simultaneously refusing to consider union proposals at the coalition table both on subjects requiring a charter amendment (e.g., the coalition's opt-in plan) and ones that did not (e.g., SRBR elimination, the Tier 2 plan, etc.). Under this purported two-table false dichotomy, AFSCME contends that the City pretended not to understand the unions' intention to bargain over the substance of the ballot measure. It relies on fact that the absence of any statement from the coalition that it did not desire to negotiate over the ballot measure, the City's ballot measure revisions that were not counterproposals to any coalition proposals, and the City's failure to communicate reservations about the coalition's opt-in plan that Gurza offered at the hearing.

The evidence fails to support the union's contention that the City engaged in any ruse to preempt bargaining over the ballot measure. As to the "ships passing in the night" phenomenon, significant was Gurza's testimony that even as to those unions agreeing to concurrent bargaining, with a single exception, the City received no counterproposals to the ballot measure, though they did provide reactions to the measure and asked questions about how its provisions would operate. No such exchanges occurred as to AFSCME. This lack of engagement cannot be blamed on the City. As to the coalition table, AFSCME cites a statement by Gurza that the unions failed to make any proposals "that the City could accept." But this simply confirms that the City remained open to proposals at the coalition table, so long as they provided meaningful relief on the question of unfunded liabilities (as stated in Gurza's August 31 letter) that might render the ballot measure unnecessary.²⁵

²⁵ While legally constrained to bargain independently with each union despite a single proposal affecting all similarly, an employer committed to proposing a unified ballot measure will be somewhat constrained as a practical matter to avoid subject-by-subject bargaining at

The City's conduct in bargaining did not circumvent the legislative mandate to meet and confer in good faith as required by *Seal Beach*.

Adoption of the Ballot Measure Proposal Prior to Commencing Negotiations

OE-3 contends that the City violated its duty to meet and confer when the City Council adopted its May 24 resolution to proceed with a ballot measure without first offering *Seal Beach* negotiations. OE-3 relies on the language of section 3505 that requires the employer to "consider fully such presentations as are made by the employee organization on behalf of its members *prior to arriving at a determination of policy or course of action.*" (Italics added.) Following a traditional unilateral change analysis, OE-3 argues that the City's resolution to place a ballot measure before the electorate was a firm one, which only allowed its negotiators to bargain over the language of the measure, but not the decision to proceed with the election.

The City responds that such a reading of the statute would conflict with *Seal Beach's* pronouncement that, notwithstanding the preemptive effect of the MMBA, under the harmonization principle, a charter city retains its article XI, section 3 constitutional right to make policy decisions concerning the substance of proposed amendments to its charter. (36 Cal.3d at p. 601.)

The City's reading of the statute is the more reasonable one. *Seal Beach* does not directly address the question, though it does state at one point that a city must meet and confer "*before it propose[s]* charter amendments which affect matters within the scope of representation." (36 Cal.3d at p. 602, italics added.) OE-3's position is impractical and inconsistent with longstanding unilateral change precedent, which only requires fulfillment of

individual tables if committed to such a proposal. (See *County of Solano* (2014) PERB Decision No. 2402-M.)

the bargaining obligation prior to reaching a firm decision. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 27-28.) In *Seal Beach* negotiations, the employer's decision to place the matter on the ballot is the point at which a firm policy decision is made, because, as the City has noted, *Seal Beach* stated that at least one the purpose of meeting and conferring is to allow the union to persuade the city council *not* to proceed with the ballot measure. The court was surely aware that not submitting a ballot measure to the voters would avoid any possible implementation of changed terms and conditions of employment. (*County of Sacramento* (2009) PERB Decision No. 2045-M; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823.) OE-3's argument appears to suggest that the decision to propose a ballot measure must be restrained because, under traditional unilateral change analysis, it forces the unions to bargain back to the status quo. However, because the City's decision to propose the ballot measure did not by itself change terms and conditions of employment, and because it permitted negotiations to alter the substance of the proposal, including the possibility of obviating the need entirely, the mere proposal of the measure did not compromise the ability of the unions to effectively negotiate with the City. (*Arcohe Union School District* (1983) PERB Decision No. 360, pp. 5-6.) The related question whether the City demonstrated an inflexible stance in bargaining over the measure so as to demonstrate bad faith is addressed with the surface bargaining claims below.

Surface Bargaining

The totality-of-circumstances test results in a finding of surface bargaining where one of the parties "goes through the motions of negotiations" but displays a lack the "genuine desire to reach agreement." (See *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25; *City & County of San Francisco* (2007) PERB Decision No. 1890-M,

pp. 10-12; *Oakland Unified School District* (1982) PERB Decision No. 275, pp. 15-16.)

Conduct at the table as well as away from the table may be considered. (*City of San Jose, supra*, PERB Decision No. 2341-M.)

PERB has identified a number of indicia that support a claim of surface bargaining, including, but not limited to: (1) entering negotiations with a "take-it-or-leave-it" attitude (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. (2d Cir. 1969) 418 F.2d 736); (2) unwillingness to schedule meetings (*Oakland Unified School District* (1983) PERB Decision No. 326); (3) failure to exchange proposals and reconcile differences (*Gonzales Union High School District* (1985) PERB Decision No. 480); (4) conditioning agreement on economic matters upon prior agreement on non-economic matters (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1249-S); (5) renegeing on tentative agreements (*Charter Oak Unified School District* (1991) PERB Decision No. 873); (6) refusing to provide information (*Stockton Unified School District* (1980) PERB Decision No. 143); (7) a negotiator's lack of authority which delays and thwarts the bargaining process (*id.*); and (8) regressive bargaining (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51). A single indicium may be sufficient to obstruct bargaining. (*City of San Jose, supra*, PERB Decision No. 2341-M.)

While a party must engage in the give-and-take process, it may also engage in require "hard bargaining," which is the adamant maintenance of a legitimate position. (*Modesto City Schools* (1983) PERB Decision No. 291, p. 35; *Oakland Unified School District, supra*, PERB Decision No. 275; *NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229.)

If the parties engage in good faith bargaining yet reach a point where further discussions would be fruitless and prospects for reaching agreement have been exhausted, a

bona fide impasse occurs. Thereupon the parties must proceed to the impasse resolution procedures; and failing resolution there, the employer may unilaterally implement terms and conditions reasonably comprehended within its LBFO. (*Modesto City Schools, supra*, PERB Decision No. 291, pp. 33-38; *City & County of San Francisco* (2009) PERB Decision No. 2041-M, p. 40.) A bona fide impasse declared by the employer assumes it has bargained in good faith. (*County of Riverside* (2014) PERB Decision No. 2360-M.)

A. Insufficient Time Devoted to Bargaining

AFSCME contends that the complex nature of retirement benefits, and the importance of the subject, dictated that ample time be devoted to the negotiations, and that despite the length of time over which the negotiations transpired (June through October), the actual amount of time devoted to the negotiations was unreasonably small. Based on the bargaining notes, AFSCME calculates that the parties engaged in 14 hours of negotiations over 12 sessions; less time if caucus time is excluded. Insufficient bargaining time has been deemed evidence of bad faith bargaining. (See *NLRB v. Cable Vision, Inc.* (1st Cir. 1981) 660 F.2d 1, [4.5 hours per month over 22 sessions spanning 14 months] (*Cable Vision*).)²⁶

There is no rigid rule concerning what constitutes sufficient bargaining time. (See *Garden Ridge Management, Inc.* (2006) 347 NLRB 131, 143-147 (*Garden Ridge*) [employer must adjust the number of sessions as necessary to the task].) The amount of time necessary will depend on a number of circumstances, such as the nature of the bargaining, the initial proposals from each side, their complexity, etc. More important than the total amount of time

²⁶ When interpreting the MMBA, PERB may also take appropriate guidance from cases arising under the National Labor Relations Act. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 617.)

spent is what transpired in the bargaining sessions. (See *Tajon, Inc.* (1984) 269 NLRB 327, 328.)

Unlike *Garden Ridge, supra*, 347 NLRB 131, and *Cable Vision, supra*, 660 F.2d 1, AFSCME never complained about the City's scheduling of meetings. Nor did the City engage in any delay in the scheduling process. The City drove the agenda in terms of scheduling meetings, which was no surprise in view of its desire to complete negotiations by the end of October, but also because of the deeply concessionary nature of its proposal. AFSCME asserts that the City did not meet as frequently as the coalition requested, citing its August 2 letter to Donnelly regarding the ballot measure. Yet in that letter AFSCME simply expressed optimism about proceeding with retirement reform issues and the ability to postpone discussion of the ballot measure. Nothing stated by AFSCME indicated a desire for more frequent meetings or expressed disappointment with the City's scheduling. In contrast, both of Donnelly's September 9 letters to the unions offered additional ballot measure meetings. (*Logemann Bros. Co.* (1990) 298 NLRB 1018, 1020.) Subsequently, on October 5, Donnelly invited multiple bargaining sessions weekly in that month to both AFSCME and OE-3. She received no immediate response and sent follow-up letters on October 11. On October 18, Pope proposed October 25 as a meeting date. There is no evidence AFSCME proposed additional meetings in response.

The City promptly attended each of the eight bargaining sessions. The City presented the proposed ballot measure language and its non-ballot measure proposals at the outset of bargaining. (*Logemann Bros. Co., supra*, 298 NLRB 1018, 1020.) It was on time and prepared for meetings. The City never restricted the duration of any of the sessions. (*Bryant & Stratton Business Institute, Inc. v. NLRB* (2d Cir. 1998) 140 F.3d 169 [employer refused

repeated requests for more meetings; meetings were short and some abruptly ended without explanation].) The bargaining notes show that the City often asked the coalition where it wished to begin meetings and that the meetings ended when there was nothing further to be discussed.

When it first transmitted its ballot measure proposal to the unions, the City explained that it would not be submitting other proposals on the subject. In turn, the unions, asserting the cart-before-the-horse metaphor, refused until very late in the process to submit proposals constituting alternatives to the ballot measure, either in terms of different ballot language or ones offering shared sacrifice on the pension unfunded liability, as Gurza had implored them to do. The unions flatly objected to bargaining over those subjects viewed as violating vested rights. Even the Grand Bargain proposal abided by the principle that no savings should come at the expense of measures viewed as involuntary by the workers. These factors more than anything explain why the total amount of bargaining time over the ballot measure was relatively short.

The brevity of total bargaining time is not evidence of bad faith on the City's part.

B. Imposition of a Shortened Timeframe that Prevented Bargaining

AFSCME asserts that the City applied an artificial and impermissibly short period of time for completion of bargaining over the complex subject of retirement reform. AFSCME relies on cases rejecting arguments of urgency on the part of employers who claimed economic exigencies as a basis for proceeding with unilateral implementation. (See *County of Santa Clara* (2010) PERB Decision No. 2114-M; *County of Riverside* (2014) PERB Decision No. 2360-M.)

The imposition of a deadline for negotiations is not per se unlawful, but depends on

context. (See *Dubuque Packing Co.* (1987) 287 NLRB 499, 537, 542.) Particularly in cases where the employer provides notice and opportunity for bargaining over proposed changes outside of contract negotiations, bad faith will not be inferred where the union fails to respond with earnest attempts to engage in bargaining. (See *Salem College* (1982) 261 NLRB 327, 336-337 [claim of misrepresented financial pressures rejected].) In addition, where an employer proposes an objectively reasonable deadline and does not refuse meetings in the interim period, a per se rule that the mere proposal of a deadline constitutes bad faith would create a license for unfair delay on the union's part. (See *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1039 [parties may agree in advance of period of time reasonably necessary to complete pre-impasse bargaining; 45 days might be sufficient].) In *County of Santa Clara, supra*, PERB Decision No. 2114-M, PERB found that the employer was not excused from fully bargaining to impasse as to one of its two proposed ballot measures for which the employer cited no urgency.²⁷ In doing so, it *distinguished* the other measure, which the employer sought as an alternative to a union proposed measure on the same subject at the same election, and noted the statutory deadline for ballot submissions. (*Id.* at p. 15.) PERB did not announce any guide for defining how much time would have been sufficient for bargaining with a ballot measure deadline.

Here, the City decided to propose the ballot measure in May, began negotiations in early June, and proposed completion by the end of October. The negotiations involved a limited number of subjects in contrast to contract bargaining. The City's ballot proposals, while complex in nature, were more remarkable for their economic impact on the bargaining

²⁷ The parties in *County of Santa Clara* met on four occasions between June 1 and August 3, the date when the employer's governing body approved two ballot measures, without a declaration of impasse by the employer as to either measure.

units. Yet the unions failed to explore the intended operation of the ballot measure provisions at the table. As previously noted, the City followed its initial demand for a deadline with repeated offers to schedule additional meetings beginning in September, which the unions rebuffed. The City's deadline based on between four and five months of bargaining was not an unreasonable demand.

Although an employer's citation of a deadline may be some evidence the parties failed to reach a bona fide impasse, and an employer may not assert a deadline based on economic circumstances as a justification for declaring impasse and implementing, the dispositive question is whether the City reached a bona fide impasse in the negotiations with the unions. That question is analyzed below. (*County of Riverside, supra*, PERB Decision No. 2360-M, pp. 19-20.)

C. Refusal To Provide Information

AFSCME contends that the City, in response to the coalition's July 29 written information request, failed to provide: (1) an updated actuarial calculation of the effect on Cheiron's projected contribution requirements in view of the most recent salary reductions and layoffs; (2) copies of studies performed by the City's retained actuary; (3) an answer to the question whether the dollar amount referenced in the ballot measure triggering changes in the COLAs and contributions would be indexed to inflation; (4) whether the City would use the market or actuarial value of assets to compute the cost sharing of unfunded liabilities; (5) whether the ARC for retiree health benefits was calculated with respect to retired employees versus active employees, or both; (6) information regarding the reservation of rights clause; (7) clarification of how benefits for VEP employees would be computed; and (8) how the value of accrued benefits would be preserved if an increase in retirement age occurred under the VEP

plan. In addition, AFSCME contends more generally that the City failed to: (1) explain the cost savings it hoped to achieve through retirement reform; (2) provide the actuarial, demographic and other data necessary to perform economic analysis of the City's proposals; and (3) provide "background information or analysis" of the ballot measure.²⁸

AFSCME's contentions are without merit. As detailed above, the City's August 9 letter recapitulated each of the written requests set forth in the coalition's July 29 written information request. AFSCME provides no evidence that it explained to the City at the table how the responses were inadequate, or clarified how the City had misunderstood the requests. (*County of Sierra (2007)* PERB Decision No. 1915-M.) When specifically asked, Doonan was unable to identify any follow up information that was lacking.

As to the City's response that an actuarial report updated by Cheiron to reflect the recent salary reductions as of July 2011 would not be available for several months, AFSCME argues that it was not a report per se that it sought, but rather new calculations that included current numbers. It cites no evidence this was conveyed to the City in response to the City's answer. Moreover, an employer is not required to produce information that does not exist. (*County of Solano, supra*, PERB Decision No. 2402-M; *City of Pinole (2012)* PERB Decision No. 2288-M.)

AFSCME contends it required only the information about updated market returns, but fails to explain why the City's answer (i.e., that the latest market return reports of March 2011 were available at the Retirement Services website) was unsatisfactory.

²⁸ As noted above, AFSCME withdrew this allegation as a per se violation, prior to issuance of the complaint, without prejudice to raising it as an indicium of surface bargaining.

As to retained actuary reports, the City responded that none were available because Bartel had not been directed to perform studies on the issues of the effect of lower salaries and recent positive asset returns on projected contributions.²⁹ AFSCME offered no evidence that it objected to the City's response. Doonan also conceded that it was not unreasonable for the City to have interpreted the request as limited to the particular concerns identified in the City's response, as opposed to any and all studies rendered.

Similarly, after the City responded that it had no present information responsive to whether the unfunded liabilities trigger level would be indexed for inflation, Doonan concluded the City had simply not considered the issue at that point in time. The coalition never followed up on its request.

AFSCME contends that it could not meaningfully bargain without knowing the method by which the City had calculated the greater share of the unfunded retiree health care liability current employees would be contributing as a proportion of their compensation that was necessary to pay for the richer benefits received by already retired employees relative to their contributions, so as to enable it to "determine whether requiring them to do so would ensure an adequate, and commensurate benefit." The City answered that the information was not readily available. An employer is not required to produce information that does not exist. (*County of Solano, supra*, PERB Decision No. 2402-M; *City of Pinole, supra*, PERB Decision No. 2288-M.) There is no reason to suspect the City would have made such a calculation. Current

²⁹ The request stated: "To the extent the city has hired its own actuaries and is not relying on the Pension Plan's actuaries *for the above requested information*, please also provide analyses conducted by the City's actuaries and describe how the City's actuary's methods, assumptions and conclusion differ, if at all, from those of the Plan's actuary." (Italics added.)

retirees historically would not have made any contributions to future liabilities because the City had only just begun to pre-fund retiree health benefits.

As to the question whether the ballot measure failed to provide a guarantee that current employees would achieve the full benefit of their increased contributions, AFSCME cites the City's supposedly inadequate answer that it did indeed reserve the right to declare "benefits described in the ballot measure" unvested. AFSCME acknowledges it effectively received the answer to its question: the City did not intend such a guarantee.

AFSCME fails to explain how the City's response of inviting the unions to provide ideas on how VEP employees might be required to share the burden of unfunded liabilities imposed on non-electing employees since it had not considered the question, was an inadequate response. In essence the City admitted VEP employees were not expected to share this burden in the initial proposal.

Similarly, the City's response that it had no plan to preserve the value of vested accrued benefits for VEP members as a result of the increased retirement age change was also a concession that such value might be diluted. No information was withheld.³⁰

AFSCME's claim that requests outside of the July 29 letter were unlawfully ignored must also be rejected. It identifies no communicated request by the coalition for the cost savings sought to be achieved by the retirement reform proposals. AFSCME only cites evidence that the coalition provided estimated savings with its Grand Bargain proposal and expected one in return from the City.

³⁰ Several of the coalition's questions were rhetorical in nature in that they attempted to point out, and confirm, that current employees would be relatively disadvantaged by the ballot measure's provisions. The City responded by not denying these effects, and also admitting that there were no plans to ameliorate them. The answers were responsive.

Citing the coalition's August 22 letter, AFSCME contends that the City refused to provide demographic information necessary for it to perform calculations on the City's proposals. Again, it cites no evidence such a request was communicated to the City at any time prior to the letter objecting to the alleged refusal. Subsequently, Allen raised the purported "outstanding request" at the October 12 meeting, surprising Donnelly. Nevertheless, Rodriguez then promised to submit a request for such information. AFSCME cites no evidence as to how the City failed to respond thereafter, or that the coalition followed up on its request. (*Trustees of the California State University* (2004) PERB Decision No. 1732-H.)

As to "background information or analysis" of the ballot measure, there is no evidence that the City conducted any quantitative or other analysis of the impact of the proposed ballot measure's provisions. (*City of Pinole, supra*, PERB Decision No. 2288-M.) Nothing suggests such studies would necessarily have been undertaken. The concept of the ballot measure was relatively simple: substantially increase employee contributions, allow employees to forfeit future accruals to avoid those contributions, and implement a far less generous plan for new employees, all for the purpose of returning City retiree contributions to 2010 levels. On June 3, the City transmitted the Council's May 13 memorandum which included background information regarding the ballot measure.

AFSCME has failed to demonstrate that the City evidenced bad faith by failing to respond to information requests.

D. Unlawful Ballot Terms

AFSCME contends that Measure B included illegal terms, impermissible subjects of bargaining, and a waiver of the statutory right to bargain. By including these subjects, the City exhibited bad faith, and, by implementing them, committed per se violations of the MMBA.

AFSCME's first line of argument attacks the substance of the City's ballot measure, specifically, the VEP, the mandatory obligation to contributed to unfunded liabilities, and the imposition of wage reductions should any of the provisions be declared illegal by a court. The conditional wage reduction language is described by AFSCME as the "poison pill" provision.

Section 1514-A of Measure B provides:

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

AFSCME's post-hearing brief only analyzes Section 1514-A. As to the VEP and mandatory employee contributions, it simply relies on the Santa Clara County Superior Court judgment agreeing with AFSCME's vested rights claims as to Measure B.

AFSCME cites no analogous case precedent for the proposition that the cited proposals demonstrate bad faith. As a preliminary matter, it is a well settled principle that the labor boards do not stand in judgment of the substance of proposals advanced by the parties. (*NLRB v. American National Insurance Co.* (1952) 343 U.S. 395, 404; *NLRB v. Insurance Agents' International Union* (1960) 361 U.S. 477, 485-486.) While predictably unacceptable proposals may be indicative of bad faith, proposals are not such if a rational and non-arbitrary basis is articulated for their presentation. (See *San Bernardino Unified School District* (1998) PERB Decision No. 1270, administrative law judge's proposed decision at p. 84.)

AFSCME does cite authority supporting its claim that Section 1514-A violates the duty to bargain because it constitutes a waiver of the statutory right to bargain following impasse. (See *Rowland Unified School District* (1994) PERB Decision No. 1053.) In *Rowland*, PERB

held that implementation of the employer's proposed limited reopener provision following impasse was an unlawfully imposed waiver of the right to bargain. AFSCME maintains that that Section 1514-A accomplishes the same. AFSCME reads the section as making future wage reductions "automatic and non-negotiable." The argument is unpersuasive. Section 1514-A only states that pay reductions shall be obtained by the City "to the maximum extent permitted by law." It does not state that the MMBA is a law which the City may ignore. Therefore, the language does not constitute a repudiation of the City's obligation to comply with the MMBA.

AFSCME further contends that the City's provisions imposing increased employee contributions to reduce the unfunded liabilities and the VEP provisions forfeiting future retirement benefits conflict with the state constitution and the vested rights doctrine developed thereunder. (See *City of San Jose, supra*, PERB Decision No. 2341-M, p. 21.) In response, the City urges that PERB decline to exercise jurisdiction of these matters of external law because a finding in the union's favor could result in a conflicting decision if the City prevails in its appeal of the Superior Court judgment. AFSCME replies that PERB can exercise jurisdiction to decide constitutional issues if necessary to resolve matters within its exclusive initial jurisdiction. (See *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 583; *Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 53.)

In *California Association of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, the union filed an unfair practice charge claiming the Legislature's adoption of a second tier retirement plan for new employees amounted to a unilateral change. The court held that it was necessary to ascertain the gravamen of the dispute to determine whether PERB had exclusive initial jurisdiction. Because the court concluded that the fundamental issue was

whether the legislation violated the vested rights doctrine, it concluded that the constitutional issue was one for the judiciary.

Here, the coalition, primarily through ALP's Doyle, made clear at the outset that it had no intention of bargaining over matters it believed were unconstitutional. AFSCME never asserted a contrary position in its meetings with the City. AFSCME provided no vested rights analysis in its briefing. Because AFSCME's claim that the City's proposals were objectionable is fundamentally an objection based on the vested rights doctrine, those matters are reserved to the courts.

E. Failing To Respond or Make Counterproposals

Relying on undisputed testimony of Pope that none of the City's amendments to the ballot measure drafts were prompted as a result of union proposals, OE-3 asserts that the City exhibited bad faith by failing to make counterproposals. The argument is without merit. OE-3 does not dispute that it failed to make counterproposals in direct response to the ballot measure or that the City's revisions overall exhibited a softening of position on the ballot measure. OE-3 is really only drawing attention to the limited number of counterproposals made by the City to the coalition's proposals as to the issues in the retirement reform negotiations, including the City's failure to make a counterproposal to the Grand Bargain proposal. While the record provides some support for this narrower contention, it does not reveal any unwillingness on the City's part to engage in exchange as to the ballot measure. Aside from the apparent failure to make a counterproposal to the Grand Bargain proposal, OE-3 provides no analysis explaining this claim.

