EXHIBITS TO

REPORT OF THE

SAN DIEGO CITY ATTORNEY MICHAEL J. AGUIRRE

REGARDING WHETHER THE SAN DIEGO

CITY ATTORNEY IS COUNSEL TO SAN DIEGO CITY

EMPLOYEES' RETIREMENT SYSTEM

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE: (619) 236-6220

22 FEBRUARY 2006

Exhibit 1

Section 40: City Attorney

At the municipal primary and general election in 1977, a City Attorney shall be elected by the people for a term of seven (7) years. A City Attorney shall thereafter be elected for a term of four (4) years in the manner prescribed by Section 10 of this Charter.

Notwithstanding any other provision of this Charter and commencing with elections held in 1992, no person shall serve more than two (2) consecutive four-year terms as City Attorney. If for any reason a person serves a partial term as City Attorney in excess of two (2) years, that partial term shall be considered a full term for purposes of this term limit provision. Persons holding the office of City Attorney prior to the November 1992 election shall not have prior or current terms be counted for the purpose of applying this term limit provision to future elections.

The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney. The attorney and his or her deputies shall devote their full time to the duties of the office and shall not engage in private legal practice during the term for which they are employed by the City, except to carry to a conclusion any matters for which they have been retained prior to taking office.

The City Attorney shall appoint such deputies, assistants, and employees to serve him or her, as may be provided by ordinance of the Council, but all appointments of subordinates other than deputies and assistants shall be subject to the Civil Service provisions of this Charter.

It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law; to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof; to preserve in the City Attorney's office a docket of all cases in which the City is interested in any of the courts and keep a record of all proceedings of said cases; to preserve in the City Attorney's office copies of all written opinions he or she has furnished to the Council, Manager, Commission, or any officer. Such docket, copies and papers shall be the property of the City, and the City Attorney shall, on retiring from office, deliver the same, together with all books, accounts, vouchers, and necessary information, to his or her successor in office.

The City Attorney shall have charge and custody of all legal papers, books, and dockets belonging to the City pertaining to his office, and, upon a receipt therefor, may demand and receive from any officer of the City any book, paper, documents, or evidence necessary to be used in any suit, or required for the purpose of the office.

The City Attorney shall apply, upon order of the Council, in the name of the City, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the City or the abuse of corporate powers, or the execution or performance of any contract made in behalf of the City which may be in contravention of the law or ordinances governing it, or which was procured by fraud or corruption. The City

Attorney shall apply, upon order of the Council, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance.

The City Attorney shall perform such other duties of a legal nature as the Council may by ordinance require or as are provided by the Constitution and general laws of the State.

The Council shall have authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in connection therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes and shall charge such additional legal service against the appropriation of the respective Departments.

The salary of the City Attorney shall be fixed by the Council and set forth in the annual appropriation ordinance, provided that the salary of the City Attorney may not be decreased during a term of office, but in no event shall said salary be less than $15,000.00 per year.

In the event of a vacancy occurring in the office of the City Attorney by reason of any cause, the Council shall have authority to fill such vacancy, which said authority shall be exercised within thirty (30) days after the vacancy occurs. Any person appointed to fill such vacancy shall hold office until the next regular municipal election, at which time a person shall be elected to serve the unexpired term. Said appointee shall remain in office until a successor is elected and qualified.
(Amendment voted 04-20-1943; effective 05-04-1943.)
(Amendment voted 04-15-1947; effective 05-01-1947.)
(Amendment voted 11-04-1958; effective 02-19-1959.)
(Amendment voted 11-06-1962; effective 01-21-1963.)
(Amendment voted 11-04-1975; effective 12-01-1975.)
(Amendment voted 06-02-1992; effective 07-13-1992.)
(Amendment vote 11-02-2004; effective 04-01-2004)

Exhibit 2

Article 2: Administrative Code

Division 18: City Departments

("City Departments" added 2–25–1964 by O–8969 N.S.)

§22.1801 City Departments

(a) Purpose and Intent.

It is the purpose and intent of the City Council to enumerate the existing departments of the City because of repeated reference in City legislation and operation to such departments.

(b) The following are the departments of the City of San Diego within the meaning of the Charter and ordinances of said City:

Auditor and Comptroller
Citizens Assistance and Information
City Attorney
City Clerk
City Council — District 1
City Council — District 2
City Council — District 3
City Council — District 4
City Council — District 5
City Council — District 6
City Council — District 7
City Council — District 8
City Manager
City Retirement
City Treasurer
Development Services Department
Engineering Department
Executive Services Department
Family Justice Center Department
Financial Management
Fire
General Services
Independent Budget Analyst
Intergovernmental Relations
Library
Mayor
Neighborhood Code Compliance
Park and Recreation
Personnel

Planning
Police
Purchasing
Real Estate Assets
Risk Management
Waste Management
Water Utilities

(c) The department head for each department of City Council - Districts 1 through 8 shall be the duly elected and/or appointed Councilman or Councilwoman from the district.
(Amended 7–25–1994 by O–18088 N.S.)
(Amended 11-29-2004 by O-19339 N.S.)
(Amended 10-31-2005 by O-19431 N.S.)

Exhibit 3

ORDINANCE NO. 8969
(New Series)

AN ORDINANCE AMENDING CHAPTER I, ARTICLE 2 OF THE SAN DIEGO MUNICIPAL CODE BY ADDING THERETO DIVISION 18 AND SECTION 22.1801 RELATIVE TO CITY DEPARTMENTS.

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That Article 2, Chapter I of the San Diego Municipal Code is hereby amended by adding thereto a new division numbered 18 and a new section numbered 22.1801, to read as follows:

"DIVISION 18

CITY DEPARTMENTS

"SEC. 22.1801 CITY DEPARTMENTS

(a) Purpose and Intent: It is the purpose and intent of the City Council to enumerate the existing departments of the City because of repeated reference in city legislation and operation to such departments.

(b) The following are the departments of The City of San Diego within the meaning of the charter and ordinances of said City:

Administrative Management

Auditor and Comptroller

City Attorney

City Clerk

City Council

City Manager

City Retirement

Civil Service

Engineering

Fire

Inspection

Library

Mayor

Park and Recreation

Planning

Police

Public Works

Purchasing

Social Service

Treasury

Utilities"

Section 2. This ordinance shall take effect and be in force on the thirty-first day from and after its passage.

Presented by [signature]

APPROVED: EDWARD T. BUTLER, City Attorney

By [signature]
Assistant City Attorney

8969

RJC/rb
2-11-64

ke effect and be in

ter its passage.

Dated _____

Auditor and Comptroller of The City of San Diego, California

By _____ Deputy

Passed and adopted by the Council of The City of San Diego on FEB 25 1964, by the following vote:

Councilmen	Yeas	Nays	Excused	Absent
Helen R. Cobb	✓			
Ivor de Kirby				✓
Harry F. Scheidle	✓			
Allen Hitch	✓			
Tom Hom	✓			
Jack Walsh	✓			
Mayor Frank E. Curran	✓			

AUTHENTICATED BY: Frank E. Curran

Mayor of The City of San Diego, California

(Seal)

PHILLIP ACKER

City Clerk of The City of San Diego, California

By Ruth Blauer, Deputy

I HEREBY CERTIFY that the foregoing ordinance was not finally passed until six calendar days had elapsed between the day of its introduction and the day of its final passage, to-wit, on February 18, 1964, and on February 25, 1964.

~~I FURTHER CERTIFY that said ordinance was read in full prior to its final passage.~~

I FURTHER CERTIFY that the reading of said ordinance in full prior to its final passage was dispensed with by a vote of not less than four members of the Council, and that there was available for the consideration of each member of the Council prior to the day of its final passage a written or printed copy of said ordinance.

PHILLIP ACKER

City Clerk of The City of San Diego, California

(Seal)

By Ruth Blauer, Deputy

I HEREBY CERTIFY that the foregoing ordinance was passed on the day of its introduction, to-wit, on _____, said ordinance being of the kind and character authorized for passage on its introduction by Section 16 of the Charter.

I FURTHER CERTIFY that the final reading of said ordinance was in full.

I FURTHER CERTIFY that the reading of said ordinance in full was dispensed with by a vote of not less than four members of the Council, and that there was available for the consideration of each member of the Council prior to the day of its passage a written or printed copy of said ordinance.

RECEIVED
CITY CLERK'S OFFICE
FEB 12 11 41 AM 1964
SAN DIEGO, CALIFORNIA

City Clerk of The City of San Diego, California

(Seal)

By _____ Deputy

Office of the City Clerk, San Diego, California

Document Number 666709 Filed FEB 14 1964

Ordinance Number 8969 Adopted FEB 25 1964

Goes into effect

Recorded on microfilm roll number

FORM CC-1255
(11-63)

Exhibit 4

Article 4: City Employees' Retirement System

Division 9: Powers and Duties of the Board

("Guaranty" incorp. 1–22–1952 by O–5046 N.S., contained in O–10792 O.S. adopted 11–29–1926; repealed 10–25–1926 by O–8874 N.S.) ("Powers and Duties of Board" added 10–25–1962 by O–8744 N.S.) (Retitled to "Powers and Duties of the Board on 4-2-2002 by O-19043 N.S.)

§24.0901 Rules, Actuarial Valuations, Determined Interest Assumption Rate, Employ Actuary, Investment Counsel

The Board may make the rules it deems proper to administer the Retirement System. Subject to this ordinance, and the Board's rules, the Board may modify benefits for service and disability, determine who are Members, and is the sole judge of the conditions under which persons may receive benefits from the System. The Board may also secure and pay reasonable compensation for the medical services and advice it deems necessary to discharge its duties.

The Board may employ an actuary as needed. Each year, on a fiscal year established for this purpose, the Board will employ an Actuary to make a valuation of the System's assets and liabilities. At least once every five years, the Board will employ an Actuary to conduct a thorough investigation of the mortality, service and compensation experience of Members and other persons receiving benefits, along with an actuarial valuation of the System's assets and liabilities. From time to time, the Board will also determine the assumed rate of interest earnings for the Retirement Fund. The Board may also employ independent investment counselors as needed to provide professional services to support the Board's investment responsibilities. *("Board of Administration — Rules and Regulations, Actuarial Valuations Determined Interest Assumption Rate, Employ Actuary, Investment Counsel" repealed; "Rules, Actuarial Valuations, Determined Interest Assumption Rate, Employ Actuary, Investment Counsel" added 4-2–2002 by O–19043 N.S.)*

§24.0902 Adoption of Mortality, Service, Interest Rates and Other Tables

Based upon its investigations, valuations, determinations and the recommendation of the Actuary, the Board will adopt the mortality, service and other tables and interest rates it deems proper, and will revise the Members' contribution rates as it deems necessary, to provide the benefits of the Plan. The Board's decisions on matters

covered by this section are conclusive, if arrived at in good faith.
("Election of Safety Members to The Board" repealed; "Adoption of Mortality, Service, Interest Rates and Other Tables" added 4–2–2002 by O–19043 N.S.)

§24.0903 Transfers to be Made by the Board of Administration

Based upon its investigations, valuations, determinations and the recommendation of the Actuary, the Board will transfer the proper amount from the employee and employer contribution accounts to the reserve for retiree benefits.
("Adoption of Mortality, Service, Interest Rates and Other Tables" repealed; "Transfers to be Made by the Board of Administration" added 4–2–2002 by O–19043 N.S.)

§24.0904 Crediting of Interest

The Board credits interest to the contribution accounts of Members and the City at a rate determined by the Board, compounded at each June 30th.
("Transfers to be Made by the Board of Administration" repealed; "Crediting of Interest" added 4–2–2002 by O–19043 N.S.)

§24.0905 Forfeiture of Inactive Retirement Accounts

(a) The Board may declare a forfeiture of an inactive Member's Accumulated Contributions if the Board is unable to locate the Member, after making a reasonable effort, and:

(1) the Member is eligible for benefits and has not requested or accepted payment of those benefits within one year after becoming eligible to receive them; or

(2) the Member has left City employment, is not eligible for benefits and has not requested a return of his or her Accumulated Contributions within two years of leaving City employment.

(b) Forfeitures under this section will be credited to the Retirement Fund.
("Crediting of Interest" repealed; "Forfeiture of Inactive Retirement Accounts" added 4–2–2002 by O–19043 N.S.)

§24.0906 Preparation of the Annual Budget

Each year, the Board will prepare an annual budget of administrative costs for the System, upon the recommendation of the Board's Business and Procedures Committee. The Board will submit the annual budget to the City Council for inclusion in the annual budget ordinance. Once the City Council adopts the budget ordinance, the Board will appropriate, from the Undistributed Earnings Reserve, a sum sufficient to meet the budgeted expenses of operating the System for the fiscal year concerned. The portion of the expenses attributable to the employees of any public agency participating in the System will be paid by that agency, under the terms of that agency's participation agreement, and will be remitted to the Undistributed Earnings Reserve.
("Board of Administration — Preparation of Annual Budget" repealed; "Preparation of the Annual Budget" added 4–2–2002 by O–19043 N.S.)

§24.0907 Meetings; Quorum

Seven of the members elected or appointed to the Board under Section 144 of the Charter constitutes a quorum to do business or conduct a hearing, but a lesser number may take action to adjourn a meeting or hearing. The affirmative vote of seven Board members is necessary to pass any vote and take final action on any decision before the Board, except that a vote to adjourn may be adopted by a majority of the Board members present.
("Meetings; Quorum" repealed; "Meetings; Quorum" added 4-2-2002 by O-19043 N.S.)

§24.0908 Board Hearings

The Board may, in its discretion, hold a hearing to determine any question presented to it involving any right, benefit or obligation of any person under the System. The Board may issue subpoenas to compel the attendance of witnesses and the production of documents. When holding a hearing, the Board may administer oaths and require testimony to be presented under oath. The Board may determine the time and place of a hearing and may continue the hearing as necessary.
("Board Hearings" repealed; "Board Hearings" added 4–2–2002 by O–19043 N.S.)

§24.0909 Confidentiality of Member Records

Information submitted to the Board by any Member or Beneficiary is confidential. It must not be divulged by any Board or Retirement System staff member to any person other than the Member or Beneficiary to whom the information relates, his or her personal representative or the City of San Diego. The Board may use this information

only for the purpose of administering the System. It is a misdemeanor for any Board or System staff member to divulge this information to any person not authorized by this section to receive it.
("Confidentiality of Member Records" repealed; "Confidentiality of Member Records" added 4–2–2002 by O–19043 N.S.)

§24.0910 Legal Advisor to Board of Administration

Unless otherwise provided by Memorandum of Understanding between the City Attorney and the Board of Administration, the City Attorney will designate one or more Assistant or Deputy City Attorneys to advise and represent the Board in the administration of the System.
("Legal Advisor to Board of Administration" repealed; "Legal Advisor to Board of Administration" added 4-2-2002 by O-19043 N.S.)

§ 24.0911 Annual Report

(a) The Retirement Board shall prepare an Annual Report at the end of each fiscal year to provide information to all Members concerning the System. Copies of the Annual Report shall be distributed to all Members. The Retirement Administrator shall keep a copy of the Annual Report in his or her office.

(b) The President of the Retirement Board shall provide the Annual Report to the City Manager and the City Council, shall inform the City Manager and the City Council semi-annually of the funding status of the pension system, the impact of any demographic or actuarial issues, and any other changes affecting the benefits or funding of the Retirement System that have occurred since the date of the previous semi-annual report pursuant to this section.

(c) The President of the Retirement Board and the Retirement Administrator shall promptly inform the City Manager and the City Council of all material facts or significant developments relating to all matters under the jurisdiction of the Board, except as may be otherwise controlled by the laws and regulations of the United States or the State of California.

(d) The President of the Retirement Board, the Retirement Administrator, and all officers and employees of the Retirement System shall comply promptly with all lawful requests for information by the City Council, the City Manager, the City Attorney, or their designees.

("Annual Report" added 4-2-2002 by O-19043 N.S.)
(Amended 10-11-2004 by O-19320 N.S.)

§24.0912 Board's Authority to Contract with Public Agencies

The Board may contract with any Public Agency to administer the Public Agency's retirement plan, pursuant to Division 18 of this Article, after the City Council makes a finding that the Public Agency is eligible to participate in the Retirement Fund and approves the agreement between the Public Agency and the Board. The Board may adopt the rules that it deems necessary or proper to administer these plans.
("Board's Authority to Contract with Public Agencies" added 1-7-2003 by O-19140 N.S.)

Exhibit 5

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE SAN DIEGO CITY ATTORNEY
AND
THE BOARD OF ADMINISTRATION,
SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM
REGARDING THE PROVISION OF LEGAL SERVICES TO THE BOARD

THIS MEMORANDUM OF UNDERSTANDING, between the City Attorney of the City of San Diego (City Attorney) and the Board of Administration (Board) of the San Diego City Employees Retirement System (System), regarding the provisions of legal services to the Board, is entered into this 22nd day of July, 1998.

RECITALS

A. Historically, the City Attorney has provided legal services to the Board by assigning deputy city attorneys to the Board to give day-to-day legal advice on a variety of issues, as well as to provide specific services to the Board in the areas of disability retirement hearings and domestic relations orders.

B. By Agreement dated April 9, 1997, between the City Attorney and the Board (1997 Agreement), the parties agreed that the Board would create its own Legal Services Division to provide day-to-day legal advice. The positions were staffed by two deputy city attorneys and one support employee from the City Attorney's office. The attorney positions were classified as General Counsel and Assistant General Counsel, respectively. Upon enactment of the City's Fiscal Year 1998 Salary Ordinance, these two professional positions were no longer classified as deputy city attorneys, but were separately classified consistent with the Civil Service Commission's action of April 10, 1997, creating these positions and exempting them from the

classified service.

C. The Board has represented to the City Attorney its position that California Constitution article XVI, section 17 (Proposition 162) grants the Board the exclusive authority to administer the System, including the power to hire its own lawyers. The Board, based on advice of its fiduciary counsel, is of the opinion that Proposition 162 grants that authority to the Board, notwithstanding the provisions of Section 40 of the San Diego City Charter and the home rule provisions of the California Constitution.

D. The City Attorney does not concur with the Board's analysis of the applicable law. However, in recognition of the complexity of the legal issues surrounding the Board's fiduciary responsibilities under Proposition 162, the City Attorney has agreed to enter into this Memorandum of Understanding providing that the Board will retain its own separate legal counsel for all matters related to the performance of its fiduciary duties. This determination does not constitute an admission against the City's interest nor a waiver of the City Attorney's position regarding his rights and responsibilities to the Retirement System under section 40 of the City Charter.

AGREEMENT

1. The 1997 Agreement. The 1997 Agreement is superseded in all respects by this Memorandum of Understanding.

2. Legal Services Department. The Board shall retain its own Legal Services Department and shall employ such persons as it deems necessary to fulfill its fiduciary and administrative responsibilities to the System. Persons employed by the Board shall report to the Board, and shall be compensated by the Board and not the City Attorney.

3. No Supervision by City Attorney. Except as provided in section 4 of this Memorandum of Understanding, the City Attorney shall have no responsibility to provide legal services to the Board or to be responsible for the supervision, substance or accuracy of any services performed by the Board's Legal Services Department.

4. Transition Period. In recognition of the value of the experience and expertise of the deputy city attorneys currently performing legal services in disability retirement and domestic relations matters, the Board agrees to a two-year transition period. The Board further agrees to compensate the City Attorney for work performed by deputy city attorneys and other City Attorney staff during the transition period, in the following manner:

a) For the period from July 1, 1998, to June 30, 1999, the City Attorney shall provide legal services as may be agreed to between the City Attorney and the Board, in return for which the Board shall pay to the City Attorney the sum of $150,000 on or before December 31, 1998;

b) For the period from July 1, 1999, to June 30, 2000, the City Attorney shall provide legal services as may be agreed to between the City Attorney and the Board, in return for which the Board shall pay to the City Attorney the sum of $75,000, on or before December 31, 1999.

5. Complete Agreement. This Memorandum of Understanding constitutes the complete agreement of the parties with respect to the legal representation of the Board.

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IN WITNESS WHEREOF, this Memorandum of Understanding is executed by the City Attorney and the duly authorized representative of the Board; this 22nd day of July, 1998.

CASEY GWINN, City Attorney

By: Casey Gwinn
Casey Gwinn
City Attorney

BOARD OF ADMINISTRATION,
San Diego City Employees'
Retirement System

By: Keith W Enerson
Keith Enerson
President

Exhibit 6

MICHAEL J. AGUIRRE
SAN DIEGO CITY ATTORNEY

Copy

Hand Delivered

December 15, 2004

Lawrence Grissom
Retirement Administrator
San Diego City Employees Retirement System
401 B Street, Suite 400
San Diego, CA 92101

RE: City Attorney As Legal Advisory to Board of Administration
Per City of San Diego City Charter Section 40

Dear Mr. Grissom:

Effective immediately the undersigned assumes the role of chief legal advisor to the Board of Administration of the Retirement System.

All counsel currently serving the board in a legal advisory capacity are immediately discharged from those duties, and directed to contact Richel Thaler in the office of the City Attorney for further information and/or assignment. All personnel identifications and office access devices are to be turned in to you immediately. All files and office materials, including computers, are to remain in the respective offices of these former counsels, and not removed or altered in any way unless and until you receive specific directions from me in that regard.

Background:

The City Employees' Retirement System (sdCERS) is governed by Article IX, Sections 141 through 148.1 of the City of San Diego City Charter, other relevant Charter provisions and all applicable laws of the State of California. Originally established in 1927, the City created the fund without a separate trust agreement. The City Treasury holds the monies of sdCERS.

City of San Diego City Charter Section 40 provides, in part, for the office of the City Attorney, as follows:

OFFICE OF THE CITY ATTORNEY
1200 THIRD AVE., SUITE 1620, SAN DIEGO, CA 92101-4178
Telephone: (619) 236-6220 Fax: (619) 236-7215 E-Mail: michaelaguirre@sandiego.gov

> "The City Attorneys shall be the chief legal advisor of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties. . . .
>
> It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; . . ."

In recognition of this Charter mandate, San Diego Municipal Code Sec. 24.0910 provides that, "...the City Attorney shall designate one of his staff to advise and represent the Board of Administration in the administration of the retirement system."

City of San Diego City Charter Section 40 further provides, in part, as follows:

> "The City Attorney shall have charge and custody of all legal papers, books and dockets belonging to the City pertaining to his office..."

Prior to 1998, the office of the City Attorney provided legal services to the Board by assigning deputy City Attorneys to give day-to-day legal advice on a variety of issues. By 1998, sdCERS sought to replace the City Attorney with a "General Counsel" to the Board of Administration, separate from the control and oversight of the City Attorney. Notwithstanding the clear conflict with the Charter, and the possibility for behavior inconsistent with the interests of the people of the City of San Diego, it argued its rights to do so under California Constitution Article XVI, section 17 (Proposition 162), which was read by sdCERS to grant to it plenary (argued to mean exclusive and unfettered) authority over the System.

The City Attorney did not concur with the Board's analysis of the applicable law, but capitulated to the Board's demand. On November 10, 1998, an ordinance was passed which: 1) specifically reflected the position of the Board demanding the right to appoint its own separate General Counsel and achieve the repeal of Municipal Code Sec. 24.0910; 2) specifically reflected the objection of the City Attorney to the Board's desire to repeal the Municipal Code provisions for City Attorney's participation as mandated by the Charter; and 3) resolved the matter by providing for the option of a General Counsel position to the sdCERS Board under a Memorandum of Understanding between the City Attorney and the Board. Municipal Code Sec. 24.0910 was adopted specifically retaining the City Attorney's Charter rights as legal counsel to the Board but also providing for the alternate General Counsel(s) under a Memorandum of Understanding.

On or about July 22, 1998 , the City Attorney and the Board executed a Memorandum of Understanding allowing the Board to retain its own legal services department; however, that same MOU specifically reserved the City Attorney's rights under the Charter and Municipal Code "regarding his rights and responsibilities to the Retirement System under Section 40 of the City Charter."

There was no term to the Memorandum of Understanding agreement.

Exhibit 7

CP101

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SAN DIEGO COUNTY, CA

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Reg A. Vitek, Esq. (SBN 041166)
Michael A. Leone, Esq. (SBN 151276)
Christine M. LaPinta, Esq. (SBN 225990)
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750 B Street, Suite 2100
San Diego, CA 92101
Telephone: (619) 685-3003
Facsimile: (619) 685-3100

Attorneys for Plaintiff SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM

Can They Sue? No Danger

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

Same as Congr

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM, by and through its Board of Administration, Plaintiff, vs. SAN DIEGO CITY ATTORNEY MICHAEL J. AGUIRRE; THE CITY OF SAN DIEGO and DOES 1-100, Defendants.	Case No.: GIC 841845 VERIFIED COMPLAINT FOR: (1) DECLARATORY RELIEF (Cal. Code Civ. Proc. § 1060); (2) PRELIMINARY AND PERMANENT INJUNCTION (Cal. Code Civ. Proc. § 525); AND (3) POSSESSION OF PERSONAL PROPERTY (Cal. Code Civ. Proc. §§ 3379, 3380) Unlimited Civil Case

Hand Swing Brain

Plaintiff SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM ("SDCERS") by and through its Board of Administration ("the Board") alleges as follows:

A. The Parties.

1. SDCERS is a public employee retirement system established pursuant to San Diego City Charter ("the Charter"), Article IX, sections 141 and 144, for the purpose of administering the City of San Diego's Retirement System.

2. Defendant City of San Diego ("the City") is a municipal entity established by charter pursuant to California Constitution, Article XI, section 3.

COPY

3. Defendant Michael J. Aguirre ("Aguirre") presently holds the office of San Diego City Attorney. Unless otherwise specified, all actions alleged to have been taken by Aguirre were taken in his capacity as City Attorney.

4. Defendants DOES 1 through 100 are sued herein under fictitious names. The true names and capacities of these DOE Defendants are unknown to SDCERS at this time. SDCERS will amend this Complaint by inserting their true names and capacities after they have been discovered and identified by SDCERS. Each of the fictitiously named Defendants is responsible in some manner for the acts, omissions, conduct and occurrences herein alleged and that SDCERS' injuries were proximately and legally caused in whole or in part by such DOE Defendants.

5. At all times mentioned herein, each Defendant was the agent, employee, partner, co-conspirator, or otherwise exercised some form of authority, direction or control over the remaining Defendants and, in acting or failing to act as alleged in this Complaint, each Defendant was acting within the course and scope of its agency, employment, partnership, or conspiracy, and with the knowledge and consent and under the direction and control of each of the remaining Defendants.

B. <u>The Retirement System.</u>

6. The Council of the City ("City Council") is authorized and empowered by the Charter, Article IV, section 141, to establish a retirement system for compensated public officers and employees.

7. The San Diego Unified Port District ("the Port District") is a legally independent public entity authorized and empowered to establish a retirement system for compensated Port District officers and employees.

8. The San Diego County Regional Airport Authority ("the Airport Authority") is a legally independent public entity authorized and empowered to establish a retirement system for compensated Airport Authority officers and employees.

C. SDCERS.

9. SDCERS is an entity legally independent from the City, and is empowered to sue and be sued in its own name.

10. Pursuant to Charter, Article IX, section 144, SDCERS is managed by a Board of Administration, which consists of the City Manager, City Auditor and Comptroller, City Treasurer, three members of the Retirement System elected by the active membership, one retired member of the Retirement System elected by the retired membership, an officer of a local bank, and three other citizens of the City, the latter four appointed by the City Council. The Board's composition will change on April 1, 2005, pursuant to the adoption of Proposition H in the November 2004 election.

11. Pursuant to Charter, Article IX, section 149, and Agreements dated March 30, 2004 (Port District), and September 17, 2004 (Airport Authority), the Board administers the Port District's retirement system and the Airport Authority's retirement system. Hereafter, the public employee pension system in which the City, Port District, and Airport Authority participate is referred to as "the Retirement System."

12. The Board is empowered by Charter, Article IX, section 144, to establish such rules and regulations as it may deem proper for the management and administration of the Retirement System.

13. The Board is empowered by Charter, Article IX, section 144, to appoint such employees as may be necessary for the management and administration of the Retirement System. Appointment of such employees under section 144 must be made under the provisions of Charter, Article VIII, pertaining to the Civil Service Commission.

14. Under such general ordinances as may be adopted by the City Council, the Board is the sole authority and judge as to the conditions under which persons may be admitted to benefits of any sort under the Retirement System.

15. Pursuant to Charter, Article IX, section 144, the Board has exclusive control of the administration and investment of such funds as are established for the Retirement System.

16. SDCERS, by and through the Board, is empowered to transact business in the name of SDCERS, including, but not limited to, contracting with third party vendors for services necessary to the management and administration of the Retirement System, leasing office space, leasing and/or purchasing office equipment, and entering into contracts with independent contractors for the purpose of rendering services to SDCERS which are necessary to the management and administration of the Retirement System.

17. All monies contributed by City employees, or appropriated by the City Council, pursuant to Charter, Article IX, section 145, are placed in a special fund in the City Treasury called "the City Employees' Retirement Fund," which is established as a trust fund to be held and used only for the purpose of carrying out the provisions of Charter, Article IX, and may not be merged with any other funds of the City. No payments may be made from the City Employees' Retirement Fund except upon the Board's order.

18. Pursuant to Charter, Article IX, section 144, the Board is empowered to invest in the name of SDCERS monies held in trust by the City Employees' Retirement Fund.

19. Pursuant to California Constitution, Article XVI, section 17, the Board is vested with sole and exclusive fiduciary responsibility over the assets of the Retirement System.

20. Pursuant to California Constitution, Article XVI, section 17, the Board is vested with sole and exclusive responsibility to administer the Retirement System in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.

21. Pursuant to California Constitution, Article XVI, section 17, the Board must discharge its fiduciary duties solely in the interests of, and for the exclusive purpose of providing benefits to the Retirement System's participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the Retirement System.

22. Pursuant to California Constitution, Article XVI, section 17, the Board's duty to the Retirement System's participants and their beneficiaries takes precedence over any other duty.

D. **The City and Its Officials.**

23. The City is established by Charter, Article I, section 1. Pursuant to Charter, Article I, section 2, the City has the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in the Charter. The City is authorized by Charter, Article I, section 2, to exercise any and all rights, powers and privileges granted or prescribed by the General Laws of the State of California ("the State").

24. Pursuant to Charter, Article III, section 11, all legislative power of the City is vested in the City Council, except such legislative powers as are reserved to the People by the Charter and State Constitution.

25. Pursuant to Charter, Article V, section 27, the City Manager is the chief administrative officer of the City. Pursuant to section 27, it is the City Manager's duty to see that the ordinances of the City and laws of the State are enforced. Except as otherwise provided by the Charter, all administrative powers conferred by the laws of the State upon any municipal official shall be exercised by the City Manager, or persons designated by him.

26. Pursuant to Charter, Article V, section 40, the City Attorney is the chief legal advisor of, and attorney for, the City, and all Departments and Offices thereof in matters relating to their official powers and duties.

E. **Creation of SDCERS' General Counsel Positions.**

27. Pursuant to Charter, Article VIII, section 115, the Civil Service Commission ("the Commission") exercises supervision over the selection, promotion and removal of all City employees. Pursuant to Charter, Article IX, section 144, the Commission exercises such supervision over the Board's appointment of SDCERS' employees.

28. Under Charter, Article VIII, section 117, Unclassified Service employees include managerial employees having significant responsibility for formulating or administering departmental policies and programs. Each Unclassified Service position shall be exempted from Classified Service by ordinance, upon initiation of the appropriate appointing authority

and after receiving the advisory review and comment of the Commission and the approval of the City Council.

29. Pursuant to Charter, Article V, section 30, officers and employees in Unclassified Service appointed by the Manager or other appointing authority not under the Manager's control may be removed only by such appointing authority.

30. An office or department established by ordinance may not be abolished except by ordinance. Powers and duties conferred or assigned by ordinance may only be transferred by ordinance. Only the City Council can enact or rescind ordinances.

31. On or about March 27, 1997, the Board issued a request to the Commission to create the positions of General Counsel and Assistant General Counsel to provide legal services to the Board. The Board further requested that the Commission exempt these positions from Classified Service pursuant to Charter, Article VIII, section 117, subdivision (a)(17).

32. On or about April 15, 1997, the Commission issued a recommendation to the City Council that SDCERS' General Counsel and Assistant General Counsel positions be exempted from Classified Service under Charter, Article VIII, section 117.

33. On or about May 27, 1997, the City Council authorized the creation of SDCERS' General Counsel and Assistant General Counsel positions and exempted them from Classified Service pursuant to Ordinance Number O-18406.

34. On or about September 10, 1998, the Board issued a request to the Commission to create the position of Associate Counsel to provide legal services to the Board. The Board further requested that the Commission exempt this position from Classified Service pursuant to Charter, Article VIII, section 117, subdivision (a)(17).

35. On or about September 16, 1998, the Commission issued a recommendation to the City Council that SDCERS' Associate Counsel position be exempted from Classified Service under Charter, Article VIII, section 117.

36. On or about October 20, 1998, the City Council authorized the creation of SDCERS' Associate Counsel position, and exempted it from Classified Service, pursuant to Ordinance Number O-18598.

F. **Defendants' Interference with SDCERS' Legal Counsel.**

37. On or about December 15, 2004, Aguirre advised SDCERS in writing that, effective immediately, he assumed the role of chief legal advisor to the Board in place of SDCERS' General Counsel, Assistant General Counsel and Associate Counsel. Aguirre further stated that SDCERS' General Counsel, Assistant General Counsel and Associate Counsel were immediately discharged. In taking these actions, Aguirre acted without notice to, or authority from, the Board. SDCERS is informed and believes and on that basis alleges that Aguirre also acted without notice, or authority from the City Council.

38. On or about December 16, 2004, the Board's President, Frederick W. Pierce, and SDCERS' Retirement Administrator, Lawrence B. Grissom, advised Aguirre they disputed his authority to discharge SDCERS' General Counsel, Assistant General Counsel and Associate Counsel and take over the role of its chief legal advisor in their place. Pierce and Grissom advised Aguirre that all legal counsel currently working for SDCERS would continue to work for SDCERS, and specifically advised him that SDCERS' General Counsel and her staff would remain the legal advisors to the Board for its upcoming public meetings.

39. On or about December 17, 2004, Aguirre telephonically advised SDCERS' General Counsel, Loraine Chapin, Esq., that she was fired from her position as SDCERS' General Counsel.

40. On December 17, 2004, Deputy City Attorney Yolanda Gammill, acting on behalf of Aguirre, advised the Board in open session that the City Attorney's Office is assuming the role of chief legal advisor to SDCERS, and that SDCERS' General Counsel and her staff were no longer authorized to provide legal advice to SDCERS. Ms. Gammill directed the Board not to proceed with any decisions or convene closed sessions to the extent it relied upon advice of any counsel other than the City Attorney's Office. Ms. Gammill advised the Board that persons who disobeyed her directives on behalf of the City Attorney's

Office would be held accountable under the law for their actions. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre and Ms. Gammill acted without notice to, or authority from, the City Council.

41. On December 17, 2004, Aguirre again notified the Board in writing he was assuming the role of chief legal advisor to SDCERS, effective immediately. Aguirre further notified the Board he had directed SDCERS' General Counsel, Assistant General Counsel and Associate Counsel to report to him. Aguirre further notified the Board that its legal relationship is solely with the City Attorney's Office, and that it could no longer rely upon advice from its General Counsel, Assistant General Counsel or Associate Counsel. Aguirre stated that Board members acting in contravention of his statements would be held accountable for their actions. Finally, Aguirre stated he was investigating the Board regarding its November 19, 2004, vote to exclude Board member Diann Shipione from future closed sessions. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre acted without notice to, or authority from the City Council.

42. On December 21, 2004, Aguirre advised SDCERS' outside counsel that SDCERS' General Counsel, Assistant General Counsel and Associate Counsel no longer held their positions with SDCERS. Aguirre instructed outside counsel not to have any further communications with SDCERS' General Counsel, Assistant General Counsel or Associate Counsel on SDCERS matters. Aguirre demanded copies of all outside counsels' engagement agreements and billing information for the past two years. Aguirre stated outside counsel were not to proceed with legal work on SDCERS' behalf without his authority. In taking these actions, Aguirre acted without notice to, or authority from, the Board. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre also acted without notice to, or authority from the City Council.

43. On December 23, 2004, Pierce and Grissom, on behalf of SDCERS, publicly directed outside counsel to continue to take all direction and instruction only from the Board, General Counsel, or SDCERS' management. Outside counsel were further directed not to send invoices or other confidential information to anyone other than SDCERS without its

specific authorization. Outside counsel were advised SDCERS expected them to protect and preserve its attorney-client privileged information.

44 On December 23, 2004, Reg Vitek, Esq., advised Aguirre in writing that his firm represented SDCERS in ongoing litigation in which SDCERS and the City were adversaries. Vitek advised Aguirre that his purported assumption of the legal representation of SDCERS was without legal authority; and furthermore, absent the informed written consent of both the City and the Board, was in violation of California Rule of Professional Conduct 3-310(C). Vitek advised Aguirre his firm would continue to take its instruction from the Board, SDCERS' Retirement Administrator, and SDCERS' General Counsel. Vitek requested that Aguirre direct all future communications intended for SDCERS to his attention.

45. On January 3, 2005, Aguirre advised Vitek in writing that he did not need a waiver, approval or authority from any agency, to take the actions alleged herein. Aguirre directed Vitek not to continue work on SDCERS' behalf without his specific approval to do so. In violation of California Rule of Professional Conduct 5-100(A), Aguirre presented an erroneous interpretation of the ruling in *Westly v. CALPERS*, and threatened that Vitek's firm would be subjected to "all available recourse" if it gave advice to SDCERS inconsistent with Aguirre's erroneous interpretation. In taking these actions, Aguirre acted without notice to, or authority from, the Board. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre also acted without notice to, or authority from the City Council.

46. On January 11, 2005 agents of the City Attorney's Office, including Yolanda Gammill, acting at Aguirre's direction and with his authorization, seized documents from the office of City Auditor and Comptroller Terri A. Webster, a current member of the Board, with knowledge that the documents included privileged communications between SDCERS and its outside counsel regarding matters in which SDCERS and the City were adversaries. In taking these actions, Aguirre acted without notice to, or authority from, the Board. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre also acted without notice to, or authority from the City Council.

47 On January 11, 2005, Mike Leone, Esq , advised Aguirre in writing that his agents had seized privileged communications between his firm and SDCERS regarding the matter of *Gleason v. SDCERS*, San Diego Superior Court Case Number GIC 803779, despite being advised at the time of the seizure of the privileged nature of such documents. Leone notified Aguirre that SDCERS and the City were and are adversaries in the *Gleason* litigation. Leone asserted SDCERS' attorney-client privilege and its attorneys' work product protection, and that seizure of such documents was in violation of SDCERS' rights. Leone demanded the immediate return, without copying or inspection, of all privileged materials. Aguirre thereafter made an erroneous public statement that Leone had demanded the return of all seized documents, when in fact Leone had demanded only the return of any attorney-client privileged communications contained in the seized documents.

Brown Act

48. On January 13, 2005, SDCERS' Board members received written notice of an investigation by the Criminal Division of the City Attorney's Office regarding an alleged violation of the Ralph M. Brown Act which occurred at the Board's November 19, 2004, closed session meeting.

49. On or about January 14, 2005, agents of the City Attorney's Office, acting at Aguirre's direction and with his authorization, seized documents from the City offices of former Board members Mary Vattimo, and Cathy Lexin, with knowledge that the documents potentially included privileged communications between SDCERS and its outside counsel. In taking these actions, Aguirre acted without notice to, or authority from, the Board. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre also acted without notice to, or authority from the City Council.

50. On January 14, 2005, Leone repeated the demand made on behalf of SDCERS that Aguirre immediately return all privileged communications between his firm and SDCERS regarding the *Gleason* litigation, in which SDCERS and the City are adversaries.

51. Aguirre has failed and refused, and continues to fail and refuse, to return documents protected by SDCERS' attorney-client privilege and its attorneys' work product protection to SDCERS. Instead, Aguirre has conditioned return of copies of the privileged

documents on the original documents remaining in the custody of a person or entity other than the holder of the privilege – SDCERS. SDCERS is informed and believes and on that basis alleges that in so acting, Aguirre has acted without notice to, or authority from the City Council.

52 Aguirre has contacted Board member Diann Shipione and requested that she review documents seized from Webster, Lexin and Vattimo. At no time has the Board designated Ms. Shipione as the holder of its attorney-client privilege for any purpose. Ms. Shipione has reviewed documents seized from Webster, Lexin and Vattimo. In so acting, Aguirre has acted without notice to, or authority from the Board. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre also acted without notice to, or authority from the City Council.

53. SDCERS is informed and believes, and on that basis alleges that Aguirre has disclosed to a third party, Patrick Shea, Esq., SDCERS' attorney-client privileged materials contained in documents seized from Webster, Lexin and Vattimo. SDCERS is informed and believes, and on that basis alleges that Shea has reviewed documents seized from Webster, Lexin and Vattimo. At no time has the Board designated Shea as its agent for any purpose, including as the holder of its attorney-client privilege. In so acting, Aguirre has acted without notice to, or authority from the Board. SDCERS is informed and believes and on that basis alleges that in taking these actions, Aguirre also acted without notice to, or authority from the City Council.

A. Told Shea about docs.

Shea ?

54. In several pending and prospective matters, the interests of SDCERS and the City are or will be in actual or potential conflict within the meaning of California Rule of Professional Conduct 3-310(C). Those matters include, without limitation: (a) San Diego Superior Court Case No. GIC 803779, entitled *James F. Gleason, et al. v. San Diego City Employees' Retirement System, et al.*; (b) SDCERS' position as a secured creditor of the City as the beneficiary under deeds of trust encumbering more than $375,000,000.00 in real property held to secure the City's annual employer contributions to the City Employees' Retirement Fund in Fiscal Years 2006, 2007 and 2008; (c) the annual determination of the

amount of the City's employer contribution to the City Employees' Retirement Fund under Charter, Article IX, section 143; and (d) all matters in which SDCERS' fiduciary duty to the Retirement System's participants and their beneficiaries pursuant to California Constitution, Article XVI, section 17 (b), take precedence over any duties it may have to the City, including the duty to minimize employer contributions.

55. On January 21, 2005, the Board authorized the filing of this lawsuit by majority vote.

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

(Against All Defendants and DOES 1-10)

56. SDCERS incorporates by reference and realleges paragraphs 1 through 55 as though fully set forth herein.

57. An actual and justiciable controversy has arisen, and now exists, between SDCERS and the defendants, as to whether SDCERS is empowered to employ legal counsel of its own choosing, separate and independent from the City and the City Attorney's Office, for the purpose of discharging its fiduciary duties regarding management and administration of the Retirement System.

58. SDCERS contends it is empowered under the State Constitution and the Charter to employ legal counsel of its own choosing, separate and independent from the City and the City Attorney's Office, for the purpose of discharging its fiduciary duties regarding management and administration of the Retirement System.

59. Defendants contend SDCERS is not empowered to employ its own legal counsel independent of the City and the City Attorney's Office. Defendants further contend SDCERS may only obtain legal advice and representation as to the discharge of its fiduciary duties regarding management and administration of the Retirement System from the City Attorney's Office.

60. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a judicial determination that it is empowered under the State Constitution and the Charter to employ legal counsel of its own choosing, separate and independent from the City and the

City Attorney's Office, for the purpose of discharging its fiduciary duties regarding management and administration of the Retirement System.

61. This judicial determination is necessary and appropriate at this time so that the parties can ascertain their respective rights and duties.

62. There are no administrative remedies available to SDCERS to compel the relief sought herein. Therefore, SDCERS has exhausted all available administrative remedies.

63. SDCERS has no plain, speedy or adequate remedy at law.

SECOND CAUSE OF ACTION FOR DECLARATORY RELIEF

(Against All Defendants and DOES 11-20)

64. SDCERS incorporates by reference and realleges paragraphs 1 through 55 as though fully set forth herein.

65. An actual and justiciable controversy has arisen, and now exists, between SDCERS and the defendants, as to whether Aguirre, in the capacity of City Attorney, is empowered to remove from office SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

66. SDCERS contends Aguirre, in the capacity of City Attorney, is not authorized or empowered to remove from office SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

67. Defendants contend Aguirre, in the capacity of City Attorney, is authorized or empowered to remove from office SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

68. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a judicial determination that Aguirre, in the capacity of City Attorney, is not authorized or empowered to remove from office SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

69. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a further judicial determination that only the Board, as appointing authority, is authorized or

empowered to remove from office SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

70. These judicial determinations are necessary and appropriate at this time so that the parties can ascertain their respective rights and duties.

71. There are no administrative remedies available to SDCERS to compel the relief sought herein. Therefore, SDCERS has exhausted all available administrative remedies.