OE-3 further contends the City resorted to self-help in the form of its alleged unilateral decision to proceed with the ballot measure (citing *County of Santa Clara* (2010) PERB

Decision No. 2120-M, p. 15), when it should have filed an unfair practice charge against OE-3 for bad faith bargaining due to its alleged failure to engage the City on the ballot measure. This argument is also without merit. The issue in *County of Santa Clara* was the employer's contention that the union waived its right to bargain by engaging in delay tactics, a claim PERB rejected based on the evidence. PERB's point about self-help added nothing dispositive to the question concerning fulfillment of the duty to bargain. Here, the alleged unilateral implementation turns on whether the City bargained to impasse in good faith, a question analyzed below.

F. Maintaining an Inflexible Position

OE-3 contends that the City maintained an inflexible position by coming to the table with a fixed intent of: (1) submitting a ballot measure that would remove retirement benefits from the bargaining table and mandate voter approval of any modifications thereafter; and (2) insisting on the completion of bargaining by October 31, yet never following through with a declaration of fiscal emergency as originally proposed.

Maintaining an inflexible position on a subject of bargaining may be evidence of bad faith, particularly when the position is not fairly maintained. (*San Bernardino Unified School District, supra*, PERB Decision No. 1270.) An indicator that a position is not fairly maintained is when the respondent fails to offer a legitimate explanation for its proposals. (*Ibid.*) In some cases an inflexible position on a proposal signals that it is predictably unacceptable as well. (*Ibid.*)

Setting aside the question whether the ballot measure unreasonably removed subjects from the bargaining arena (an issue analyzed below), the record substantiates a finding that the City was open and transparent as to the reason for its admittedly harsh ballot measure: it was

succumbing to substantially increasing pension obligations that would starve its citizens of services and cause an unreasonably high expenditure of funds toward retirement benefits as a proportion of total employee compensation. The analysis for this conclusion was laid out by Figone in the Fiscal Reform Plan prior to the City Council's direction to commence *Seal Beach* bargaining. The crux of the debate with the unions was whether the impending rise in the financial markets would be sufficient to stem the rising demand for City contributions and whether the City had been too aggressive in planning for unfunded liabilities by simultaneously insisting on addressing the retiree health care portion of that liability.³¹ But that debate is one that relates to the merits of the parties' economic proposals. Again, the labor boards are bound to respect the principle of freedom of contract, which, in turn prohibits passing judgments on the substance of the proposals. (*NLRB v. American National Insurance Co.*, *supra*, 343 U.S. 395, 404; *NLRB v. Insurance Agents' International Union*, *supra*, 361 U.S. 477, 485-486.) It is sufficient that all parties at the table understood why the City insisted on moving forward with a ballot measure and the position was reasonably held. The City did modify its ballot measure in overall terms over the course of bargaining with all of its unions. Its insistence on a ballot measure as opposed to the unions' only apparent alternative – the Grand Bargain – was at worst hard bargaining. Some lack of flexibility may have resulted from the City's desire for a unitary ballot measure, but the City's rationale was not designed to avoid its duty to bargain. (See *County of Solano*, *supra*, PERB Decision No.2402-M.)

³¹ Cruz's editorial explained as persuasively as could be argued that the drastic changes in pension benefits were being proposed without a dispassionate long term view of retirement benefit obligations and the financial strength of the plans. As is typically claimed under this argument, the unfunded liability is an amortized obligation that does not become due until many years out. On the other hand, if such obligations are akin to a mortgage, they are also similar to an adjustable rate mortgage, because pension plans are subject to revised actuarial assumptions and increased volatility, as Bartel explained in the hearing.

The City's insistence on a deadline has been analyzed above, and so the reasons why such a position was reasonable will not be repeated here. The City's decision not to proceed with the declaration of fiscal emergency is not significant. Any diminishing sense of urgency does not undermine the reasonableness of the City's proposal for four to five months of bargaining over the ballot measure. Further analysis of the issue of the deadline is covered below in the discussion on the legitimacy of the City's declaration of impasse.

There is no evidence of bad faith arising from the City's alleged inflexibility.

G. Negotiators' Lack of Authority

Both AFSCME and OE-3 argue that the City team lacked sufficient authority; that its representatives were merely sent to listen to the unions and report back to either the City Council or the legal team that was drafting the ballot measure. A negotiator's lack of authority may constitute evidence of bad faith. (See *Oakland Unified School District* (1983) PERB Decision No. 326; *State of California (Department of Personnel Administration)* (2006) PERB Decision No. 1836-S.)

AFSCME relies on: (1) Donnelly's statement, cited by Pope, that she had "direction" from City Council rather than "authority" to negotiate; (2) the evidence that Donnelly was having to report back to Gurza; and (3) Doonan's impression that Donnelly "sort of stumbled [at] various meetings, [and] various things in [the City's retiree health care proposal] w[ere]n't clear."³² AFSCME also cites Donnelly's statement on November 15 that the City could not accept the Grand Bargain proposal because the parties were already at impasse. AFSCME further asserts, without record citation, that Donnelly lacked authority to draft agreements

³² In this regard, Doonan noted that Donnelly provided an August 25 letter providing answers to questions regarding the details of the City's high-deductible insurance plan proposal.

produced at the table. Additionally, OE-3 relies on the fact that the ballot measure revisions did not correspond to offers made at the coalition table.

Overall the record fails to substantiate the unions' claims in this regard. Donnelly did tell Pope on September 27 that if OE-3 proposed any alternatives to the ballot measure, she would "consider and share it with Council." OE-3 relies on statements from Rodriguez acknowledging that another City team was developing the language of the ballot measure and that she and Donnelly reported back to that team regarding input received. But as to these negotiations, the process never came into play because the unions maintain there was an agreement to table the ballot measure negotiations until there was an agreement on the broader subject of retirement reform. Ultimately, on November 15, AFSCME explained that the Grand Bargain proposal was one that should be put to the voters. Since the unions never made anything explicitly declared to be a counterproposal to the ballot measure, any question regarding Donnelly's lack of authority as to the ballot measure cannot be credited in the unions' favor.

As to non-ballot subjects, there was no evidence of lack of authority. There is nothing suggesting that the City Council possessed a preconceived outline as to these subjects from which the bargaining team could not deviate. (Cf. *Thill Inc.* (1990) 298 NLRB 669, 683.) The record establishes that Donnelly was sufficiently prepared to discuss these proposals, and her team did engage the unions in give-and-take. Donnelly accepted a tentative agreement on SRBR without consulting her principals. There was never an occasion to present a full tentative agreement on non-ballot measure subjects to the City Council.

H. Piecemeal Bargaining

AFSCME contends that the City's insistence on separate tables for retirement reform issues and the ballot measure constituted improper "piecemeal" or "fragmented" bargaining. It argues that the City's conduct arbitrarily limited the range of possible compromises by declaring certain mandatory subjects of bargaining off limits for discussion or relegating them to the other table.

PERB gave approval to the theory of piecemeal bargaining in *City of San Jose, supra*, PERB Decision No. 2341-M, following precedent of the National Labor Relations Board (NLRB), in particular *E. I. DuPont de Nemours & Co.* (1991) 304 NLRB 792, 802 (*DuPont*). In *DuPont*, the employer announced that it wanted to create a new bargaining unit classification and establish its terms and conditions. The employer refused to negotiate this proposed action despite simultaneously engaging the union in contract negotiations, because the classification matters were not "contract issues." Before the contract negotiations were concluded, the employer unilaterally implemented its new classification proposals. While the employer was willing to consider the union's input and counterproposals as to these matters, it also terminated whatever bargaining had taken place, claiming it could not await full resolution of the contract negotiations. The NLRB noted that the proposals "clearly pertained to subjects which one might reasonably expect to be encompassed in the give and take of [the] contract negotiations." (*Id.* at p. 800.) Citing the rule that an employer violates the duty to bargain when it "reduces the flexibility of collective bargaining and narrows the range of possible compromises by rigidly and unreasonably fragmenting negotiations" *DuPont* found that the employer denied the union its ability to "horse trade" on the classification subjects. (*Id.* at pp.

800, 802, citing *Trumbull Memorial Hospital* (1988) 288 NLRB 1429, 1446-1447 [rigidly and unreasonably fragmenting negotiations].)

In *City of San Jose*, the City, as noted above, identified pension reform as a matter it intended to negotiate with AFSCME after the conclusion of the ongoing 2011 contract negotiations. The City's insistence on first reaching agreement on non-retirement issues and deferring retirement negotiations constituted unreasonable delay and thus an indicium of bad faith. (PERB Decision No. 2341-M, pp. 29, 39.) PERB stated that "a party may not condition its willingness even to *discuss* a particular mandatory subject on prior agreement over other subjects." (*Id.* at p. 31.) PERB explained that piecemeal bargaining is impermissible because it allows one party to "arbitrarily limit[] the range of possible compromises by declaring certain mandatory subjects of bargaining off limits for discussion until complete agreement has been reached on all other subjects." (*Id.* at pp. 19-20, citing *San Bernardino City Unified School District, supra*, PERB Decision No. 1270, p. 80; *Visiting Nurse Services v. NLRB* (1st Cir. 1999) 177 F.3d 52, 59.)

The record fails to support AFSCME's claim. Lacking are facts demonstrating that the City absolutely refused to negotiate any issues pertaining to retirement benefits or the ballot measure. The City acknowledged that the retirement reform subjects were broader than those addressed in the ballot measure. While the City preferred to deal with both subjects at the same table as it was doing with the non-coalition unions, it acceded to the coalition's request that ballot measure issues be addressed individually by the unions, ostensibly because not all members of the coalition had closed contracts. (See *Korn Industries, Inc. v. NLRB* (4th Cir. 1967) 389 F.2d 117, 119-121.) The instant case is the virtual converse of *City of San Jose* because here AFSCME refused to discuss the ballot measure until retirement reform

negotiations had concluded. The City's proposal to bargain a wider range of subjects simultaneously created *more* flexibility for AFSCME to achieve its objectives, not less.³³

AFSCME further contends that an example of piecemeal bargaining was the City's addition of the language eliminating the SRBR to the ballot measure after it had declared impasse because it amounted to unlawful unilateral implementation. This argument is also without merit. SRBR elimination was a proposal to which the parties tentatively agreed at the coalition table. Though it was never discussed at the purported *Seal Beach* table, inclusion of the SRBR agreement was reasonably comprehended within the City's LBFO. (*County of Sonoma* (2010) PERB Decision No. 2100-M.) The original version of the measure included a provision within the section reducing the COLA to one percent, stating that "[a]ny supplemental payments shall not be funded from plan assets." This language remained in that section until the fourth revision, where it was moved to a separate section entitled "Supplemental Payments to Retirees." The subsequent version retained the quoted heading and text in same place (section 11) as this language, but clarified that provision related to the SRBR. The history of the changes suffices to establish that the City's intention to eliminate supplemental payments had always been a part of the proposed measure. Otherwise, the only difference in the final version is the language that any reserve would be returned to the fund. Even assuming it is reasonable to argue that this term was not reasonably comprehended in the LBFO, no violation can be found, because it is an unalleged violation and the City would be prejudiced by the lack of opportunity to provide evidence on the matter. (*Coachella Valley*

³³ On August 15, 2014, AFSCME withdrew a second unfair practice charge against the City (case number SF-CE-837-M) alleging bad faith bargaining by the City during 2011 contract negotiations, including the allegation of piecemeal or fragmented bargaining over retirement benefits. (See *City of San Jose, supra*, PERB Decision No. 2341-M.)

Mosquito & Vector Control District (2009) PERB Decision No. 2031-M.) No evidence as to the possible amount that had accumulated without distribution, if any, was entered in the record. Even had funds been reserved but not disbursed, they still would not have been subject to distribution to the retirees. Therefore, returning the accumulations to the unfunded liability would likely have served to reduce the contributions owed by unit members.

In a similar vein, AFSCME argues that the savings provision (imposing wage reductions to offset lost savings if a court declared any portion of the ballot measure to be illegal and unenforceable) was added in the fifth revision of the ballot measure on October 27, four days prior to the City's declaration of impasse but never taken up by the parties in negotiations. In fact, a savings provision was included in the very first version of the ballot measure (sec. 12, subs. (b) and (c)). The City made concessions from the original language which claimed to forfeit "all benefit enhancements or increases . . . granted to retirees since the date of their retirement," as well as an immediate 50 percent sharing of the amortized unfunded liability for non-VEP employees in the event of an adverse court determination. By the fifth revision, the benefit enhancement forfeiture clause had been removed and the 50 percent share of the unfunded liability had been limited to illegality of the VEP and suspension of COLAs. The pay reductions, cited by AFSCME, had been limited to non-VEP employees, with implementation in five percent annual increments rather than an immediate 50 percent sharing of the unfunded liability. Thus, this provision was also reasonably comprehended within the LBFO. Despite its very late inclusion, this language has not been shown to be regressive. (See *Ventura County Community College District* (1998) PERB Decision No. 1264.) Therefore it does not establish evidence of bad faith.

I. Premature Declaration of Impasse

A premature declaration of impasse constitutes a per se violation because it amounts to unilateral action. (*County of Riverside, supra*, PERB Decision No. 2360-M.)³⁴ In evaluating claims that a party has prematurely declared impasse, PERB analyzes the totality of the bargaining conduct leading up to the impasse declaration. (*Kings In-Home Supportive Services Public Authority* (2009) PERB Decision No. 2009-M.) As noted above, a bona fide impasse declared by the employer assumes it has bargained in good faith. (*County of Riverside, supra*; *Temple City Unified School District* (1990) PERB Decision No. 841, pp. 11-12.)

Absent evidence of bad faith bargaining, the question is simply whether the parties have reached a legitimate impasse. Impasse is the point reached after mutual consideration of proposals and attempts to bridge differences, when further discussions can be deemed futile. (*County of Riverside, supra*, PERB Decision No. 2360-M, p. 12.) Discussion of proposals and review of outstanding differences over five final bargaining sessions, with only minor movement to bridge substantial differences on economic issues and important non-economic issues, has led to a finding of bona fide impasse. (*Regents of the University of California* (1985) PERB Decision No. 520-H.) Continued movement on minor issues will not prevent a finding of impasse if the parties remain deadlocked on one or more major issues. (*California State University* (19981) PERB Decision No. 799-H; *Taft Broadcasting Corp.* (1967) 163 NLRB 475, 478.) On the other hand, where the parties continue to make economic concessions and display movement, an abrupt declaration of impasse that denies one party an opportunity to respond to the other's final offer has been found to be premature. (*Kings In-Home Supportive Services Public Authority, supra*, PERB Decision No. 2009-M; *County of*

³⁴ AFSCME asserts this as a per se violation; OE-3 does not.

Riverside, supra, PERB Decision No. 2360-M.) In addition, an employer's hurried attempt to present an LBFO with little discussion when the parties differed on only one economic subject, in turn prompting a counterproposal and request for additional sessions that produced no further face-to-face meetings, was evidence leading to a finding of a premature declaration of impasse. (*City of Selma* (2014) PERB Decision No. 2380-M.) The lack of bona fide impasse in *City of Selma* was found despite the union's slowness in presenting an economic proposal in the context of concessionary bargaining. Lack of bona fide impasse resulted in part from evidence of the employer's intent to meet an externally imposed deadline for negotiations that coincided with the city's budget calendar and a unilateral imposition as to another union concurrently in bargaining. (*Id.* at pp. 21-22; administrative law judge's proposed decision at p. 12.)

AFSCME asserts that this case is controlled by *City of Selma, supra*, PERB Decision No. 2380-M. OE-3 relies on the City's insistence on the October 31 deadline, its failure to offer a counterproposal to the Grand Bargain proposal, and its amendments of the ballot measure in December that broke the impasse.

The City contends that the unions waived their right to bargain over the ballot measure by their lack of response to the ballot measure proposal, while emphasizing that a party is not required to engage in fruitless negotiations where there are irreconcilable differences in bargaining positions. (See *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M [failing to request bargaining for four months]; *NLRB. v. American National Insurance Co., supra*, 343 U.S. 395, 404.) The City also relies on *Compton Community College District, supra*, PERB Decision No. 720 (*Compton*) for the proposition that an employer is privileged to declare impasse when "confronted with the practical and legal

requirement of a statutory deadline for submission of a ballot initiative.” (See Elec. Code, sec. 9255, subd. (b) [governing body certification required 88 days prior to election].) *Compton* developed a test for an implementation occurring prior to completion of negotiations or impasse that contains the following elements: (1) the implementation date is not an arbitrary one, but is based upon either an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer’s right to make the non-negotiable decision; (2) notice of the decision and implementation date is given sufficiently in advance to allow for meaningful negotiations prior to implementation; and (3) the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation. (*Id.* at pp. 14-15.) The City couples the necessity of compliance with the Election Code with the notion that each election reflects a unique moment in time that cannot be recreated in terms of voter sentiment. (See *Southwest Voter Registration Education Project v. Shelley* (C.D. Cal. 2003) 278 F.Supp.2d 1131, 1145.)

In response, AFSCME relies on *City of Palo Alto* (2014) PERB Decision No. 2388-M. There PERB rejected the employer’s claim that its decision to proceed with a ballot measure was justified based on the *Compton* case. *City of Palo Alto* rejected the *Compton* defense because: (1) *Compton* dealt with implementation of a decision for which only the effects were negotiable; and (2) the city failed to establish its decision to proceed with a ballot measure was compelled by exigent circumstances.

Because evidence is lacking to conclude that the City engaged in surface bargaining, it is necessary to address the issue whether the City legitimately claimed impasse. Here, the unions repeatedly declined to bargain over the City’s ballot measure until completion of bargaining over

the subject of "retirement reform," when there would be an end product the unions could support as a ballot measure. Though Allen contended on the basis of overlap in subjects that the substance of the measure was negotiated at the coalition table, the unions never presented a proposal in direct response to the ballot measure, either as an alternative, or in terms of removal of objectionable language. This was consistent with the view articulated by AFSCME team members throughout the process. The coalition's first set of ground rules proposed a two-month study session before commencing bargaining was one of several indications of the unions' understandable resistance to engaging over the substance of the ballot measure. The coalition asserted at the outset that it would never bargain over provisions it deemed illegal. Then as the coalition bargaining developed, Cruz claimed that even the City's Tier 2 proposal would infuriate the membership, presumably because of the recent contract negotiations and past economic concessions. Nevertheless, Gurza, seeking to emphasize the inadequacy of counterproposals at the coalition table in terms of substance, wrote the unions urging a proposal that addressed the financial burden of the unfunded liability.

Eventually the coalition merged its individual retirement reform proposals into the Grand Bargain proposal. The proposal offered no change to the employees' share of the ARC. Whether explicitly stated or not, this proposal was consistent with its view that what was objectionable about the ballot measure was the compulsory forfeiture of vested rights. In the unions' view the only way to avoid such a result was to have a truly voluntary opt-in plan that operated on the basis of incentives sufficient to generate meaningful participation. The unions presented an outline of the aggregate savings premised on an unreasonable projection that there would be 100 percent opt-in and the City's agreement to additional financial commitments to create meaningful incentives for participation. This would understandably have been a non-

starter for the City. (*Fremont Unified School District* (1980) PERB Decision No. 136, p. 16 [economic proposals contingent on passage of tax measure evidence of bad faith].)

Despite the fact that Donnelly had declared impasse in her October 31 letters to the unions, the Grand Bargain proposal did not alter the basis for the City's conclusion that additional negotiations over the ballot measure would be futile. Given the unions' ideological opposition to involuntary cost sharing of the unfunded liability, its categorical opposition to negotiating over any unconstitutional ballot measure provisions, and its proposal for increased revenues contingent upon a future election, this conclusion was not unreasonable despite the unions' presentation of only its first comprehensive proposal. Doonan conceded that the Grand Bargain proposal was principally intended to deal with only with the retiree healthcare unfunded liability. (*Sage Development Co.* (1991) 301 NLRB 1173 [legitimate impasse due to lack of substantial progress on major disputes, notwithstanding employer's deadline announced at the outset of bargaining]; *Sonat Marine, Inc.* (1986) 281 NLRB 87 [lawful hard bargaining where union made only one wage offer and philosophical differences were substantial]; cf. *City of Selma, supra*, PERB Decision No. 2380-M [premature declaration where parties differed on only one economic subject].)

Following the City's rejection of the Grand Bargain proposal, and despite two additional revisions of the ballot measure that included further sweeteners, which the unions credit as narrowing the gap, the unions failed to request further negotiations for the purpose of presenting a new proposal with additional concessions toward the City's overall financial goal of returning its retiree obligations to 2010 levels.

In addition, the impasse declaration was justified by the unions' dilatory tactics in approaching the ballot measure negotiations. The City requested a mutual deadline (or even just

a goal) for completion of ballot measure negotiations at least four months in advance, and, notwithstanding the unions' refusal to engage, offered additional sessions to negotiate over the proposal and made movement against itself. (See *AAA Motor Lines* (1974) 215 NLRB 793, 793-794; *M & M Contractors* (1982) 262 NLRB 1472; *RBE Electronics of S. D.* (1995) 320 NLRB 80, 81 [economic exigency and delaying tactics are exceptions to the unilateral change bar]; Higgins, *The Developing Labor Law* (5th ed. 2006) chap. 13, p. 906.) The unions have provided no explanation why their insistence upon resolution of retirement reform issues before addressing the ballot measure was legally justified. To the contrary, its conduct is akin to conditional bargaining on ground rules. (*Ross School District Board of Trustees* (1978) PERB Decision No. 48, p. 9; *City of San Jose, supra*, PERB Decision No. 2341-M, pp. 19-20, 29, 31, 39 [refusal to discuss as a form of delay].) In contradistinction, the statute obligates the employer to meet "promptly" upon request. (See *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118 [duty to meet promptly is absolute]; sec. 3505.)³⁵

Although the unions cite the fact that the City withdrew its recommendation for declaration of a fiscal emergency in the fall of 2011 and later moved its election from March (the original date upon which the October deadline was premised) to June 2012, that fact alone is insufficient to change the outcome in terms of the impasse determination. (See *Matanuska*

³⁵ The City also argues that the unions, by demanding separation of the issues and deferral of the ballot measure negotiations, and by failing to discuss any of the City's ballot measure proposals, "effectively waived [their] right to bargain over [the charter amendment] proposals." It rejects as disingenuous testimony from Allen that the parties over time were "essentially dealing with all issues at one table." Whether the private sector authority cited here involves a species of waiver by inaction, as argued by the City, need not be reached. The consequences of delay are subsumed under the question of the bona fides of the City's declaration of impasse.

Electric Assn. (2002) 337 NLRB 680; cf. *County of Santa Clara* (2010) PERB Decision No. 2120-M, pp. 14-15 [no evidence of union delay tactics].)³⁶

City of Selma, supra, PERB Decision No. 2380-M does not control because the unions' conduct here in delaying ballot measure negotiations distinguishes this case. The coincidence in time of the proposed October 31 deadline and the declaration of impasse is inconsequential due to the unions' unwillingness to bargain over ballot measure proposals they deemed illegal and to the futility of further bargaining.

This does not complete the analysis however. It is important to distinguish between the parties' two sets of negotiations -- one purporting to address the ballot measure and the other to address the retirement reform issues for which charter amendments were not required. The complaints allege that the bad faith bargaining occurred as to "retirement reform and a related ballot measure." Though there is no evidence that the City unilaterally implemented any of its proposals as to subjects not contained in the ballot measure, an employer's premature declaration of impasse constitutes a violation even without implementation. (*County of Riverside, supra*, PERB Decision No. 2360-M, p. 12.)