72. SDCERS has no plain, speedy or adequate remedy at law.

THIRD CAUSE OF ACTION FOR DECLARATORY RELIEF

(Against All Defendants and DOES 21-30)

73. SDCERS incorporates by reference and realleges paragraphs 1 through 55 as though fully set forth herein.

74. An actual and justiciable controversy has arisen, and now exists, between SDCERS and the defendants, as to whether Aguirre, in the capacity of City Attorney, is empowered to abolish the offices of SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

75. SDCERS contends Aguirre, in the capacity of City Attorney, is not authorized or empowered to abolish the offices of SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

76. Defendants contend Aguirre, in the capacity of City Attorney, is authorized or empowered to abolish the offices of SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

77. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a judicial determination that Aguirre, in the capacity of City Attorney, is not authorized or empowered to abolish the offices of SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

78. This judicial determination is necessary and appropriate at this time so that the parties can ascertain their respective rights and duties.

79. There are no administrative remedies available to SDCERS to compel the relief sought herein. Therefore, SDCERS has exhausted all available administrative remedies.

80. SDCERS has no plain, speedy or adequate remedy at law

FOURTH CAUSE OF ACTION FOR DECLARATORY RELIEF

(Against All Defendants and DOES 31-40)

81. SDCERS incorporates by reference and realleges paragraphs 1 through 55 as though fully set forth herein.

82. Aguirre has never sought, and SDCERS has never given, informed written consent to representation by Aguirre, in the capacity of City Attorney, of both SDCERS and the City.

83. SDCERS is informed and believes and thereon alleges that Aguirre has never sought and the City Council has never given, informed written consent to representation by Aguirre, in the capacity of City Attorney, of both SDCERS and the City.

84. An actual and justiciable controversy has arisen, and now exists, between SDCERS and the defendants, as to whether Aguirre, in the capacity of City Attorney, is barred by California Rule of Professional Conduct 3-310 (C) from acting as attorney for both the City and SDCERS.

85. SDCERS contends Aguirre, in the capacity of City Attorney, is barred by California Rule of Professional Conduct 3-310 (C) from acting as attorney for both the City and SDCERS.

86. Defendants contend Aguirre, in the capacity of City Attorney, is not barred by California Rule of Professional Conduct 3-310 (C), or any other law of professional ethics, from acting as attorney for both the City and SDCERS.

87. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a judicial determination that Aguirre, in the capacity of City Attorney, is barred by California Rule of Professional Conduct 3-310 (C) from acting as attorney for both the City and SDCERS.

88. This judicial determination is necessary and appropriate at this time so that the parties can ascertain their respective rights and duties.

89. There are no administrative remedies available to SDCERS to compel the relief sought herein. Therefore, SDCERS has exhausted all available administrative remedies.

90. SDCERS has no plain, speedy or adequate remedy at law.

FIFTH CAUSE OF ACTION FOR DECLARATORY RELIEF

(Against All Defendants and DOES 41-50)

91. SDCERS incorporates by reference and realleges paragraphs 1 through 55 as though fully set forth herein.

92. An actual and justiciable controversy has arisen, and now exists, between SDCERS and the defendants, as to whether Aguirre, in the capacity of City Attorney, has violated SDCERS' attorney-client privilege by seizing, retaining and refusing SDCERS' demand to return, privileged communications between SDCERS and its outside counsel regarding litigation in which SDCERS and the City are adversaries.

93. A further actual and justiciable controversy has arisen, and now exists, between SDCERS and the defendants, as to whether Aguirre, in the capacity of City Attorney, has violated SDCERS' attorney-client privilege by making documents containing SDCERS' attorney-client privileged communications available for inspection by a third party.

94. SDCERS contends Aguirre, in the capacity of City Attorney, has violated SDCERS' attorney-client privilege by seizing, retaining and refusing its demand to return, privileged communications between SDCERS and its outside counsel regarding litigation in which SDCERS and the City are adversaries, and has further violated its attorney-client privilege by making documents containing SDCERS' attorney-client privileged communications available for inspection by a third party.

95. Defendants contend Aguirre, in the capacity of City Attorney, has not violated SDCERS' attorney-client privilege by seizing, retaining and refusing its demand to return, privileged communications between SDCERS and its outside counsel regarding litigation in which SDCERS and the City are adversaries. Defendants further contend Aguirre, in the

capacity of City Attorney, has not violated SDCERS' attorney-client privilege by making documents containing SDCERS' attorney-client privileged communications available for inspection by a third party.

96. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a judicial determination that Aguirre, in the capacity of City Attorney, has violated SDCERS' attorney-client privilege by seizing, retaining and refusing its demand to return privileged communications between SDCERS and its outside counsel regarding litigation in which SDCERS and the City are adversaries.

97. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a further judicial determination that Aguirre, in the capacity of City Attorney, has violated SDCERS' attorney-client privilege by making documents containing SDCERS' attorney-client privileged communications available for inspection by a third party.

98. These judicial determinations are necessary and appropriate at this time so that the parties can ascertain their respective rights and duties.

99. There are no administrative remedies available to SDCERS to compel the relief sought herein. Therefore, SDCERS has exhausted all available administrative remedies.

100. SDCERS has no plain, speedy or adequate remedy at law.

SIXTH CAUSE OF ACTION FOR DECLARATORY RELIEF

(Against All Defendants and DOES 51-60)

101. SDCERS incorporates by reference and realleges paragraphs 1 through 55 as though fully set forth herein.

102. An actual and justiciable controversy has arisen, and now exists, between SDCERS and the defendants, as to whether Aguirre, in the capacity of City Attorney, has violated California Rule of Professional Conduct 2-100 by communicating directly with a member of the Board regarding litigation in which SDCERS and the City are adversaries with knowledge that the Board is represented by counsel in that matter.

What Litigation

103. SDCERS contends Aguirre, in the capacity of City Attorney, has violated California Rule of Professional Conduct 2-100 by communicating directly with a member of

the Board regarding litigation in which SDCERS and the City are adversaries with knowledge that the Board is represented by counsel in that matter.

Sloppy

104. Defendants contend Aguirre, in the capacity of City Attorney has not violated California Rule of Professional Conduct 2-100 by communicating directly with a member of the Board regarding litigation in which SDCERS and the City are adversaries with knowledge that the Board is represented by counsel in that matter

105. Pursuant to California Code of Civil Procedure section 1060, SDCERS desires a judicial determination that Aguirre, in the capacity of City Attorney, has violated California Rule of Professional Conduct 2-100 by communicating directly with a member of the Board regarding litigation in which SDCERS and the City are adversaries with knowledge that the Board is represented by counsel in that matter

106. This judicial determination is necessary and appropriate at this time so that the parties can ascertain their respective rights and duties.

107. There are no administrative remedies available to SDCERS to compel the relief sought herein. Therefore, SDCERS has exhausted all available administrative remedies.

108. SDCERS has no plain, speedy or adequate remedy at law.

SEVENTH CAUSE OF ACTION FOR PRELIMINARY AND PERMANENT INJUNCTION

(Against All Defendants and DOES 61-70)

109. SDCERS incorporates by reference and realleges paragraphs 1 through 55 as though fully set forth herein.

110. The Board is bound by the California Constitution, Article XVI, section 17, and the Charter, Article IX, sections 141, et seq., to manage and administer the Retirement System in a manner that will assure prompt delivery of benefits and related services to participants and their beneficiaries. ha! ha!

111. The Board is empowered by Charter, Article IX, section 144, to appoint necessary employees to allow it to carry out its Constitutional and Charter-based duties.

112. Legal counsel and related support staff are necessary for the Board to manage and administer the Retirement System in accordance with the Board's Constitutional and Charter-based duties.

113. The positions of SDCERS' General Counsel, Assistant General Counsel and Associate Counsel were created in accordance with the City's civil service laws, pursuant to Charter, Article VII, section 117, and were enacted by lawful ordinances of the City Council.

114. Beginning on December 15, 2004, and continuing to the present time, defendants, and each of them, have wrongfully and unlawfully interfered with the Board's ability to employ, direct, consult, be represented by, and rely upon SDCERS' General Counsel, Assistant General Counsel, and Associate Counsel, through, without limitation, the following actions: purporting to terminate the employment of SDCERS' General Counsel, Associate General Counsel, and Assistant Counsel; purporting to assume the position of SDCERS' chief legal advisor in place of SDCERS' General Counsel; purporting to abolish the offices of SDCERS' General Counsel, Assistant General Counsel, and Associate Counsel; threatening unspecified legal action against SDCERS' Retirement Administrator, General Counsel, Board President, Board members and outside counsel for failure to comply with Aguirre's demands; conducting criminal investigations of the Board's actions while demanding that the Board obtain legal advice and representation only from the City Attorney's Office; purporting to assume control over SDCERS' employment of outside counsel, including matters in which SDCERS is adverse to the City; demanding that SDCERS' outside counsel have no further communications with SDCERS' General Counsel; demanding that SDCERS' outside counsel take direction only from Aguirre instead of their client, the Board; demanding that SDCERS' outside counsel disclose to Aguirre information protected by SDCERS' attorney-client privilege; seizing and refusing to return SDCERS' privileged communications with its outside counsel regarding matters in which it is adverse to the City; interfering with SDCERS' ability to comply with ongoing investigations by governmental agencies; and making repeated public threats in the media and elsewhere regarding retaliation against SDCERS for its refusal to submit to Aguirre's demands.

115. SDCERS has repeatedly advised defendants it does not recognize Aguirre's purported authority to control its legal affairs, including its right to engage and direct outside counsel; nor does it recognize Aguirre's purported authority over its Charter-based power to appoint employees necessary to the discharge of its Constitutional and Charter-based duties, specifically including its power to employ legal counsel of its own choosing. SDCERS has repeatedly advised Aguirre he has violated its attorney-client privilege and demanded the return of all privileged communications.

ATTYS? are they 'ees

116. Aguirre has refused to stop his course of wrongful and unlawful conduct, and has instead continued his course of wrongful and unlawful conduct notwithstanding SDCERS' statements.

117. Aguirre's course of wrongful and unlawful conduct, unless and until enjoined and restrained by an order of this Court as prayed for in this Complaint, has legally and proximately caused, and will continue to cause, SDCERS to suffer great and irreparable injury insofar as it is, and will continue to be, deprived of the services of its own legal counsel and the services of outside counsel, which are necessary to the daily and ongoing discharge of its Constitutional and Charter-based duties.

118. SDCERS has no adequate remedy at law for the injuries currently being suffered and that will continue to be suffered as long as defendants' wrongful and unlawful conduct is not enjoined.

EIGHTH CAUSE OF ACTION FOR POSSESSION OF PERSONAL PROPERTY

(Against Defendant Aguirre and DOES 71-80)

119. SDCERS is, and at all times mentioned was, the owner of personal property described as documents related to the matter of *James F. Gleason, et al. v. San Diego City Employees' Retirement System, et al.*, San Diego Superior Court Case Number GIC 803779, which contain communications and notes of communications between members of the Board and SDCERS' outside counsel, and are therefore protected from disclosure to any third party by SDCERS' attorney-client privilege and attorney work product protection ("the Documents").

120. The Documents were wrongfully seized by Aguirre and/or agents acting on his instruction and at his direction from the offices of current Board member Terri A. Webster, and former SDCERS Board members Mary Vattimo and Cathy Lexin.

121. SDCERS is, and at all times mentioned was, entitled to immediate possession of the Documents.

122. On January 11 and 14, 2005, Aguirre, and/or agents acting on his instruction and at his direction, wrongfully seized the Documents; and without the consent of SDCERS, the Board, Webster, Vattimo, or Lexin, and over their objection took possession of the Documents. Since that time, Aguirre has been, and now is, in wrongful possession of the Documents in violation of SDCERS' right to immediate possession.

123. SDCERS, through attorney Leone, has repeatedly demanded the return of the Documents, and any and all copies made thereof. Aguirre has refused, and continues to refuse to return the Documents and any copies made thereof; and further continues to withhold possession of the original Documents from SDCERS in violation of SDCERS' right to immediate possession.

124. Aguirre's conduct is a legal and proximate cause of injury to SDCERS by virtue of his status as counsel for the City, an adverse party in the *Gleason* litigation, and his possession of privileged communications between SDCERS and its outside counsel regarding that litigation.

PRAYER FOR RELIEF

WHEREFORE, SDCERS prays that:

125. Following a duly noticed hearing, this Court render a judicial determination on SDCERS' First Cause of Action that SDCERS is empowered by the State Constitution and the Charter to employ legal counsel of its own choosing, separate and independent from the City and the City Attorney's Office, for the purpose of discharging its fiduciary duties regarding management and administration of the Retirement System.

126. Following a duly noticed hearing, this Court render a judicial determination on SDCERS' Second Cause of Action that: (a) Aguirre, in the capacity of City Attorney, is not

authorized or empowered to remove from office SDCERS' General Counsel, Assistant General Counsel and Associate Counsel; and (b) only the Board, as appointing authority, is authorized or empowered to remove from office SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

127. Following a duly noticed hearing, this Court render a judicial determination on SDCERS' Third Cause of Action that Aguirre, in the capacity of City Attorney, is not authorized or empowered to abolish the offices of SDCERS' General Counsel, Assistant General Counsel and Associate Counsel.

128. Following a duly noticed hearing, this Court render a judicial determination on SDCERS' Fourth Cause of Action that Aguirre, in the capacity of City Attorney, is barred by California Rule of Professional Conduct 3-310 (C) from acting as attorney for both the City and SDCERS.

129. Following a duly noticed hearing, this Court render a judicial determination on SDCERS' Fifth Cause of Action that: (a) Aguirre, in the capacity of City Attorney, has violated SDCERS' attorney-client privilege by seizing, retaining and refusing its demand to return, privileged communications between SDCERS and its outside counsel regarding litigation in which SDCERS and the City are adversaries; and (b) that Aguirre, in the capacity of City Attorney, has violated SDCERS' attorney-client privilege by making documents containing SDCERS' attorney-client privileged communications available for inspection by a third party.

130. Following a duly noticed hearing, this Court render a judicial determination on SDCERS' Sixth Cause of Action that Aguirre, in the capacity of City Attorney, has violated California Rule of Professional Conduct 2-100 by communicating directly with a member of the Board regarding litigation in which SDCERS and the City are adversaries with knowledge that the Board is represented by counsel in that matter.

131. As to SDCERS' Seventh Cause of Action that:

(a) the Court issue an order requiring defendants to show cause, if they have any, why they should not be enjoined as set forth in this complaint, during the pendency of this action;

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

I, Frederick Pierce, IV, certify and declare that I have read the foregoing Verified Complaint for: Declaratory Relief and Preliminary and Permanent Injunction and know its contents.

I am the President of the Board of Administration of the San Diego City Employees' Retirement System, the plaintiff in this action, and am authorized to make this verification for an on its behalf, and I make this verification for that reason. I am informed and believe and on that ground allege that the matters stated in the document described above are true.

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

Executed on JANUARY 27, 2005, at San Diego, California.

Frederick Pierce, IV

Exhibit 8

ARTICLE 16 PUBLIC FINANCE

SECTION 1. The Legislature shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars ($300,000), except in case of war to repel invasion or suppress insurrection, unless the same shall be authorized by law for some single object or work to be distinctly specified therein which law shall provide ways and means, exclusive of loans, for the payment of the interest of such debt or liability as it falls due, and also to pay and discharge the principal of such debt or liability within 50 years of the time of the contracting thereof, and shall be irrepealable until the principal and interest thereon shall be paid and discharged, and such law may make provision for a sinking fund to pay the principal of such debt or liability to commence at a time after the incurring of such debt or liability of not more than a period of one-fourth of the time of maturity of such debt or liability; but no such law shall take effect unless it has been passed by a two-thirds vote of all the members elected to each house of the Legislature and until, at a general election or at a direct primary, it shall have been submitted to the people and shall have received a majority of all the votes cast for and against it at such election; and all moneys raised by authority of such law shall be applied only to the specific object therein stated or to the payment of the debt thereby created. Full publicity as to matters to be voted upon by the people is afforded by the setting out of the complete text of the proposed laws, together with the arguments for and against them, in the ballot pamphlet mailed to each elector preceding the election at which they are submitted, and the only requirement for publication of such law shall be that it be set out at length in ballot pamphlets which the Secretary of State shall cause to be printed. The Legislature may, at any time after the approval of such law by the people, reduce the amount of the indebtedness authorized by the law to an amount not less than the amount contracted at the time of the reduction, or it may repeal the law if no debt shall have been contracted in pursuance thereof.

Notwithstanding any other provision of this Constitution, Members of the Legislature who are required to meet with the State Allocation Board shall have equal rights and duties with the nonlegislative members to vote and act upon matters pending or coming before such board for the allocation and apportionment of funds to school districts for school construction purposes or purposes related thereto.

Notwithstanding any other provision of this constitution, or of any bond act to the contrary, if any general obligation bonds of the State heretofore or hereafter authorized by vote of the people have been offered for sale and not sold, the Legislature may raise the maximum rate of interest payable on all general obligation bonds authorized but not sold, whether or not such bonds have been offered for sale, by a statute passed by a two-thirds vote of all members elected to each house thereof.

The provisions of Senate Bill No. 763 of the 1969 Regular Session, which authorize an increase of the state general obligation bond maximum interest rate from 5 percent to an amount not in excess of 7 percent and eliminate the maximum rate of interest payable on notes given in anticipation of the sale of such bonds, are hereby ratified.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 1.3. (a) For the purposes of Section 1, a "single object or work," for which the Legislature may create a debt or liability in excess of three hundred thousand dollars ($300,000) subject to the

requirements set forth in Section 1, includes the funding of an accumulated state budget deficit to the extent, and in the amount, that funding is authorized in a measure submitted to the voters at the March 2, 2004, statewide primary election.

(b) As used in subdivision (a), "accumulated state budget deficit" means the aggregate of both of the following, as certified by the Director of Finance:

(1) The estimated negative balance of the Special Fund for Economic Uncertainties arising on or before June 30, 2004, not including the effect of the estimated amount of net proceeds of any bonds issued or to be issued pursuant to the California Fiscal Recovery Financing Act (Title 17 (commencing with Section 99000) of the Government Code) and any bonds issued or to be issued pursuant to the measure submitted to the voters at the March 2, 2004, statewide primary election as described in subdivision (a).

(2) Other General Fund obligations incurred by the State prior to June 30, 2004, to the extent not included in that negative balance.

(c) Subsequent to the issuance of any state bonds described in subdivision (a), the State may not obtain moneys to fund a year-end state budget deficit, as may be defined by statute, pursuant to any of the following: (1) indebtedness incurred pursuant to Section 1 of this **article**, (2) a debt obligation under which funds to repay that obligation are derived solely from a designated source of revenue, or (3) a bond or similar instrument for the borrowing of moneys for which there is no legal obligation of repayment. This subdivision does not apply to funding obtained through a short-term obligation incurred in anticipation of the receipt of tax proceeds or other revenues that may be applied to the payment of that obligation, for the purposes and not exceeding the amounts of existing appropriations to which the resulting proceeds are to be applied. For purposes of this subdivision, "year-end state budget deficit" does not include an obligation within the accumulated state budget deficit as defined by subdivision (b).

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 1.5. The Legislature may create and establish a "General Obligation Bond Proceeds Fund" in the State Treasury, and may provide for the proceeds of the sale of general obligation bonds of the State heretofore or hereafter issued, including any sums paid as accrued interest thereon, under any or all acts authorizing the issuance of such bonds, to be paid into or transferred to, as the case may be, the "General Obligation Bond Proceeds Fund." Accounts shall be maintained in the "General Obligation Bond Proceeds Fund" of all moneys deposited in the State Treasury to the credit of that fund and the proceeds of each bond issue shall be maintained as a separate and distinct account and shall be paid out only in accordance with the law authorizing the issuance of the particular bonds from which the proceeds were derived. The Legislature may abolish, subject to the conditions of this section, any fund in the State Treasury heretofore or hereafter created by any act for the purpose of having deposited therein the proceeds from the issuance of bonds if such proceeds are transferred to or paid into the "General Obligation Bond Proceeds Fund" pursuant to the authority granted in this section; provided, however, that nothing in this section shall prevent the Legislature from re-establishing any bond proceeds fund so abolished and transferring back to its credit all proceeds in the "General Obligation Bond Proceeds Fund" which constitute the proceeds of the particular bond fund being re-established.

CALIFORNIA CONSTITUTION

ARTICLE 16 PUBLIC FINANCE

SEC. 2. (a) No amendment to this Constitution which provides for the preparation, issuance and sale of bonds of the State of California shall hereafter be submitted to the electors, nor shall any such amendment to the Constitution hereafter submitted to or approved by the electors become effective for any purpose.

Each measure providing for the preparation, issuance and sale of bonds of the State of California shall hereafter be submitted to the electors in the form of a bond act or statute.

(b) The provisions of this Constitution enumerated in subdivision (c) of this section are repealed and such provisions are continued as statutes which have been approved, adopted, legalized, ratified, validated, and made fully and completely effective, by means of the adoption by the electorate of a ratifying constitutional amendment, except that the Legislature, in addition to whatever powers it possessed under such provisions, may amend or repeal such provisions when the bonds issued thereunder have been fully retired and when no rights thereunder will be damaged.

(c) The enumerated provisions of this Constitution are: **Article** XVI, Sections 2, 3, 4, 41/2, 5, 6, 8, 81/2, 15, **16**, **16**.5, 17, 18, 19, 19.5, 20 and 21.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 3. No money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State, except that notwithstanding anything contained in this or any other section of the Constitution:

(1) Whenever federal funds are made available for the construction of hospital facilities by public agencies and nonprofit corporations organized to construct and maintain such facilities, nothing in this Constitution shall prevent the Legislature from making state money available for that purpose, or from authorizing the use of such money for the construction of hospital facilities by nonprofit corporations organized to construct and maintain such facilities.

(2) The Legislature shall have the power to grant aid to the institutions conducted for the support and maintenance of minor orphans, or half-orphans, or abandoned children, or children of a father who is incapacitated for gainful work by permanent physical disability or is suffering from tuberculosis in such a stage that he cannot pursue a gainful occupation, or aged persons in indigent circumstances--such aid to be granted by a uniform rule, and proportioned to the number of inmates of such respective institutions.

(3) The Legislature shall have the power to grant aid to needy blind persons not inmates of any institution supported in whole or in part by the State or by any of its political subdivisions, and no person concerned with the administration of aid to needy blind persons shall dictate how any applicant or recipient shall expend such aid granted him, and all money paid to a recipient of such aid shall be intended to help him meet his individual needs and is not for the benefit of any other person, and such aid when granted shall not be construed as income to any person other than the blind recipient of such aid, and the State Department of Social Welfare shall take all necessary action to enforce the provisions relating to aid to needy blind persons as heretofore stated.

(4) The Legislature shall have power to grant aid to needy physically handicapped persons not inmates of any institution under

the supervision of the Department of Mental Hygiene and supported in whole or in part by the State or by any institution supported in whole or part by any political subdivision of the State.