Unlike the ballot measure proposal, as to which the City was justified in waiting for a plausible counterproposal without making further movement, the non-ballot measure proposals introduced by the City on July 29 established definable differences as to which continued negotiations held the promise of further compromise and resolution. The City never claimed the October 31 deadline applied to non-ballot measure items, and it took the unions at their

³⁶ The parties' dispute about whether *Seal Beach* negotiations include an accommodation of a constitutional prerogative to adhere to a bargaining deadline based on political considerations (i.e., current voter sentiment, ability of the city council to obtain or retain a majority, etc.) is not reached. *City of Palo Alto, supra*, PERB Decision No. 2388, rejecting such an accommodation, is not final because an appeal is pending.

word in terms of keeping the two matters at separate tables. Consistent with that premise, the City's October 31 letters to the unions declared waiver and/or impasse only as to the ballot measure. After impasse declaration as to the ballot measure, the City agreed to further negotiations over non-ballot subjects at the November 2 and November 15 coalition meetings.

By October 31, there had been little substantive bargaining over the City's non-ballot measure proposals. Some were introduced at the July 29 meeting; others at the September 28 meeting. The City passed new proposals at the October 26 meeting on multiple subjects. At the November 2 meeting Donnelly sought no immediate response to the City's October 26 proposals, after stating she believed the parties may have been close to agreement on Tier 2 benefits. The parties' last session on November 15 was preoccupied with the coalition's Grand Bargain proposal. Again, the City sought no resolution of its non-ballot proposals. There is no evidence the City ever presented an LBFO as to these subjects.

At the November 15 meeting, Donnelly reminded the unions that negotiations on the ballot measure had already concluded. Two days later, on November 17, Donnelly wrote to the coalition declaring impasse over issues of retirement reform. Though Donnelly recited lack of movement in the Grand Bargain proposal on the non-ballot issues, she emphasized that the unions' proposals failed to achieve the savings that would avoid devastating cuts to public services. This conflated the two sets of negotiations. The ballot measure was always contemplated by the City as achieving the lion's share of cost savings. (See *Compton, supra*, PERB Decision No. 720 [requirement that employer be willing to continue negotiating matters not resolved by the unilateral implementation].) Negotiations on non-ballot measures had been superficial, and the parties distracted by discussions on ground rules and questions about the ballot measure.

Similarly, when Gurza explained the City's basis for impasse, he conflated the two sets of negotiations. Although Gurza objected to elements of Grand Bargain proposal due to lack of further movement, he, too, objected to the unions' claiming savings based simply on more favorable actuarial data and the sales tax measure which merely shifted costs to the residents – in a word, the lack of sacrifice as to the unfunded liability. Whether or not he was clear in his own mind as to which bargaining these claims of futility were made, such claims only truly applied to the ballot measure at this stage of the process. (Compare *Taft Broadcasting Corp.*, *supra*, 163 NLRB 475, 478 [existence of some unresolved issues does not negate existence of impasse].)

Gurza gave no testimony explaining Donnelly's declaration of impasse on the issues of retiree healthcare for new employees, Medicare enrollment, and healthcare plan design/cost sharing. The coalition had accepted the City's proposal to require Medicare eligibles to contribute the cost difference as a result of non-enrollment without acknowledgement by Donnelly. As to another non-ballot measure issue raised by the City – raising the number of hours for a year of service credit – little discussion or exchange occurred. At the September 7 and 28 sessions, and the November 2 session, Donnelly began the meeting asking what the unions wanted to discuss. But at no point did the City seek resolution of the proposals it had introduced. The City's apparent lack of interest in pursuing its own proposals is not an excuse for failing to seek closure. If it was no longer interested in pursuing them, it should have withdrawn them, because its declaration of impasse as to those matters placed it in position to unilaterally impose. (*County of Riverside, supra*, PERB Decision No. 2360-M, p. 12.)

The City's attempt to declare impasse on non-ballot measure subjects constituted an abrupt termination of negotiations without an opportunity for the unions to meet and determine

the futility of further negotiations on the non-ballot measure subjects. Such premature declaration of impasse is a per se violation. (*County of Riverside, supra*, PERB Decision No. 2360-M.)

J. Failure To Resume Negotiations Following Impasse

AFSCME contends that the City continued to produce revisions to the ballot measure after its October 31 version, yet offered only mediation to the union. In addition, the City's declaration of impasse was impeached as a result of the continuing revisions as well as Cheiron's December 1 report with its more favorable view of the unfunded liabilities. This and other post-impasse conduct³⁷ is claimed to demonstrate bad faith.

The City argues that only non-substantive changes were made to the ballot measure, or if they had any substance, they were reasonably comprehended within the previous ballot measure language.

Though it argues in essence that the City had a duty to resume negotiations because the impasse was broken by the new ballot measure drafts, AFSCME fails to explain why the impasse was broken. (See *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2102-S [the employer's duty to resume negotiations arises only if the union's proposal contained a concession from its earlier position which demonstrates changed circumstances].) Changed circumstances are only established when there is an objective basis to conclude that agreement may be possible. That predicate is not established here.

³⁷ Such conduct included submission of a ballot title and a question later found biased by a court (see *McDonough v. Superior Court* (2012) 204 Cal.App.4th 1169), and filing of the lawsuit seeking declaratory relief on the constitutionality of the measure which named AFSCME as a defendant.

Taking a different approach, OE-3 contends that the City committed a per se violation when, on March 6, 2012, the City Council adopted Resolution No. 76158, substituting new ballot language for that adopted in Resolution No. 76087. The new ballot language prohibited arbitrators from increasing pension and/or retiree health care benefits, capped the pension benefit accrual rate at two percent, and placed modifying caps for automatic pay reductions in the savings provisions. This unalleged allegation will not be reached as it is outside the scope of the complaint (the bargaining conduct was alleged to have occurred between June 8, and November 22, 2011), and described nowhere in the charge. On the merits, the claim fails due to a lack of analysis as to how these changes constituted changed circumstances.

Measure B's Imposition of Permanent Retirement Benefit Terms and Wage Reductions

OE-3 relies on the preemption principle to raise a novel per se claim regarding the decision to proceed with the ballot measure. OE-3 maintains that Measure B permanently removed the most important aspects of retirement benefits from future contract bargaining and imposed automatic (i.e., non-bargained) wage cuts if any cost savings provisions were judicially nullified. It notes that the City included matters in the measure that did not even require an amendment to the charter (e.g., SRBR, Tier 2 benefits, etc.) OE-3 asserts that this result constitutes establishment of an unreasonable local regulation. (PERB Regulation 32603, subd. (f); *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 202.)

Some support for OE-3's argument is found in *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492 (*City of Huntington Beach*), which found a per se violation of section 3505 as a result of adoption of a charter city resolution that excluded work schedules from the meet-and-confer process. Measure B had a similar effect as

a result of engraving in stone reductions in the level of pension and retiree health care benefits, matters clearly within the scope of representation. (*County of Sacramento* (2008) PERB Decision No. 1943-M; *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865 [“inflexible standards” or “immutable provisions” of state law bar negotiability]; see also *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 97.)

Ballot measures on negotiable subjects do create tension with the MMBA’s principle of bilateralism. In connection with unlawful bypassing, PERB has explained that the duty to bargain includes the “concomitant obligation to meet and negotiate *with no others*, including the employees themselves [and] . . . actions of a public school employer which are in *derogation of the authority* of the exclusive representative are evidence of a refusal to negotiate in good faith.” (*Muroc Unified School District* (1978) PERB Decision No. 80, p. 19, emphasis added; *California State University* (1989) PERB Decision No. 777-H, citing *Medo Photo Supply Corp. v. NLRB* (1944) 321 U.S. 678, 684-687.) Bypassing occurs when the offending party’s intent is to achieve bargaining objectives while circumventing the negotiations process. (*California State University* (1987) PERB Decision No. 621-H.)

Seal Beach bargaining reveals the anomaly in MMBA jurisdictions presented by the existence of two legislative bodies – the governing body and the electorate – each having the power to legislate terms and conditions of employment but only one, the governing body, having a statutory obligation to meet and confer. *Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765 (*Trinity County*) described this situation as the “problematic nature of the relationship between the MMBA and the [initiative-] referendum power.” (*Id.* at p. 782.) *Trinity County* held that the employer justifiably ignored a

citizens' claim to a right of referendum by giving preemptive effect to the MMBA's language in section 3505.1 which provides that the governing body has the authority to adopt a negotiated agreement on behalf of the employer. The court explained:

[T]he effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU under section 3505.1 – i.e., the governing body – is the same entity that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges. If the referendum were interjected into this process, then the power to negotiate an agreement and the ultimate power to approve an agreement would be wholly divorced from each other, with the result that the bargaining process established by the MMBA could be undermined. This kind of bifurcation of authority between negotiators and decisionmakers would not be considered lawful were it to occur in the realm of private sector labor relations.

(*Trinity County, supra*, 8 Cal.4th at pp. 782-783; *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25; but see *United Public Employees v. City and County of San Francisco* (1987) 190 Cal.App.3d 419, 422-426.) In *Trinity County*, the referendum proposed would have sanctioned a “kind of bad faith bargaining process in which those who possess the ultimate reservation of rights to approve the collective bargaining agreement – i.e., the electorate – are completely absent from the negotiating table.” (*Id.* at p. 783.) This potentially problematic nature of voter determination of terms and conditions of employment is intensified by the country's current pension underfunding issue where taxpayer ownership interests and economic envy are powerful political drivers against which unions may have little countervailing influence, except through the type of constitutional litigation undertaken here.

(Summers, *Public Employee Bargaining: A Political Perspective* (1974) 83 Yale L.J. 1156, 1159.)³⁸

Seal Beach did not specifically address the issue framed here. But, the question of preemption as to substantive rulemaking was considered. As the City has argued, the court viewed the meet and confer requirement as a minimal infringement on a city's constitutional right to propose charter amendments. OE-3 has cited no authority which treats the MMBA as having preemptive effect over a city council's right to propose legislation to alter negotiable subjects through the initiative process, and makes no argument similar to that in *Trinity County* based on statutory text. *City of Huntington Beach* is distinguishable because the legislation would grant the employer permanent unfettered discretion to alter a negotiable subject as it deemed necessary, whereas *Seal Beach* amendments concretely define negotiable subjects. Finding that Measure B is preempted by the MMBA because it permanently alters terms and conditions of employment would be contrary to the result in *Seal Beach*.

In sum, the record fails to substantiate the unions' claims of surface bargaining and related per se violations, while supporting the City's legitimate declaration of impasse as to the ballot measure. As to the ballot measure negotiations there was no breach of the duty to meet and confer. However, since the declaration of impasse as to the non-ballot measure subjects

³⁸ Summers argues that the critical difference between the private and public sectors is not the nature of the industry or the work performed, but the character of the employer. Economic decisions in the labor arena are in fact political decisions around budget. More so than the elected officials who supervise the negotiations, the voters to whom those officials are responsible constitute the real party opposing the interests of labor. Voters are purchasers and users of public services, and because they want to maximize services and minimize costs, their economic interests are inherently in conflict with public employees. Indeed, the City Council here framed the debate as a choice between employee benefits and the level of City services.

was premature despite the absence of implementation, the City violated section 3505 and the related derivative provisions.

REMEDY

Pursuant to section 3509, subdivision (a), the PERB under section 3541.3, subdivision (i) is empowered to:

... take any action and make any determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

The City has been found to have violated section 3505 by prematurely declaring impasse as to the non-ballot retirement reform issues. It is appropriate to order that the City cease and desist from failing to meet and confer in good faith and resume negotiations upon request. (*City of Selma, supra*, PERB Decision No. 2380-M, p. 27.) No make whole remedy is required due to the lack of evidence that the City implemented any non-ballot measure retirement reform proposals offered to the unions. .

As a result of the above-described violation, the City has also interfered with the right of employees to participate in an employee organization of their own choosing, in violation of section 3506 and PERB Regulation 32603, subdivision (a), and has denied the charging parties their right to represent employees in their employment relations with a public agency, in violation of section 3503 and PERB Regulation 32603 subdivision (b). The appropriate remedy is to cease and desist from such unlawful conduct. (*Rio Hondo Community College District* (1983) PERB Decision No. 292.)

Finally, it is the ordinary remedy in PERB cases that the party found to have committed an unfair practice is ordered to post a notice incorporating the terms of the order. Such an order is granted to provide employees with a notice, signed by an authorized agent that the

offending party has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. Thus, it is appropriate to order the City to post a notice incorporating the terms of the order herein at its buildings, offices, and other facilities where notices to bargaining unit employees are customarily posted. Posting of such notice effectuates the purposes of the MMBA that employees are informed of the resolution of this matter and the City's readiness to comply with the ordered remedy.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the City of San Jose (City) violated the Meyers-Milias-Brown Act (Act). The City prematurely declared impasse in negotiations over retirement benefits not contained in the related ballot measure, in violation of Government Code section 3505 and Public Employment Relations Board (PERB or Board) Regulation 32603, subdivision (c) (Cal. Code of Regs., tit. 8, sec. 31001 et seq.). By this conduct, the City also interfered with the right of employees to participate in the activities of an employee organization of their own choosing, in violation of Government Code section 3506 and PERB Regulation 32603, subdivision (a), and denied Operating Engineers Local 3, International Union of Operating Engineers, and American Federation of State, County and Municipal Employees, Local 2620 their right to represent employees in their employment relations with a public agency, in violation of Government Code section 3503 and PERB Regulation 32603 subdivision (b). All other allegations of the charges and complaints are hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith by prematurely declaring impasse on the subject of retirement benefits not contained in the related ballot measure.
2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.
3. Denying Charging Parties their right to represent employees in their employment relations with the City.

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

1. Meet and confer upon request by the Charging Parties as to the subject of retirement benefits not contained in the related ballot measure.
2. Within 10 workdays of the service of a final decision in this matter, post at all work locations in the City, where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the City, indicating that the City 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.
3. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of PERB, or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on the Charging Parties.

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 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, subdivision (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 consolidated hearing in Unfair Practice Case No. SF-CE-900-M, *Operating Engineers Local Union No. 3, International Union of Operating Engineers v. City of San Jose*, and Unfair Practice Case No. SF-CE-924-M, *American Federation of State, County and Municipal Employees, Local 2620 v. City of San Jose*, in which the parties had the right to participate, it has been found that the City of San Jose (City) violated the Meyers-Milias-Brown Act (Act), Government Code section 3505 and PERB Regulation 32603, subdivision (c) (Cal. Code of Regs., tit. 8, sec. 31001, et seq.) by prematurely declaring impasse on the subject of retirement benefits not contained in the related ballot measure. This conduct also violated Government Code section 3506 and PERB Regulation 32603, subdivision (a), by interfering with the right of bargaining unit members to participate in an employee organization of their own choosing, and Government Code section 3503 and PERB Regulation 32603, subdivision (b), by denying the Charging Parties their right to represent employees in their employment relations with the City.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith by prematurely declaring impasse on the subject of retirement benefits not contained in the related ballot measure.
2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.
3. Denying Charging Parties their right to represent employees in their employment relations with the City.

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

1. Meet and confer upon request by the Charging Parties as to the subject of retirement benefits not contained in the related ballot measure.

Dated: _____

CITY OF SAN JOSE

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



OPERATING ENGINEERS LOCAL 3,
INTERNATIONAL UNION OF OPERATING
ENGINEERS,

Charging Party,

v.

CITY OF SAN JOSE,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-900-M

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 101,

Charging Party,

v.

CITY OF SAN JOSE,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-924-M

NOTICE OF ERRATA TO
PROPOSED DECISION
(May 13, 2015)

Five corrections have been made to the above-captioned Proposed Decision.

All five corrections concern typographical errors where the reference to the American Federation of State, County and Municipal Employees (AFSCME), Local 2620, have been deleted and have been replaced by a reference to AFSMCE Local 101.

The first two corrections are on page 1 in the Caption and the Appearances sections, respectively. The references to AFSCME Local 2620 have been deleted and have been replaced by references to AFSMCE Local 101.

The third correction is on page 2, in the second paragraph under the Procedural History heading. The reference to AFSCME Local 2620 has been deleted and has been replaced by a reference to AFSMCE Local 101.

The fourth correction is on page 96, in the first paragraph under the Proposed Order heading. The reference to AFSCME Local 2620 has been deleted and has been replaced by a reference to AFSMCE Local 101.

The fifth correction is on the attached Appendix, Notice to Employees, in the first paragraph. The reference to AFSCME Local 2620 has been deleted and has been replaced by a reference to AFSMCE Local 101.

Please replace the attached pages 1-2, 96-97, and the Appendix in your copy of the Proposed Decision with the attached corrected pages.

Dated: May 13, 2015


Shawn P. Cloughesy
Chief Administrative Law Judge

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On May 13, 2015, I served the Proposed Notice of Errata to Proposed Decision regarding Case Nos. SA-CE-900-M and SF-CE-924-M on the parties listed below by

placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

personal delivery.

facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

electronic service (e-mail).

Jolsna M. John, House Counsel
Robert E. Jesinger, House Counsel
Operating Engineers Local Union No. 3
1620 South Loop Road
Alameda, CA 94502

Charles Sakai, Attorney
Stephen P. Shaw, Attorney
Renne, Sloan, Holtzman & Sakai LLP
350 Sansome Street, Suite 300
San Francisco, CA 94104

Teague Patterson, Attorney
Vishtasp M. Soroushian, Attorney
Beeson, Tayer & Bodine
483 9th Street
Ross house, 2nd Floor
Oakland, CA 94607

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 13, 2015, at Sacramento, California.

B. Buddingh'

(Type or print name)

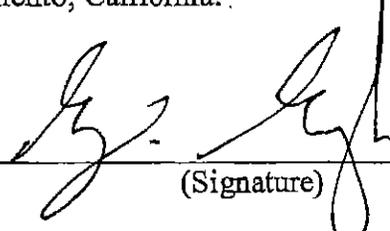

(Signature)

EXHIBIT I



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Jennifer Schembri
Jennifer A. Maguire

SUBJECT: SEE BELOW

DATE: July 24, 2015

Approved

Date

7/24/15

SUBJECT: APPROVAL OF THE TERMS OF THE ALTERNATIVE PENSION REFORM SETTLEMENT FRAMEWORK AGREEMENT CONCERNING THE LITIGATION ARISING OUT OF MEASURE B WITH THE SAN JOSE POLICE OFFICERS' ASSOCIATION (SJPOA) AND THE SAN JOSE FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 230 (IAFF, LOCAL 230) AND RELATED APPROPRIATION ACTIONS

RECOMMENDATION

It is recommended that the City Council approve the following actions:

- a) Approval of the terms of the Alternative Pension Reform Settlement Framework agreement between the City and the San Jose Police Officers' Association (SJPOA) and San Jose Fire Fighters, International Association of Fire Fighters, Local 230 (IAFF, Local 230).
- b) Authorize the City Manager to negotiate and execute a Tripartite Retirement Memorandum of Agreement between the City, the SJPOA, and IAFF, Local 230.
- c) Adopt the following 2015-2016 Appropriation Ordinance amendments in the General Fund:
 - i. Establish a City-Wide Measure B Settlement appropriation to the City Manager's Office in the amount of \$1,500,000; and
 - ii. Decrease the Fiscal Reform Plan Implementation Reserve in the amount of \$1,500,000.

OUTCOME

Approval of the terms of the Alternative Pension Reform Settlement Framework agreement, and authorize the City Manager to negotiate and execute the Tripartite Retirement Memorandum of Agreement between the City, the SJPOA and IAFF, Local 230.

July 24, 2015

Subject: Approval of Terms of an Agreement with the SJPOA and IAFF, Local 230

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BACKGROUND

The City of San Jose is currently in litigation with the San Jose Police Officers' Association (SJPOA), the San Jose Fire Fighters, International Association of Fire Fighters, Local 230 (IAFF, Local 230), and other employee and retiree groups over the pension reform ballot measure known as Measure B. Measure B was approved by the voters on June 5, 2012, and has subsequently been the subject of various forms of litigation. In an effort to settle these cases for budget stability and to provide certainty to the City's workforce, the City Council directed the City Administration to make any and all reasonable efforts to reach and implement a settlement this year.

In April 2015, settlement discussions with the SJPOA and IAFF, Local 230 commenced and, on or about July 15, 2015, the City, the SJPOA and IAFF, Local 230 reached an agreed upon settlement on an Alternative Pension Reform Settlement Framework (Framework). The attached Framework presents a path toward the settlement of litigation over Measure B. The settlement framework is subject to a final overall global settlement with all parties related to Measure B litigation. It is also contingent on the City and the SJPOA reaching agreement on a successor Memorandum of Agreement (MOA). Those discussions are currently ongoing.

The City Council has not yet made a decision regarding the path by which to implement the framework, such as through a 2016 ballot measure to modify Measure B or through the quo warranto process to remove the language attributable to Measure B from the City Charter. The City Council will consider that issue at a subsequent meeting.

In summary, the Alternative Pension Reform Settlement Framework will:

- Settle significant litigation with SJPOA and IAFF, Local 230 with the Framework's alternative strategy to pension reform. This agreement should avoid further litigation costs with these groups.
- Over the next 30+ years, provide savings of approximately \$1.7 billion from the revised Tier 2 compared to Tier 1 (\$1.15 billion), the revised retiree healthcare program compared to the current retiree healthcare program (\$244.2 million), and from the elimination of the SRBR (\$270 million).
- Modify Tier 2 pension benefits for sworn employees to levels similar to other Bay Area agencies to attract and retain sworn employees, providing a competitive Tier 2 pension benefit at a reduced cost. The new Tier 2 benefit has several differences from the California Public Employees' Retirement System (CalPERS) second tier benefit (the Public Employees' Pension Reform Act, or PEPPRA) that reduce costs. For example, the accrual rate is back loaded so that the more years of service an employee has, the higher accrual rate they receive, which is a significant difference from the Tier 2 benefit in other agencies and reduces the cost of the Tier 2 benefit significantly. This also incentivizes longevity. This Tier 2 benefit also has a maximum benefit of 80%, while other agencies have no maximum benefit.

July 24, 2015

Subject: Approval of Terms of an Agreement with the SJPOA and IAFF, Local 230

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- Allow Tier 1 employees who left the City and either subsequently have returned or return in the future to return into the Tier 1 benefit, incentivizing employees who have left to return to City service.
- Preserve 50/50 risk sharing with employees through the cost sharing of a 50/50 split in normal costs and any future unfunded liability associated with the Tier 2 benefit. In other agencies, the cost sharing is just 50/50 of normal cost.
- Close the retiree healthcare defined benefit plan to new and Tier 2 employees, and allow an opt-out for Tier 1 employees, into a defined contribution Voluntary Employee Beneficiary Association (VEBA) subject to legal and IRS approval. The VEBA has no employer contribution and is completely funded by the employee. Because the VEBA has a lower contribution than the existing defined benefit plan, it reduces retiree healthcare costs for sworn employees and increases their take home pay, while reducing the City's liability for retiree healthcare.
- Implement a new lowest cost healthcare plan in order to reduce retiree healthcare costs.
- Allow retirees with alternate coverage to receive 25% credit towards future premiums instead of being covered by the City in order to reduce costs (similar to "in lieu" programs commonly used for active employees).
- Reinstate the Police and Fire Retirement Plan's previous definition of disability which is comparable to other agencies.
- Create an Independent Medical Panel appointed by the Retirement Board which will determine disability eligibility instead of the Retirement Board. The agreement creates a process and minimum qualifications for the Independent Medical Panel.
- Create a workers' compensation offset to disability retirements received by Tier 2 employees represented by the SJPOA and IAFF, Local 230.
- Create a committee for the City and the SJPOA and IAFF, Local 230 to continue discussions on wellness and workers' compensation to streamline the process and reduce costs.
- Continue the elimination of the Supplemental Retiree Benefit Reserve (SRBR) from the Police and Fire Retirement Plan, solidifying \$9 million in General Fund savings.
- Allow for continued discussions regarding the following provisions of Measure B not addressed in this agreement:
 - Actuarial soundness
 - Voters' ability to vote on any benefit increases

The below chart depicts the realized savings from Measure B and retirement reform as shown to the Council during the January 20, 2015, Study Session regarding General Fund Structural Budget Deficit History and Service Restoration Priorities and Strategies:

Retirement Reform Estimate	GF Savings
Implemented	
SRBR Elimination	\$13 M
Retiree Healthcare Changes (lowest cost plan)	\$7 M
New Tier 2 Retirement Plans	\$5 M
<i>Subtotal Implemented</i>	<i>\$25 M</i>

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The Settlement Framework preserves these savings, including \$9 million from the continued SRBR elimination for the Police and Fire Retirement Plan (the remaining \$4 million is attributable to the Federated Retirement System). Additionally, the new lowest cost plan saves additional retiree medical funds (including an estimated \$4.6 million in the first year) while the prior savings continue. The exception is the increased cost for the revised Tier 2 benefit. In the first year of the revised Tier 2 Police and Fire pension benefit, the cost will increase from the current Tier 2 by \$400,000.

The Alternative Pension Reform Settlement Framework was ratified by IAFF, Local 230 on July 21, 2015, and is pending ratification by the SJPOA, which will notify the City of the ratification results as soon as ratification is completed.

ANALYSIS

A complete copy of the Alternative Pension Reform Settlement Framework is attached (Attachment A). The following is a summary of the key provisions of the Framework applicable to employees represented by the SJPOA and IAFF, Local 230.

Tripartite Retirement Memorandum of Agreement

A Tripartite agreement between the City, the SJPOA and IAFF, Local 230, will be finalized to memorialize all agreements related to retirement.

The term of the Tripartite MOA shall be July 1, 2015 – June 30, 2025.

Revised Tier 2

In order to address recruitment and retention issues, this agreement modestly increases the Tier 2 benefits; however, the City's portion of the Normal Cost will go from 11.2% to an estimated 14.7%, which is still drastically lower than the City's portion of the Normal Cost for Tier 1, which is 31.6%.

Employees hired on or after the effective date of the ordinance implementing these changes will be subject to the following pension benefits. Any current Tier 2 members will be retroactively placed in the revised Tier 2.

Pension Formula Accrual Rate

Years: 1-20	2.4%
21-25	3.0%
<u>26+</u>	<u>3.4%</u>

Maximum Benefit

The above accrual rate is subject to a maximum of 80% of final compensation.

Final Compensation

Average annual earned pay of the highest three consecutive years of service. Final Compensation will include base pay, holiday in lieu pay, anti-terrorism training pay, POST pay, and base FLSA pay.

Revised Tier 2 **Minimum Service**
(cont'd)

Tier 2 employees shall be eligible for a service retirement after earning five (5) years of retirement service credit and meeting the age requirement.

Normal Age of Retirement

Employees shall be eligible to retire at age 57 with at least five (5) years of retirement service credit.

Tier 2 employees have the ability to retire at age 50 with a 7% reduction per year below age 57, prorated to the closest month.

Retiree Cost of Living Adjustment (COLA)

Plan members shall receive a cost of living adjustment limited to the increase in the consumer price index, or CPI (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 2.0% per fiscal year. The first COLA will be prorated based on the number of months retired.

No Retroactive Pension Increases or Decreases

Any changes in pension benefits will be on a prospective basis only.

Current Tier 2 Employees

The Police and Fire employees currently in Tier 2 will be retroactively moved to this revised Tier 2 benefit.

Any costs, including unfunded liabilities associated with moving the current Tier 2 employees into the revised structures, will be shared between the employees and the City on a 50/50 basis with no ramp up and amortized as a separate liability over a minimum of 16 years.

Vesting Language

The City will remove the language currently contained in City Charter Section 1508-A referring to limiting vesting of benefits.

Cost Sharing

Employees and the City will share equally in all costs of Tier 2 to the pension plan, including all normal costs and unfunded liabilities.

If an unfunded liability exists for Tier 2 members, employees will contribute based on a “ramp up” to paying 50% of the liability. In years where an unfunded liability exists, the member contribution will be increased by increments of 0.33% per year until such time that the contribution associated with the unfunded liability is shared 50/50. Until such time, the City will pay the balance of the contribution associated with the unfunded liability of the Tier 2 plan.

July 24, 2015

Subject: Approval of Terms of an Agreement with the SJPOA and IAFF, Local 230

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Revised Tier 2
(cont'd)

For example, if the unfunded liability contribution rate of the Police and Fire Tier 2 plan is 2% for three years, the following ramp-up schedule will occur:

Year	Total UAL Rate	City UAL Rate	Employee UAL Rate
1	2.00%	1.67%	.33%
2	2.00%	1.34%	.66%
3	2.00%	1.01%	.99%

Disability Benefits

Service Connected

Plan members eligible for a service connected disability retirement benefit shall receive an annual benefit equal to the greater of 50% of final compensation, a service retirement allowance if the member is eligible, or an actuarially reduced factor, determined by the plan's actuary, for each quarter year that the member's service age is less than 50 years, multiplied by the number of years of safety service subject to the applicable formula, if not eligible for a service retirement.

Non-Service Connected

Plan members eligible for a non-service connected disability retirement benefit shall receive an annual benefit equal to the either 1.8% per year if the member is less than age 50 or the amount of the service pension benefit if the member is older than age 50.

Survivorship Benefits

The survivorship benefits for Tier 2 shall be the same as the survivorship benefits for Tier 1; however, these benefits will be reduced to reflect the 80% pension benefit maximum.

Rehired Employees/New Hires From Outside Agencies

Former City Tier 1 sworn employees who have been rehired since the implementation of the Police and Fire Tier 2 plans, or rehired after the effective date of this agreement, will return to Tier 1. Any lateral hires that are defined as "Classic" members under the Public Employees' Pension Reform Act (PEPRA), regardless of the tier of their previous employer, will also become Tier 1 members. Employees who are considered "new" employees under PEPRA will enter the revised Tier 2 plan.

The costs associated with the transition of current Tier 2 employees into Tier 1 will be shared between the employees and the City on a 50/50 basis with no ramp up. This will be a separate liability amortized over 16 years.

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Revised Tier 2
(cont'd)

Service Credit Purchases

Tier 2 members shall be eligible to make the same service credit purchases as Tier 1, with the exception of purchases of service credit related to suspension. All costs associated with service credit purchases will be paid for by the Tier 2 member.

Actuarial Assumptions

The City, the SJPOA and IAFF, Local 230 will work with their respective actuaries to jointly request that the Police and Fire Department Retirement Plan Board of Administration and its actuary carefully consider the new Tier 2 actuarial assumptions. In particular, the parties will request that the Board and its actuary incorporate assumptions similar to the CalPERS PEPPA rates of retirement, which are expected to reduce the cost of the benefit.

Tier 2 Costing

The below chart indicates the difference in the current Tier 1 and Tier 2 pension normal cost rates for Fiscal Year 2015-2016 in comparison to the revised Tier 2 estimated normal cost based on calculations by the City's actuary. The retirement board's actuary, Cheiron, will be asked to calculate the final contribution rates. The City's actuary, Bartel Associates, valued the revised Tier 2 benefit using two methods: Cheiron's current Tier 2 retirement rates and the retirement rates used by CalPERS for a similar pension formula. Please refer to Attachment B.

	Current Tier 1	Current Tier 2	Agreement Tier 2 Formula using	
			Cheiron Tier 2 Retirement Rates	CalPERS Retirement Rates for Similar Formula
Total	43.0%	22.4%	30.5%	29.4%
City	31.6%	11.2%	15.25%	14.7%
Member	11.4%	11.2%	15.25%	14.7%

The City's actuary estimates that the savings between the revised Tier 2 benefit and the current Tier 1 normal cost would be \$1.15 billion over 30 years.

Retiree
Healthcare

The current retiree healthcare defined benefit program will be closed to new employees and current Tier 2 employees.

Voluntary Employee Beneficiary Association (VEBA)

The City will implement a defined contribution retiree healthcare benefit in the form of a VEBA.

New and current Tier 2 members shall contribute 4% of base pay to the VEBA. There will be no City contribution into the VEBA.

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Retiree
Healthcare
(cont'd)

New Lowest Cost Medical Plan

Effective after the final overall agreement is reached, the Kaiser NCAL 4307 Plan shall be available to all active sworn employees, in addition to the existing plan options for active sworn employees. Currently, the lowest cost medical plan for Police and Fire employees is the Kaiser \$25 co-pay plan. This plan will reduce the total premium payment by an estimated \$199 for single coverage and an estimated \$496 for family coverage per month. The Kaiser 4307 Plan has a \$3000 deductible and qualifies for a Health Savings Account (HSA).

The current cost sharing arrangement of the City paying 85% of the lowest cost non-deductible HMO plan will continue for active employees but active employees have the option of selecting the new lowest cost healthcare plan. For retiree healthcare, the retirement plan pays 100% of the lowest cost plan available to active employees. The Kaiser 4307 Plan will be the lowest cost plan available to active employees after implementation.

The lowest cost plan for any future or current retirees will be set so that any plan may not be lower than the "silver" level of health insurance as specified by the current Affordable Care Act as of the date of the agreement. The "silver" plans are estimated to be 70% of healthcare expenses.

Tier 1 Opt-Out

Upon legal and IRS verification, Tier 1 employees will be offered a one-time, irrevocable election to opt-out of the current defined benefit retiree healthcare plan and instead be placed in the VEBA. Tier 1 employees will be offered individual, independent financial counseling to assist with their decision.

If legally permissible, deferred vested rehires will also be offered a one-time irrevocable opt-out upon return to City employment.

Tier 1 members who choose to opt-out will contribute 5% of base pay to the VEBA. Tier 1 members who elect to remain in the defined benefit plan will contribute 8% to the defined benefit plan. The difference between the 5% contribution to the VEBA and the 8% contribution to the plan will be taxable to the employee.

The City will contribute the amount necessary (when combined with the mandatory employee contributions) to ensure the defined benefit plan receives the full Annual Required Contribution (ARC). City contributions will be expressed as a percentage of payroll for all bargaining unit members and the City will contribute based on all members (including Tier 2). If the City portion reaches 11% of payroll, the City may decide to contribute a maximum of 11%.

Retiree
Healthcare
(cont'd)

If, subsequent to IRS approval, a Tier 1 employee elects to opt-out of the defined benefit retiree healthcare plan, they will receive from the 115 retiree healthcare trust an amount estimated to equal the employee only contributions into the retiree healthcare plan, with no interest included. These funds will be placed in the employee's VEBA.

The City will be seeking an IRS private letter ruling regarding the funding of the VEBA through the 115 trust. Should the City not receive a favorable ruling from the IRS or the amounts of funds returned to those employees who opt-out exceeds the amount of funds in the VEBA, the parties will meet and confer over the opt-out and whether or not it can be implemented through other means.

Medicare Part A and B Enrollment

A member of the Police and Fire Department Retirement Plan shall be required to enroll in Medicare Part A and B based on federal regulations and insurance provider requirements.

Retiree Healthcare In-Lieu Premium Credit

At the beginning of each plan year, a qualified retiree may choose to forego the defined benefit retiree healthcare plan and instead receive a 25% credit for the monthly premium of the lowest cost healthcare plan and dental plan. This credit may only be used for future City retiree healthcare premiums. Retirees may choose this option at the beginning of the plan year or upon a qualifying event. Retirees must verify dependent enrollment on an annual basis if they are receiving a credit for any tier other than single.

Accumulated credits that are never used by the retiree or survivor/beneficiary are forfeited. There is no cap on the amount of credit accumulated.

Catastrophic Disability Healthcare Program (CDHP)

VEBA members who receive a service-connected disability will be eligible for 100% of the single premium for the lowest cost healthcare plan until the member is eligible for Medicare (usually age 65). The member must not be eligible for an unreduced service retirement, must exhaust the funds in the VEBA before becoming eligible for the CDHP, and submit an affidavit on an annual basis verifying the member does not have employment that offers healthcare. A member may re-enroll in the CDHP if they lose employment that offers healthcare coverage before Medicare eligibility.

30 Year Fresh Start Amortization

The City will continue considering whether to recommend that the retirement boards use a 30-year fresh start amortization for the Police and Fire retiree healthcare actuarial valuation.

**Retiree
Healthcare
(cont'd)**

Retiree Healthcare Costing

The City's actuary estimates that the changes in the lowest cost healthcare and the opt-out will lower the actuarial liability by 21%. The actuary assumed that 50% of those at younger ages with shorter service grading to 0% of those at older ages with longer service currently in the defined benefit plan will opt-out. Please refer to Attachment C.

	Current Valuation	With Kaiser 4307 Plan	With Opt Out	Total \$ Impact	Total % Impact
Active	\$ 208.4	\$ 180.7	\$ 135.8	\$ (72.6)	-35%
Inactive	347.4	305.8	305.8	(41.5)	-12%
Total	555.7	486.5	441.6	(114.1)	-21%

The City's actuary estimates that, over the next 35 years, the total dollar savings between the existing retiree healthcare plan and the new plan (without the fresh start) would be \$244.2 million. It is important to note that the actual cost impact will be determined by the retirement board's actuary.

**Disability
Definition
and Process**

The City will reinstate the previous disability retirement definition for all sworn employees.

Disability Process Deadlines

Applications for disability retirement must be filed within one month of separation from City service rather than the previous one year time period. Exceptions contained in the Municipal Code will still apply. The applicants must submit medical paperwork including, but not limited to, the initial nature of the disability and current medical treatments. The medical paperwork must be filed within one year of separation unless the independent medical review panel grants a longer deadline due to extenuating circumstances. Application must not be deferred past four (4) years of the date of application unless the independent medical review panel grants a longer deadline due to extenuating circumstances.

Disability Hearing Process

The Police and Fire Retirement Board will appoint an independent medical review panel of three (3) experts to grant or deny disability retirement applications. The panel will make decisions based on a majority vote. The independent medical review panel may decide, based on its own motion or request from a member, to determine if a disability retirement recipient is capable of returning to work.

The appointment shall be approved by a vote of six (6) of nine (9) trustees.

**Disability
Definition
and Process
(cont'd)**

Each member of the independent medical review panel will serve four year terms and meet the following minimum qualifications:

- I. 10 years of practice after completion of residency.
- II. Currently in practice or retired.
- III. Not a prior or current City employee.
- IV. No prior experience providing the City or retirement boards with medical services. The exception shall be prior service as an independent panel member seeking reappointment.
- V. No prior experience as a qualified medical examiner or agreed medical evaluator.
- VI. Varying types of medical practice experience.

Administrative Law Judge (ALJ)

Decisions to grant or deny a disability retirement made by the independent medical review panel may be appealed to an ALJ. Either the applicant or the City has forty-five (45) days to appeal the decision made by the independent medical review panel. The appeal hearing must happen within ninety (90) days of the notice of appeal, unless a later date is mutually agreed upon. The ALJ decision will be considered final.

Modified Duty (SJPOA – Article 39)

The City and the SJPOA will discuss the modified duty positions during collective bargaining. Until the parties agree, the number of modified duty positions will increase to 30. On an annual basis, the independent medical review panel will review the status of the employees on modified duty until the program is modified.

Workers' Compensation Reform

Tier 2 members will have the Federated workers' compensation language as currently contained in the Municipal Code apply to qualifying disability retirement allowances to a maximum aggregate total of \$10,000 per Tier 2 employee.

The parties will convene a Public Safety Wellness Improvement Committee to discuss wellness and workers' compensation in order to streamline the process, reduce costs, decrease the number of work-related injuries through prevention, and expedite the return to work of those injured or ill.

**Supplement
Retiree Benefit
Reserve
(SRBR)**

The elimination of the SRBR will continue.

Guaranteed Purchasing Power (GPP)

The SRBR will be replaced with a Guaranteed Purchasing Power provision for all current and future Tier 1 retirees, but the GPP will be applied prospectively after its implementation. The GPP is designed to maintain the monthly allowance for Tier 1 retirees at 75% of purchasing power effective the date of the retiree's retirement.

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**Supplemental
Retiree Benefit
Reserve
(SRBR)
(cont'd)**

A retiree's pension benefit will be recalculated annually to determine if the allowance has kept up with inflation per the CPI-U. The actual benefit will be compared to what would have been required to maintain the same purchasing power at the time of retirement. If the benefit for Tier 1 retirees falls below 75%, a separate check will be issued to make up the difference, beginning in February 2016.

The number of Tier 1 retirees who currently fall below 75% purchasing power is approximately 55.

The SJPOA and IAFF, Local 230 will have a right to tender defense of the litigation to the City in the event of litigation brought forward by a retired member or members of the SJPOA or IAFF, Local 230, against SJPOA or IAFF, Local 230 challenging this settlement framework agreement.

SRBR Costing

By continuing the elimination of the SRBR, the City will solidify the \$9 million General Fund savings already achieved by the City as a result of Measure B. Assuming the savings of \$9 million continues annually, using simple arithmetic, the elimination of the SRBR is estimated to result in an approximate savings of \$270 million over 30 years. It should be noted that the calculation of the \$9 million was based on the information available to the City when the SRBR was initially eliminated. Please refer to Attachment D.

**Memorandum
of Agreement**

This Settlement Framework agreement is contingent on reaching a successor MOA with the SJPOA.

**Attorneys'
Fees**

To settle attorneys' fee related to Measure B legal matters, the City shall pay the SJPOA and IAFF, Local 230, \$1.5 million within thirty (30) days of the settlement framework agreement being approved by City Council.

There will be final and binding arbitration before a JAMS judge to resolve any additional claims for attorneys' fees related to Measure B litigation (including administrative proceedings) and resolution.

Quo Warranto

In the Mayor's March 11, 2015, letter to all bargaining units sent on behalf of the City Council, the direction was that a quo warranto process would be used to replace the provisions of Measure B, contingent on the following conditions being met:

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Quo Warranto
(cont'd)

1. Agreement on an alternative strategy to implement pension reform and replace Measure B. Such agreement must achieve all reform objectives that the Council deems necessary to the public interest, including improved city services, and the sustainability of our retirement plans.
2. The quo warranto strategy is legally viable and can be carried out on a timeline that would allow the Council sufficient time to pursue a 2016 ballot measure should a quo warranto strategy fail.
3. All bargaining units have agreed to pursue the quo warranto strategy.
4. The Council is satisfied that the quo warranto strategy does not impair the public interest.

Should an agreement with the Federated litigation plaintiffs and Retirees' Association not be reached or the quo warranto process does not permit the replacement of Measure B, the SJPOA and IAFF, Local 230 will stay all Measure B litigation and permit this agreement to appear on a November 2016 ballot as a measure to replace Measure B.

Currently, no decision has been made on the process by which to enact this agreement. This information will be brought forward on a later date. If the agreement is implemented through the Quo Warranto process, the City and the bargaining units will discuss the City Charter provisions requiring voter approval of benefits and actuarial soundness for consideration in a November 2016 ballot measure.

EVALUATION AND FOLLOW-UP

The City, the Federated bargaining units, and the Federated Retirees' Association are continuing settlement discussions related to litigation arising out of Measure B. The goal of these discussions is to reach a global settlement with all parties to the litigation. The City Administration will continue to keep the Council apprised of any updates related to this matter.

Once a decision has been made on the recommended process by which to enact this Settlement Framework agreement, the City Administration will bring it forward to City Council for consideration.

PUBLIC OUTREACH/INTEREST

This memorandum will be posted on the City's website in advance of the August 11, 2015, City Council Agenda.

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COORDINATION

This memorandum was coordinated with the City Attorney's Office and the City Manager's Budget Office.

COST SUMMARY/IMPLICATIONS

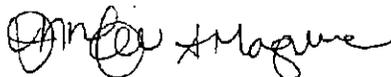
Appropriation actions in the amount of \$1.5 million, funded from the Fiscal Reform Plan Implementation Reserve, are recommended as part of this memorandum to pay attorney's fees related to the settlement of Measure B. The cost/savings estimates of each element of the framework are noted above and in the attachments, and it is estimated that, over 30+ years, the City will realize savings of approximately \$1.7 billion from the revised Tier 2 compared to Tier 1 (\$1.15 billion), the revised retiree healthcare program compared to the current retiree healthcare program (\$244.2 million), and from the elimination of the SRBR (\$270 million). With the exception of the SRBR, it is important to note that these estimates were done by the City's actuary and actual costs/savings will be determined by the Retirement Board's actuary.

CEQA

Not a Project, File No. PP10-069(b), Personnel Related Decisions.



JENNIFER SCHEMBRI
Director of Employee Relations



JENNIFER A. MAGUIRE
Senior Deputy City Manager / Budget Director

For questions please contact Jennifer Schembri, Director of Employee Relations, at (408) 535-8150.

Attachment A – Alternative Pension Reform Settlement Framework Agreement

Attachment B – Letter from John Bartel dated July 23, 2015 on Tier 2 Costing

Attachment C – Letter from John Bartel dated July 23, 2015 on Retiree Healthcare Costing

Attachment D – Letter from John Bartel dated July 23, 2015 on Guaranteed Purchasing Power

ALTERNATIVE PENSION REFORM SETTLEMENT FRAMEWORK

(Evidence Code Section 1152)

Settlement Discussion Framework Language

The City of San Jose, the San Jose Fire Fighters, IAFF Local 230, and the San Jose Police Officers' Association have engaged in settlement discussions concerning litigation arising out of a voter-approved ballot measure, known as Measure B. The parties have reached the below framework for a tentative settlement of San Jose Police Officers' Association v. City of San Jose, Santa Clara Superior Court, No. 1-12-CV-22926, Sapien, et. Al. v. City of San Jose, et. al., Santa Clara County Superior Court, No. 1-13-CV-225928 (and associated actions), The People of the State of California ex rel. San Jose Police Officers' Association v. City of San Jose, Santa Clara County Superior Court, No. 1-13-CV245503 (quo warranto proceedings), International Association of Firefighters, Local 230 vs. City of San Jose, Public Employment Relations Board Unfair Practice No. SF-GE 969-M, and various other actions, including grievances. This settlement framework shall be presented for approval by the City Council and the respective Union Board of Directors.

It is understood that this settlement framework is subject to a final overall global settlement. In the event the settlement framework is not accepted, all parties reserve the right to modify, amend and/or add proposals. Each individual item contained herein is contingent on an overall global settlement/agreement being reached on all terms, by all parties/litigants (including the retirees), and ratified by union membership and approved by the City Council.

MARCH 11th LETTER

In accordance with Mayor Sam Liccardo's letter on behalf of the City Council to all bargaining units dated March 11, 2015, inclusive of the direction from Councilmember Don Rocha's March 6, 2015, memorandum, the City Council is willing to pursue settlement of Measure B litigation through a quo warranto process in 2015, contingent on the Council's satisfaction that the following conditions have been met before the quo warranto process begins:

- 1. Agreement on an alternative strategy to implement pension reform and replace Measure B. Such agreement must achieve all reform objectives that the Council deems necessary to the public interest, including improved city services, and the sustainability of our retirement plans.*
- 2. The quo warranto strategy is legally viable and can be carried out on a timeline that would allow the Council sufficient time to pursue a 2016 ballot measure should a quo warranto strategy fail.*
- 3. All bargaining units have agreed to pursue the quo warranto strategy.*
- 4. The Council is satisfied that the quo warranto strategy does not impair the public interest.*

If agreements are not reached to end litigation with all plaintiffs in Measure B litigation, or if the process of quo warranto does not permit the replacement of Measure B with this or any other agreement, the City Council, Local 230 and the POA shall request a stay of all Measure B litigation to which they are involved in to permit this agreement to appear on a 2016 ballot as a measure to replace Measure B in its entirety with respect to police and fire participants of the Police & Fire Retirement Plan. If this ballot measure is enacted, all Measure B litigation involving Local 230, the POA and the City would be terminated and dismissed.

Retirement Memorandum of Agreement

1. The parties (The City of San Jose, San Jose Police Officers' Association and San Jose Fire Fighters, IAFF Local 230) shall enter into a Tripartite Memorandum of Agreement to memorialize all agreements related to retirement. The Tripartite MOA shall expire June 30, 2025.
2. The Tripartite MOA will be a binding agreement describing the terms of the final agreement between the parties and will be subject to any agreed-upon reopeners herein.