(5) The State shall have at any time the right to inquire into the management of such institutions.

(6) Whenever any county, or city and county, or city, or town, shall provide for the support of minor orphans, or half-orphans, or abandoned children, or children of a father who is incapacitated for gainful work by permanent physical disability or is suffering from tuberculosis in such a stage that he cannot pursue a gainful occupation, or aged persons in indigent circumstances, or needy blind persons not inmates of any institution supported in whole or in part by the State or by any of its political subdivisions, or needy physically handicapped persons not inmates of any institution under the supervision of the Department of Mental Hygiene and supported in whole or in part by the State or by any institution supported in whole or part by any political subdivision of the State; such county, city and county, city, or town shall be entitled to receive the same pro rata appropriations as may be granted to such institutions under church, or other control.

An accurate statement of the receipts and expenditures of public moneys shall be attached to and published with the laws at every regular session of the Legislature.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 4. The Legislature shall have the power to insure or guarantee loans made by private or public lenders to nonprofit corporations and public agencies, the proceeds of which are to be used for the construction, expansion, enlargement, improvement, renovation or repair of any public or nonprofit hospital, hospital facility, or extended care facility, facility for the treatment of mental illness, or all of them, including any outpatient facility and any other facility useful and convenient in the operation of the hospital and any original equipment for any such hospital or facility, or both.

No provision of this Constitution, including but not limited to, Section 1 of **Article** XVI and Section 14 of **Article** XI, shall be construed as a limitation upon the authority granted to the Legislature by this section.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 5. Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of **Article** XVI.

CALIFORNIA CONSTITUTION

ARTICLE 16 PUBLIC FINANCE

SEC. 6. The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of **Article** XVI; and it shall not have power to authorize the State, or any political subdivision thereof, to subscribe for stock, or to become a stockholder in any corporation whatever; provided, further, that irrigation districts for the purpose of acquiring the control of any entire international water system necessary for its use and purposes, a part of which is situated in the United States, and a part thereof in a foreign country, may in the manner authorized by law, acquire the stock of any foreign corporation which is the owner of, or which holds the title to the part of such system situated in a foreign country; provided, further, that irrigation districts for the purpose of acquiring water and water rights and other property necessary for their uses and purposes, may acquire and hold the stock of corporations, domestic or foreign, owning waters, water rights, canals, waterworks, franchises or concessions subject to the same obligations and liabilities as are imposed by law upon all other stockholders in such corporation; and

Provided, further, that this section shall not prohibit any county, city and county, city, township, or other political corporation or subdivision of the State from joining with other such agencies in providing for the payment of workers' compensation, unemployment compensation, tort liability, or public liability losses incurred by such agencies, by entry into an insurance pooling arrangement under a joint exercise of powers agreement, or by membership in such publicly-owned nonprofit corporation or other public agency as may be authorized by the Legislature; and

Provided, further, that nothing contained in this Constitution shall prohibit the use of state money or credit, in aiding veterans who served in the military or naval service of the United States during the time of war, in the acquisition of, or payments for, (1) farms or homes, or in projects of land settlement or in the development of such farms or homes or land settlement projects for the benefit of such veterans, or (2) any business, land or any interest therein, buildings, supplies, equipment, machinery, or tools, to be used by the veteran in pursuing a gainful occupation; and

Provided, further, that nothing contained in this Constitution shall prohibit the State, or any county, city and county, city, township, or other political corporation or subdivision of the State from providing aid or assistance to persons, if found to be in the public interest, for the purpose of clearing debris, natural materials, and wreckage from privately owned lands and waters deposited thereon or therein during a period of a major disaster or emergency, in either case declared by the President. In such case, the public entity shall be indemnified by the recipient from the award of any claim against the public entity arising from the rendering of such aid or assistance. Such aid or assistance must be eligible for federal reimbursement for the cost thereof.

And provided, still further, that notwithstanding the restrictions contained in this Constitution, the treasurer of any city, county, or city and county shall have power and the duty to make such temporary transfers from the funds in custody as may be necessary to

provide funds for meeting the obligations incurred for maintenance purposes by any city, county, city and county, district, or other political subdivision whose funds are in custody and are paid out solely through the treasurer's office. Such temporary transfer of funds to any political subdivision shall be made only upon resolution adopted by the governing body of the city, county, or city and county directing the treasurer of such city, county, or city and county to make such temporary transfer. Such temporary transfer of funds to any political subdivision shall not exceed 85 percent of the anticipated revenues accruing to such political subdivision, shall not be made prior to the first day of the fiscal year nor after the last Monday in April of the current fiscal year, and shall be replaced from the revenues accruing to such political subdivision before any other obligation of such political subdivision is met from such revenue.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 7. Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 8. (a) From all state revenues there shall first be set apart the moneys to be applied by the State for support of the public school system and public institutions of higher education.

(b) Commencing with the 1990-91 fiscal year, the moneys to be applied by the State for the support of school districts and community college districts shall be not less than the greater of the following amounts:

(1) The amount which, as a percentage of General Fund revenues which may be appropriated pursuant to **Article** XIIIB, equals the percentage of General Fund revenues appropriated for school districts and community college districts, respectively, in fiscal year 1986-87.

(2) The amount required to ensure that the total allocations to school districts and community college districts from General Fund proceeds of taxes appropriated pursuant to **Article** XIIIB and allocated local proceeds of taxes shall not be less than the total amount from these sources in the prior fiscal year, excluding any revenues allocated pursuant to subdivision (a) of Section 8.5, adjusted for changes in enrollment and adjusted for the change in the cost of living pursuant to paragraph (1) of subdivision (e) of Section 8 of **Article** XIIIB. This paragraph shall be operative only in a fiscal year in which the percentage growth in California per capita personal income is less than or equal to the percentage growth in per capita General Fund revenues plus one half of one percent.

(3) (A) The amount required to ensure that the total allocations to school districts and community college districts from General Fund proceeds of taxes appropriated pursuant to **Article** XIIIB and allocated local proceeds of taxes shall equal the total amount from these sources in the prior fiscal year, excluding any revenues allocated pursuant to subdivision (a) of Section 8.5, adjusted for changes in enrollment and adjusted for the change in per capita General Fund revenues.

(B) In addition, an amount equal to one-half of one percent times the prior year total allocations to school districts and community colleges from General Fund proceeds of taxes appropriated pursuant to **Article** XIIIB and allocated local proceeds of taxes, excluding any

revenues allocated pursuant to subdivision (a) of Section 8.5, adjusted for changes in enrollment.

(C) This paragraph (3) shall be operative only in a fiscal year in which the percentage growth in California per capita personal income in a fiscal year is greater than the percentage growth in per capita General Fund revenues plus one half of one percent.

(c) In any fiscal year, if the amount computed pursuant to paragraph (1) of subdivision (b) exceeds the amount computed pursuant to paragraph (2) of subdivision (b) by a difference that exceeds one and one-half percent of General Fund revenues, the amount in excess of one and one-half percent of General Fund revenues shall not be considered allocations to school districts and community colleges for purposes of computing the amount of state aid pursuant to paragraph (2) or 3 of subdivision (b) in the subsequent fiscal year.

(d) In any fiscal year in which school districts and community college districts are allocated funding pursuant to paragraph (3) of subdivision (b) or pursuant to subdivision (h), they shall be entitled to a maintenance factor, equal to the difference between (1) the amount of General Fund moneys which would have been appropriated pursuant to paragraph (2) of subdivision (b) if that paragraph had been operative or the amount of General Fund moneys which would have been appropriated pursuant to subdivision (b) had subdivision (b) not been suspended, and (2) the amount of General Fund moneys actually appropriated to school districts and community college districts in that fiscal year.

(e) The maintenance factor for school districts and community college districts determined pursuant to subdivision (d) shall be adjusted annually for changes in enrollment, and adjusted for the change in the cost of living pursuant to paragraph (1) of subdivision (e) of Section 8 of **Article** XIIIB, until it has been allocated in full. The maintenance factor shall be allocated in a manner determined by the Legislature in each fiscal year in which the percentage growth in per capita General Fund revenues exceeds the percentage growth in California per capita personal income. The maintenance factor shall be reduced each year by the amount allocated by the Legislature in that fiscal year. The minimum maintenance factor amount to be allocated in a fiscal year shall be equal to the product of General Fund revenues from proceeds of taxes and one-half of the difference between the percentage growth in per capita General Fund revenues from proceeds of taxes and in California per capita personal income, not to exceed the total dollar amount of the maintenance factor.

(f) For purposes of this section, "changes in enrollment" shall be measured by the percentage change in average daily attendance. However, in any fiscal year, there shall be no adjustment for decreases in enrollment between the prior fiscal year and the current fiscal year unless there have been decreases in enrollment between the second prior fiscal year and the prior fiscal year and between the third prior fiscal year and the second prior fiscal year.

(h) Subparagraph (B) of paragraph (3) of subdivision (b) may be suspended for one year only when made part of or included within any bill enacted pursuant to Section 12 of **Article** IV. All other provisions of subdivision (b) may be suspended for one year by the enactment of an urgency statute pursuant to Section 8 of **Article** IV, provided that the urgency statute may not be made part of or included within any bill enacted pursuant to Section 12 of **Article** IV.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 8.5. (a) In addition to the amount required to be applied for the support of school districts and community college districts pursuant to Section 8, the Controller shall during each fiscal year transfer and allocate all revenues available pursuant to paragraph 1

of subdivision (a) of Section 2 of **Article** XIIIB to that portion of the State School Fund restricted for elementary and high school purposes, and to that portion of the State School Fund restricted for community college purposes, respectively, in proportion to the enrollment in school districts and community college districts respectively.

(1) With respect to funds allocated to that portion of the State School Fund restricted for elementary and high school purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Superintendent of Public Instruction mutually determine that current annual expenditures per student equal or exceed the average annual expenditure per student of the 10 states with the highest annual expenditures per student for elementary and high schools, and that average class size equals or is less than the average class size of the 10 states with the lowest class size for elementary and high schools.

(2) With respect to funds allocated to that portion of the State School Fund restricted for community college purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Chancellor of the California Community Colleges mutually determine that current annual expenditures per student for community colleges in this State equal or exceed the average annual expenditure per student of the 10 states with the highest annual expenditures per student for community colleges.

(b) Notwithstanding the provisions of **Article** XIIIB, funds allocated pursuant to this section shall not constitute appropriations subject to limitation.

(c) From any funds transferred to the State School Fund pursuant to subdivision (a), the Controller shall each year allocate to each school district and community college district an equal amount per enrollment in school districts from the amount in that portion of the State School Fund restricted for elementary and high school purposes and an equal amount per enrollment in community college districts from that portion of the State School Fund restricted for community college purposes.

(d) All revenues allocated pursuant to subdivision (a) shall be expended solely for the purposes of instructional improvement and accountability as required by law.

(e) Any school district maintaining an elementary or secondary school shall develop and cause to be prepared an annual audit accounting for such funds and shall adopt a School Accountability Report Card for each school.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 9. Money collected under any state law relating to the protection or propagation of fish and game shall be used for activities relating thereto.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 10. Whenever the United States government or any officer or agency thereof shall provide pensions or other aid for the aged, co-operation by the State therewith and therein is hereby authorized in such manner and to such extent as may be provided by law.

The money expended by any county, city and county, municipality, district or other political subdivision of this State made available

of subdivision (a) of Section 2 of **Article** XIIIB to that portion of the State School Fund restricted for elementary and high school purposes, and to that portion of the State School Fund restricted for community college purposes, respectively, in proportion to the enrollment in school districts and community college districts respectively.

(1) With respect to funds allocated to that portion of the State School Fund restricted for elementary and high school purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Superintendent of Public Instruction mutually determine that current annual expenditures per student equal or exceed the average annual expenditure per student of the 10 states with the highest annual expenditures per student for elementary and high schools, and that average class size equals or is less than the average class size of the 10 states with the lowest class size for elementary and high schools.

(2) With respect to funds allocated to that portion of the State School Fund restricted for community college purposes, no transfer or allocation of funds pursuant to this section shall be required at any time that the Director of Finance and the Chancellor of the California Community Colleges mutually determine that current annual expenditures per student for community colleges in this State equal or exceed the average annual expenditure per student of the 10 states with the highest annual expenditures per student for community colleges.

(b) Notwithstanding the provisions of **Article** XIIIB, funds allocated pursuant to this section shall not constitute appropriations subject to limitation.

(c) From any funds transferred to the State School Fund pursuant to subdivision (a), the Controller shall each year allocate to each school district and community college district an equal amount per enrollment in school districts from the amount in that portion of the State School Fund restricted for elementary and high school purposes and an equal amount per enrollment in community college districts from that portion of the State School Fund restricted for community college purposes.

(d) All revenues allocated pursuant to subdivision (a) shall be expended solely for the purposes of instructional improvement and accountability as required by law.

(e) Any school district maintaining an elementary or secondary school shall develop and cause to be prepared an annual audit accounting for such funds and shall adopt a School Accountability Report Card for each school.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 9. Money collected under any state law relating to the protection or propagation of fish and game shall be used for activities relating thereto.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 10. Whenever the United States government or any officer or agency thereof shall provide pensions or other aid for the aged, co-operation by the State therewith and therein is hereby authorized in such manner and to such extent as may be provided by law.

The money expended by any county, city and county, municipality, district or other political subdivision of this State made available

under the provisions of this section shall not be considered as a part of the base for determining the maximum expenditure for any given year permissible under Section 20 of **Article** XI of this Constitution independent of the vote of the electors or authorization by the State Board of Equalization.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 11. The Legislature has plenary power to provide for the administration of any constitutional provisions or laws heretofore or hereafter enacted concerning the administration of relief, and to that end may modify, transfer, or enlarge the powers vested in any state agency or officer concerned with the administration of relief or laws appertaining thereto. The Legislature, or the people by initiative, shall have power to amend, alter, or repeal any law relating to the relief of hardship and destitution, whether such hardship and destitution results from unemployment or from other causes, or to provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes, either directly by the State or through the counties of the State, and to grant such aid to the counties therefor, or make such provision for reimbursement of the counties by the State, as the Legislature deems proper.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 13. Notwithstanding any other provision of this Constitution, the Legislature shall have power to release, rescind, cancel, or otherwise nullify in whole or in part any encumbrance on property, personal obligation, or other form of security heretofore or hereafter exacted or imposed by the Legislature to secure the repayment to, or reimbursement of, the State, and the counties or other agencies of the state government, of aid lawfully granted to and received by aged persons.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 14. The Legislature may provide for the issuance of revenue bonds to finance the acquisition, construction, and installation of environmental pollution control facilities, including the acquisition of all technological facilities necessary or convenient for pollution control, and for the lease or sale of such facilities to persons, associations, or corporations, other than municipal corporations; provided, that such revenue bonds shall not be secured by the taxing power of the State; and provided, further, that the Legislature may, by resolution adopted by either house, prohibit or limit any proposed issuance of such revenue bonds. No provision of this Constitution, including, but not limited to, Section 25 of **Article** XIII and Sections 1 and 2 of **Article** XVI, shall be construed as a limitation upon the authority granted to the Legislature pursuant to this section. Nothing herein contained shall authorize any public agency to operate any industrial or commercial enterprise.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 14.5. The Legislature may provide for the issuance of revenue bonds to finance the acquisition, construction, and installation of facilities utilizing cogeneration technology, solar power, biomass, or any other alternative source the Legislature may deem appropriate, including the acquisition of all technological facilities necessary or convenient for the use of alternative sources, and for the lease or sale of such facilities to persons, associations, or corporations, other than municipal corporations; provided, that such revenue bonds shall not be secured by the taxing power of the State; and provided, further, that the Legislature may, by resolution adopted by both houses, prohibit or limit any proposed issuance of such revenue bonds. No provision of this Constitution, including, but not limited to, Sections 1, 2, and 6, of this **article**, shall be construed as a limitation upon the authority granted to the Legislature pursuant to this section. Nothing contained herein shall authorize any public agency to operate any industrial or commercial enterprise.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 15. A public body authorized to issue securities to provide public parking facilities and any other public body whose territorial area includes such facilities are authorized to make revenues from street parking meters available as additional security.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. **16**. All property in a redevelopment project established under the Community Redevelopment Law as now existing or hereafter amended, except publicly owned property not subject to taxation by reason of that ownership, shall be taxed in proportion to its value as provided in Section 1 of this **article**, and those taxes (the word "taxes" as used herein includes, but is not limited to, all levies on an ad valorem basis upon land or real property) shall be levied and collected as other taxes are levied and collected by the respective taxing agencies.

The Legislature may provide that any redevelopment plan may contain a provision that the taxes, if any, so levied upon the taxable property in a redevelopment project each year by or for the benefit of the State of California, any city, county, city and county, district, or other public corporation (hereinafter sometimes called "taxing agencies") after the effective date of the ordinance approving the redevelopment plan, shall be divided as follows:

(a) That portion of the taxes which would be produced by the rate upon which the tax is levied each year by or for each of those taxing agencies upon the total sum of the assessed value of the taxable property in the redevelopment project as shown upon the assessment roll used in connection with the taxation of that property by the taxing agency, last equalized prior to the effective date of the ordinance, shall be allocated to, and when collected shall be paid into, the funds of the respective taxing agencies as taxes by or for those taxing agencies on all other property are paid (for the purpose of allocating taxes levied by or for any taxing agency or agencies which did not include the territory in a redevelopment project on the effective date of the ordinance but to which that territory has been annexed or otherwise included after the ordinance's effective date,

the assessment roll of the county last equalized on the effective date of that ordinance shall be used in determining the assessed valuation of the taxable property in the project on that effective date); and

(b) Except as provided in subdivision (c), that portion of the levied taxes each year in excess of that amount shall be allocated to and when collected shall be paid into a special fund of the redevelopment agency to pay the principal of and interest on loans, moneys advanced to, or indebtedness (whether funded, refunded, assumed or otherwise) incurred by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project. Unless and until the total assessed valuation of the taxable property in a redevelopment project exceeds the total assessed value of the taxable property in the project as shown by the last equalized assessment roll referred to in subdivision (a), all of the taxes levied and collected upon the taxable property in the redevelopment project shall be paid into the funds of the respective taxing agencies. When the loans, advances, and indebtedness, if any, and interest thereon, have been paid, then all moneys thereafter received from taxes upon the taxable property in the redevelopment project shall be paid into the funds of the respective taxing agencies as taxes on all other property are paid.

(c) That portion of the taxes identified in subdivision (b) which are attributable to a tax rate levied by a taxing agency for the purpose of producing revenues in an amount sufficient to make annual repayments of the principal of, and the interest on, any bonded indebtedness for the acquisition or improvement of real property shall be allocated to, and when collected shall be paid into, the fund of that taxing agency. This paragraph shall only apply to taxes levied to repay bonded indebtedness approved by the voters of the taxing agency on or after January 1, 1989.

The Legislature may also provide that in any redevelopment plan or in the proceedings for the advance of moneys, or making of loans, or the incurring of any indebtedness (whether funded, refunded, assumed, or otherwise) by the redevelopment agency to finance or refinance, in whole or in part, the redevelopment project, the portion of taxes identified in subdivision (b), exclusive of that portion identified in subdivision (c), may be irrevocably pledged for the payment of the principal of and interest on those loans, advances, or indebtedness.

It is intended by this section to empower any redevelopment agency, city, county, or city and county under any law authorized by this section to exercise the provisions hereof separately or in combination with powers granted by the same or any other law relative to redevelopment agencies. This section shall not affect any other law or laws relating to the same or a similar subject but is intended to authorize an alternative method of procedure governing the subject to which it refers.

The Legislature shall enact those laws as may be necessary to enforce the provisions of this section.

CALIFORNIA CONSTITUTION
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SEC. 17. The State shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association, or corporation, except that the State and each political subdivision, district, municipality, and public agency thereof is hereby authorized to acquire and hold shares of the capital stock of any mutual water company or corporation when the stock is so acquired or held for the purpose of furnishing a supply of water for public, municipal or governmental purposes; and the holding of the stock shall entitle the holder thereof to all of the rights, powers and privileges, and shall subject the holder to the obligations and

liabilities conferred or imposed by law upon other holders of stock in the mutual water company or corporation in which the stock is so held.

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

(b) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.

(c) The members of the retirement board of a public pension or retirement system shall discharge their duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

(d) The members of the retirement board of a public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not prudent to do so.

(e) The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.

(f) With regard to the retirement board of a public pension or retirement system which includes in its composition elected employee members, the number, terms, and method of selection or removal of members of the retirement board which were required by law or otherwise in effect on July 1, 1991, shall not be changed, amended, or modified by the Legislature unless the change, amendment, or modification enacted by the Legislature is ratified by a majority vote of the electors of the jurisdiction in which the participants of the system are or were, prior to retirement, employed.

(g) The Legislature may by statute continue to prohibit certain investments by a retirement board where it is in the public interest to do so, and provided that the prohibition satisfies the standards of fiduciary care and loyalty required of a retirement board pursuant to this section.

(h) As used in this section, the term "retirement board" shall mean the board of administration, board of trustees, board of directors, or other governing body or board of a public employees' pension or retirement system; provided, however, that the term "retirement board" shall not be interpreted to mean or include a governing body or board created after July 1, 1991 which does not administer pension or retirement benefits, or the elected legislative body of a jurisdiction which employs participants in a public employees' pension or retirement system.

CALIFORNIA CONSTITUTION
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SEC. 18. (a) No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose, except that with respect to any such public entity which is authorized to incur indebtedness for public school purposes, any proposition for the incurrence of indebtedness in the form of general obligation bonds for the purpose of repairing, reconstructing or replacing public school buildings determined, in the manner prescribed by law, to be structurally unsafe for school use, shall be adopted upon the approval of a majority of the voters of the public entity voting on the proposition at such election; nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and to provide for a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the indebtedness.

(b) Notwithstanding subdivision (a), on or after the effective date of the measure adding this subdivision, in the case of any school district, community college district, or county office of education, any proposition for the incurrence of indebtedness in the form of general obligation bonds for the construction, reconstruction, rehabilitation, or replacement of school facilities, including the furnishing and equipping of school facilities, or the acquisition or lease of real property for school facilities, shall be adopted upon the approval of 55 percent of the voters of the district or county, as appropriate, voting on the proposition at an election. This subdivision shall apply only to a proposition for the incurrence of indebtedness in the form of general obligation bonds for the purposes specified in this subdivision if the proposition meets all of the accountability requirements of paragraph (3) of subdivision (b) of Section 1 of **Article** XIIIA.

(c) When two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when two-thirds or a majority or 55 percent of the voters, as the case may be, voting on any one of those propositions, vote in favor thereof, the proposition shall be deemed adopted.