The current Tier 2 retirement plans for Police and Fire employees will be modified as follows:

1. Pension benefit based upon a back-loaded accrual rate as follows:
 - a. For each year from years 1-20: 2.4% per year
 - b. For each year from years 21-25: 3.0% per year
 - c. For each year 26 and above: 3.4% per year
2. Retirement Age
 - a. The eligible age for an unreduced pension benefit will be age 57
 - b. The eligible age for a reduced pension benefit will be age 50. The reduction for retirement before age 57 will be 7.0% per year, prorated to the closest month.
3. 80% cap
 - a. The maximum pension benefit will be 80% of an employee's final average salary
4. Three-year final average salary
5. A member is vested after 5 years of service
6. No retroactive pension increases or decreases

- a. Any such changes in retirement benefits will only be applied on a prospective basis.
7. No pension contribution holiday
8. Pensionable pay will include base pay, holiday in lieu pay, EMT pay, anti-terrorism training pay, POST pay, and base FLSA pay as per Tier 1 members.
9. Current Tier 2 sworn employees will retroactively be moved to the new Tier 2 retirement benefit plan except as provided in Paragraph 16a (returning Tier 1).
 - a. Any costs, including any unfunded liability, associated with transitioning current Tier 2 employees into the restructured Tier 2 benefit will be amortized as a separate liability over a minimum of 16 years and split between the employee and the City 50/50. This will be calculated as a separate unfunded liability and not subject to the ramp up increments of other unfunded liability.
10. Removal of language limiting vesting of benefits from City Charter (Section 1508-A (h))
11. Tier 2 cost sharing
 - a. Employees and the City will split the cost of Tier 2 including normal cost and unfunded liabilities on a 50/50 basis
 - b. In the event an unfunded liability is determined to exist for the Police and Fire Tier 2 retirement plans, Tier 2 employees will contribute (the "Ramp Up") toward the unfunded liability in increments of 0.33% per year until such time that the unfunded liability is shared 50/50 between employee and employer
 - c. Until such time that the unfunded liability is shared 50/50, the City will pay the balance of the unfunded liability
12. Cost of Living Adjustment (COLA)

- a. Tier 2 retirees will receive an annual cost of living adjustment based on the Consumer Price Index – Urban Consumers (San Francisco-Oakland-San Jose, December to December) or 2.0%, whichever is lower
- b. In the first year of pension benefits, the COLA will be pro-rated based on the date of retirement

13. Disability Benefit (Tier 2)

- a. A Tier 2 member who is approved by the independent medical review panel for a service-connected disability retirement is entitled to a monthly allowance equal to the greater of:
 - i. 50% of final compensation;
 - ii. A service retirement allowance, if he or she qualified for such;
 - iii. An actuarially reduced factor, as determined by the plan's actuary, for each quarter year that his or her service age is less than 50 years, multiplied by the number of years of safety service subject to the applicable formula, if not qualified for a service retirement.
- b. A Tier 2 member who is approved by the independent medical review panel for a non-service connected disability is entitled to a monthly allowance equal to:
 - i. If less than age 50: 1.8% per year of service; or
 - ii. If older than age 50: The amount of service pension benefit as calculated based upon the service pension formula.

14. If there is any Tier 1 or Tier 2 benefit not mentioned in this framework, the parties agree to meet to discuss whether or not that benefit should be included in the Tier 2 benefit.

15. Tier 2 members will be provided with 50% Joint and Survivor benefits, which provide 50% of the retiree's pension to the retiree's surviving

spouse or domestic partner in the event of the retiree's death after retirement.

- a. Tier 2 members will be provided with survivor benefits in the event of death before retirement. These benefits will be the same as Tier 1 members but reduced to reflect the new 80% pension cap versus the current 90% pension cap.
16. "Classic" Lateral will become Tier 1, including former San Jose Fire Department /San Jose Police Department sworn employees
- a. Former Tier 1 sworn City employees who have been rehired since the implementation of Tier 2 or rehired after the effective date of a tentative agreement based on this framework will be placed in Tier 1
 - b. Any costs, including any unfunded liability, associated with transitioning current Tier 2 employees who were former Tier 1 sworn City employees who have since been rehired will be amortized as a separate liability over a minimum of 16 years and split between the employee and the City 50/50. This will be calculated as a separate unfunded liability and as Tier 1 employees these members are not subject to a ramp up in unfunded liability.
 - c. Any lateral hire from any other pension system who transfers as a "Classic" employee under PEPR, regardless of tier, will be placed in Tier 1.
 - d. Any lateral hire from any other pension system who transfers as a "new" employee under PEPR will be placed in Tier 2.
17. Tier 2 members will be provided the same service repurchase options as Tier 1 members (excluding purchases of service credit related to disciplinary suspensions) so long as all costs for the repurchase are paid for by the employee.

18. The City and the Unions agree to work with their actuaries to jointly request that the Police and Fire Retirement Board of Administration and its actuary carefully consider retirement rate actuarial assumptions with regard to the new Tier 2 plan. Specifically, the parties will request that the Board and its actuary incorporate retirement rate assumptions similar to the CalPERS retirement rates of the similarly designed CalPERS PEPRA plan rather than that of the existing San Jose Police and Fire Tier 1 plan.

Retiree Healthcare - All provisions below are contingent on final costing by the City's Actuary and review for legal and/or tax issues

1. Close the current defined benefit retiree healthcare program to new employees and current Tier 2 employees
2. The parties will implement a defined contribution healthcare benefit in the form of a Voluntary Employee Beneficiary Association (VEBA). The plans would not provide any defined benefit, would not obligate the City to provide any specific benefit upon member retirement, and therefore create no unfunded liability. This agreement does not require the City to contribute any future funds to an employee's VEBA, nor does it preclude an agreement to allow future City contributions
3. New lowest cost medical plan
 - a. Kaiser NCAL 4307 Plan (305/\$3,000 HSA-Qualified Deductible HMO Plan) will be adopted as the new lowest cost healthcare plan, for active and retired members

- b. The City will continue the cost sharing arrangement for active employees of 85% of the lowest cost non-deductible HMO plan
 - c. The "lowest cost plan" for any current or future retiree in the defined benefit retirement healthcare plan shall be set that it may not be lower than the "silver" level as specified by the current Affordable Care Act in effect at the time of this agreement. This specifically includes the provision that the healthcare plan must be estimated to provide at least 70% of healthcare expenses as per the current ACA "silver" definition.
4. Potential Tier 1 opt-out
- a. So long as it is legally permitted, Tier 1 employees may make a one-time election to opt-out of the defined benefit retiree healthcare plan into an appropriate vehicle for the funds, i.e. a Voluntary Employee Beneficiary Association (VEBA). Members of the current defined benefit plans will be provided with one irrevocable opportunity to voluntarily "opt out" of the current retiree medical plan. Those members who "opt out," and are thus not covered by the City defined benefit retiree medical plan, will be mandated to join the VEBA plan.
5. Enrollment in Medicare Parts A and B as required by any applicable federal regulations or by insurance providers
6. The current defined benefit retiree healthcare plan is modified to enable retired members to select an "in lieu" premium credit option. At the beginning of each plan year, retirees can choose to receive a credit for 25% (twenty-five percent) of the monthly premium of the lowest priced healthcare and dental plan as a credit toward future member healthcare premiums in lieu of receiving healthcare coverage. On an annual basis,

or upon qualifying events described in the "special enrollment" provisions of the Health Insurance Portability and Accountability Act of 1996, retirees and their spouses/dependents can elect to enroll in a healthcare plan or continue to receive an "in lieu" premium credit. Enrollees receiving in lieu credit at any tier other than retiree only must verify annually that they are still eligible for the tier for which they are receiving the in lieu credit. If a member selects the "in-lieu" premium credit, but the member, their survivor or beneficiaries never uses their accumulated premium credit, the accumulated credit is forfeited. At no time can a member or survivor/beneficiary take the credit in cash or any form of taxable compensation. There is no cap on the size of the accumulated credit.

7. Members of the VEBA and their spouses/dependents, during retirement, may also elect to enter or exit coverage on an annual basis or upon a qualifying event (however, members in the VEBA will not receive an "in lieu" benefit).
8. The VEBA contribution rate for all new hires and Tier 2 members will be 4.0% of base pay. The VEBA contribution rate for all members who opt out of the defined benefit plan and are mandated to join the VEBA plan will be 5.0% of base pay.
9. Members who remain in the Defined Benefit retirement healthcare plan will contribute 8.0% of their pensionable payroll into the plan. The City will contribute the additional amount necessary to ensure the Defined Benefit retirement healthcare plan receives its full Annual Required Contribution each year. If the City's portion of the Annual Required Contribution reaches 11% of payroll, the City may decide to contribute a maximum of 11%.

10. The parties have been advised that the difference between the defined benefit contribution rate (8.0%) and the VEBA opt-out contribution rate (5.0%) will be taxable income.
11. Upon making such an irrevocable election to opt-out of the defined benefit retiree healthcare plan, an amount estimated to equal the member's prior retiree healthcare contribution, with no interest included, will be contributed by the City to the member's VEBA plan account (pending costing and tax counsel advice). In making these contributions, the City may transfer funds from the 115 Trust to the members' VEBA plan account to the extent permitted by federal tax law and subject to receipt of a favorable private letter ruling. If it is determined by the IRS that the funds may not come out of the 115 trust, the parties will meet and confer regarding the opt-out and whether or not it can be implemented through other means. In addition, if the amount needed based on the number of employees who chose to opt out is more than the funds in 115 trust, the parties will also meet and confer. Members will be provided with individual, independent financial counseling to assist them with any decisions to remain in or "opt out" of the defined benefit retiree medical plan.
12. Pending legal review by tax counsel, deferred-vested Tier 1 members who return to San José will be given a one-time irrevocable option to "opt out" of the defined benefit retirement healthcare option. Upon choosing to "opt out", they will become a member of the VEBA and their VEBA account will be credited for their prior contributions. If they choose not to "opt out", they will return to the Defined Benefit retirement healthcare plan.

13. Catastrophic Disability Healthcare Program –Members of the VEBA who receive service-connected disability retirements will be eligible for 100% of the single premium for the lowest cost plan until the member and is eligible for Medicare (usually age 65).
- a. Qualifications - The member must not be eligible for an unreduced service retirement.
 - b. The member must exhaust any funds in their VEBA account prior to becoming eligible for the Catastrophic Disability Healthcare Program.
 - c. Upon reaching Medicare eligibility, the benefit will cease
 - d. Any retiree who qualifies must submit on an annual basis an affidavit verifying that they have no other employment which provides healthcare coverage.
 - e. If a retiree is found to have other employment which provides healthcare coverage, their eligibility to participate in the Catastrophic Disability Healthcare Program will automatically cease, subject to re-enrollment if they subsequently lose said employment-provided healthcare coverage.

Disability Definition and Process

1. Reinstate the previous City definition for disability for all sworn employees
2. Applications for disability must be filed within one month of separation from City service subject to the exceptions reflected in Municipal Code § 3.36.920 A (4).
3. All applicants must submit medical paperwork indicating the initial nature of their disability including the affected body part if applicable, the current level of disability, and current treatments underway. Such medical paperwork must be filed within one year of separation unless

- the independent medical review panel grants a longer deadline due to extenuating circumstances.
4. Applications for disability may not be deferred by the applicant past four (4) years of the date of application submittal, unless the independent medical review panel grants a longer deadline due to extenuating circumstances.
 5. The member and the City may have legal representation at hearings
 6. Independent panel of experts appointed by 6 of 9 retirement board members will evaluate and approve or deny disability retirement applications
 - a. Using the established Request for Proposal process, the retirement boards will recruit potential members of the independent medical panel
 - b. Each member shall have a four-year term and meet the following minimum qualifications
 - i. 10 years of practice after completion of residency
 - ii. Practicing or retired Board Certified physician
 - iii. Not a prior or current City employee
 - iv. No experience providing the City or retirement boards with medical services, except for prior service on medical panel
 - v. No experience as a Qualified Medical Evaluator or Agreed Medical Evaluator
 - vi. Varying medical experience
 - c. A panel of three independent medical experts will decide whether to grant or deny all disability applications, whether service or non-service connected. The panel's decision will be made by majority vote.
 - d. Upon its own motion or request, the independent medical panel may determine the status of a disability retirement recipient to

confirm that the member is still incapacitated or if the member has the ability to return to work

7. Administrative law judge

- a. A decision to grant or deny the disability retirement made by the independent medical panel may be appealed to an administrative law judge.
- b. Applicant or City has forty-five (45) days to appeal a decision made by the independent medical panel. The appeal hearing must commence within ninety (90) days of the notice of appeal, unless a later date is mutually agreed to by the parties.
- c. The decision rendered by the administrative law judge is to be based on the record of the matter before the independent medical review panel.
- d. The decision of the administrative law judge will be a final administrative decision within the meaning of Section 1094.5 of the California Code of Civil Procedure.

8. Modified Duty (POA – Article 39)

- a. The City and the POA will continue to discuss the modified duty positions during collective bargaining
- b. While these discussions take place, the number of modified duty positions will be increased to 30
- c. The independent medical review panel will evaluate the status of the employees in the modified duty program on a yearly basis until the program is modified through bargaining

9. Worker's Compensation Reform

- a. For Tier 2 participants, the workers' compensation offset currently in place for Federated Plan participants will apply to a maximum aggregate total of \$10,000.00 per Tier 2 employee in workers'

compensation cash disability benefit awards only using the same pension benefit offset formula.

- b. In an effort to streamline the workers' compensation process, reduce costs, decrease the number of work related injuries through prevention and expedite the return to work of those injured or ill, the parties agree to convene a Public Safety Wellness Improvement Committee to discuss modifications to, or creation of, wellness and/or workers' compensation policies, procedures and protocols.

Supplement Retiree Benefit Reserve (SRBR)

1. Continue elimination of SRBR

- a. The funds credited to the SRBR will continue to be credited to the Police and Fire Department Retirement Plan to pay for pension benefits

2. City will replace SRBR with guaranteed purchasing power (GPP) provision for all Tier 1 retirees, prospectively. The GPP is intended to maintain the monthly allowance for Tier 1 retirees at 75% of purchasing power effective with the date of the retiree's retirement

- a. Beginning January 2016 and each January thereafter, a retiree's pension benefit will be recalculated annually to determine whether the benefit level (including any increases due to cost of living adjustments) has kept up with inflation as measured by the CPI-U (San Francisco-Oakland-San Jose). The actual benefit level will be compared to what would have been required to maintain the same purchasing power as the retiree had at the time of retirement, with a CPI-based increase.

- b. Those Tier 1 retirees whose benefit falls below 75% of purchasing power will receive a supplemental payment that shall make up the difference between their current benefit level and the benefit level required to meet the 75% GPP.
- c. The supplemental GPP payment to qualifying retirees will be paid annually in a separate check, beginning February 2016, and each February thereafter.
- d. The number of Tier 1 retirees whose benefit level was below 75% GPP at the time of costing was approximately 55.
- e. In the event of litigation by a retired member or members of POA and/or IAFF Local 230 challenging this provision of the Settlement Agreement against POA and/or IAFF Local 230, the Unions will have a right to tender the defense of the litigation to the City. City will accept the defense of the litigation and will defend POA and/or IAFF Local 230 with counsel of City's choice, including the City Attorney's Office. If the City is also named defendant in any such suit, Unions will not claim that joint representation of either or both of them and the City constitutes a legal conflict for the attorney(s) defending the suit. This defense obligation will not apply to lawsuits challenging or in any way relating to this provision filed more than five years after the effective date of this agreement.

Memoranda of Agreement (MOA)

1. This agreement is contingent upon reaching a successor MOA agreement with the POA.

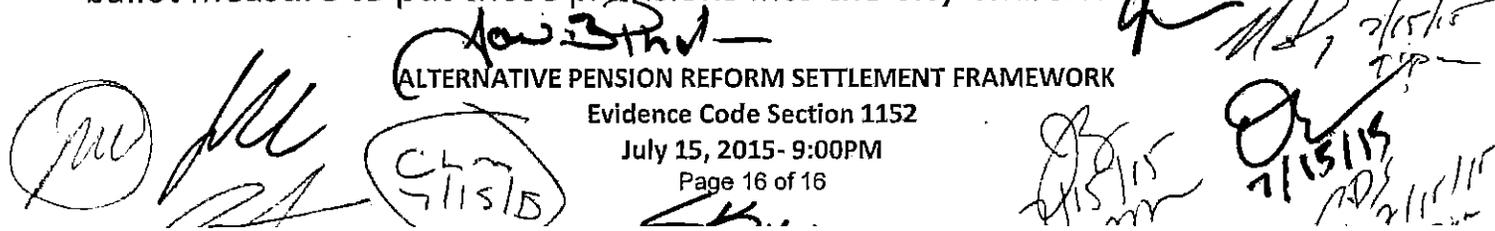
Attorney's Fees

1. \$1.5 million within 30 days of settlement framework being approved by Council in open session
2. The parties agree to final and binding arbitration to resolve additional claims over attorneys' fees and expenses related to the litigation and resolution of Measure B
3. The arbitration will be before a JAMS judge formerly of San Francisco or Alameda County
4. The City shall pay the arbitrator's fees and costs, including court reporter
5. The parties agree that the issue presented shall be: Whether the Unions are entitled, under any statutory or common law basis, to additional attorneys' fees and/or expenses related to litigation (including administrative proceedings) and resolution of Measure B? If so, in what amounts?

Implementation Timeline

1. Each party will receive approval of this settlement framework from their respective principals (for the City, this means the City Council; for the Unions, this means their respective Boards of Directors) by August 4th, 2015.

This settlement framework is an outline of the agreement reached by the parties that will need to be implemented through various means, such as ordinances. Successful implementation of this agreement will satisfy and terminate the "Retirement (Pension and Retiree Healthcare) Reopener" agreed upon by SJFF Local 230 or SJPOA. If this agreement is implemented through the quo warranto process, the parties agree to discuss provisions for voter approval of benefits and actuarial soundness for consideration of a 2016 ballot measure to put those provisions into the City Charter.



 ALTERNATIVE PENSION REFORM SETTLEMENT FRAMEWORK
 Evidence Code Section 1152
 July 15, 2015- 9:00PM
 Page 16 of 16

BARTTEL ASSOCIATES, LLC

July 23, 2015

Jennifer Schembri
Interim Director
City Manager's Office of Employee Relations
200 E. Santa Clara Street, 3rd Floor Wing
San José, CA 95113-1905

Re: San Jose Police Officers and Fire Fighters Tier 2 Pension Benefit

Dear Ms. Schembri:

This letter provides our analysis of the San Jose Police Officers and Fire Fighters Tier 2 pension benefit agreement. We understand the agreement will redefine Tier 2 pension benefits as:

■ **Benefit formula based on City service:**

Years of City service	Benefit Accrual Rate
1-20	2.4%
21-25	3.0%
26+	3.4%

- Normal retirement age 57 with 7% reduction for each year retirement precedes age 57
- Provide the following ancillary benefits:
 - Cost of Living Adjustments based on the lessor of CPI and 2%
 - Automatic 50% survivor benefit
 - Disability benefit the greater of:
 - 50% of current pensionable wages
 - Service retirement benefit if eligible to retire
 - Actuarial equivalent of service retirement benefit if not eligible to retire
 - 5 year vesting

Analysis

We priced the agreement Tier 2 formula using both Cheiron's current Tier 2 retirement rates and retirement rates used by CalPERS for a similar pension formula. The following table shows the estimated impact on the Tier 2 Normal Cost:

	Current Tier 1	Current Tier 2	Agreement Tier 2 Formula using	
			Cheiron Tier 2 Retirement Rates	CalPERS Retirement Rates for Similar Formula
Total	43.0%	22.4%	30.5%	29.4%
City	31.6%	11.2%	15.25%	14.7%
Member	11.4%	11.2%	15.25%	14.7%

We believe the CalPERS retirement rates for similar formulas are reasonable retirement rates and would recommend Cheiron consider using these retirement rates rather than the existing Tier 2 retirement rates.



The following table projects out City cost assuming Tier 2 benefits were the same as Tier 1, under current Tier 2 benefit formula and under the agreed to Tier 2 benefit formula over the next 30 years (note agreed to projections are based on the CalPERS retirement rates for a similar benefit formula):

City of San Jose
Police & Fire
Projection of Additional City Cost of Agreed to Pension Tier 2 Benefit Formula
 (\$ millions)

FYE	Total Proj. Payroll	Tier 2 Benefit Unchanged		Tier 2 Benefit Restored to Tier 1 Level		Tier 2 Benefit As Bargained	
		22.4% Tier 2 NC		43.0% Tier 2 NC		29.4% Tier 2 NC	
		Total City Cost		Total City Cost		Total City Cost	
		% of pay	\$	% of pay	\$	% of pay	\$
2016	194.3	11.2%	1.4	31.6%	3.9	14.7%	1.8
2017	200.6	11.2%	2.0	31.6%	5.8	14.7%	2.7
2018	207.0	11.2%	2.9	31.6%	8.1	14.7%	3.8
2019	213.9	11.2%	3.9	31.6%	10.9	14.7%	5.1
2020	220.9	11.2%	5.0	31.6%	14.1	14.7%	6.6
2021	228.1	11.2%	6.2	31.6%	17.6	14.7%	8.2
2022	235.5	11.2%	7.8	31.6%	22.0	14.7%	10.2
2023	243.1	11.2%	9.5	31.6%	26.9	14.7%	12.5
2024	251.0	11.2%	11.5	31.6%	32.3	14.7%	15.0
2025	259.2	11.2%	13.4	31.6%	37.9	14.7%	17.6
2026	267.6	11.2%	15.2	31.6%	43.0	14.7%	20.0
2027	276.3	11.2%	17.1	31.6%	48.3	14.7%	22.4
2028	285.3	11.2%	19.2	31.6%	54.1	14.7%	25.2
2029	294.6	11.2%	21.2	31.6%	59.7	14.7%	27.8
2030	304.2	11.2%	23.1	31.6%	65.2	14.7%	30.3
2031	314.0	11.2%	25.0	31.6%	70.5	14.7%	32.8
2032	324.2	11.2%	27.0	31.6%	76.2	14.7%	35.4
2033	334.8	11.2%	29.1	31.6%	82.0	14.7%	38.2
2034	345.7	11.2%	31.4	31.6%	88.6	14.7%	41.2
2035	356.9	11.2%	33.9	31.6%	95.5	14.7%	44.4
2036	368.5	11.2%	36.3	31.6%	102.4	14.7%	47.6
2037	380.5	11.2%	38.5	31.6%	108.7	14.7%	50.6
2038	392.8	11.2%	40.7	31.6%	114.7	14.7%	53.4
2039	405.6	11.2%	42.7	31.6%	120.6	14.7%	56.1
2040	418.8	11.2%	44.9	31.6%	126.7	14.7%	59.0
2041	432.4	11.2%	47.0	31.6%	132.7	14.7%	61.7
2042	446.5	11.2%	49.1	31.6%	138.4	14.7%	64.4
2043	461.0	11.2%	51.0	31.6%	143.9	14.7%	66.9
2044	475.9	11.2%	52.9	31.6%	149.2	14.7%	69.4
2045	491.4	11.2%	54.8	31.6%	154.5	14.7%	71.9
Total			763.6		2,154.5		1,002.3



The agreement also provides that Tier 2 members will pay 50% of the unfunded liability contribution. Even though there is ramp up feature to this cost sharing we believe, if unfunded liabilities do materialize this will be a cost savings feature for the City.

Assumptions

Study results were estimated using the same assumptions, except as noted above for retirement rates, as the Cheiron June 30, 2014 actuarial valuation.