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SEC. 19. All proceedings undertaken by any chartered city, or by any chartered county or by any chartered city and county for the construction of any public improvement, or the acquisition of any property for public use, or both, where the cost thereof is to be paid in whole or in part by special assessment or other special assessment taxes upon property, whether the special assessment will be specific or a special assessment tax upon property wholly or partially according to the assessed value of such property, shall be undertaken only in accordance with the provisions of law governing: (a) limitations of costs of such proceedings or assessments for such proceedings, or both, in relation to the value of any property assessed therefor; (b) determination of a basis for the valuation of any such property; (c) payment of the cost in excess of such limitations; (d) avoidance of such limitations; (e) postponement or abandonment, or both, of such proceedings in whole or in part upon

majority protest, and particularly in accordance with such provisions as contained in Sections 10, 11 and 13a of the Special Assessment Investigation, Limitation and Majority Protest Act of 1931 or any amendments, codification, reenactment or restatement thereof.

Notwithstanding any provisions for debt limitation or majority protest as in this section provided, if, after the giving of such reasonable notice by publication and posting and the holding of such public hearing as the legislative body of any such chartered county, chartered city or chartered city and county shall have prescribed, such legislative body by no less than a four-fifths vote of all members thereof, finds and determines that the public convenience and necessity require such improvements or acquisitions, such debt limitation and majority protest provisions shall not apply.

Nothing contained in this section shall require the legislative body of any such city, county, or city and county to prepare or to cause to be prepared, hear, notice for hearing or report the hearing of any report as to any such proposed construction or acquisition or both.

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

SEC. 20. (a) The Budget Stabilization Account is hereby created in the General Fund.

(b) In each fiscal year as specified in paragraphs (1) to (3), inclusive, the Controller shall transfer from the General Fund to the Budget Stabilization Account the following amounts:

(1) No later than September 30, 2006, a sum equal to 1 percent of the estimated amount of General Fund revenues for the 2006-07 fiscal year.

(2) No later than September 30, 2007, a sum equal to 2 percent of the estimated amount of General Fund revenues for the 2007-08 fiscal year.

(3) No later than September 30, 2008, and annually thereafter, a sum equal to 3 percent of the estimated amount of General Fund revenues for the current fiscal year.

(c) The transfer of moneys shall not be required by subdivision (b) in any fiscal year to the extent that the resulting balance in the account would exceed 5 percent of the General Fund revenues estimate set forth in the budget bill for that fiscal year, as enacted, or eight billion dollars ($8,000,000,000), whichever is greater. The Legislature may, by statute, direct the Controller, for one or more fiscal years, to transfer into the account amounts in excess of the levels prescribed by this subdivision.

(d) Subject to any restriction imposed by this section, funds transferred to the Budget Stabilization Account shall be deemed to be General Fund revenues for all purposes of this Constitution.

(e) The transfer of moneys from the General Fund to the Budget Stabilization Account may be suspended or reduced for a fiscal year as specified by an executive order issued by the Governor no later than June 1 of the preceding fiscal year.

(f) (1) Of the moneys transferred to the account in each fiscal year, 50 percent, up to the aggregate amount of five billion dollars ($5,000,000,000) for all fiscal years, shall be deposited in the Deficit Recovery Bond Retirement Sinking Fund Subaccount, which is hereby created in the account for the purpose of retiring deficit recovery bonds authorized and issued as described in Section 1.3, in addition to any other payments provided for by law for the purpose of retiring those bonds. The moneys in the sinking fund subaccount are continuously appropriated to the Treasurer to be expended for that purpose in the amounts, at the times, and in the manner deemed appropriate by the Treasurer. Any funds remaining in the sinking fund subaccount after all of the deficit recovery bonds are retired shall be transferred to the account, and may be transferred to the

General Fund pursuant to paragraph (2).
(2) All other funds transferred to the account in a fiscal year shall not be deposited in the sinking fund subaccount and may, by statute, be transferred to the General Fund.

CALIFORNIA CONSTITUTION

Exhibit 9

General and Charter Elections
April 7, 1931

Semi-Official Returns

Precinct No. _____

Election Officers After Completing Canvass Will Enter Results on This Sheet and Return to the City Clerk, Outside of Other Packages, But in Envelope Provided for That Purpose.

FOR MAYOR (VOTE FOR ONE)		
WALTER W. AUSTIN	23	178
HARRY C. CLARK	8	589

FOR MEMBERS OF THE BOARD OF EDUCATION (VOTE FOR TWO)		
ORTON E. DARNALL	16	772
VESTA C. MUEHLEISEN	18	999
CHARLES C. QUITMAN	8	500
CHESTER H. WEBBER	13	795

FOR MEMBERS OF THE COMMON COUNCIL (VOTE FOR TWO)		
EDWARD H. DOWELL	12	506
LeROY E. GOODBODY	14	165
JOSEPH J. RUSSO	16	064
ALFRED STAHEL, JR.	16	585

PROPOSITIONS TO BE VOTED UPON

PROPOSITION I.

Shall the Charter proposed by the Board of Freeholders, and filed in the office of the City Clerk of the City of San Diego on the 9th day of January, 1931, be adopted as the Charter for the government of the City of San Diego?			
	YES	22	727	79.76%
	NO	5	767	20.24%

28,494 total

PROPOSITION II.

"Shall Ordinance No. 5681 of the Ordinances of the City of San Diego, entitled, 'An Ordinance of the City of San Diego, granting a franchise and privilege to Pacific Telephone and Telegraph Company, to construct, maintain and operate a system of telephone and telegraph wires, over, under and along all of the public streets, alleys, and places in the City of San Diego,' approved July 7th, 1914, be amended by adding thereto a new section to be numbered Section 5½, which said section shall read as follows: 'Section 5½. This franchise is granted and shall continue for the term thereof only on the further condition that the Pacific Telephone and Telegraph Company, or its assigns, shall not make any special charge for any connection or conversation over any telephone within the corporate limits of The City of San Diego against regular patrons of said company who pay the regular monthly charge for telephone service.'"				
	YES	21	709	83.28%
	NO	4	558	16.72%

26,067

Printed in San Diego O-13136

Total votes cast 32046

Exhibit 10

Certificate of Election

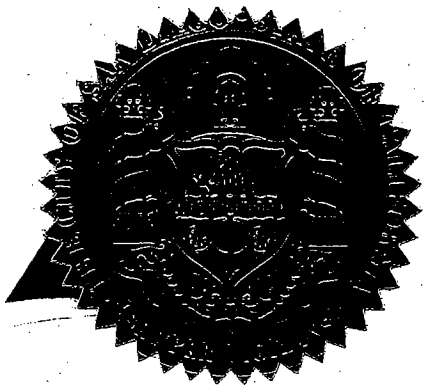
THIS CERTIFIES THAT, at a Municipal General Election held November 2, 2004
in the City of San Diego, County of San Diego, State of California

Michael J. Aguirre

was duly elected to the Office of

City Attorney

as appears by the Official Returns of said Election and the statement of votes cast,
now of record in my office.



IN WITNESS WHEREOF I hereunto affix my hand
and the Seal of the City of San Diego, State of California
this 6th day of December, 2004

Charles G. Abdelnour
San Diego City Clerk

Exhibit 11

ORDINANCE NO. 10792

AN ORDINANCE ESTABLISHING A CITY EMPLOYEES' RETIREMENT SYSTEM FOR THE EMPLOYEES OF THE CITY OF SAN DIEGO.

WHEREAS, Section 20 of Chapter I of Article II of the Charter of The City of San Diego, as adopted on the 7th day of April, 1925, authorized the Common Council to establish by ordinance a retirement system for employees of The City of San Diego, NOW, THEREFORE,

BE IT ORDAINED By the Common Council of The City of San Diego, as follows:

Section 1. Definitions

The following words and phrases as used in this ordinance unless a different meaning is plainly required by the context shall have the following meanings:

(1) "Retirement System" shall mean the City Employees' Retirement System of San Diego as defined under Section 2 of this ordinance.

(2) "Employee" shall mean any regular and permanent officer, agent, servant or employee of The City of San Diego whose compensation is paid wholly by the said City except that for the purpose of this ordinance policemen and firemen for whom pensions are provided under Sections 26 and 27 of Chapter I of Article II of the City Charter and elective officers, and officers appointed by the Mayor who serve without pay shall not be considered as employees.

(3) "Member" shall include any perso[illegible] included in the membership of the retirement system as provided in Section 3 of this ordinance.

(4) "Board of Administration" shall mean the Board of Administration of the retirement system as created by Section 20 of Chapter [illegible] Article II of the City Charter.

[illegible] "Service" shall mean service [illegible] Section 2 of this Section.

I, Elizabeth S. Maland, Clerk of the City of San Diego, California, hereby certify that this is a true copy of papers on file and of record in the office of the Clerk of said city.

ELIZABETH S. MALAND, City Clerk

By _____, Deputy

Dated 2/15/2026

ORDINANCE NO. 10792

AN ORDINANCE ESTABLISHING A CITY EMPLOYEES' RETIREMENT SYSTEM FOR THE EMPLOYEES OF THE CITY OF SAN DIEGO.

WHEREAS, Section 28 of Chapter I of Article II of the Charter of The City of San Diego, as adopted on the 7th day of April, 1925, authorized the Common Council to establish by ordinance a retirement system for employees of The City of San Diego, NOW, THEREFORE,

BE IT ORDAINED By the Common Council of The City of San Diego, as follows:

Section 1. Definitions

The following words and phrases as used in this ordinance unless a different meaning is plainly required by the context shall have the following meanings:

(1) "Retirement System" shall mean the City Employees' Retirement System of San Diego as defined under Section 2 of this ordinance.

(2) "Employee" shall mean any regular and permanent officer, agent, servant or employee of The City of San Diego whose compensation is paid wholly by the said City except that for the purpose of this ordinance policemen and firemen for whom pensions are provided under Sections 26 and 27 of Chapter I of Article II of the City Charter and elective officers, and officers appointed by the Mayor who serve without pay shall not be considered as employees.

(3) "Member" shall include any person included in the membership of the retirement system as provided in Section 3 of this ordinance.

(4) "Board of Administration" shall mean the Board of Administration of the retirement system as created by Section 28 of Chapter I of Article II of the City Charter.

(5) "Service" shall mean service as an employee as described in Subsection 2 of this Section.

I hereby certify that the above and foregoing page is a full, true and correct copy of a certified copy of Ordinance No. O-10792 of the Ordinances of the City of San Diego, California, on file in my office, as adopted by the Common Council of said City and approved by the Mayor of said City on the 1st day of December, 1926.

CHARLES G. ABDELNOUR

City Clerk of the City of San Diego, California

By: Linda Davis,
Deputy

Date: May 27, 1987

(6) "Prior Service" shall mean service rendered prior to the first day of January, 1927 for which credit is allowable under the provisions of Section 4, Subsection 4, of this ordinance.

(7) "Membership Service" shall mean service as a member rendered since last becoming a member.

(8) "Creditable Service" shall mean "Prior Service" plus "Membership Service" for which credit is allowable as provided in Section 4, Subsection 5, of this ordinance.

(9) "Beneficiary" shall mean any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this ordinance.

(10) "Regular Interest" shall mean interest at 4 per cent. per annum compounded annually.

(11) "Accumulated Contributions" shall mean the sum of all the amounts deducted from the compensation of a member and credited to his individual account in the Annuity Savings Account together with regular interest thereon as provided in Sections 7 and 8 of this ordinance.

(12) "Earnable Compensation" shall mean the full rate of the compensation that would be payable to an employee if he worked the full normal working time, except that any compensation in excess of $2,400 per annum shall be used as $2,400 for the purpose of this system.

(13) "Average Final Compensation" shall mean the average annual earnable compensation of a member during his last 10 years of service as an employee.

(14) "Annuity" shall mean payments for life derived from the accumulated contributions of a member. All annuities shall be paid in equal monthly installments.

(15) "Pension" shall mean payments for life derived from the moneys provided by the City of San Diego. All pensions shall be paid in equal monthly installments.

(16) "Retirement Allowance" shall mean the sum of the annuity

and the pension.

(17) "Annuity Reserve" shall mean the present value of all payments to be made on account of an annuity or benefit in lieu of an annuity computed upon the basis of such mortality tables as shall be adopted by the Board of Administration and regular interest.

(18) "Pension Reserve" shall mean the present value of all payments to be made on account of a pension or benefit in lieu of a pension computed upon the basis of such mortality tables as shall be adopted by the Board of Administration and regular interest.

Section 2. Name and Date Operative

A retirement system is hereby established and placed under the management of the Board of Administration as provided in Section 28 of Chapter 1 of Article II of the City Charter, for the purpose of providing retirement allowances for employees of The City of San Diego under the provisions of this ordinance. The retirement system shall be known as the "City Employees' Retirement System of San Diego" and by such name all of its business shall be transacted, all of its funds invested and all of its cash and securities and other property held.

The retirement system so created shall begin operation as of the first day of January, 1927.

Section 3. Membership

(1) Membership in the retirement system shall begin not earlier than the first day of January, 1927, and shall consist of the following:

(a) All employees who enter or re-enter the service of The City of San Diego after the first day of January, 1927 may become members on their own application, and all such employees who shall complete 6 months of service thereafter shall become members of the retirement system as a condition of their employment.

(b) All employees in service on the first day of January, 1927 shall become members as of the said first day of January, 1927 unless

[illegible] the Board of Administration [illegible] prescribed [illegible], a notice that he does not desire to be included in the membership of the system, which notice shall include a duly executed waiver of all present and prospective benefits which would otherwise inure to him on account of his participation in the retirement system.

(2) An employee whose membership in the retirement system is dependent on his own election, and who elects not to become a member, may thereafter apply for and be admitted to membership; but no such employee shall receive prior service credit unless he shall have become a member on or before the first day of January, 1928.

(3) A member in the City Employees' Retirement System shall lose his membership in said system if he shall:

(a) Become a beneficiary;

(b) Die;

(c) Withdraw his accumulated contributions;

(d) Be absent from the City service more than five years;

(e) Cease to become a member by voluntary withdrawal or dismissal from the City service.

Nothing herein contained, however, shall be construed as preventing said employee from again becoming a member upon again being employed by the municipality; provided, however, that if said member shall be absent from the service of the City for more than five years, he shall not be entitled to retirement benefits other than those to which a new employee of the municipality may be entitled by reason of employment with the municipality.

(4) It shall be the duty of the head of each department to submit to the Board of Administration a statement showing the name, title, compensation, duties, date of birth and length of service of each member and such information regarding other employees in his department as the Board of Administration may require for the operation of the retirement system.

Section 4. Service Creditable

(1) Under such rules and regulations as the Board of Administration shall adopt, each member who was an employee at any time during the year 1926 and who becomes a member during the year 1927 shall file a detailed statement of all service as an employee as defined in this ordinance, rendered, by him prior to January 1, 1927 for which he claims credit and of such other facts as the Board of Administration may require for the proper operation of the retirement system.

(2) The Board of Administration shall fix and determine by appropriate rules and regulations how much service in a year is equivalent to a year of service, but in no case shall more than one year be creditable for all service in one calendar year, nor shall the Board of Administration allow credit for service for a period of more than one month's duration during which the employee was absent without pay.

(3) Subject to the above restrictions and to such other rules and regulations as the Board of Administration may adopt, the Board of Administration shall verify, as soon as practicable after the filing of such statements of service, the service therein claimed.

(4) Upon verification of the statements of service the Board of Administration shall issue to each member a prior service certificate certifying the aggregate length of service rendered prior to the first day of January, 1927, with which he is credited on the basis of his statement of service. So long as membership continues a prior service certificate shall be final and conclusive for retirement purposes as to such service, provided, however, that any member may, within one year from the date of issuance or modification of such certificate, request the Board of Trustees to modify or correct his prior service certificate.

When membership ceases such prior service certificate shall become void. Should the employee again become a member, such employee shall enter the system as an employee not entitled to prior service

credit.

(5) Creditable service on retirement shall consist of the membership service rendered by him since he last became a member, and also if he has a prior service certificate which is in full force and effect, the amount of the service certified on his prior service certificate.

Section 5. Benefits

Service Retirement Benefit

(1) (a) Any member in service may retire upon his written application to the Board of Administration setting forth at what time, not less than 30 days nor more than 90 days subsequent to the execution and filing thereof, he desires to be retired, provided that the said member at the time so specified for his retirement shall have attained the age of 62 and shall have completed not less than 10 years of creditable service as an employee, and notwithstanding that during such period of notification, he may have separated from service.

Allowance on Service Retirement

(2) Upon retirement for service a member shall receive a service retirement allowance which shall consist of:

(a) An annuity which shall be the actuarial equivalent of his accumulated contributions at the time of his retirement; and

(b) A pension, in addition to his annuity, of like amount; and

(c) If he has a prior service certificate in full force and effect an additional pension which shall be equal to 1/140 of his average final compensation multiplied by the number of his years of prior service as certified on his prior service certificate; and

(d) If he has a prior service certificate in full force and effect and has attained age 72, such further pension as may be required to bring his total retirement allowance up to a minimum of three hundred dollars per annum.

Death Benefit

(3) Upon the receipt of proper proofs of the death of a mem-

ber in service there shall be paid to his estate or to such person having an insurable interest in him as he shall have nominated by written designation duly executed and filed with the Board of Administration, the amount of his accumulated contributions.

Return of Accumulated Contributions

(4) Should a member cease to be an employee except by death or retirement under the provisions of this ordinance he shall be paid such part of the amount of the accumulated contributions standing to the credit of his individual account in the Annuity Savings Account as he shall demand; provided, however, that the Board of Administration may, in its discretion, before ordering a warrant for the payment of said accumulated contribution so demanded by said employee upon his retirement from service other than by death or pursuant to the provisions of this ordinance, require a written notice to be served on said board at least sixty (60) days prior to payment, in order that said board may have time to convert securities in its hands for the payment of such claim, or realize money from such investments as it may have made.

Optional Allowances

(5) Any member may elect to receive his benefit in a retirement allowance payable throughout life, or he may elect to receive the actuarial equivalent, at that time, or his retirement allowance in a lesser retirement allowance payable throughout life with the provisions that:

Option 1. If he dies before he has received in payments the present value of his retirement allowance as it was at the time of his retirement, the balance shall be paid to his legal representative or to such person as he shall nominate by written designation duly acknowledged and filed with the Board of Administration; or

Option 2. Such other form of benefit as shall be certified by the actuary to be of equivalent actuarial value to his retirement allowance, provided that the Board of Administration shall determine

[illegible] purpose of the retirement system shall be necessary or desirable from the point of view of the [illegible].

Section 6. Administration

Board of Administration

(1) The general administration and the responsibility for the proper operation of the retirement system and for making effective the provisions of this ordinance shall be vested in the Board of Administration as provided in Section 28 of Chapter I of Article II of the Charter of The City of San Diego.

(2) Subject to the limitations of the said Section 88 of Chapter I of Article II of the City Charter and of the limitations of this ordinance the Board of Administration shall, from time to time, establish rules and regulations for the administration of the retirement system and the transactions of its business.

(3) The Board of Administration shall engage such actuarial and other services as shall be required to transact the business of the retirement system.

(4) The Board of Administration shall keep in convenient form such data as shall be necessary for actuarial valuation of the various funds of the retirement system and for checking the experience of the system.

(5) The Board of Administration shall keep a record of all its proceedings which shall be open to public inspection. It shall prepare annually during the month of January a report showing the fiscal transactions of the retirement system for the preceding fiscal year as provided in Section 12 of Article X of the City Charter, the amount of the accumulated cash and securities of the system, and the last balance sheet showing the financial condition of the system by means of an actuarial valuation of the assets and liabilities of the retirement system. The Board shall submit said report to the Mayor and shall furnish copies thereof to the heads of the various

departments for their use and for the use of the members employed therein.

Legal Adviser

(6) The City Attorney of the City of San Diego shall be the legal adviser of the Board of Administration.

Duties of Actuary

(7) The Board of Administration shall designate an actuary who shall be the technical adviser of the Board on matters regarding the operation of the retirement system and shall perform such other duties as may be required in connection therewith.

(8) Immediately after the establishment of the retirement system the actuary shall make such investigation of the mortality, service and compensation experience of the members of the system as he shall recommend and the Board of Administration shall authorize, and on the basis of such investigation he shall recommend for adoption by the Board of Administration such tables and such rates as are required in Subsection 9, Paragraphs (a), (b), and (c) of this section. On the basis of such recommendation, the Board of Administration shall adopt tables and certify rates, and as soon as practicable thereafter, the actuary shall make a valuation, based on such tables and rates, of the assets and liabilities of the funds and accounts created by this ordinance.

(9) In the year 1930, and at least once in each five year period thereafter, the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the retirement system, and shall make a valuation of the assets and liabilities of the funds of the system and taking into account the result of such investigation and valuation, the Board of Administration shall -

(a) adopt for the retirement system such mortality, service and such other tables as shall be deemed necessary;

(b) certify the rates of contribution payable by members under

the provisions of this ordinance; and

(9) certify the rates of contribution payable by the City of San Diego under the provisions of this ordinance.

(10) On the basis of such tables as the Board of Administration shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the funds of the system created by this ordinance.

Section 7. Management of Funds

(1) The Board of Administration shall be the trustees of the several funds of the retirement system, and shall have full power to invest and re-invest such funds in bonds of the United States, State of California, municipal corporations, counties, or irrigation districts, or in such securities as may be authorized by law for the investment of funds of municipal corporations; and subject to the restrictions of such laws as may be in effect for the investment of funds of municipal corporations said trustees shall have full power to hold, purchase, sell, assign, transfer and dispose of any of the securities and investments in which the funds shall have been invested, as well as the proceeds of such investments.

(2) The Board of Administration annually shall allow regular interest on the mean amount for the preceding year in each of the accounts of the City Employees' Retirement Fund. The amounts so allowed shall be due and payable to said accounts and shall be annually credited thereto by the Board of Administration from interest and other earnings on the moneys in the retirement system. Any excess of earnings over the amount required to pay interest on the various accounts in said City Employees' Retirement Fund shall be deductible from the amounts to be contributed each year by the City of San Diego.

(3) The Treasurer of the City of San Diego shall be the custodian of the several funds and accounts of the system. All payments from such funds or accounts shall be made by him only upon

the proper warrants signed by the City Auditor after having first been duly authorized by the Board of Administration of the City Employees' Retirement Fund.

(4) For the purpose of meeting disbursements for pensions, annuities, and other payments [illegible] cash, not exceeding ten per centum of the total amount in the several funds of the retirement system, on deposit in one or more banks or trust companies of the City of San Diego, organized under the laws of the State of California or of the United States, provided, that the sum on deposit in any one bank or trust company shall not exceed twenty-five per centum of the paid up capital and surplus of such bank or trust company.