* * *

To the best of our knowledge, this letter is complete and accurate and has been prepared using generally accepted actuarial principles and practices. As a member of the American Academy of Actuaries meeting the Academy Qualification Standards, I certify the actuarial results and opinions herein.

Please call Cathy Wandro (650-377-1606) or me (650-377-1601) with any questions about this letter.

Sincerely,

John E. Bartel
President

c: Cathy Wandro, Bartel Associates
Marilyn Oliver, Bartel Associates

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July 23, 2015

Jennifer Schembri
Interim Director
City Manager's Office of Employee Relations
200 E. Santa Clara Street, 3rd Floor Wing
San José, CA 95113-1905

Re: San Jose Police Officers and Fire Fighters Retiree Healthcare Agreement

Dear Ms. Schembri:

This letter provides our analysis of the San Jose Police Officers and Fire Fighters retiree healthcare agreement. We understand the agreement will:

- Establish a VEBA
 - New hires will participate in the VEBA only and will not be eligible for current plan benefits (except as noted below for subsidized premiums).
 - Current retiree healthcare participants would be given the option to "opt-out" of the current plan and join the VEBA. This, in conjunction with closing the plan to new hires will effectively mean the current benefit will wear away over time.
 - Historical contributions to the current plan would be transferred for anyone opting out of the current plan.
- Contributions:
 - City will contribute the full ARC, less member contributions, to the current plan based on total pensionable pay regardless of whether an individual participates in the current plan or the VEBA. (note the City, per the agreement, may cap its contribution at 11% of total pensionable pay)
 - City will not contribute to the VEBA.
 - Members remaining in the current plan will contribute 8% of their pensionable pay.
 - Members participating in the VEBA will not contribute to the current plan.
- All retirees, whether participating in the current plan or the VEBA would be allowed to participate in the City's medical plan paying subsidized premiums.
- Adoption of the Kaiser 4307 medical plan for actives and retirees.
- Proposal is contingent on cost analysis determining that funding will be adequate for the current plan.
- Add an "in lieu" feature to the current plan that would allow retirees to receive a credit for 25% of the lowest cost plan as a credit toward future healthcare premiums, in lieu of receiving healthcare coverage.



Analysis – Funding Valuation Basis

The following table shows the estimated impact of the proposed changes on the Actuarial Liability under the Funding Valuation basis which uses a 7% discount rate and includes the explicit subsidy only (millions):

	Current Valuation	With Kaiser 4307 Plan	With Opt Out	Total \$ Impact	Total % Impact
Active	\$ 208.4	\$ 180.7	\$ 135.8	\$ (72.6)	-35%
Inactive	<u>347.4</u>	<u>305.8</u>	<u>305.8</u>	<u>(41.5)</u>	-12%
Total	555.7	486.5	441.6	(114.1)	-21%

The following table shows the estimated impact of the proposed changes on the contribution rates for the explicit subsidy under the Funding Valuation basis. This table is based on current amortization periods (24 years for Police and 26 years for Fire).

	Uncapped			Capped		
	Current Valuation	With Opt Out	% of Total Payroll Impact	Current Valuation	With Opt Out	% of Total Payroll Impact
Police Member	11.71%	8.00%	-7.26%	10.00%	8.00%	-5.55%
Police City	<u>12.82%</u>	<u>11.98%</u>	<u>-0.84%</u>	<u>11.00%</u>	<u>11.00%</u>	<u>0.00%</u>
Total¹	24.53%	16.43%	-8.10%	21.00%	15.45%	-5.55%
Fire Member	10.54%	8.00%	-6.09%	9.74%	8.00%	-5.29%
Fire City	<u>11.56%</u>	<u>10.26%</u>	<u>-1.30%</u>	<u>10.62%</u>	<u>10.26%</u>	<u>-0.36%</u>
Total¹	22.10%	14.71%	-7.39%	20.36%	14.71%	-5.65%

We are also attaching a table that projects City contributions under three scenarios: current plan with current amortization periods, agreement plan with 30 year fresh start amortization period and agreement plan with current amortization periods. Please note the projections based on the agreement include an assumption of additional Tier 2 payroll growth over the next 3 years.

The following table shows the impact of the proposed changes on FY 2015/16 dollar contributions for the explicit subsidy with total contributions uncapped but member contributions capped and with current amortization periods, rounded to the nearest \$100,000:

	Current	With Opt Out	Savings
Police Total NC	\$ 9,100,000	4,100,000	5,000,000
Police UAL	<u>19,500,000</u>	<u>15,000,000</u>	<u>4,500,000</u>
Total Police	28,600,000	19,100,000	9,500,000
Member	<u>11,600,000</u>	<u>5,200,000</u>	<u>6,500,000</u>
Net Police	17,000,000	13,900,000	3,000,000
Fire Total NC	\$6,100,000	2,800,000	3,300,000
Fire UAL	<u>11,100,000</u>	<u>8,700,000</u>	<u>2,400,000</u>
Total Fire	17,200,000	11,500,000	5,700,000
Member	<u>7,600,000</u>	<u>3,500,000</u>	<u>4,100,000</u>
Net Fire	9,600,000	8,000,000	1,600,000
Total Net Safety	\$ 26,600,000	21,900,000	4,600,000

¹ The proposal requires member contribution rate be applied only to pensionable pay for those remaining in the current plan while the City contribution rate would be applied to total pensionable pay. Since the member and City rates apply to different pensionable pay the total percentages were calculated for the "With Opt Out" scenario based on total pensionable pay, including those assumed to opt out.



The Net contributions are calculated with a cap on Member contribution rates but without regard to any cap on City contribution rates.

Analysis – GASB Valuation Basis

The following table shows the estimated impact of the proposed changes on the Actuarial Liability under the GASB Valuation basis which uses a 6% discount rate and includes both the explicit and implicit subsidy (millions):

	Current Valuation	With Kaiser 4307 Plan	With Opt Out	Total \$ Impact	Total % Impact
Active	\$ 277.7	\$ 247.7	\$ 188.6	\$ (89.1)	-32%
Inactive	429.0	380.6	380.6	(48.4)	-11%
Total	706.7	628.4	569.2	(137.5)	-19%

The following table shows the estimated impact of the proposed changes on the Annual Required Contribution for the implicit and explicit subsidy under the GASB Valuation basis (millions):

	Current Valuation	With Opt Out	Total Impact
Total ARC \$	\$ 51.0	\$ 34.0	\$ (17.0)
Total ARC %	27.09%	18.07%	-9.02%

The ARC %'s are based on total pensionable pay, including those assumed to opt out.

Assumptions

The above calculations are based on the assumption that the following percentage of employees will opt into the VEBA:

Age	Service						
	x < 5	5 <= x < 10	10 <= x < 15	15 <= x < 20	20 <= x < 25	25 <= x < 30	30 <= x
< 25	100%	n/a	n/a	n/a	n/a	n/a	n/a
25 - 29	100%	100%	n/a	n/a	n/a	n/a	n/a
30 - 34	100%	100%	100%	n/a	n/a	n/a	n/a
35 - 39	100%	100%	80%	60%	n/a	n/a	n/a
40 - 44	100%	80%	60%	33%	0%	n/a	n/a
45 - 49	100%	67%	33%	0%	0%	0%	n/a
50 - 54	100%	67%	33%	0%	0%	0%	n/a
55 - 59	n/a	n/a	33%	0%	0%	0%	n/a
60 - 64	n/a	n/a	33%	n/a	n/a	n/a	0%
>= 65	n/a	n/a	n/a	n/a	n/a	n/a	n/a

In addition, the results under the GASB valuation basis assume 50% of those who opt out will remain in the City's medical plans and continue to have a liability for the implicit subsidy.

Study results were estimated based on the Cheiron June 30, 2014 actuarial valuation for both funding (explicit subsidy only) and GASB purposes (explicit and implicit subsidy). However, even though the City is not pre-funding the implicit subsidy, it still exists as long as the retiree participates in the City's medical plans whether the member stays in the current plan or opts out for the VEBA. The liability for the implied subsidy will remain with the City and only decrease to the extent that opt outs leave the City plans.

* * *

Jennifer Schembri
July 23, 2015
Page 4



To the best of our knowledge, this letter is complete and accurate and has been prepared using generally accepted actuarial principles and practices. As a member of the American Academy of Actuaries meeting the Academy Qualification Standards, I certify the actuarial results and opinions herein.

Please call Cathy Wandro (650-377-1606) or me (650-377-1601) with any questions about this letter.

Sincerely,

A handwritten signature in black ink, appearing to read 'John E. Bartel'. The signature is fluid and cursive, with the first name 'John' and last name 'Bartel' clearly distinguishable.

John E. Bartel
President

c: Cathy Wandro, Bartel Associates
Marilyn Oliver, Bartel Associates

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San Jose Police & Fire Retiree Medical Plan

City Contribution Projections

Projections are based on the 6/30/14 Funding Valuation and do not Include any liability associated with the Implied Subsidy

Projection of City Contributions - Combined Police & Fire (\$millions)

EE % City % UAL Amort. P/F Modify Pay?	Current Plan		3a		3b	
	50% Med/25% Dent		8%		8%	
	50% Med/75% Dent		ARC less EE%		ARC less EE%	
	24/26		30/30		24/26	
	No		Yes		Yes	
FYE	%	\$	%	\$	%	\$
2016	12.32%	\$ 23.9	9.51%	\$ 19.4	10.8%	\$ 21.9
2017	12.32%	24.7	9.09%	20.1	10.3%	22.7
2018	12.32%	25.5	8.70%	20.8	9.8%	23.5
2019	12.32%	26.4	8.73%	21.5	9.9%	24.3
2020	12.32%	27.2	8.76%	22.3	9.9%	25.2
2021	12.32%	28.1	8.79%	23.1	9.9%	26.1
2022	12.32%	29.0	8.84%	24.0	10.0%	27.1
2023	12.32%	29.9	8.88%	24.9	10.0%	28.1
2024	12.32%	30.9	8.93%	25.8	10.1%	29.1
2025	12.32%	31.9	8.98%	26.8	10.1%	30.2
2026	12.32%	33.0	9.02%	27.8	10.2%	31.3
2027	12.32%	34.0	9.05%	28.8	10.2%	32.5
2028	12.32%	35.1	9.09%	29.9	10.2%	33.7
2029	12.32%	36.3	9.13%	31.0	10.3%	34.9
2030	12.32%	37.5	9.16%	32.1	10.3%	36.1
2031	12.32%	38.7	9.19%	33.2	10.3%	37.4
2032	12.32%	39.9	9.21%	34.4	10.4%	38.7
2033	12.32%	41.2	9.24%	35.6	10.4%	40.1
2034	12.32%	42.6	9.27%	36.9	10.4%	41.5
2035	12.32%	44.0	9.30%	38.2	10.4%	43.0
2036	12.32%	45.4	9.33%	39.6	10.5%	44.5
2037	12.32%	46.9	9.35%	41.0	10.5%	46.0
2038	12.32%	48.4	9.36%	42.4	10.5%	47.6
2039	12.32%	50.0	9.38%	43.8	10.5%	49.2
2040	7.06%	29.6	9.39%	45.3	3.9%	18.6
2041	7.06%	30.5	9.40%	46.8	3.9%	19.2
2042	4.06%	18.1	9.41%	48.4	0.0%	-
2043	4.06%	18.7	9.42%	50.0	0.0%	-
2044	4.06%	19.3	9.42%	51.7	0%	-
2045	4.06%	20.0	9.43%	53.4	0%	-
2046	4.06%	20.6	0%	-	0%	-
2047	4.06%	21.3	0%	-	0%	-
2048	4.06%	22.0	0%	-	0%	-
2049	4.06%	22.7	0%	-	0%	-
2050	4.06%	23.4	0%	-	0%	-
Totals		1,096.7		1,019.1		852.5
PV at 3% Int.		686.2		625.5		573.2
PV at 7% Int.		414.6		366.8		366.9



July 23, 2015

Jennifer Schembri
Interim Director
City Manager's Office of Employee Relations
200 E. Santa Clara Street, 3rd Floor Wing
San José, CA 95113-1905

Re: San Jose Police Officers and Fire Fighters Guaranteed Purchasing Power (GPP)

Dear Ms. Schembri:

This letter provides our analysis of the San Jose Police Officers and Fire Fighters Guaranteed Purchasing Power (GPP) agreement. We understand the agreement provides for a GPP benefit in exchange for agreement to eliminate the Supplemental Retirement Benefit Reserve (SRBR). Elimination of the SRBR has already resulted in significant savings. The GPP benefit will provide current and future Tier 1 retirees a guaranteed 75% of purchasing power benefit after retirement. This benefit will be calculated by comparing the ratio of actual pension benefits to what pension benefits would have been had retirees received 100% of Bay Area CPI increases. If that ratio is less than 75% then retirees would receive an additional check equal to the difference.

Analysis

We believe the cost of this benefit will only be significant if inflation returns to high levels. Inflation has generally been less than 3% (Tier 1 Cost of Living Adjustments) over the last 20 years so only retirees who retired several years ago (prior to 1981) would have ratios less than 75%. As of May 2015 there were approximately 56 retirees with an average age of 80.

The estimated liability for this group of earlier retirees is approximately \$2.4 million and because this is an increase for current retirees we think it is possible (if not likely) Cheiron will recommend a shorter (5 year) amortization period. If so then the first year payment will be about \$550,000. However, if they do not recommend a shorter amortization then using 20 years the first year payment will be about \$180,000. Both of these would increase with the aggregate payroll assumption of 3.25%.

Due to time constraints, our analysis did not include a volatility assumption for inflation. While we believe Cheiron will price the GPP for other (current and future) retirees using some volatility assumptions for inflation, we also would generally expect any additional cost to be fairly modest.

Assumptions

Study results were estimated using the same assumptions as the Cheiron June 30, 2014 actuarial valuation. Our analysis also assumes Cheiron will price this using stochastic simulations based on a median inflation assumption of 3% or less.

* * *

Jennifer Schembri
July 23, 2015
Page 2



To the best of our knowledge, this letter is complete and accurate and has been prepared using generally accepted actuarial principles and practices. As a member of the American Academy of Actuaries meeting the Academy Qualification Standards, I certify the actuarial results and opinions herein.

Please call Cathy Wandro (650-377-1606) or me (650-377-1601) with any questions about this letter.

Sincerely,

John E. Bartel
President

c: Cathy Wandro, Bartel Associates
Marilyn Oliver, Bartel Associates
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EXHIBIT J



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Jennifer Schembri

SUBJECT: SEE BELOW

DATE: August 17, 2015

Approved

Date

8/17/15

SUPPLEMENTAL

SUBJECT: ACTIONS RELATED TO THE SETTLEMENT AGREEMENT WITH THE SAN JOSÉ POLICE OFFICERS' ASSOCIATION AND THE SAN JOSÉ FIRE FIGHTERS, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 230

REASON FOR SUPPLEMENTAL

The reason for the supplemental memorandum is to provide additional information based on an addendum to the Alternative Pension Reform Settlement Framework Agreement reached with the San Jose Police Officers' Association (SJPOA) and International Association of Fire Fighters, Local 230 (IAFF, Local 230) on the quo warranto process to implement the Alternative Pension Reform Settlement Framework ("Framework Agreement").

BACKGROUND

The City, the SJPOA and IAFF, Local 230 reached an agreement on the Framework Agreement on July 15, 2015. This agreement provides the framework for a settlement of the outstanding litigation between the parties regarding Measure B. This settlement is contingent on a number of factors, including settlements by other litigants (other bargaining units and retirees). Because the Framework Agreement does not include specific terms for implementation, the parties continued discussing the appropriate implementation path to take while acknowledging that the City is still in global settlement discussions with the Federated bargaining units and retirees' association. Addendum #1 regarding the ballot measure (Attachment A) and Addendum #2 regarding the implementation plan (Attachment B) should be considered addendums to the Alternative Pension Reform Framework Agreement.

ANALYSIS

The agreed upon implementation path utilizes a two-prong approach that includes using the SJPOA quo warranto case to immediately implement the agreed-upon changes to retirement benefits and pursuing a November 2016 ballot measure. It is important to note that the quo warranto process allows the parties to carry out the Alternative Settlement Framework as quickly as practical to begin recruiting and retaining police offers immediately.

Under the agreement, before the quo warranto process is initiated in Court, the POA and IAFF, Local 230 will work collaboratively with the City to develop a Charter amendment ballot measure,

HONORABLE MAYOR AND CITY COUNCIL

August 17, 2015

Subject: Actions Related to the Settlement Agreement with the San José Police Officers' Association and the San José Fire Fighters, International Association of Fire Fighters, Local 230

Page 2

which, if the quo warranto process (as defined in the Settlement Framework and Proposed Quo Warranto Implementation Plan) succeeds, will supersede Measure B with the following: (1) a provision requiring voter approval of defined benefit pension enhancements, (2) a provision requiring actuarial soundness, (3) a provision prohibiting retroactivity of defined benefit pension enhancements, and (4) any other provisions contained in the Settlement Framework to which the parties mutually agree. The ballot measure will go to voters in November 2016. Once the parties mutually agree on language, POA and IAFF agree to endorse the ballot measure. Please refer to Attachment A – Addendum #1 for the agreement.

Once the Federated bargaining units and retirees' association agree to and ratify a global settlement of the remaining Measure B litigation, the implementation process will begin. Each party will request a stay in the Appellate Court regarding the Measure B litigation and unfair practice charges before the California Public Employee Relations Board (which will be stayed until December 31, 2015 subject to quarterly continuation if the quo warranto process is on-going). Using the POA case, the parties will propose a stipulation to stay the implementation of Measure B while the other items in the implementation process are proceeding. Please note that this may require coordination with the Attorney General. The parties will then propose a Stipulated Judgment in the quo warranto case that Measure B should be invalidated; however, the settlement will be non-precedential in any forum and the City will not admit wrongdoing (and the judgment will not include a finding that it negotiated in bad faith). The issue will be whether or not the City should have placed on the ballot the version of the ballot measure adopted by Council in December 2011 or resumed negotiations once it was modified. Please see the Attachment B - Addendum #2 for the detailed Proposed Quo Warranto Implementation Plan.

As part of the addendum agreement, the SJPOA and IAFF, Local 230 will oppose any third party litigation that challenges the invalidation of Measure B, whether by joining the litigation or petitioning an Amicus Brief.

In the event that the Federated bargaining units and retirees' association do not reach agreements to settle litigation with the City or the quo warranto process fails to invalidate Measure B, the parties agreed that the November 2016 ballot measure would implement the Alternative Pension Reform Framework.

The City Administration will continue to update the Council on the implementation process.



Jennifer Schembri
Director of Employee Relations

Attachment A – Addendum #1 to the July 15, 2015 Alternative Pension Reform Settlement Framework

Attachment B – Addendum #2 to the July 15, 2015 Alternative Pension Reform Settlement Framework

For questions, please contact Jennifer Schembri, Director of Employee Relations at (408) 535-8154.

ADDENDUM #1 TO THE JULY 15, 2015 ALTERNATIVE PENSION REFORM SETTLEMENT
FRAMEWORK

BETWEEN
THE CITY OF SAN JOSE
AND

THE SAN JOSE POLICE OFFICERS' ASSOCIATION (POA)
THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 230 (IAFF)

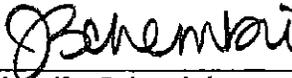
The POA and IAFF, Local 230 agree to work collaboratively with the City to develop a ballot measure, which, if the quo warranto process (as defined in the Settlement Framework and Proposed Quo Warranto Implementation Plan) succeeds, will supersede Measure B with the following (1) a provision requiring voter approval of defined benefit pension enhancements, (2) a provision requiring actuarial soundness, (3) a provision prohibiting retroactivity of defined benefit pension enhancements, and (4) any other provisions contained in the Settlement Framework that the parties mutually agree to, for inclusion in a 2016 ballot measure that will incorporate any such provisions into the City Charter. Once the parties mutually agree to the language, POA and IAFF shall endorse the ballot measure.

FOR THE CITY:



Norberto Dueñas
City Manager

8/14/15
Date



Jennifer Schembri
Director of Employee Relations

8/14/15
Date



Edgardo Garcia
Assistant Chief of Police

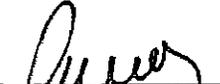
8/14/15
Date



Charles Sakai
Labor Consultant

8/14/15
Date

FOR THE UNIONS:



Paul Kelly
President, SJPOA

8/14/15
Date



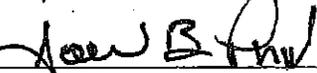
James Gonzalez
Vice President, SJPOA

Date



Gregg Adam
SJPOA Counsel

8/14/15
Date



Joel Phelan
President, IAFF, Local 230

8/14/15
Date

Sean Kaldor
Vice President, IAFF, Local 230

Date

Christopher Platten
Legal Counsel, IAFF, Local 230

Date



Tom Saggau
SJPOA/IAFF, Local 230 Consultant

8.14.15
Date

**ADDENDUM #2 TO JULY 15, 2015 ALTERNATIVE PENSION REFORM SETTLEMENT
FRAMEWORK**

**BETWEEN
THE CITY OF SAN JOSE**

AND

**THE SAN JOSE POLICE OFFICERS' ASSOCIATION (POA)
THE INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 230 (IAFF)**

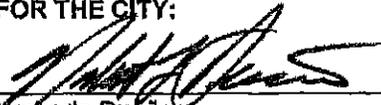
PROPOSED QUO WARRANTO IMPLEMENTATION PLAN, AUGUST 14, 2015

As agreed upon by the City, the San Jose Police Officers' Association and the International Association of Firefighters, Local 230, the proposed quo warranto implementation plan shall be followed by the parties in the manner prescribed below.

Step	Time	Action
1	Upon ratification of Federated/Retirees Deal	Global Settlement Addendum Agreement on quo warranto process: <ul style="list-style-type: none"> Global settlement involving all litigants (including retirees) and bargaining unit representatives Entered into for purposes of settlement Except as otherwise provided in the stipulated order and judgment described below no admission of wrongdoing, including no admission that the City acted in bad faith Non-precedential for any purpose
2	Immediately after #1	Parties ask for a stay in appellate proceedings (Lucas ruling). Local 230 will also ask for a stay in the PERB proceedings until December 31, 2015. If Step 8 has occurred and the quo warranto process is still ongoing, the stay will be continued on a quarterly basis until the conclusion of the quo warranto process.
3	Immediately after #1	Begin drafting ordinances and Tripartite Retirement MOA. Begin identifying ordinances implemented as a result of Measure B.
4	Immediately after #1	Local 230 intervenes as necessary/indispensable party in POA quo warranto case, without objection from the City, which may require seeking permission from the Attorney General.
5	Immediately after #1	Use POA case to offer a proposed stipulation to the Judge staying the implementation of Measure B pending further proceedings outlined below, which may require coordination with the Attorney General.
6	Immediately after #1	Parties negotiate charter language, pursuant to Addendum #1, simultaneous with agreement on stipulated facts, order and judgment.
7	Simultaneous with #6	Proposed Stipulated Facts, Order and Proposed Stipulated Judgment in quo warranto case Outline of stipulated facts and findings: <ul style="list-style-type: none"> history of negotiations including agreement on impasse as of 10/31, number of negotiation sessions, and use of mediation; changes to the proposed ballot language, including post-impasse changes; tension between City's powers and MMBA and effort to harmonize through Seal Beach negotiations—as described on pages 3-4 of Attorney General opinion No. 12-605.

		<ul style="list-style-type: none"> language from AG decision to grant QW based on the question of whether impasse had been broken by post-impasse ballot changes made by City and whether City Council needed to negotiate further (the inherent powers vs. MMBA issue); the cost and time and risks of litigating QW, including appeals and the issue of whether a decision in QW case would be universally applicable; the desirability of finding a solution that is collaborative financial challenges facing City and retirement funds - desire on part of employees, retirees and City to make benefits sustainable; Stipulated Order that City should have engaged in further negotiation of final language before putting on ballot to comply with MMBA obligations and failure to do so was a procedural defect significant enough to declare null and void Resolution placing Measure B on ballot; This order will not include a finding that the City acted in bad faith. Any additional language required by the court to allow the Court to approve the parties' Stipulated Order and Judgment. The Court order must be factually accurate. Agreement that Resolution No. 76158 shall be null and void. Overriding public interest in expedited resolution of quo warranto proceedings and implementation of Settlement Framework to restore and improve city services and sustainability of retirement plans. Stipulated Judgment shall reflect that Measure B shall be invalidated
8	Upon completion of #6 and #7	Submission of Stipulated Order and Stipulated Judgment to quo warranto judge, which may require coordination with the Attorney General.
9	Upon entry of judgment in quo warranto case	<ul style="list-style-type: none"> Formally adopt ordinances to implement Settlement Framework and replace Measure B. All parties dismiss/withdraw all complaints, unfair practice charges, etc.
10	January 2016	Begin discussions over including any other provisions in Settlement Framework in ballot measure (per Addendum #1 to Settlement Framework) to be completed by July 2016
11		POA and Local 230 agree to oppose any third party litigation challenging the invalidation of Measure B through the quo warranto process either by joining the litigation or by petitioning to file an Amicus Brief.
12	Immediately upon (1) federated unions failing to reach pension settlement; (2) retirees not settling their litigation or (3) quo warranto process not succeeding in invalidating Measure B	Craft ballot measure to implement all aspects of Settlement Framework

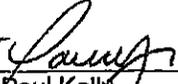
FOR THE CITY:



Norberto Dueñas
City Manager

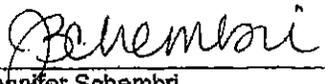
8/17/15
Date

FOR THE UNION:



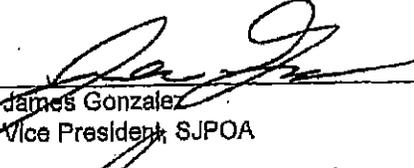
Paul Kelly
President, SJPOA

Date



Jennifer Schembri
Director of Employee Relations

8/17/15
Date

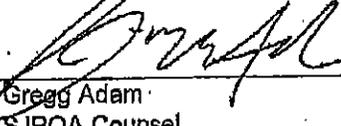


James Gonzalez
Vice President, SJPOA

Date

Edgardo Garcia
Assistant Chief of Police

Date



Gregg Adam
SJPOA Counsel

8-17-15
Date

Charles Sakai
Labor Consultant

Date



Joel Phelan
President, IAFF, Local 230

8/17/15
Date



Sean Kaldor
Vice President, IAFF, Local 230

Date

Christopher Platten
Legal Counsel, IAFF, Local 230

Date



Tom Saggau
SJPOA/IAFF, Local 230 Consultant

Date

EXHIBIT K

Alternative Pension Reform Settlement Framework Agreement

Background

In April 2015, the City began discussions with the San Jose Police Officers' Association (SJPOA) and the International Association of Fire Fighters, Local 230 (Local 230) to settle litigation surrounding Measure B, a pension reform ballot measure that passed in June 2012. On July 15, 2015, the parties agreed upon an Alternative Pension Reform Framework (Framework) that presents a path toward the settlement of litigation over Measure B. The Framework is subject to a final overall global settlement with all parties related to the Measure B litigation. The Framework is specific to employees represented by SJPOA and Local 230, however discussions are continuing with the Federated bargaining units and Federated Retirees' Association.

Over the next 30+ years, the savings from the modification to Tier 2, closing of the retiree healthcare defined benefit plan, and continuation of the elimination of the Supplemental Retiree Benefit Reserve (SRBR) are estimated to be **\$1.7 billion**, for Police and Fire.

Proposed Implementation Plan

- The implementation plan is contingent on reaching an agreement with the other parties to litigation. The City and the Federated bargaining units met on August 31, 2015 to continue those discussions and will continue meeting.
- Once a global settlement is reached and before the quo warranto process begins in court, which is a legal proceeding used to overturn a ballot measure post-election, the parties will agree on ballot measure language for November 2016 that will include provisions to ensure:
 - Actuarial soundness of the pension plan
 - Only voter-approved retirement benefit enhancements
 - No retroactive retirement benefit enhancements
 - Any other mutually agreed upon language
- The parties will agree upon and submit a factual stipulation and stipulated judgment in the quo warranto case finding that Measure B is invalid.
 - This will be non-precedent setting and will not include a finding that the City acted in bad faith.
- If the quo warranto process does not result in an invalidation of Measure B, the November 2016 ballot measure would implement the Framework Agreement for Police and Fire.

Rehires and Recruits

Until the implementation of the alternative pension reform settlement framework is complete, employees who have left City service and return to the Police or Fire Departments, or new employees, will be placed in the current Tier 2. Implementation will require a court declaring Measure B to be void and/or the voters replacing Measure B. Any implementation will occur after the Council is allowed to modify the municipal code to permit employees to retroactively be placed into either the revised Tier 2 (new employees) or Tier 1 (if rehired and formerly Tier 1). This will create an amortized unfunded liability that the City and these employees will share equally.

The following is a summary of the Framework's key provisions that would affect current or future employees.

Tier 2 Key Points

- "Backloaded" 2.7% at 57 formula with 80% maximum, which is a service-based formula where the employee earns a fixed benefit per year of services which is lower for earlier years of service and increases by a specified amount as an employee earns additional years of service.
- CPI or max 2.0% Cost of Living Adjustment
- Eligible to retire with five (5) years of service
- 50/50 cost sharing of Normal Cost and Unfunded Liability
 - Ramp-Up of 0.33% per year for Unfunded Liability
- Revised Tier 2 will be retroactive for current sworn Tier 2 employees who will share 50/50 in the amortized unfunded liability created by making the changes retroactive.
- Rehired former Tier 1 employees will go back into Tier 1. These employees will share 50/50 in the amortized unfunded liability created by making the changes retroactive for those Tier 1 employees who have since returned and gone into Tier 2.

Retiree Healthcare Key Points

- Closes the defined benefit retiree healthcare plan and establishes a Voluntary Employee Beneficiary Association (VEBA) for new and current Tier 2 employees. The contribution rate will be 4% into the VEBA.
- Offer Tier 1 employees a one-time irrevocable opt-out into the VEBA, pending IRS approval. The contribution rate for those who opt-out will be 5% in the VEBA. Those who stay in the defined benefit plan will have a contribution rate of 8%. The difference between the contribution amount for those who opt-out and those who stay in the defined benefit plan (3%) will be from post tax earnings.
- A new lowest cost healthcare plan will be offered with a \$3000 deductible - the current 85/15 cost sharing would not change for active employees.
- A floor will be set for the lowest cost healthcare plan so that the level of coverage does not go below the "silver" level of benefits as specified by the Affordable Care Act.
- Retirees will be offered an In-Lieu Premium Credit of 25% of the monthly premium for those who choose to forego the retiree healthcare plan.

Disability Process and Definition Key Points

- Reinstate the previous definition of disability, an employee injured or sick during service and unable to perform the duties of the position then held or any other position in the same classification of positions.
- The retirement board will appoint a 3-member independent medical review panel for disability retirement applications.
- Disability retirement applications must be submitted within one month of separation from the City and not deferred past four (4) years.
- A workers' compensation offset will be applied to Tier 2 members up a maximum of \$10,000 per employee.
- The parties will convene a Public Safety Wellness Improvement Committee with goals to streamline the process, reduce costs, increase prevention and expedite an employee's return to work.

Supplemental Retiree Benefit Reserve (SRBR)/Guaranteed Purchasing Power (GPP) Key Points

- The SRBR ("13th Paycheck") will continue to be eliminated, preserving the achieved savings.
- A GPP program will be put in place so that current and future Tier 1 retirees can maintain 75% of purchasing power of their pension benefit.
 - There are currently approximately 56 retirees in the Police and Fire Plan under 75%.

EXHIBIT L

CITY OF SAN JOSÉ

SJPOA and IAFF Alternative Pension Reform Settlement Framework

Background

- Measure B approved by the voters in June 2012
- SJPOA and individuals represented by IAFF, Local 230 filed suit against the City
- Superior Court ruling
- Public Employment Relations Board (PERB) hearings and decisions
- Appeals pending

Background (cont'd)

- Council direction to pursue global settlement with all litigation plaintiffs
- Retirement Reform Savings Achieved

Retirement Reform Estimate (FY 14-15)	GF Savings
---------------------------------------	------------

Implemented	
--------------------	--

SRBR Elimination	\$13 M
Retiree Healthcare Changes (lowest cost plan)	\$7 M
New Tier 2 Retirement Plans	\$5 M
<i>Subtotal Implemented</i>	<i>\$25 M</i>

- Began settlement discussions in April 2015
- Agreement on July 15th

Revised Tier 2 – Key Points

- Backloaded 2.7% at 57 formula, 80% max

Years of City Service	Benefit Accrual Rate
1-20	2.4%
21-25	3.0%
26+	3.4%

- CPI or max 2.0% Cost of Living Adjustment
- 50/50 Cost Sharing of Normal Cost and Unfunded Liability
- - Ramp up of 0.33% per year for Unfunded Liability
- Retroactive for current sworn Tier 2
- Rehired former Tier 1 go back into Tier 1

Retiree Healthcare – Key Points

- Close retiree healthcare plan and establish a Voluntary Employee Beneficiary Association (VEBA) for new and current Tier 2

Employee Contribution Rate	City Contribution Rate
4%	N/A

- Tier 1 opt-out to VEBA

- One-time irrevocable election

Plan	Employee Contribution Rate	City Contribution Rate
VEBA	5%	N/A
Defined Benefit	8%	ARC

- The difference (3%) between the VEBA contribution rate for those who opt-out and the defined benefit plan is post tax

Retiree Healthcare – Key Points (cont'd)

- New lowest cost healthcare plan
 - Kaiser NCAL 4307 Plan
 - \$3000 deductible
 - Qualifies for a Health Savings Account (HSA)
 - Floor for lowest cost healthcare plan established
 - Cannot be lower than the current ACA “silver” plan (provide at least 70% of healthcare expenses)
 - Mandatory enrollment in Medicare Parts A and B
- Retiree Healthcare In-Lieu Premium Credit
 - 25% credit for the monthly premium of the lowest cost healthcare and dental plan
 - No cap – cannot be taken in cash

Disability Process and Definition

- Reinstate previous disability definition
- 3-member independent medical review panel
 - Appointed by retirement board
- Applications for disability retirement must be:
 - Submitted within one (1) month of separation, and
 - Cannot be deferred past four (4) years
- Tier 2 workers' compensation offset – \$10,000 max per employee
- New *Public Safety Wellness Improvement Committee* with goals to streamline the process, reduce costs, increase prevention, and expedite return to work

Supplemental Retiree Benefit Reserve (SRBR) – Guaranteed Purchasing Power (GPP)

- Continue elimination of the SRBR and preserve savings
- Guarantee current and future retirees can maintain 75% purchasing power of pension benefit
 - Currently, approximately 56 retirees in Police & Fire Plan under 75%

Proposed Implementation Plan

- Before quo warranto process begins in court, the ballot measure language will be agreed on
- November 2016 ballot measure will include:
 - Ensure actuarial soundness
 - Only voter-approved retirement benefit enhancements
 - Guarantee no retroactive retirement benefit enhancements
 - Any other mutually agreed upon language

Proposed Implementation Plan (cont'd)

- Propose a stipulated agreement in the *quo warranto* case that Measure B should be invalidated
 - Settlement will be non-precedential setting
 - This order will not include a finding that the City acted in bad faith
- Contingent on Federated bargaining units and retirees agreeing to a global settlement
- Request a stay of all litigation and PERB matters related to Measure B
- POA and IAFF agree to oppose any 3rd party litigation
- If the *quo warranto* fails or the other parties do not agree, the November 2016 ballot measure would implement the Framework Agreement

EXHIBIT M

Mercury News editorial: Liccardo olive branch is substantial

Mercury News Editorial

San Jose Mercury News

Posted: Mon Feb 16 04:21:10 MST 2015

After Sam Liccardo surprised labor leaders by winning the San Jose mayor's race in November, they told him that if he wanted to negotiate a settlement and get beyond the divisive Measure B — as he'd said he did during the campaign — then he needed to set a goal for the savings to be negotiated.

Fair enough. So Liccardo laid out a proposal several weeks ago in discussions with union leaders and last week in public. His savings target: \$25 million a year. That's half the amount projected if the pension measure approved by voters in 2012 is upheld in court.

Half.

Now you might think this conciliatory gesture would be welcomed. Instead it landed with a thud. But that was predictable: This is a time of Kabuki-grade posturing, and it will pass. If city unions, including police and fire, want to get San Jose back on track to recruit and keep good employees — and we believe they do — they will return to bargaining, and soon.

It's easy to pick apart the specifics of any offer, especially after unions put their credibility on the line last year to paint Liccardo as a villain. But Liccardo is demonstrating that he wants to settle, as we were confident he would.

A negotiated settlement will be in everyone's best interest.

The mayor says anything in his proposal is negotiable. He intended it to revive talks, not to be swallowed whole. He wants to put off implementing the contested provisions of Measure B until at least 2017 to allow time to reach agreement and go back to the ballot if necessary with a settlement. He wants a sales tax increase on the ballot next year.

Ben Field, head of the South Bay Labor Council, says he believes unions see Liccardo's opener as positive, even though some public comments have been dismissive. He says three things need to be accomplished to resolve conflicts: Fix the disability provision in Measure B, restore vested rights that the measure undermined, and improve the Tier 2 benefit plan for new hires in public safety to make it competitive.

Fixing the disability provision is part of Liccardo's agenda, and he said Friday the other ideas Field mentioned can be on the table. The only hard line he draws is that the city can't return to the unsustainable levels of spending that got it in trouble over the past decade. And really, isn't sustainability in everyone's interests?

Field says the unions need to start working with Acting City Manager Norberto Duenas' negotiating team to explore what's possible. He says it's critical that all this be settled this year.

Makes sense to us. And it argues for a swift return to serious bargaining.

Close Window

Send To Printer

San Jose, unions reach pension settlement

By Ramona Giwargis
rgiwargis@mercurynews.com

San Jose Mercury News

Posted: Thu Jul 16 06:53:27 MDT 2015

SAN JOSE — After more than three years of bitter fighting, city and public safety union leaders Wednesday reached a tentative deal that would end litigation over the Measure B pension reforms voters overwhelmingly approved in 2012.

The proposed deal came after round-the-clock talks during the City Council's summer break on the day union leaders had threatened to walk out if they couldn't reach a settlement.

"Today's agreement will be a catalyst for the rebuilding of our public safety services, to restore San Jose's police and fire departments," said Mayor Sam Liccardo, who'd championed the pension reforms as a councilman and candidate. "It's also a moment to celebrate our collective commitment to move forward beyond the contentiousness of the past."

Paul Kelly, president of the San Jose Police Officers' Association, called it "a historic day for San Jose."

"When two sides work cooperatively and collectively," Kelly said, "a positive outcome can be had."

While the agreement Wednesday only covers retirement benefits for police and firefighters, Vice Mayor Rose Herrera said it would pave the way for settlements with other unions that also are suing the city.

"The other groups will look at this as a template," Herrera said.

The police and fire unions expect members to ratify the settlement in the next few days. The deal will then go to the City Council in early August for final approval.

The pension reform measure fueled a heated court battle between the city and its unions, especially the public safety groups who blame the 2012 initiative for chasing away droves of San Jose police officers.

But the city viewed Measure B as a way to control skyrocketing retirement costs that had more than tripled after benefit increases in the late 1990s and devoured funds for services. The measure called for current employees to pay more into their pensions, eliminated bonus checks for retirees, established scaled-back benefits for new workers and stricter disability provisions.

The proposed settlement would roughly maintain most parts of the measure already enacted, such as eliminating bonus checks for retirees and scaled-back pensions for new hires while abandoning provisions blocked by a trial judge's 2013 ruling or which the council had not enacted, such as higher pension contributions from workers and some disability changes.

"The message was being sent to new officers that they wouldn't be protected if they become disabled," Herrera said. "But if somebody gets injured on the job, they shouldn't have to fight for disability and I didn't want us to be different than other agencies."

Measure B became the signature fiscal reform initiative of former Mayor Chuck Reed, but he called the settlement "good news."

"It's a good move to lock in savings because litigation is uncertain and you never know if you're going to be able to hold on to all your winnings," said Reed, who had backed successor Liccardo and is pushing for pension reform on a statewide level by introducing a new measure earlier this year.

Councilman Ash Kalra, who had criticized the pension measure, called the settlement "bittersweet vindication."

"Today, we begin to close a very dark chapter in San Jose and start to rebuild our city," Kalra said on Twitter.

In a news conference late Wednesday, Liccardo said the technical details about how the city will replace Measure B charter

changes with the settlement are still being worked out, and it's unclear if voters would have to approve.

Nearly 70 percent of city voters approved the June 2012 measure over objections of city unions that called it an illegal assault on their employees' promised benefit rights that would spawn an exodus of city workers.

The police department has seen its ranks dwindle from a historic peak of 1,400 officers in 2009 to about 960 today, marking the first time in three decades that number was below 1,000. By contrast, San Francisco, a city with 15 percent fewer people than San Jose, is served by over 2,100 officers.

After Measure B was passed in 2012, the city was slapped with numerous lawsuits from its employee unions and retirement associations. The city and unions have collectively spent millions litigating Measure B in court before coming to the table four months ago to discuss settlement options. Liccardo said the city will repay some of the unions' attorney fees as part of the settlement.

Less than a year ago, the two bitterly torn sides could hardly be in the same room to discuss a settlement. But new blood at the city's administration -- a new city manager, employee relations director and mayor -- along with fresh leadership at the San Jose Police Officers' Association, seemed to turn the tide.

"A number of people believed the problems between Mayor Reed and the public bargaining units were so poisoned that nothing could happen until there was a new administration," said Larry Gerston, a political science professor emeritus at San Jose State University.

Follow Ramona Giwargis at [Twitter.com/ramonagiwargis](https://twitter.com/ramonagiwargis) or contact her at 408-920-5705.

PROPOSED PENSION SETTLEMENT

- Maintains elimination of bonus checks for retirees, scaled-back pensions for new hires.
- Abandons blocked provision that would make current workers pay more for pensions or reduce benefits earned in remaining years.
- Eliminates requirement that disabled workers take another city job if capable but maintains disability evaluation by medical panel instead of retirement board trustees.

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Mercury News editorial: Police settlement on Measure B -- a new day for San Jose

Mercury News Editorial

San Jose Mercury News

Posted: Thu Jul 16 14:20:19 MDT 2015

It's a new day for San Jose.

The tentative settlement reached Wednesday with police and fire unions over Measure B litigation will fling a door wide open to fresh air -- a new political climate, a financially sustainable future for the city and an affirmation that, yes, this community still can set aside differences to work for the common good.

It's a credit to new leadership of the San Jose Police Officers Association, to the firefighters union -- and to Mayor Sam Liccardo, who has made settling the dispute over voter-approved pension reform a priority in his first six months in office. The public safety settlement will be a template for settling with other unions.

Liccardo was not the unions' candidate for mayor. As the councilman representing downtown, he had supported Mayor Chuck Reed's Measure B when negotiations failed to rein in pension benefits to a level the city could sustain. But Liccardo understood that endless litigation would prolong the acrimony and the employee flight inspired by the ballot measure and ensuing conflict.

Union leaders have been gracious in discussing the agreement. The change in tone signals a sense of partnership that could make all the difference in achieving civic goals.

Liccardo held out for a settlement that, while short of the Measure B savings, provides employee benefits the city should be able to afford. San Jose could not compete for police or other key staff without rolling back some of the Measure B provisions, and while voters approved Measure B, they want a fully staffed police department. Crime is again on a downward trend, but if your house gets burglarized and the police can't come quickly, statistics are cold comfort.

We're particularly relieved that there's a clean settlement on disability provisions, which we always said needed revision. Now it's simple: A medical board has to approve disability retirement, not pension boards that include union appointees inevitably sympathetic to applicants. That should eliminate outrageous claims while restoring the city's commitment to stand by its protectors.

The change in tone of the talks is a credit to everyone at the table. The groundwork for much of the settlement was laid last year with different city and union representatives, but personality conflicts and the political rancor of a mayoral campaign made closure impossible.

It's easy to blame the acrimony on Reed, whose talents did not include diplomacy. But he saw a problem of unsustainable pension costs and had the tenacity to draw a line. Fortunately, he said this week that settling the litigation was the right thing to do. We hope his supporters join him in embracing compromise.

Now the unions' rank and file need to ratify the agreement. A resounding yes would affirm a new spirit of collaboration and common ground.

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Liccardo's first six months defined by 'historic' Measure B deal

By Ramona Giwargis
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San Jose Mercury News

Posted: Sat Jul 18 14:17:37 MDT 2015

SAN JOSE -- When Mayor Sam Liccardo promised last year to bring closure to City Hall's most rancorous battle, his critics scoffed.

But after six months in office, Liccardo reached a tentative accord last week to settle the city's feud over pension reforms he'd championed as a councilman and mayoral candidate -- but which critics blamed for an exodus of cops and other workers that critically weakened city services.

Now, even Liccardo's critics, who decried his steadfast predecessor and ally Chuck Reed, are acknowledging the mayor's first six months have shown an unexpected effort to mend fences.

"It was 'my way or the highway' with Reed," said Ben Field, executive officer of the South Bay AFL-CIO Labor Council. "Mayor Liccardo has taken a different approach in the sense that he's been willing to go to the table and negotiate."

Liccardo isn't taking a victory lap yet -- the proposed settlement has yet to be ratified by union workers, and it's too early to say how it will go over with the voters who approved the pension cutbacks. But the tentative deal capped an eventful -- and sometimes sorrowful -- first six months that tested his leadership.

Just 13 weeks after his inauguration, and with tension already high over the pension dispute, Liccardo was challenged with leading the reeling city after the murder of a policeman. In the following months, he was forced to corral the fractious council in fending off developer efforts to further weaken the city's anemic industrial base, and to strategize a city response to the state's withering drought.

"I feel fortunate to say we've had a great run so far," Liccardo said. "I came into office with a sharply divided council and a divided city, and we're seeing folks work together to accomplish some important goals on everything from resolving pension disputes to creating job opportunities for at-risk teens to improving public safety."

Liccardo, a former Santa Clara County prosecutor and two-term city councilman representing downtown, enjoyed strong business support as he narrowly defeated his union-backed opponent, county Supervisor Dave Cortese, in last year's race to succeed the termed-out Reed. The pension fight was front and center during the campaign.

Though voters since have largely favored pension-reform candidates like Liccardo, the pension battle was leaving the police department in crisis. The department has seen its ranks dwindle from 1,400 officers in 2009 to about 960 today.

"My fundamental position hasn't changed much, but I'd be the first to acknowledge that the fallout from Measure B was a painful one," Liccardo said, "and certainly our workforce suffered and the city suffered in its inability to retain many of our employees."

Larry Gerston, a political science professor emeritus at San Jose State University, said resolving the Measure B dispute will define Liccardo's first six months in office.

"This will certainly enhance the stature of Mayor Liccardo, who came into office saying he'll find a way to solve this," Gerston said. "He's seen as someone who's much more open to accommodation."

It's this change in stature that's won over some of Liccardo's harshest critics, many of whom say his leadership style is a welcome change from Reed.

"We're sincerely appreciative that Mayor Liccardo rejected the Reed approach, embraced negotiations and provided critical leadership at the seminal moment when Measure B negotiations were at a tipping point to resolve this long nightmare," said

Tom Saggau, a spokesman for the San Jose Police Officers' Association and San Jose Firefighters Local 230.

In an attempt to hit the reset button with an army of jaded employees, Liccardo cleaned house at the city manager's office prior to beginning his term. He led the council in replacing Ed Shikada with Norberto Dueñas, a leader well-respected by city employees.