(5) Except as otherwise herein provided, no trustee and no employee of the Board of Administration shall have any direct interest in the gains or profits of any investment made by the Board of Administration, nor as such receive any pay or emolument for his services. No trustee nor employee of the Board shall, directly or indirectly, for himself or as an agent in any manner use the same, except to make such current and necessary payments as are authorized by the Board of Administration; nor shall any trustee or employee of the Board of Administration become an endorser or surety or in any manner an obligor for moneys loaned by or borrowed from the Board of Administration.

Section 8. Method of Financing

(1) All of the assets of the retirement system shall be credited in accordance with the purpose for which they are held to one of two funds, namely, the City Employees' Retirement Fund, as created by Subsection 7 of Section 23 of Chapter 1 of Article 21 of the City Charter, and the Retirement System Expense Fund.

(2) City Employees' Retirement Fund

The City Employees' Retirement Fund shall be subdivided into fond accounts as follows: The Annuity Savings Account, the Annuity

[illegible] Account, [illegible] the [illegible] Reserve Account.

(5) Annuity Savings Account

(a) The Annuity Savings Account shall be the account in which shall be accumulated contributions from the compensation of members to provide for their annuities. Upon the basis of such tables as the Board of Administration shall adopt and regular interest, the actuary of the retirement system shall calculate for each age of entrance into membership the constant proportion of compensation which, when deducted from each payment of the prospective earnable compensation of a member entering at any such age prior to his attainment of age 62 and accumulated at regular interest until his attainment of age 62, shall provide at that time an annuity equal in amount to 1/140 of his average final compensation multiplied by the number of his years of service as a member. Such proportion of compensation shall be limited to a maximum of 5 per cent. for all employees under 50 years of age at the establishment of the system and to a maximum of 5 per cent. for all employees entering the service after January 1, 1927. Such proportion of compensation so limited shall be known as the normal rate of member's contribution. The proportion so computed for a member age 61 shall be applied to a member who attains a greater age before he becomes a member of the retirement system.

(b) The Board of Administration shall certify to the head of each department and to the City Auditor the rate of contribution for each member, and the head of each department and the City Auditor shall cause to be deducted from the compensation of each and every member on each and every payroll of such department for each and every payroll period amounts computed by multiplying the earnable compensation for the payroll period by the rates so certified for each member, provided however that compensation at a rate in excess of $2,400 per annum shall be considered as $2,400 for the purposes of computing the amounts to be deducted.

In determining the amount payable by a member in a payroll period, the Board of Administration may consider the rate of annual compensation payable to such member on the first day of the payroll period as continuing throughout such payroll period and it may omit deductions from compensation for any period less than a full payroll period if an employee was not a member on the first day of the payroll period; and to facilitate the making of deductions it may modify the deduction required by any member by such an amount as shall not exceed one-tenth of one per centum of the annual compensation upon the basis of which said deduction is to be made.

(c) The deductions provided for herein shall be made notwithstanding that the minimum compensation provided for by law for any member shall be reduced thereby. Every member shall be deemed to consent and agree to the deductions made and provided for herein and shall receipt for his full salary or compensation; and payment of salary or compensation less said deductions shall be a full and complete discharge and acquittance of all claims and demands whatsoever for the services rendered by such person during the period covered by such payment except as to the benefits provided under this ordinance. Said head of each department shall certify to the Board of Administration on each and every payroll the amounts to be deducted; and each of said amounts shall be deducted and when deducted shall be paid into said Annuity Savings Account and shall be credited, together with regular interest, to an individual account of the member from whose compensation said deduction was made.

(d) In addition to the normal contributions deducted from compensation as hereinbefore provided, subject to the approval of the Board of Administration, any member may redeposit in the Annuity Savings Account by single payment or by an increased rate of contribution any amount or any part thereof which he previously withdrew, or such additional amount as may be computed to provide with his prospective retirement allowance a total retirement allowance not in excess of one-half of his final average compensation on retirement [illegible]

Such additional amount so deposited or [illegible] shall become a part of his accumulated contributions but [illegible] shall not be considered in computing the pension to be provided from the contributions of the City, as provided in Section [illegible], Subsection (2), subdivision (b).

(e) The accumulated contributions of a member withdrawn by him, or paid to his estate or to his designated beneficiary in the event of his death as provided in this ordinance, shall be paid from the Annuity Savings Account. Upon the retirement of a member his accumulated contributions shall be transferred from the Annuity Savings Account to the Annuity Reserve Account.

(4) Annuity Reserve Account

The Annuity Reserve Account shall be the account from which shall be paid all annuities and all benefits in lieu of annuities payable as provided in this ordinance.

(5) Pension Accumulation Account

(a) The Pension Accumulation Account shall be the account in which shall be accumulated all reserves for the payment of all pensions and other benefits payable from contributions made by The City of San Diego and from which shall be paid all pensions and other benefits on account of members with prior service credit.

(b) On account of each member who is an employee of The City of San Diego, the said City shall pay annually into the Pension Accumulation Account for the preceding fiscal year an amount equal to a certain percentage of the earnable compensation of each member to be known as the "normal contribution", and an additional percentage of his earnable compensation to be known as the "accrued liability contribution". The rates per centum of such contributions shall be fixed on the basis of the liabilities of the retirement system as shown by actuarial valuation. Until the first valuation the normal contribution shall be one and sixteen hundredths per centum, and the accrued liability contribution shall be [illegible] seventy-three

hundred [illegible] per centum of the [illegible] annual [illegible] of all members.

(c) On the basis of [illegible] mortality and other tables [illegible] adopted by the Board of Administration, the actuary employed by the Board to make each valuation required by this ordinance during the period over which the deficiency contribution is payable, immediately after making such valuation, shall determine the uniform and constant percentage of the earnable compensation of the average new entrant, which, if contributed on the basis of the earnable compensation of such new entrant throughout his entire period of active service would be sufficient to provide for the payment of any pension or other benefit provided by the City that may be payable on his account. The rate per centum so determined shall be known as the "normal contribution" rate. After the accrued liability contribution has ceased to be payable, the normal contribution rate shall be the rate per centum of the earnable compensation of all members obtained by deducting from the total liabilities of the Pension Accumulation Fund the amount of the funds in hand to the credit of that fund and dividing the remainder by one per centum of the present value of the prospective future salaries of all members as computed on the basis of the mortality and service tables adopted by the Board of Administration and regular interest. The normal rate of contribution shall be determined by the actuary after each valuation.

(d) Immediately succeeding the first valuation, the actuary employed by the Board of Administration shall compute the rate per centum of the total annual compensation of all members which is equivalent to the sinking fund payment that would liquidate at regular interest within a period of thirty years the liability on account of all members and beneficiaries which is not liquidated by the aforesaid normal contribution made on account of such members during the remainder of their active service. The rate per centum originally so determined shall be known as the "accrued liability contribution" rate.

(e) [illegible] Accumulation Fund shall be not less than [illegible] per centum [illegible] as the normal contribution rate and the accrued liability contribution rate of the total compensation earnable by all members during the preceding year; provided however that the aggregate payment by the City of San Diego shall be sufficient, when combined with the amount in the fund to provide the pensions and any other benefits payable out of the fund during the year then current.

(f) The accrued liability contribution shall be discontinued as soon as the accumulated reserve in the Pension Accumulation Fund shall equal the present value, as actuarially computed and approved by the Board of Administration, of the total liability of such fund less the present value, computed on the basis of the normal contribution rate then in force, of the prospective normal contributions to be received on account of persons who are at that time members.

(g) All pensions and benefits in lieu thereof, with the exception of those payable on account of members who receive no prior service allowance, shall be paid from the Pension Accumulation Account.

(h) Upon the retirement of a member not entitled to credit for prior service, an amount equal to his pension reserve shall be transferred from the Pension Accumulation Account to the Pension Reserve Account.

(6) Pension Reserve Account.

The Pension Reserve Account shall be the account from which shall be paid the pensions to members not entitled to credit for prior service and benefits in lieu thereof.

(7) Expense Fund.

The Expense Fund shall be the fund to which shall be credited all money provided by the City of San Diego to pay the administration expenses of the retirement system, and from which shall be paid the expenses necessary in connection with the administration and operation of the system. Annually the Board of Administration shall estimate the amount of money necessary to be paid [illegible] for

[illegible] to provide [illegible] retirement system fund, such estimate shall be submitted to the City Auditor in accordance with Section 1 of Chapter [illegible] of Article [illegible] of the City Charter.

(8) Estimate of Appropriations Required

(a) On or before the last day of November in the year 1927 and each year thereafter the Board of Administration shall certify to the City Auditor the amount of the appropriation necessary to pay to the various funds and accounts of the retirement system, the amounts payable by The City of San Diego as enumerated in this ordinance for the year beginning on the succeeding first day of January, and items of appropriation providing such amounts shall be included in the budget ordinance. The amount so appropriated shall be credited to the various funds and accounts of the retirement system.

(b) To cover the requirements of the system for the period prior to the first day of January, 1928, the amount of $11,000.00 shall be paid into the Pension Accumulation Account of the City Employees' Retirement Fund and the amount of $4,500.00 shall be paid into the Expense Fund.

Section 9. Guaranty

The creation and maintenance of reserves in the Pension Accumulation Account, the maintenance of annuity reserves and pension reserves as provided for, and regular interest creditable to the various accounts as provided in Section 7, Subsection (2) of this ordinance and the payment of all pensions, annuities, retirement allowances, refunds and other benefits granted under the provisions of this ordinance and all expenses in connection with the administration and operation of this retirement system are hereby made obligations of The City of San Diego to the extent that the Charter of said City authorizes such obligation; provided, however, that nothing in this ordinance contained shall be construed as imposing any liability in addition to that imposed upon said City by the terms and provisions of Subdivision ( ), Section [illegible],

Chapter [illegible], Article [illegible] of the [illegible] Civil Service, Interest and dividends derived from [illegible] and investments authorized by this article shall be used for the payment of the said obligations of the said City. Any amounts derived therefrom which, when combined with the regular amount otherwise contributable by the City of San Diego as provided under the provisions of this ordinance exceed the amount required to provide such obligations, shall be used to reduce the regular appropriations otherwise required.

Section 10. Protection Against Fraud

Should any change or error in the records result in any member or beneficiary receiving from the retirement system more or less than he would have been entitled to receive had the records been correct, the Board of Administration shall correct such error, and as far as practicable, shall adjust the payments in such manner that the actuarial equivalent of the benefit to which such member or beneficiary was correctly entitled shall be paid.

Section 11. Limitation of Other Statutes

If any section or sub-section of this ordinance, or any part of any section of this ordinance, be declared unconstitutional, the remainder of the ordinance shall not thereby be invalid, and the Common Council hereby declares that in the event of any section or part of any section of this ordinance is declared to be unconstitutional, it would have passed the remainder of this ordinance notwithstanding.

All provisions of ordinances inconsistent with the provisions of this ordinance are hereby repealed, to the extent of such inconsistency.

Section 12. This ordinance shall take effect and be in force on the thirty-first day from and after its passage and approval.

Presented by _____

Form approved by S. J. Higgins

Exhibit 12

(See Article X for additional members.)
(Amendment voted 11-2-2004; effective 04-01-2005)

SECTION 145. RETIREMENT FUND.

All moneys contributed by employees of the City or appropriated by the Council or received from any other source under the terms of this Article, shall be placed in a special fund in the City Treasury to be known as the City Employees' Retirement Fund, which said fund is hereby created. Such fund shall be a Trust Fund to be held and used only for the purpose of carrying out the provisions of this Article. No payments shall be made therefrom except upon the order of the Board of Administration. This fund may be placed by the Board under the Funds Commission for investment; but shall not be merged with other funds of the City.

SECTION 146. ADDITIONAL PROVISIONS.

The Council is hereby fully empowered by a majority vote of the members to enact any and all ordinances necessary, in addition to the ordinance authorized in Section 141 of this Article, to carry into effect the provisions of this Article; and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein.

SECTION 147. FORMER PENSIONERS ENTITLED TO BENEFITS OF THIS ARTICLE.

All persons who were receiving pensions prior to the adoption of this Charter shall be entitled to all the provisions of this Article.

SECTION 148. DECLARATION OF INTENT.

It is the intent and purpose of this Article, where not in conflict with the terms of the present existing City Employees' Retirement System, to continue said system in force and effect as existing at the time this Charter is adopted.

SECTION 148.1. AUTHORITY TO CONSOLIDATE CITY EMPLOYEES' RETIREMENT SYSTEM WITH STATE OF CALIFORNIA RETIREMENT SYSTEM AND/OR U.S. GOVERNMENT SOCIAL SECURITY.

Notwithstanding any of the provisions of this Article IX to the contrary, the Council may, with the approval of a majority of all active members of the City Employees' Retirement System, enter into a contract with the State of California wherein said employees shall be entitled to become members of and enjoy all of the benefits of the State Retirement System for state employees, and/or with the U. S. Government for the conferring of Social Security benefits upon such municipal employees; provided, however, that in any such contract provision shall be made for protecting and safeguarding any and all vested rights of the active and retired members of the City Employees' Retirement System as it exists under this Charter.

(Addition voted 04–21–1953; effective 05–29–1953.)

SECTION 149. CONTRACTING PUBLIC AGENCIES

Subject to approval by the City Council, a public agency may participate in the City Employees Retirement Trust Fund. After a finding by the City Council that the public agency is eligible for participation in the Trust Fund and approval by the City Council of a contract between the Board of Administration and the public agency, as provided by ordinance, the Board may administer the benefits adopted by the public agency for its employees. The public agency shall establish its own benefits and vesting schedule. All monies contributed by the public agency and its employees or appropriated by the public agency or received from any other source under the terms of this Article shall be placed in the Trust Fund to be held and used only for the purpose or paying benefits and necessary expenses of administration related to the public agency's participation. The public agency and its employees shall be responsible for all costs associated with participation in the Fund and the administration of the public agency's benefits. The Board may establish such rules and regulations as it may deem proper, within the terms of applicable Charter sections and ordinances, for the administration of the public agency's contract and benefits.

(Addition voted 03-05-2002; effective 04-24-2002.)

Exhibit 13

H

BARRY BAGLEY et al., Plaintiffs and Appellants,
v.
CITY OF MANHATTAN BEACH et al., Defendants and Respondents.
L.A. No. 30523.

Supreme Court of California

September 16, 1976.

SUMMARY

A city council of a general law city refused to place on the ballot an initiative measure which provided the unresolved disputes between the city and the recognized firemen's employee organization should be submitted to arbitration, and that the arbitrator's award should be final and binding. In a mandate action, the trial court refused to compel the council to place the measure on the ballot, concluding the proposed measure was invalid. (Superior Court of Los Angeles County, No. C76275, Campbell M. Lucas, Judge.)

The Supreme Court affirmed, holding that the Legislature had placed the power to determine salaries in a general law city in the city council (Gov. Code, § 36506), which precluded delegation of that power to an arbitrator. The court further held since the city possessed no power under state law to provide for arbitration of wage rates, such power could not be created by local initiative.

In Bank. (Opinion by Clark, J., with Wright, C. J., McComb, Sullivan and Richardson, JJ., concurring. Separate dissenting opinion by Mosk, J., with Tobriner, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Municipalities § 74--Officers, Agents, and Employees-- Compensation--Arbitration.
Under the clear language of Gov. Code, § 36506, requiring compensation of all appointive officers and employees to be fixed by the city council of a general law city by ***23** ordinance or resolution, a general law city had no power to permit fixing of compensation by administrative order or by arbitrator's award. Accordingly, the city properly refused to place on the ballot an initiative measure which would have provided that unresolved disputes between the city and the firemen's employee organization should be submitted to arbitration, and his award should be final and binding; since the city possessed no power under state law to provide for arbitration of wage rates, such power could not be created by local initiative.

[See **Cal.Jur.2d,** Municipal Corporations, § 337; **Am.Jur.2d,** Municipal Corporations, Counties, and Other Political Subdivisions, § 258.]

(2) Statutes § 3--Performance of Public Duty.
When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization.

(3) Initiative and Referendum § 15--Local Elections--Initiative--Adoption of Ordinances.
A city ordinance proposed by initiative must constitute such legislation as the legislative body of such city has the power to enact under the law granting, defining and limiting the powers of such body.

COUNSEL

Stephen Warren Solomon, Carole Heller Solomon, Brundage, Reich & Pappy and Dennis M. Harley for Plaintiffs and Appellants.

Davis, Cowell & Bowe, Philip Paul Bowe and Richard G. McCracken as Amici Curiae on behalf of Plaintiffs and Appellants.

Carl K. Newton, City Attorney, Burke, Williams & Sorensen and Mark C. Allen, Jr., for Defendants and Respondents.

Thomas M. O'Connor, City Attorney City and County of (San Francisco), Milton H. Mares, Deputy City Attorney, C. Samuel Blick, City Attorney (Escondido), Donald H. Maynor, Deputy City Attorney, Paul B. Pressman, City ***24** Attorney (Vista), Barbara A. Platt, Mark C. Allen, Jr., City Attorney (El Segundo), and Paul A. Geihs, City Attorney (Pismo Beach), as Amici Curiae on behalf

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of Defendants and Respondents.

CLARK, J.

After the City Council of the City of Manhattan Beach refused to place an initiative measure on the ballot, petitioners sought a writ of mandate to compel the council to do so. The trial court denied relief, and petitioners appeal.

The proposed initiative measure provides that unresolved disputes between the city and the recognized firemen's employee organization shall be submitted to arbitration and that the arbitrator's award shall be final and binding. The arbitration requirement applies not only to unresolved disputes pertaining to the interpretation or application of contracts but also to all disputes as to wages, hours, and terms of employment.

Denying the writ, the superior court concluded the proposed measure is invalid because (1) the Legislature placed the power to determine salaries in a general law city in the city council, precluding delegation to an arbitrator and (2) there are no safeguards in the proposed initiative to prevent abuse of the arbitrator's power. (1a) We affirm the judgment on the first ground, finding it unnecessary to reach the second.

Government Code section 36506, dealing with general law cities, provides: "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees."

The language in the statute is clear. It requires compensation be fixed by the city council by ordinance or resolution; the language does not permit fixing of compensation by administrative order or by arbitrator's award.

(2) When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization. (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 [120 Cal.Rptr. 707, 534 P.2d 403]; ***25** *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144 [89 Cal.Rptr. 620, 474 P.2d 436].)

Although standards might be established governing the fixing of compensation and the city council might delegate functions relating to the application of those standards, the ultimate act of applying the standards and of fixing compensation is legislative in character, invoking the discretion of the council. (*City and County of San Francisco v. Cooper, supra*, 13 Cal.3d 898, 919-921; *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634, 637 [12 Cal.Rptr. 671, 361 P.2d 247]; *City and County of S.F. v. Boyd* (1943) 22 Cal.2d 685, 689-690 [140 P.2d 666]; *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518, 532 [106 Cal.Rptr. 441]; *Collins v. City & Co. of S. F.* (1952) 112 Cal.App.2d 719, 730-731 [247 P.2d 362]; *Spencer v. City of Alhambra* (1941) 44 Cal.App.2d 75, 77 [111 P.2d 910].) As such, and because the language of the statute is not merely clear, but redundant (cf. *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 838 [313 P.2d 545]), the city council may not delegate its power and duty to fix compensation.

Examination of the history of other legislation relating to general law city employees confirms that we should apply the plain language of Government Code section 36506 literally. The Meyers-Milias-Brown Act (Gov. Code, § § 3500-3510), which applies to local government employees and deals with public employee organizations and labor relations, seeks to provide "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code, § 3500.) Although there is provision for a written memorandum of understanding by employee organizations and *representatives* of a negotiating public agency, the act expressly provides that the memorandum "shall not be binding" but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others. (Gov. Code, § 3505.1; see *City and County of San Francisco v. Cooper, supra*, 13 Cal.3d 898, 926-928 [under the Winton Act involving school labor relations, written memorandum of understanding is not binding, the school board retaining ultimate authority].)

Moreover, the Meyers-Milias-Brown Act provides for negotiation and *permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration.* (***26**Gov. Code, § § 3505, 3505.2; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4 [116 Cal.Rptr. 507, 526 P.2d 971]; *Alameda County*

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Employees' Assn. v. Alameda County, supra, 30 Cal.App.3d 518, 533-534.) Similarly, Labor Code sections 1960-1963 permit firefighters to form unions and to present grievances but do not authorize arbitration.

Probably no issue in recent years has been presented to the Legislature more frequently than proposed arbitration of public employee salaries, including firemen's. (Assem. Bill Nos. 1781, 1724, 119, 86 (1975-1976 Reg. Sess.); Sen. Bill Nos. 1310, 1294, 275, 4 (1975-1976 Reg. Sess.); Assem. Bill Nos. 3666, 1243, 33 (1973-1974 Reg. Sess.); Sen. Bill No. 32 (1973-1974 Reg. Sess.); Sen. Bill Nos. 1440, 1424 (1972 Reg. Sess.); Sen. Bill No. 333 (1971 Reg. Sess.); Assem. Bill No. 98 (1970 Reg. Sess.); Sen. Bill Nos. 1294, 1293 (1970 Reg. Sess.); Assem. Bill No. 1400 (1969 Reg. Sess.); Assem. Bill No. 1935 (1967 Reg. Sess.); Assem. Bill Nos. 3084, 2500 (1963 Reg. Sess.).) But no such bill has become law.

Petitioner's reliance on *Kugler v. Yocum* (1968) 69 Cal.2d 371 [71 Cal.Rptr. 687, 445 P.2d 303], is misplaced. The case involved the sufficiency of standards necessary to a valid delegation of legislative power in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body. Here legislative intent limiting delegability is clear.

The language of Government Code section 36506, the provisions of the Meyers-Milias-Brown Act, and the Legislature's repeated refusal to enact any law permitting general law cities to fix salaries by arbitration compel the conclusion that the Legislature intends the city council of a general law city to fix compensation, precluding the fixing of compensation by arbitrator.

(3) It has long been settled that a city ordinance proposed by initiative "must constitute such legislation as the legislative body of such ... city has the power to enact under the law granting, defining and limiting the powers of such body. [Citations.]" (*Hurst v. City of Burlingame* (1929) 207 Cal. 134, 140 [277 P. 308].) (1b) The city ***27** possessing no power under existing state statute to provide for arbitration of wage rates, such power cannot be created by local initiative. [FN1]

FN1 Although *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, approved arbitration procedures adopted by initiative, Vallejo is a chartered city - not a general law city subject to Government Code section 36506.

The judgment is affirmed.

Wright, C. J., McComb, J., Sullivan, J., and Richardson, J., concurred.

MOSK, J.

I dissent.

Under the principles enunciated by this court in *Kugler v. Yocum* (1968) 69 Cal.2d 371 [71 Cal.Rptr. 687, 445 P.2d 303], the proposed initiative should not be banned, as an improper delegation of power, from consideration by the electorate.

In divining a legislative intent to preclude the local use of arbitration for resolution of labor disputes, the majority appear to employ two theories. First, they seem to conclude that whenever a discretionary power is granted to one body, any infringement on that authority, of whatever extent or effect, is per se an improper delegation of power. (*Ante*, p. 24.) Second, in the majority view, the Legislature has expressly voiced hostility to any arbitration ordinance. The former conclusion is incorrect under relevant case law, the latter as a matter of statutory interpretation.

As for the first rationale, the majority position is contradicted by *Kugler v. Yocum, supra*, in which we upheld a proposed ordinance decreeing that the salaries of Alhambra firefighters shall be no less than the average wage of firefighters employed by the City of Los Angeles and those working for Los Angeles County. The majority vainly attempt to distinguish *Kugler* because it involved a chartered city and thus was decided "in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body." (*Ante*, p. 26.)

On the contrary, at the time of the proposed ordinance in *Kugler*, the Alhambra City Charter provided, in a manner similar to Government Code section 36506, on which the majority rely, that "The [city] council ... shall have power to organize the fire division and ... establish the number of its members and the amount of their salaries ...." (*Kugler, supra*, 69 Cal.2d at p. 374, fn. 1.) As a charter provision has all the force of state law within a chartered city (*Bruce v. Civil Service Board* (1935) 6 Cal.App.2d 633, 636 [45 P.2d 419]), pursuant to the majority's reasoning ***28** we could have held simply that the terms of the Alhambra Charter precluded the

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proposed ordinance. Instead, we proceeded to scrutinize the ordinance in order to ascertain whether it contained safeguards sufficient to insure that the fundamental policy decisions regarding wages would be made by the city council, not by extraneous forces. (*Kugler, supra*, 69 Cal.2d 371, 376.) We declared, "Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an ' unlawful delegation,' and then only to preserve the representative character of the process of reaching legislative decision." (*Id.* at p. 384.)

Yet the majority imperiously label a legislative enactment an unlawful delegation without ascertaining the extent of the delegation or the availability of standards and safeguards to prevent its abuse. This result cannot be justified on the simplistic ground that the Legislature granted the city council power to fix wages. In *Kugler* and in every California case confronting the issue of unlawful delegation, a power has been granted by statute or the Constitution to one body and then delegated some aspect to another entity. Yet unless the delegation removes *all* authority from the group originally directed to exercise that power (see *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 [120 Cal.Rptr. 707, 534 P.2d 403]), courts have analyzed the delegation to determine whether fundamental policy-making power has been maintained by the legislative body originally designated to exercise it. (See, e.g., *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 816 [114 Cal.Rptr. 577, 523 P.2d 617]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 369 [55 Cal.Rptr. 23, 420 P.2d 735]; *Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 437 [166 P. 348].)

In the present case, Government Code section 36506 states only that, "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees." The proposed initiative would not divest the council of that designated power; indeed, the arbitrator's award could be implemented only by a council ordinance. Of course, the initiative would, in many instances, inhibit the council from unilaterally pronouncing decisions regarding wages, as would, for example, any collective bargaining with the firefighters. Because of this potential infringement, we should analyzed the initiative in the manner undertaken ***29** by *Kugler*. But it is heroic and unprecedented to conclude that grants of power to one body absolutely preclude any appropriate referral of aspects of that power to another entity. (See *Eastlake v. Forest City Enterprises, Inc.* (1976) 426 U.S. 668 [49 L.Ed.2d 132, 96 S.Ct. 2358].)

As for the other point relied upon by the majority - the Legislature expressly intended to prohibit local arbitration ordinances - little persuasive support is offered. Government Code section 36506, as we have seen, does not, by its terms, prohibit arbitration or other reasonable means to resolve labor disputes. The majority can find no legislative history to suggest that the section was intended to be anything other than it facially appears to be: a general grant of power to a local government.

The majority also rely on the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.). It is true that the act does not compel local governments to submit to arbitration, but the majority misreads the statute to conclude that the act prohibits municipalities from arbitrating. The act establishes certain minimum procedures that must be undertaken by public employers and employees. They must meet and confer with each other and bargain in good faith. (Gov. Code, § 3505.) If they reach an agreement, they must prepare a memorandum of agreement (§ 3505.1). The Legislature's directive that the agreement shall not be binding reflects a reluctance to impose arbitration on unwilling municipalities, not a repudiation of local arbitration ordinances voluntarily adopted.

This is made clear in other provisions of the act. Section 3500 provides: "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." The act thus allows local governments to maintain their own procedures, consistent with the purposes of the act. (*Ball v. City Council* (1967) 252 Cal.App.2d 136, 143 [60 Cal.Rptr. 139]; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 725.) As the act is designed to provide reasonable dispute-solving

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mechanisms, section 3500 seems to permit such procedures as arbitration. ***30**

Also significant are sections 3505 and 3507. The former provides that the bargaining process "should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance ...." Section 3507 allows a public agency to adopt "additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." Taken together, these provisions indicate that the Meyers-Milias-Brown Act expresses no marked hostility, but benign neutrality toward local use of arbitration procedures.

Also lending dubious credence to the majority conclusion is the reference to defeat of various public employment bills in the Legislature. (*Ante*, p. 26.) As we observed recently in *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 418 [128 Cal.Rptr. 183, 546 P.2d 687], "At best, 'Legislative silence is a Delphic divination.'" In these circumstances, even the Oracle of Delphi would have difficulty in finding legislative hostility to local use of arbitration. Of the 22 bills cited by the majority, 14 would have required as a matter of state law public employers and employees to submit to arbitration of wage disputes. Obviously, the defeat of a bill to establish state-imposed arbitration requirements does not signify legislative opposition to voluntary local decisions to adopt arbitration. Six of the bills would have imposed mandatory mediation and fact-finding, while at the same time providing for arbitration of disputes revolving around interpretations of existing agreements, an area entirely different from arbitration of wage disputes. One of the remaining two measures cryptically stated, without further explanation, "Upon failure to reach agreement, the difference may be referred to voluntary arbitration." (Assem. Bill No. 3084 (1963) Reg. Sess.).) Only 1 of the 22 bills was at all relevant to our problem. That measure purported to amend the Meyers-Milias-Brown Act to provide that any arbitration procedures adopted by local agencies would be governed by the Code of Civil Procedure sections regarding arbitration. (Assem. Bill No. 3666 (1973-1974 Reg. Sess.).) The bill, thus, did not propose allowing local governments to use arbitration, but assumed that the power already existed.

In short, from the standpoint of case law and legislative history, the majority have erred in concluding that the Legislature expressly intended to prevent adoption of arbitration to resolve labor disputes.

But the initiative must still be examined to determine whether it constitutes an improper delegation of power. As stated, the keys to this ***31** determination are whether the legislative body retains the fundamental policy-making decision and whether there are sufficient safeguards in the initiative to prevent abuse of authority. (*Kugler v. Yocum* (1968) *supra*, 69 Cal.2d 371, 381-382.)

Our analysis in *Kugler* aids us in ascertaining when a delegation of power amounts to an abdication of the legislative policy-making role in labor matters. In approving in that case the proposed ordinance pegging wages of Alhambra firefighters to their counterparts in Los Angeles, we stated, "Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the 'fundamental issue'; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation ... the implementation of the policy by reference to Los Angeles is not the delegation of it." (*Id.* at p. 377.)

Similarly, the initiative in question here does not strip policy-making powers from the legislative body of Manhattan Beach. The proposed ordinance makes a fundamental policy determination, i.e., that impasses in labor disputes involving firefighters shall be resolved not by the present adversary method, with its potential for disruption of essential services, but by a mutual reasoned appeal to an impartial arbitrator. Also, it sets forth detailed procedures concerning the selection of the arbitrator and guidelines governing his decisions. Referring disputes to an arbitrator so selected and directed, like the pegging of wages to those prevalent in Los Angeles in *Kugler*, is not delegating but implementing policy-making.

Further, the proposed ordinance contains safeguards sufficient to prevent abuse of the grant of authority; indeed it appears to be less susceptible to abuse than the proposal approved by this court in *Kugler*.

First, the present initiative, unlike the ordinance in *Kugler*, contemplates reference to an agency beyond the control of the city council only when all else fails. In most circumstances, the firefighters and the city council will continue to reach agreements based on normal collective bargaining. Only when an impasse is reached will there be resort to arbitration. While it may be suggested that the availability of a

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compulsory arbitration alternative will discourage serious compromising by disputants, it is equally likely that the potential of an adverse binding arbitration award will encourage each side to be conciliatory. In Michigan, where compulsory arbitration is available to resolve police ***32** and firefighter labor disputes, during a 15-month period 224 disputes were settled by the parties and only 105 went to arbitration; of the latter, 17 were settled before final determination by the arbitrator. (McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector* (1972) 72 Colum.L.Rev. 1192, 1210 (hereinafter cited as McAvoy).)

Another safeguard inherent in the present initiative is the potentiality of court review of an arbitrator's decision. Under Code of Civil Procedure section 1286.2, a court must vacate an arbitration award if, inter alia, the arbitrator exceeds his powers or his award is tainted with corruption, fraud, misconduct, or procedural irregularities. While courts will not usually examine the merits of an arbitration decision (*Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332* (1974) 40 Cal.App.3d 431, 437 [114 Cal.Rptr. 909]), the prospect of judicial review on the grounds listed in section 1286.2 should deter any untoward tendency of an arbitrator to rule capriciously. Indeed, the Oregon Supreme Court has held that the existence of an appeals procedure in itself may constitute an adequate safeguard against administrative abuse. (*Warren v. Marion County* (1960) 222 Ore. 307 [353 P.2d 257, 261-262], cited with approval in *Kugler* at pp. 381-382 of 69 Cal.2d.)

Most significantly, the present initiative purports to afford protection to the municipal fisc. In this regard, the city and amici claim, in a strictly policy argument, that the imposition of arbitration will inevitably lead to exorbitant labor settlements and skyrocketing taxes. Implicit in their contention is a marked antipathy to arbitrators as being biased and irresponsible, particularly in matters affecting city treasuries. No authority in support of such apprehension is offered. On the contrary, this court has recognized arbitration to be a time-honored, respected method of settling labor disputes. In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622 [116 Cal.Rptr. 507, 526 P.2d 971], a case involving a charter amendment providing for arbitration of disputes between firefighters and a city, we declared that "state policy in California 'favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.'"

Again, a comparison with *Kugler* is appropriate. There we approved the proposed ordinance even though it linked firefighter salaries in Alhambra, population 64,500, with those paid in Los Angeles, where ***33** 2,743,500 people lived at the time. (69 Cal.2d at p. 385, Burke, J., dissenting.) While Los Angeles may have had greater tax resources to pay salary increases than Alhambra and a tradition of providing some of the highest salaries in the state, we reasoned that the proposed parity plan contained safeguards because "Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra." (69 Cal.2d 371, 382.)

The arbitration provisions in the present case contain a number of financial safeguards. In contrast to the *Kugler* initiative, the ordinance here in question sets no floor for salaries. Although the arbitrator will not be directly responsible to the electorate, the city will share an equal role with the employees in selecting him. While the salary level in *Kugler* was to be determined solely by one index - the wages paid by Los Angeles - the Manhattan Beach arbitrator must weigh a number of factors. The initiative requires the arbitrator not only to consider the cost of living and existing salaries and benefits in other communities, but also "the interest and welfare of the public; [and] the availability and sources of funds to defray the cost of any changes in wages, hours and conditions of employment." As one commentator has suggested, in reference to a provision in a Nebraska statute similar to the quoted clauses, "Such a formulation avoids the possibility of an award that would necessitate increased taxes, employee lay-offs or reduced municipal services." (McAvoy, at p. 1200.)

For the foregoing reasons I conclude that the proposed initiative is not an unconstitutional delegation of power. The people of the city should not be denied the right to determine by democratic vote how their city government is to resolve labor disputes.

I would reverse the judgment.

Tobriner, J., concurred. ***34**

Cal.,1976.

Bagley v. City of Manhattan Beach

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IX.
VIOLATION OF CIVIL RIGHTS LAW TO OBSTRUCT SAN DIEGO CITY ATTORNEY'S FUNCTION AS PENSION BOARD ATTORNEY

The San Diego City Attorney, pursuant to San Diego City Charter Section 40, is elected by the people of the City to occupy a public office.

> "A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, ***187** occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public." *Coulter v. Pool,* 187 Cal. 181, 187 (1921).
>
> . . .
>
> "A public officer is a public agent and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting." *Coulter* at 187.

As a public officer elected by the citizens of San Diego, the City Attorney is required to fulfill the public duties delegated and entrusted to him. San Diego City Charter section 40 enumerates those duties as follows:

> The City Attorney shall be the chief legal advisor of and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties, except in the case of the Ethics Commission, which shall have its own legal counsel independent of the City Attorney.
>
> . . .
>
> It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incidental to the legal department, ...

Supreme Court of California.
COULTER
v.
POOL, County Auditor, et al.
S. F. 9792.

Oct. 7, 1921.

In Bank.

Application by Paul Coulter for a writ of mandamus against C. A. Pool, as Auditor of the County of Sonoma, and others. Writ refused, and plaintiff appeals.

Reversed.

West Headnotes

[1] Counties 61
104k61 Most Cited Cases
St.1919, p. 1290 (repealed 1947), providing for the appointment of a county engineer, held unconstitutional in that it creates a county office and delegates to the board of supervisors of counties not having charters under
Const. art. 11, § § 7 1/2, 7 1/2a, authority to fix the compensation of such county officer in violation of § 5, and in that it permits a departure from uniformity in county government provided for by § 4, by making it optional with supervisors of county as to whether such officer shall be appointed; the county engineer so provided for being a county officer, and not a mere employee, notwithstanding provision of statute that he shall be deemed an "employee and not a county officer."

[2] Statutes 181(1)
361k181(1) Most Cited Cases
A statute will be construed according to the legislative intent if consistent with the real object and purpose of the statute.

[3] Constitutional Law 47
92k47 Most Cited Cases
A legislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose, is not conclusive on the courts, and they must inquire into the real as distinguished from the ostensible purpose of the statute, and determine whether it in its scope and effect departs from the declared legislative design and contravenes the Constitution.

[4] Officers and Public Employees 3
283k3 Most Cited Cases
Whether a statute creates a public office or provides for the employment of the employee depends, not upon the name given the particular office, but upon the power granted, the duties and functions to be performed, and other circumstances manifesting the true character of the position.

[5] Officers and Public Employees 1
283k1 Most Cited Cases
A "public officer" is a public agent, and acts only on behalf of the public, whose sanction is generally necessary to give his act the authority and power of a public act or law, a public officer being distinguished from a mere employee in that a public duty is delegated and intrusted to him, and in that there is a fixed tenure of position, the execution of a public oath of office, and generally of an official bond, the liability to be called to account for misfeasance or nonfeasance in office, and the payment of a salary from the general county treasury.

[6] Counties 61
104k61 Most Cited Cases
A "county officer" is a public officer who fills a position usually provided for in the organization of counties and county governments, and is selected by the county to represent it continuously and as part of the regular and permanent administration of public power in carrying out certain acts with the performance of which it is charged in behalf of the public.

[7] Statutes 89
361k89 Most Cited Cases
The word "system," within Const. art. 11, § 4, providing that the Legislature shall establish a "system" of county governments which shall be uniform throughout the state, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete harmonious whole, and imports both a unity of purpose and entirety of

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operation.

Highways 113(4)
200k113(4) Most Cited Cases
Contractor who performed work on order of county supervisors under Pol.Code. § § 2641, 2645 (repealed. See Streets and Highways Code, § § 1020-1024), subsequent to appointment of county engineer, *held* entitled to payment in view of the invalidity of the county engineer act.

Statutes 89
361k89 Most Cited Cases
St.1919, p. 1290 (repealed 1947), providing for the appointment of a county engineer, *held* unconstitutional in that it permits a departure from uniformity in county government provided for by Const. art. 11, § 4, by making it optional with supervisors of county as to whether such officer shall be appointed.

****121 *183** Appeal from Superior Court, Sonoma County; Emmet Seawell, judge.

W. F. Cowan, of Santa Rosa (R. M. F. Soto, of San Francisco, of counsel), for appellant.

G. W. Hoyle, Dist. Atty., of Santa Rosa, for respondents.

LENNON, J.

In this proceeding the plaintiff sought, and was denied, mandamus to compel the defendants, respectively the auditor and the treasurer of the county of Sonoma, to audit and pay the claim of plaintiff presented against said county in the sum of $39.24 for labor alleged to have been performed by the plaintiff upon certain of said county's highways.

The claim in controversy is founded primarily upon the admitted fact that plaintiff performed labor upon said highways under and by virtue of the direction and authority of one of the supervisors of said county elected from and representing the supervisorial district in which the labor was performed, and who, by virtue of his office, was road commissioner for said district, and, as such commissioner was given supervision of the highways in his district. Pol. Code, § § 2641, 2645. The labor which is the basis of the claim in controversy was performed on July 26, 1919, subsequent to the appointment by the board of supervisors of a county engineer, made pursuant to the provisions of an act entitled:

'An act providing for a county engineer for ***184** each county in this state, * * * his appointment, manner of removal, qualifications, compensation and duties; transferring to such engineer certain powers, functions and duties heretofore vested in and performed by county surveyors and members of the board of supervisors; * * * to provide for abolishing the office of county surveyor and for the fixing and levying of taxes for road purposes.' Stats. 1919, p. 1290.

Section 13 of this act provides that it shall be known and designated as 'the county engineer act,' and it will be hereinafter referred to by that title. Stats. 1919, pp. 1290, 1295. In keeping with the provisions of this act, the board of supervisors, when appointing the county engineer for a term of four years, fixed his salary at the sum of $350 per month, and the number and compensation of his assistants. Said labor was performed by plaintiff without, and never has had, the authority, inspection, and approval of said county engineer as required by the provisions of subdivision 'b' of section 5 of ****122** said act. The claim in question was, however, approved and allowed by the board of supervisors as a legal charge against the county, apparently upon the theory that, inasmuch as an ordinance passed subsequent to the ordinance appointing the county engineer, with apparent intent to do so, excluded the supervisorial district in which the labor involved was performed from the scope and operation of the ordinance appointing the engineer, it thereby, in effect, left the supervisor of that district as the ex officio road commissioner thereof in control of the work to be done on the highway therein to the exclusion of the authority and direction of the county engineer. The writ seeking an order directing the auditing and payment of the claim thus allowed was denied by the court below upon the theory that the county engineer act, having been adopted by the board of supervisors of Sonoma county, applied throughout that county; that the board of supervisors had no authority to except one district of that county from the operation of the act, and that plaintiff's claim was therefore void on its face because the work performed by plaintiff was not performed under the provisions of the county engineer act. The proceeding in mandamus is now here upon appeal of the plaintiff.

[1] We shall concern ourselves only with the constitutionality of the act, for if it be held, as we think it must, to be unconstitutional, ***185** then it does not invalidate the plaintiff's claim, and there is no need to discuss and decide the several remaining questions involved in the appeal.

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[2][3] At the outset we are satisfied that the act in question contemplates the creation of a county office, and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer. And we are convinced that this is so despite the verbiage of the act, industriously employed, which, among other things, declares that the county engineer appointed by the board of supervisors 'shall be deemed an employee and not a county officer * * * subject to the control and supervision of the board of supervisors.' We are not unmindful of the cardinal rules of statutory construction which require an interpretation of a statute which will give effect to the legislative intent, which, if consistent with the real object and purpose of the statute, must be adopted, and doubtless the express legislative declaration found in section 1 of the act purporting to designate the official character of the county engineer and specifying the category in which, when appointed, he and his duties must be considered and treated, tends in some degree to show the legislative intent to provide that the county engineer was to be a mere employee of the board of supervisors, and not a county officer who was to be part and parcel of that uniform system of county government contemplated and commanded by the Constitution. Const. of California, art. 11, § 4. While ordinarily it is the rule that, when the lawmaking power distinctly states its design in the enactment of a particular statute, no room is left for construction, nevertheless, as the District Court of Appeal well said during its discussion of this phase of the case:

> 'The label placed by the Legislature upon its work cannot be permitted to give it a meaning not fairly contemplated within its terms.'

In other words, a legislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose, is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the Legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes ***186** the fundamental and supreme law of the state. Matter of Jacobs 98 N. Y. 98, 110, 50 Am. Rep. 636; State v. Redmon, 134 Wis. 89, 107, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1003, 15 Ann. Cas. 408; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. This being so, it cannot be rightfully held that, standing alone, the legislative declaration in the instant case compels the conclusion without more ado that the act in question did no more than provide for the mere employment of a county engineer, and did not, in truth and in fact, attempt to create a county officer to be known as the county engineer. A proper construction of the act requires that due regard be given to the real object of the act. People v. Dana, 22 Cal. 11; Genilla v. Hanley, 6 Cal. App. 614, 92 Pac. 752. This may, we think, be readily ascertained, despite the legislative declaration to the contrary, by a consideration of the requirements of the act as gathered from the context of the act in its entirety.

[4] Looking, then, to the context of the act in its entirety for the purpose of ascertaining its real, as distinguished from its ostensible, purpose, we are first brought to a consideration of the question of what distinguishes a public office from a mere employment. The words 'public office' are used in so many senses that it is hardly possible to undertake a precise definition of the meaning and purpose of the phrase which will adequately and effectively cover every situation. It is far less difficult to conceive and comprehend the requirements which characterize a public office than it is to formulate a definition thereof which will have universal application ****123** and be entirely free from fault. Its definition and application depend, not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. Knox v. L. A. County, 58 Cal. 59; Mechem on Public Offices, § 4; Hartigan v. Board, 49 W. Va. 14, 38 S. E. 698. A public office is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, ***187** occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. State v. Jennings, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

[5] A public officer is a public agent, and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other

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incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, the exaction of a public oath of office, and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury. U. S. v. Hartwell, 6 Wall. 385, 18 L. Ed. 830; U. S. v. Germaine, 99 U. S. 511, 25 L. Ed. 482; People v. Langdon, 40 Mich. 673; State v. Jennings, supra; Knox v. L. A. Co., supra.