Amid the icy tension of the pension dispute came what Liccardo called his young administration's "darkest hour": In the middle of a council meeting, he got a text message that a San Jose policeman had been fatally shot. Liccardo canceled the meeting and, in the hours and days that followed, strove for a delicate balance of leading the community's outrage and expressing grief without grandstanding.

The officer, Michael Johnson, was killed in an ambush while responding to a call of a suicidal man. A 38-year-old San Jose native and graduate of Gunderson High School, he was the police department's first officer lost in the line of duty since 2001.

"This strikes the heart of all of us in San Jose," the mayor said that night.

Rebuilding the city's workforce isn't the only political challenge. Liccardo is also tasked with unifying a council often divided by business versus labor interests.

"All of them have their own interests," Reed said. "But the mayor has to create a council majority that can work together to solve problems."

Liccardo wasted no time staking out key priorities for the City Council, which has five new members. One is keeping the city's industrially zoned land off limits for conversion to housing, which is more profitable for developers but a net loss for the city's finances.

He also made a point of positioning San Jose as a leader in the state's efforts to manage its record drought, leading the council in adopting more aggressive conservation goals than had been recommended. He said the city exceeded that 30 percent cutback in June.

The unanimous adoption of Liccardo's first budget in June — one that pegged \$11.4 million for police hiring and retention, funding for road repairs and restored library hours to six days a week — was another notch in his belt.

But San Jose is still plagued by a lack of affordable housing and homelessness, which Liccardo called the city's biggest challenge. He's proposed housing initiatives such as building tiny homes and converting motels for the homeless. Liccardo said he supports expanding San Jose's rent control if state law allows it.

Liccardo hit a few stumbling blocks in his first six months. He admitted violating state open meeting laws twice in three months by discussing issues outside a public forum. The violations were resolved by delaying action on those issues.

Keeping San Jose on stable financial ground, the upcoming general plan review process, creating more jobs and getting BART to San Jose are a few challenges in the next six months.

Liccardo said he has benefited from one thing that his predecessor did not: San Jose's recovering economy.

"I had the good fortune of coming into a different set of circumstances than Chuck did," Liccardo said. "Different times call for different styles of leadership. We have the ability to be more collaborative because we have the resources to be able to restore pay and services."

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Settlement details show struggle to keep San Jose pension cuts

By Ramona Giwargis
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San Jose Mercury News

Posted: Sat Jul 25 14:24:43 MDT 2015

SAN JOSE -- With mounting pressure to settle union lawsuits over divisive pension reforms, Mayor Sam Liccardo tried to spur talks in February by offering to give up half the additional cuts the city hoped to ultimately win in court.

But a new analysis by this newspaper shows city leaders ultimately gave up all those additional cuts -- worth some \$49 million a year -- and more in the settlement with police and firefighters they announced with great fanfare earlier this month. Details released since the initial announcement show significant givebacks to retirees and new hires that were not initially revealed.

Still, it may have been the best city leaders could do. Faced with an increasingly unfavorable legal outlook and an exodus of cops and other workers, city leaders acknowledge they struggled to reach an accord that preserves the roughly \$25 million in annual retirement savings they gained when voters overwhelmingly passed the Measure B pension reforms three years ago.

"We didn't get everything I wanted or that the council wanted," Liccardo said. "But we met our key objectives."

But whether the city could have achieved that same, lower level of savings without three years of backbiting and bad blood with its own employees may be argued over for years to come.

Approved by nearly 70 percent of city voters over union objections in June 2012, Measure B reduced pensions for new hires, eliminated extra "bonus" checks to retirees from the city's underfunded pension plans, made it harder to qualify for disability retirement and called for veteran workers to either pay a lot more for their pensions or choose a reduced benefit.

City unions immediately sued to overturn the measure. A judge in 2013 blocked the higher pension contributions from city workers -- the most controversial and valuable of the measure's provisions -- citing state legal precedents effectively forbidding changes to government employees' retirement benefits after they're hired.

While both sides threatened appeals, the city saw cops, wastewater technicians, planners and other workers bolt for better compensation elsewhere, leaving several departments in a staffing crisis and amplifying critics' calls to end the legal battle.

The city hopes it did so with the settlement announced July 15. The firefighters ratified the proposed settlement, but it still needs ratification from the police union and City Council approval. The city next month will push for similar agreements with the city's other unions.

Among the proposed settlement's changes:

- **Current employees:** The settlement abandons nearly \$50 million in court-blocked annual savings from having workers hired before Measure B pay more for their pensions or choose a smaller benefit.
- **New hires:** The settlement increases the pension benefit for newly hired city workers to align with those in the state retirement system under changes the Legislature adopted after Measure B. New cops and firefighters will have a lower retirement age and higher maximum pension of 80 percent of pay than Measure B allowed. But city officials note the state system has no maximum pension cap, and say the settlement keeps key Measure B provisions: forbidding retroactive pension increases that create massive debt in the retirement system, and an agreement to split the full cost of the benefit with the city. Liccardo said it keeps about 80 percent of Measure B's new-hire pension savings.
- **Retiree bonus checks:** The settlement maintains elimination of these but substitutes a more limited benefit for veteran workers and retirees that would guarantee their pensions keep 75 percent of their "purchasing power." City officials say only about 55 older police and fire retirees would qualify, and that its added costs are about 5 percent of the original bonus check tab. A court ruling this year blocking San Francisco's elimination of bonus checks left San Jose officials uneasy about their

chances of eliminating them entirely.

- **Retiree health care:** One of the city's biggest retirement bill savings came not from Measure B but an administrative change in the medical plan offerings that reduced health benefits for retirees. Under the proposed settlement, new hires would no longer be promised full premium coverage in retirement for the cheapest health plan offered city workers. Instead, they would pay into a retirement health savings plan with no city contribution. Veteran employees and retirees would have the option of switching to that savings plan. Otherwise, the city would tie the value of their retirement health benefit to the "silver" plan under President Barack Obama's Affordable Care Act. City officials said eliminating the defined retirement health benefit will yield substantial savings not only for the city but employees, who saw big paycheck deductions for costs of the deeply underfunded plan.
- **Disability:** The proposed settlement reverses Measure B provisions that required injured workers to take other city jobs if they could, but retains having an independent medical expert panel make disability determinations.
- **Legal fees:** The proposed settlement calls for the city to pay \$1.5 million in legal fees and to have an arbitrator resolve remaining union claims for legal fees. Liccardo said it was the most distasteful part of the deal and the one that nearly hung up a settlement, but he called it "a bargain in the big picture" that would be dwarfed by annual savings in the deal.

Overall, Liccardo said, "The savings we obtained in Measure B were very much in peril, so we got them in other places," adding the deal would allow the city to "hang on to nearly every dollar" of savings it has gained since the measure's passage.

Former Mayor Chuck Reed, Measure B's leading champion, called the settlement reasonable under the circumstances.

"These changes protect much of the savings of Measure B," Reed said, calling the battle with city unions the measure unleashed "painful, but necessary" to ease the bite of retirement costs that more than tripled in a decade and now consume a quarter of the city's operating funds. The city's retirement costs continue to grow, from \$305 million now to an estimated \$320 million in five years. Reed said it was either take on the fiscal issues -- which included Measure B -- or lay off 500 employees and potentially file bankruptcy.

Still, critics argued that what's left after the proposed settlement could have been achieved through negotiations years ago, without need for the Measure B battle.

"You look at the deal they now have on the table -- that probably would've been a reasonable conclusion had the two sides come to the table," said Pat Waite, a longtime resident and retired finance executive.

Councilman Ash Kalra credited Liccardo with settling the contentious issue, but said the mayor also helped create the problem.

"It's ironic that he's being hailed for his leadership for doing something that should have been done years ago," Kalra said.

The settlement framework only covers cops and firefighters, but set the stage for talks with the city's other employee unions, which begin next month. John Mukhar, president of the city's Association of Engineers and Architects, predicted other unions will support similar settlements, calling the retiree health changes "a huge advantage to both the city and the employees."

A big question is how to implement the settlement of voter-approved charter changes. The soonest the city could take the measure to voters is November 2016. Both sides want it enacted now, but some experts say making changes without voter input could expose San Jose to lawsuits.

"After all, voters are paying for it," said Mark Hinkle, president of the Silicon Valley Taxpayers Association. "I trust the taxpayers more than I trust the special interests and City Hall."

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Sam Liccardo and Chuck Reed: Measure B settlement is right for San Jose

By Sam Liccardo and Chuck Reed
Special to the Mercury News
San Jose Mercury News

Posted: Fri Aug 07 13:18:20 MDT 2015

For both of our mayoral administrations, three objectives have guided our negotiations to settle litigation with our police and fire unions over pension reform:

First, reducing the costs of unsustainable retirement benefits; second, ensuring that the pension system does not add to the \$3 billion in unfunded liabilities already thrust on future generations; and third, reaching a settlement that enables us to rebuild San Jose's shrinking police force.

The agreement reached in July accomplishes all three.

First, it will save taxpayer dollars. The calculations of city staff and an independent actuary (whose report is linked to this column at www.mercurynews.com/opinion) show we'll achieve \$1.7 billion in cost reductions over the next three decades compared to the retirement benefits fire and police received as recently as 2012.

And that does not include additional savings that can emerge through pending negotiations with the city's other nine unions.

How does this \$ 1.7 billion compare to the savings we sought through Measure B, the pension reform measure approved by the voters and now contested in litigation?

In health benefits, this settlement offers savings of \$244 million over 30 years that we did not achieve in Measure B. This was accomplished by closing the retiree medical plan -- eliminating the defined retiree health care benefit for newly hired employees and providing incentives for current employees to opt into a less expensive plan.

On pensions, the settlement offers a Goldilocks solution between the fiscally soft benefit structure that existed prior to Measure B and the harder alternative in the measure that caused some police officers to leave for cities that paid better.

It creates a pension plan competitive with other police departments' plans, but it will cost less. It will save taxpayers 80 percent of what Measure B would have saved, or about \$1.15 billion over 30 years.

The settlement also eliminates the supplemental pension benefit, known as the "bonus check," saving \$270 million over 30 years, while still protecting existing lower-income retirees with a much less expensive benefit.

The agreement would not include savings contemplated by Measure B's mandate for employees to pay up to an additional 16 percent of their salaries for pensions. We would need to chase those savings down a long and perilous road, however, spending millions in litigation over several years to appeal to the California Supreme Court. If we failed, we'd lose the \$1.7 billion in savings achieved by this settlement, not to mention many more longtime employees who would be likely to resign.

Our residents and our employees deserve the certainty of resolution -- and of those savings -- today.

This agreement sharply reduces the likelihood of saddling future generations with additional unfunded debt. Halting any future commitment of defined retiree medical benefits forecloses the creation of new liabilities in that plan. San Jose would be one of the first major cities in the nation to do this.

The settlement also preserves modified forms of Measure B mandates for sharing future pension costs 50/50 by employees and the city, prohibiting retroactive enhancement of benefits and curbing disability abuses.

Finally, reaching an agreement goes a long way toward aligning our officers, firefighters and the city in a common imperative: rebuilding our public safety departments.

With new leadership in those unions and departments, we have a unique opportunity to do so collaboratively.

To be sure, neither side got everything it wanted in this settlement. In a serious negotiation, nobody ever does.

The important question is whether both sides accomplished their key objectives.

They did, and San Jose is better for it.

Sam Liccardo became mayor of San Jose this year, and Chuck Reed was mayor the previous eight years. They wrote this for this newspaper.

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Herhold: San Jose abandons Measure B

By Scott Herhold
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San Jose Mercury News

Posted: Fri Aug 14 18:06:58 MDT 2015

SETTING THE RECORD STRAIGHT (publ. 8/18/2015, page A4)

A Scott Herhold column erroneously reported that San Jose police and firefighters are due for an 8 percent raise and a 5 percent bonus over the next 16 months. Those numbers apply only to police.

Never mind. When all the words were said Friday afternoon, when all the justifications were proffered, that was the political epitaph for San Jose's Measure B pension reform.

Never mind that 70 percent voted for the measure back in 2012, told by the council majority under Mayor Chuck Reed that it was essential to save the city from financial ruin.

Never mind that scores of talented employees left city government and the police department because they found their pension and salary deals inferior to what they could find elsewhere.

Never mind that the city spent more than \$4 million on lawyers, or that the pension debate infected political debate for more than four years, dividing people who might be allies.

In legal terms, the city conceded that Measure B was a mistake, an error, a massive foot fault. The council agreed to ask a judge to invalidate it, to brand it formally as incorrectly designed law.

Meanwhile, San Jose plans to put the resolution of the conflict before the voters in November 2016. Over the next 16 months, the cops will get a 5 percent bonus and an 8 percent raise.

Best deal available

In truth, this might have been the best deal the city could get. With cops fleeing to other departments, Mayor Sam Liccardo was under enormous pressure to reach a settlement.

And he could legitimately argue that the city had achieved concessions in negotiations, obtaining savings he estimated at \$1.7 billion over 30 years. San Jose was able to save millions by foregoing the so-called "bonus checks" to employees. And the city and its public safety unions agreed on a cheaper health plan. All sensible steps.

Yet there were two moments at a press conference in the City Hall rotunda that underscored the political agility act that Liccardo and the council were managing as they reached peace.

The first came from yours truly. I read the mayor a statement from his campaign web site last year: "How we get past our budgetary burdens will depend on whether we have a mayor who will fully litigate -- and implement -- Measure B reforms," he wrote.

When I asked Liccardo whether he was eating his words, the mayor responded by pointing again to savings the deal achieved. He called me back later to enlarge on the point. "There's a time to litigate, and a time to settle," he said. "Sometimes you need to litigate until you settle."

Cortese's point

That was fair enough, though I couldn't help but think about Supervisor Dave Cortese, his labor-backed opponent in last year's election, who had urged that the city stop litigating Measure B. Cortese's answer was not that different than what the city achieved Friday.

The second agility test came when KLIV radio reporter Jason Bennert asked Paul Kelly, the president of the Police Officers' Association, whether he would have taken the same deal four years ago, before Measure B. "Absolutely," Kelly said.

Liccardo later quibbled with that, suggesting that not all of the city's unions would have approved cuts in health care four years ago. But Kelly's statement underscored a growing consensus about Measure B: Never mind. We didn't really need our long civic nightmare.

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San Jose police union ratifies Measure B and wage deals; council votes on Aug. 25

By Ramona Giwargis
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San Jose Mercury News

Posted: Mon Aug 17 19:35:09 MDT 2015

SAN JOSE – Nearly 90 percent of the San Jose Police Officers' Association membership ratified a wage agreement and tentative framework to replace Measure B on Monday, representing the last step before the pair of agreements head to City Council.

But the council won't take up approving the two accords for another week, city officials said late Monday.

The tentative wage agreement offers police officers 8 percent in ongoing raises and 5 percent one-time bonuses. But the POA leadership said it wouldn't take the wage offer to members without a full benefits package -- meaning the city had to reach a compromise over Measure B, the highly-litigated pension reform measure voters approved three years ago.

Though city leaders announced a tentative Measure B settlement agreement with police and fire unions last month, union leaders said the city was backing away from a legal proceeding that would replace Measure B with the settlement.

But on Friday, the city announced it will move forward with the "quo warranto" action to invalidate Measure B, replace it with the framework and then put it out to voters in 2016. It was enough to satisfy the POA, and members began voting on both deals late Friday.

Of the 794 votes cast by POA members over a two-day process, about 715 voted yes. The firefighters union also ratified the Measure B settlement in July.

As anxious as both parties appear to be in putting the contentious negotiations behind them, there's another delay. City officials on Monday said the approval of the agreements would be deferred until the Aug. 25 City Council meeting.

"My understanding is that it was a technical matter because of our 'sunshine' policies," said city spokesman David Vossbrink. "It didn't meet our standard posting requirements, and we want to make sure everyone has a chance to read it."

Follow Ramona Giwargis at [Twitter.com/ramonagiwargis](https://twitter.com/ramonagiwargis) or contact her at 408-920-5705.

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San Jose council approves Measure B settlement

By Ramona Giwargis
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San Jose Mercury News

Posted: Tue Aug 25 13:34:05 MDT 2015

SAN JOSE – After a three-year battle with employee unions and shelling out millions to defend Measure B pension reforms, the City Council voted 10-1 to approve a settlement agreement Tuesday to end litigation and begin a legal process to invalidate the measure.

The council also turned the page on contentious labor talks with police, unanimously approving a one-year agreement that gives officers 8 percent in ongoing raises and 5 percent bonuses.

"This is a day I will never forget," said Vice Mayor Rose Herrera. "We're focused on moving forward and not all the battles of the past."

Councilman Pierluigi Oliverio voted against the Measure B settlement, saying changes to the measure should go back to voters instead of being gutted through a legal process.

San Jose leaders at the time said the 2012 measure overwhelmingly approved by city voters was needed to ease the growing bite of employee retirement costs on the budget. But unions and other critics blamed it for chasing away hundreds of police officers and other city employees.

Overturing Measure B will require the city to admit it did not meet its bargaining obligations with unions three years ago.

After meeting with organized labor for months, the city in December 2011 made changes to the measure without continuing negotiations and union groups never saw the final measure that went to voters. Using that mishap as a backbone, the city will engage in a "quo warranto" legal proceeding to ask a judge to invalidate Measure B.

"What we would be saying to the judge is we can see there may have been procedural defects that would give rise to the invalidation of the resolution that the council put on the ballot," said Mayor Sam Liccardo in an interview last week.

As the city goes through the quo warranto process, which both parties agreed is the quickest way to implement changes to Measure B, city leaders and union officials plan to draft a November 2016 ballot measure to prohibit retroactive pension increases, require voter approval for benefit increases and require actuarial soundness.

If a Superior Court judge agrees to nullify Measure B, the city will replace it with the settlement agreement reached in July with police and fire unions. But if the quo warranto process fails, the city will put the settlement terms before voters.

The city needs to reach similar Measure B settlements with its nine other unions before going to the judge.

The settlement upholds parts of Measure B that were deemed lawful by Superior Court Judge Patricia Lucas in 2013, such as eliminating retiree bonus checks and bringing new hires into a new, scaled-back retirement benefits plan.

The settlement deal also restores disability benefits and closes a defined-benefit retiree health care plan that yields savings for both the city and employees. But it would abandon a Measure B provision that required existing employees to pay more into their pensions.

One of the most significant provisions in the settlement, first suggested by Herrera last year, allows former police officers that return to San Jose to receive the same retirement benefits they had when they left, rather than the smaller plan offered to new hires.

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How San Jose, San Diego pension measures have fared

By Ramona Giwargis
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San Jose Mercury News

Posted: Sun Sep 20 18:49:32 MDT 2015

SETTING THE RECORD STRAIGHT (publ. 9/25/2015, page A4)

A story about local pension measures in San Jose and San Diego should have clarified that there is some dispute whether a proposed statewide pension initiative could affect current workers as well as future hires. The authors of the initiative say they are not targeting current workers and are revising the initiative's language to clarify that.

SAN JOSE -- On the same June 2012 Election Day, California's second- and third-largest cities -- chic beachfront San Diego and high-tech hub San Jose -- made national headlines when voters overwhelmingly approved sweeping measures to trim municipal retirement benefits whose mounting costs were devouring their budgets.

The two cities took very different approaches, and the debate continues over which city has had more success -- and whether either could serve as a model for statewide reform.

Seeking bigger and more immediate relief from its soaring pension bills, San Jose's Measure B targeted its current as well as future workforce, including cops. With its police department depleted by an officer exodus, city leaders now are moving to replace the voter approved pension cuts with a union-negotiated settlement.

San Diego, meanwhile, soldiers on with its Proposition B reforms largely targeting new hires -- with the notable exception of police -- despite ongoing union efforts to overturn them and complaints that they hurt recruitment.

As it stands today, San Jose officials say the pension settlement, when approved by all the city unions and a judge, will deliver most of the nearly \$25 million near-term annual savings from the parts of the measure that a judge left standing. They say it will save \$1.7 billion over 30 years from the settlement with police and fire unions.

San Diego officials say Proposition B is saving about \$40 million a year at the moment and will deliver nearly \$1 billion in relief over 30 years.

City officials say the difference in near-term and long-term savings between San Diego and San Jose is due to the different approaches the two cities have taken.

Both cities also have suffered recruitment troubles since the reform measures passed. San Jose today has about 500 of its budgeted 5,900 positions unfilled, including 167 in the police department. San Diego officials said 792 of the city's estimated 11,000 positions are unfilled.

Josh Rauh, a pension reform scholar at Stanford University's Graduate School of Business, said San Diego took the more politically palatable approach by targeting new hires and that's primarily why the measure lives on while San Jose's is being replaced.

"San Diego's pension reform initiative in 2012 ultimately achieved more because it doesn't look like it's going to be rolled back," Rauh said. "The fact that they left out current employees and police gave it a greater chance of surviving."

But it's not all good news for San Diego either. Leaving out two of the largest groups -- cops and current workers -- limited the scope of savings and could mean the city will have to revisit pension reform again, Rauh said.

Dan Pellissier, president of California Pension Reform, said the two measures sent an important message to Sacramento, where lawmakers later adopted milder statewide reforms, that voters want action.

"What we've learned from San Diego and San Jose is the awareness of pension problems is relatively low," Pellissier said, "but once voters get educated and engaged, they know change is needed."

Government employee unions, however, say the measures only led to costly legal feuding and staffing shortages.

"San Diego has seen many of the same impacts as San Jose – employees have left and people don't want to work there anymore," said Dave Low, chairman of Californians for Retirement Security, a group that represents government worker unions. "I think the biggest lesson is that these two cities have unilaterally proposed something that's created nothing but tension and strife."

San Jose's Measure B, approved by nearly 70 percent of city voters, reduced pensions for new hires without eliminating them, struck a costly retiree perk, raised the bar for disability retirements and called for current employees to either pay more for their pensions, reduce them or take pay cuts.

San Diego's Proposition B, approved by about 65 percent of city voters, froze employee pay that counts toward their pensions for five years and put all new hires – except for police recruits – on 401(k)-type retirement plans like those typically offered to workers at private companies.

By going after current workers' pensions, San Jose was taking on a California court doctrine that has effectively rendered government worker pensions untouchable once they're hired, making those savings more legally vulnerable.

San Diego left current workers' pension formulas alone, while making more aggressive cuts to most future employees' retirement that would lower costs over time. By exempting police recruits, the city tried to avoid a police recruitment problem at a time when cities are competing for cops.

Both measures met a legal blitz from government unions. A trial court blocked the San Jose measure's cuts to current worker pensions – worth about \$50 million a year in savings.

San Diego's initiative withstood three legal challenges to keep it off the ballot, but an ongoing legal battle over whether the former mayor failed to bargain with unions before going to voters lives on.

While San Jose and San Diego garnered national attention for their pension reforms, other cities have been slow to follow suit. Ventura County officials tried to place a San Diego-like measure before voters last fall, but a trial court judge blocked it on technical grounds that a state law governing the county's pension system doesn't permit voters to make changes.

Today, the chief pitchmen for the two cities' measures, former San Jose Mayor Chuck Reed and former San Diego Councilman Carl DeMaio, are teaming up on a proposed statewide pension initiative that, like the San Diego measure, targets future rather than current workers.

One expert scoffed at the idea that either the San Jose or San Diego model could provide statewide solutions.

"Neither one of these plans is going to move the needle on a statewide referendum," said Stanford public policy lecturer David Crane. "You don't need a referendum, you need a governor and Legislature who will address this in a serious manner."

Staff reporter Thomas Peele contributed to this report. Follow Ramona Giwargis at [Twitter.com/ramonagiwargis](https://twitter.com/ramonagiwargis) or contact her at 408-920-5705.

by the numbers

San Jose Measure B proposed settlement savings over 30 years: \$1.7 billion
San Diego Proposition B savings over 30 years: \$1 billion

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