[6] As a matter of course, in keeping with these definitions, a county officer is a public officer, and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments and is selected by the political subdivision of the state called the 'county' to represent that governmental unit, continuously and as part of the reqular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public. Sheboygan County v. Parker, 70 U. S. 93, 18 L. Ed. 33; State v. Samuelson, 131 Wis. 499, 111 N. W. 712; State v. Higginbotham, 84 Ark. 537, 106 S. W. 484.

Measuring the provisions of the act hereinabove referred to by the authorities just cited, it seems evident, beyond argument, that the so-called 'employee' provided for in the statute in question is, in fact, a public and a county officer. The act specifies (section 2) that the tenure of the position of county engineer shall be a term of four years from the date of his ***188** 'appointment,' providing for removal only in the event of inefficiency, malfeasance, or misconduct in office, and then upon written charges filed with the board of supervisors and after a hearing of the charges by said board, and, if found guilty, the board must forthwith remove him from 'office' and shall immediately appoint his 'successor' in the manner provided in the act. The act also requires (section 2) that 'prior to entering upon the duties of his employment the county engineer shall file with the county clerk the *oath of office as prescribed for the county owcers* and a bond conditioned upon the faithful performance of his duties, with sufficient sureties approved by a judge of the superior court, in the sum of five thousand dollars.' (Italics ours.) The salary, which is to be fixed by the board of supervisors, 'shall be paid monthly out of the county treasury of the county in which he is appointed and in the same manner as county officers; * * * provided, however, that the compensation of the county engineer in any county shall not be less than the compensation received by the county surveyor of that county at the time said county engineer is first appointed.' Section 3. With respect to duties, it is provided that, among other things, 'the county engineer shall be ex officio road commissioner of and for each and every road district of his county, and, subject to the control and supervision of the board of supervisors as herein provided' (section 4), and 'shall * * * make, or cause to be made, all surveys, maps, plans, specifications and estimates necessary or required for the construction, improvement, maintenance and repair of the county roads, highways and bridges, and shall, from and after the first Monday in September, 1919, have and exercise all the powers and duties, and perform all the functions which are now by law conferred or imposed upon county surveyors * * *' (section 5 [a]). The act further provides that the county engineer 'may also hold and perform the duties of the office of county surveyor, but in all such cases no salary or other compensation shall be paid to him as county surveyor' (section 5 [f]), and that he shall, at regular monthly meetings of the board make a report to the board containing 'the recommendation of acceptance or rejection of any public work, completed, and all official announcements or statements which the engineer is required to make to the board' (section 5 [h]), and 'submit to the board of supervisors a certificate over his signature ***189** and official seal to the effect that such work by the contractors thereof has ****124** been completed in accordance with the specifications thereof and recommending its acceptance' (section 9). The act in terms provides that, upon the appointment of the county engineer, the county office of county surveyor shall, in certain specified contingencies, be deemed abolished. Nevertheless, as is evidenced by some of the provisions above set forth, the office and duties of the county surveyor are, in effect, by the act in question merged into the office and duties of the county engineer. The county surveyor, under the general law in force throughout the state, is a county officer (Pol. Code, § 4013), and as such is required to do certain designated county work, not specially mentioned in the act in question, pertaining to the governmental functions of the county (Pol. Code, § 4214 et seq.). The Legislature therefore attempted to transfer the burden of the duties of the county surveyor to the so-called county engineer, in conjunction with the added and different duties imposed upon him by the act in question. That this is so is further evidenced by an amendment to the county engineer act in 1921 by which a provision was added to the effect that, upon the petition of a certain percentage of qualified electors of the county, the

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board of supervisors in any county which shall have adopted the provisions of the act 'shall discontinue such office of county engineer by ordinance declaring their intention so to do and in such ordinance the board shall provide that the person holding the office of county engineer at the time the ordinance becomes effective shall be and become the county surveyor of such county until the next ensuing general election. * * *' Stats. 1921, p. 934.

That the position of county engineer is in fact a county office is apparent, in view of the authorities previously cited, from the provisions of the act above quoted and referred to, namely, the provision for trial and removal of the county engineer in the event of misfeasance or nonfeasance in office, the fixing of the tenure of office, the requirement of a bond and the taking of the oath prescribed for county officers, payment of salary from the general county treasury, the political and governmental nature of his duties, and the relation between the position of county engineer and the office of county surveyor. 'Clearly, it was a county ***190** office.' Reed v. Hammond, 18 Cal. App. 442, 123 Pac. 346. This being so, it may be stated, in passing, that it follows that the county engineer act is practically inoperative for the reason that the act itself specifies no compensation for the office, and any ordinance of a board of supervisors attempting to fix the salary of a person appointed to the position of county engineer is void to that extent for the reason that the Constitution imposes upon the Legislature exclusively the duty of regulating the compensation of all county officers, unless a county has adopted a charter in accordance with the provisions of sections 7 1/2 or 7 1/2 a of article 11 of the Constitution, or there is some other express constitutional exception. The state Legislature cannot directly delegate to the boards of supervisors of the various counties the power of fixing the compensation of a county officer. Const. Cal. art. 11, § 5; Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161.

Concluding, as we do and must, that the position of 'county engineer' which the Legislature attempted to provide for by the act under consideration is in truth and in fact a county office, we are then confronted with the question of whether or not the act, if permitted to become operative, is in keeping with and does not violate the mandatory provision of the Constitution which requires that 'the Legislature shall establish a system of county governments which shall be uniform throughout the state. * * *' Const. Cal. art. 11, § 4.

We may concede, for the purpose of discussion, that the rule prohibiting the delegation of legislative powers by a state Legislature does not necessarily probibit a conditional statute, the taking effect of which in each locality may be made to depend upon such subsequent event as its approval by the electors of that locality. Likewise it may be conceded that the act in question may be said to be a general and uniform law because the general provisions thereof are applicable alike to every county in the state. The fact remains, however, that the Constitution contemplates and commands that the system of county governments shall be uniform throughout the state, except in those special instances where the Constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which ***191** adopt charters in accordance with the provisions of sections 7 1/2 and 7 1/2 a of the Constitution. There is no section of the Constitution which specially excepts the political functions dealt with by the act in question from the requirement that the general scheme of county governments provided for by the Legislature must be uniform throughout the state. Therefore, if the county engineer act will, in its operation, necessarily tend to interfere with this uniformity, it is unconstitutional and void.

Section 1 of the act provides that----

> 'The board of supervisors of any county at their option may appoint, and upon petition therefor signed by qualified electors of the county equaling in number not less than twenty-five per cent. of the total vote cast in the county for governor at the last preceding election at which a governor was elected, they must appoint a competent civil engineer * * * as county engineer.'

****125** Section 11 provides that, if the provisions of the act are adopted in a county by the appointment of a county engineer, the office of county surveyor shall be abolished either upon the date upon which the appointment is made and accepted if the person who holds the office of county surveyor is the one appointed county engineer, or, in other cases, upon the expiration of the term of the person who holds the office of county surveyor at the time the appointment of county engineer is made. By the 1921 amendment previously mentioned, the office of county engineer may be abolished, and that of county surveyor reinstated, upon the petition of a certain percentage of electors. It is evident, therefore, that the act is not mandatory in its operation. To the contrary, it is provided in the act that the question as to whether its provisions shall become operative in any particular

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county or whether that county shall continue under the provisions of the general law on the subject heretofore in force is a matter to be determined, in the last analysis, solely by a percentage of the electors of that county. This being so, the act by its express terms renders possible and probable a situation where in one or more of the counties of the state the duties of surveying and fixing the boundaries of the public lands and roads, etc., would be performed by the county surveyor, an officer elected by the people of the respective counties and subject to the rules governing elected officials, while in ***192** another or other counties there might be an arrangement whereby these same duties would be performed by an official appointed by the board of supervisors, which official would, in addition to the duties prescribed by the general law for county surveyors, also perform the various duties set forth in section 5 of the county engineer act. In the counties operating under the general law each supervisor is ex officio road commissioner in his supervisorial district, whereas in counties electing to adopt the provisions of the county engineer act the county engineer would be 'ex officio road commissioner of and for each and every road district of his county.'

[7] The word 'system,' as employed in the Constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation. Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66; Board v. State, 26 Okl. 366, 109 Pac. 563; State v. Riordan, 24 Wis. 484. As previously indicated, uniformity means consistency, resemblance, sameness, a conformity to one pattern. In this resemblance, in this sameness, in this conformity of a class to one pattern, consists the uniformity of system which is essential to the creation and continuity of a uniform system. And therefore the constitutional mandate to establish a uniform system of county government throughout the state means one system applicable alike in all its parts and continuously operating equally in all of the counties of the state. If a particular county were expressly exempted from the operation of the act in question, there would be no boubt but that it would violate the uniformity of system contemplated and required by the Constitution. And, while in the act under consideration no particular county is expressly exempted from the operation of the law, nevertheless people of any one or more counties may, without regard to any action taken by the remaining counties, determine that they will or will not be subject to the operation of the law, and thereby, of their own volition, create an exception to the general and uniform system of county government. In other words, the Legislature by the act in question attempted to do by indirection that which it could not do directly; ***193** that is to say, having no power to exempt one or more counties from the operation of the act, it could not confer that power upon the people of the different counties. The Legislature itself must by its own enactment establish in the first instance a system of county government uniform throughout the state, and it necessarily follows that such system when once established must, in so far as its uniformity is concerned, be kept intact by the Legislature, and must not be impaired by any subsequent legislation authorizing in counties a material difference in the manner of performing functions of government intrusted to them.

Inasmuch as the county engineer act provides for a county office involving the exercise of political functions, we conclude that the said act violates the constitutional requirement that the system of county governments prescribed by the Legislature shall be uniform thoroughout the state, by reason of the fact that it is not mandatory in its operation, but that it is optional with each county whether or not the office provided for by the act shall be established therein. L. A. County v. Kirk, 148 Cal. 385, 83 Pac. 250.

This conclusion is not in conflict with the cases relied upon by respondents. In Scott v. Boyle, 164 Cal. 321, 128 Pac. 941, the court had under consideration a statute which authorized the appointment of sealers of weights and measures, but left the determination as to whether or not this authorization should be availed of to the different counties and municipalities. The statute dealt with an office which was specifically provided for by a special section of the Constitution (Const. art. 11, § 14), and which the court held was 'distinct from the general political functions of counties and cities and ****126** the general scheme of county or municipal government.' Likewise the statute upheld in the case of Board of Law Library Trustees v. Board of Supervisors, 99 Cal. 571, 34 Pac. 244, left to the election of the different counties the matter of the establishment of law libraries, but such institutions are not part of the system of county government, at least in so far as the execution of 'political functions' is concerned, and consequently the point here presented was not discussed in that case. In Tulare County v. May, 118 Cal. 303, 50 Pac. 427, the act provided for one additional deputy sheriff and two deputy ***194** clerks in any county in which an

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additional judge of the superior court was created by the Legislature. This provision was valid, for, as stated in the opinion, it operated in each county alike upon the creation of an additional judge in that county by the Legislature.

[8] The employment of plaintiff to perform the work in question was ratified by the board of supervisors by allowing his claim for compensation for the work (Power v. May, 123 Cal. 147, 55 Pac. 796), and, in view of the fact that the county engineer act must be held unconstitutional, the record discloses no valid objection to the payment of the claim thus allowed. Disregarding the findings concerning the proceedings under the said county engineer act, the remaining findings of the trial court are sufficient to support a judgment in plaintiff's favor. Accordingly the judgment is reversed, with directions to the trial court to grant the relief prayed for in plaintiff's petition.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

187 Cal. 181, 201 P. 120

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Exhibit 14

RE: DELEGATION

THE LAW OF MUNICIPAL CORPORATIONS

THIRD EDITION

EUGENE McQUILLIN

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results from express charter provisions and is an exception to the rule sometimes laid down that where an office is of legislative creation the legislature can modify, control or abolish it; and within these powers, is embraced the right to change the mode of appointment to the office.[25]

Power to fix salaries of municipal officers and employees does not embrace power to create positions.[26] But power to create an office, by necessary inference, includes power to fill it efficiently by attaching to it a salary incident, where compensation for performance of official duties is contemplated. Such power is a part of the written law as effectually as if expressed in words.[27]

Whether civil service acts confer upon municipalities[28] or upon civil service commissions of municipalities[29] the power to create offices or positions depends upon the terms of the acts.

§ 12.38 Nondelegability.

Since public powers cannot be surrendered or delegated,[1] powers conferred upon a municipal corporation and its officers and agents

nspector); Tierney v. Wynne, 209 App Div 401, 204 NYS 836 (power of board of estimate to create office).

Authority to appoint to office, see § 12.70 et seq.

[25] **Md.** Davis v. State, 7 Md 151.

[26] **N.Y.** Sullivan v. McAneny, 145 App Div 413, 130 NYS 24 (construing greater New York charter).

[27] **Cal.** San Francisco City & County Service Employees International Union Local 400, AFL-CIO v. San Francisco, 49 Cal App 3d 272, 122 Cal Rptr 293.

N.C. See Cody Realty & Mortgage Co. v. Winston-Salem, 216 NC 726, 6 SE2d 501 (authority of city to engage services of experienced real estate broker as incident to power given to city to sell its real property at public auction).

Wis. State v. Kelly, 154 Wis 482, 143 NW 153.

Power to fix salaries, see § 12.176 et seq.

[28] **Ill.** Chicago v. People, 114 Ill App 145 (Illinois Civil Service Act not purporting to deprive or confer on municipality power to create or abolish offices).

N.J. Davaillon v. Elizabeth, 121 NJL 380, 2 A2d 369 (no power of municipality by ordinance to create for fixed term and fill position of assistant city clerk).

[29] **Ill.** People v. Chicago, 202 Ill App 105 (no power of civil service commission of Chicago to create or abolish offices).

Wash. State v. Seattle, 175 Wash 42, 21 P2d 288 (no power of civil service commission to create positions for city employees).

[Section 12.38]

[1] **Pa.** Delegation of power to courts of common pleas to provide for election of additional supervisors in townships does not unconstitutionally delegate legislative power to courts. In re Appointment of Add

cannot be surrendered or deleg
power of the municipal corpor
create positions cannot be deleg

And since legislative authori
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be established by ordinance,[6] a
fix salaries[8] cannot be delegat

tional Sup'rs for North Strabar
Tp., Washington County, 22 P
Commw 272, 348 A2d 448.

See ch 10.

[2] **Ohio.** Hagerman v. Dayto
147 Ohio St 313, 71 NE2d 246.

Okla. Walton v. Donnelly, 8
Okla 233, 201 P 367 (commissione
of commission form of governme
not to transfer duties, etc., of con
missioners against charter
without clear authority).

[3] **Wash.** State v. Seattle, 17
Wash 42, 21 P2d 288.

Delegation of power to elect
appoint officers forbidden, se
§ 12.72.

[4] **Md.** Upshur v. Baltimore, 9
Md 743, 51 A 953 (under statu
relating to patrol officers for cit
parks, park commissioners n
authorized to compel police commi
sioners to detail designated numb
of officers for park service for who
year, with additional number durir
summer months).

[5] **Wash.** Nelson v. Troy, 11 Was
435, 39 P 974 (act conferring
county commissioners power
authorize employment of addition
help in certain offices not constitu
ing delegation of legislative power)

[5] **Mass.** Whalen v. Special Ju
ice of First Dist. Court
Middlesex, 295 Mass 305, 3 NE2
1005 (where statute created fi
commissioner with power to appoi

not be surrendered or delegated by them to others.[2] Thus, the power of the municipal corporation or of its officers or agents to create positions cannot be delegated.[3]

And since legislative authority cannot be delegated,[4] the vesting in the local governing body of the power to create positions and to fix salaries requires that such matters, except where the charter or legislative act applicable creates the office or fixes the salary,[5] shall be established by ordinance,[6] and such power to create offices[7] or to fix salaries[8] cannot be delegated.

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tional Sup'rs for North Strabane Tp., Washington County, 22 Pa Commw 272, 348 A2d 448.

See ch 10.

[2] **Ohio.** Hagerman v. Dayton, 147 Ohio St 313, 71 NE2d 246.

Okla. Walton v. Donnelly, 83 Okla 233, 201 P 367 (commissioners of commission form of government not to transfer duties, etc., of commissioners against charter or without clear authority).

[3] **Wash.** State v. Seattle, 173 Wash 42, 21 P2d 288.

Delegation of power to elect or appoint officers forbidden, see § 12.72.

[4] **Md.** Upshur v. Baltimore, 94 Md 743, 51 A 953 (under statute relating to patrol officers for city parks, park commissioners not authorized to compel police commissioners to detail designated number of officers for park service for whole year, with additional number during summer months).

Wash. Nelson v. Troy, 11 Wash 435, 39 P 974 (act conferring on county commissioners power to authorize employment of additional help in certain offices not constituting delegation of legislative power).

[5] **Mass.** Whalen v. Special Justice of First Dist. Court of Middlesex, 295 Mass 305, 3 NE2d 1005 (where statute created fire commissioner with power to appoint such officers and members as commissioner should determine, power to fix salaries as incident to power of appointment).

N.Y. Sugden v. Partridge, 174 NY 87, 66 NE 655 (statute declaring police officers previously appointed or assigned to duty to be known as detective sergeants, not creating new position or office, and not unconstitutional); Cain v. Warner, 45 App Div 450, 60 NYS 769 (fixing and allowing monthly salary for police surgeon regularly employed, as law requires not creating office).

[6] **Ill.** Pekin v. Industrial Commission, 341 Ill 312, 173 NE 339 (ordinance creating position of bridgetender not delegating legislative authority by placing bridgetender under control of bridge committee as to regulations and hours of labor).

See ch 15.

[7] **Cal.** Ford v. Board of State Harbor Com'rs, 81 Cal 19, 22 P 278.

Ky. Crouch v. Commonwealth, 172 Ky 463, 189 SW 698, 701.

N.Y. Broderick v. New York, 182 Misc 990, 47 NYS2d 714.

[8] **Cal.** Smith v. Strothers, 68 Cal 194, 8 P 854.

Ky. Commonwealth v. Adams, 95 Ky 588, 26 SW 581.

N.J. Delmar v. Bergen County, 117 NJL 377, 189 A 75 (invalid dele-

The creation of an office or position which must continue to exist until abolished by ordinance can only be accomplished by the exercise of a power essentially legislative—a power which the municipal council alone possesses, under the charter, which cannot be delegated. The legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number—offices which the power creating them is incompetent to abolish.[9]

But certain subordinates or employees, as day laborers, are not included, and this class of employees is usually the only exception. The fact that the ordinance confers authority upon the officer or board to appoint such additional help "as may be required for the efficient working of his department,"[10] or "as may be necessary," where the character of such help is specified by naming in terms the positions, and designating the compensation for each situation, does not constitute a delegation of legislative power.[11] In such case the ordinance itself creates the situation under the city government or its departments, and whether it be technically an office or a mere place, the officer by filling it simply supplies an incumbent or person (as in his or her judgment the demands of the public service may require) for a position already created by legal authority.[12]

gation of authority to reduce judges' salaries).

Wash. State v. Johnson, 46 Wash 2d 114, 278 P2d 662 (invalid charter provision providing for submission of disputes over wages between firefighters and city to board of arbitrators); State v. Bellingham, 183 Wash 439, 48 P2d 602 (unless restrained by law, legislative authority of municipality to make appropriation in lump sum for specified governmental purposes, leaving it to administrative officers to fix salaries or legislative authority to establish salaries to be paid).

[9] **Cal.** Ford v. Board of State Harbor Com'rs, 81 Cal 19, 22 P 278.

[10] **Pa.** Myers v. Hartnett, 153 Pa Super 228, 33 A2d 512.

[11] **Mo.** State v. Mason, 153 Mo 23, 54 SW 524 (law authorizing increase of police to such additional force as extraordinary emergencies may require as limiting permanent force to number specified in law and as not delegation of power to appoint permanent police officers ad libitum).

[12] **Kan.** In re Gilson, 34 Kan 641, 9 P 763.

Mo. State v. Mason, 153 Mo 23, 54 SW 524.

Tex. Houston v. Stewart, 96 Tex 67, 87 SW 663.

Wash. Nelson v. Troy, 11 Wash 435.

IV. MUNICIPAL DEPAR COMMISSIONERS, E

§ 12.39 Various forms; cr

It is an integral part of activities be conducted unde tuted boards and commissio and commissions exist, what ished, and what authority m particular charter and the s finance, fire, police, health, street, sewer, harbor and wh rection are commonly asso Sometimes some of these de most of them, are made de the officers and agents of th performing state functions w the state legislature withdr municipality to create and m and itself assumes control.[5]

[Section 12.39]

[1] **N.J.** McAlpine v. Gar Water Commission, 135 NJL 49 A2d 759.

[2] **Ala.** City of Montgomer Water Works & Sanitary S Board, 660 So 2d 588 (Ala 1 Opinion of Justices, 254 Ala 50 So 2d 175.

Ill. People v. Wood, 391 Ill 62 NE2d 809.

La. Odom v. Minden, 300 S 462 (La) (abolished classificati fire inspector); State v. May Board of Aldermen of City of dale, 204 La 940, 16 So 2d Dickson v. Hardy, 177 La 447, So 674.

Mass. Broadhurst v. Fall R 278 Mass 167, 179 NE 586 (boa finance; mayor as "department'

N.J. Handlon v. Town of P ville, 4 NJ 99, 71 A2d 624.

[3] See §§ 12.46–12.57.

an ordinance giving such power to the mayor is void.[8] But the power of the council to select officers may be transferred by statute to the mayor unless forbidden by the state constitution.[9] Power in the mayor to appoint with the approval of the council does not confer power on the council to appoint or elect upon rejecting the mayor's choice,[10] and an ordinance creating the office cannot confer the power of appointment upon the council alone.[11] Where a city charter provision gives the mayor the distinct power to appoint, the city council is without authority to limit that power by ordinance.[12] Furthermore, where appointments made by the mayor are required to be confirmed by the legislative authority, failure of the legislative authority to vote on the confirmation does not amount to a confirmation of the appointment.[13]

Where the law requires a vacancy to be filled by the mayor and board of aldermen, such vacancy cannot be filled by the mayor alone,[14] or by the board of aldermen alone.[15]

§ 12.72 —Nondelegability.

The rule that delegation or surrender of powers conferred on officers or departments is forbidden[1] applies to the election or appointment of municipal officers and subordinates,[2] although del-

[8] **N.J.** Orre v. Roosma, 14 NJ Misc 529, 185 A 922.

Tex. Uhr v. Lambert, 188 SW 946 (Tex Civ App).

[9] **Mass.** Attorney-General v. Varnum, 167 Mass 477, 46 NE 1.

[10] **N.H.** Attorney General v. Hayes, 77 NH 358, 92 A 166 (law providing that members of named board be elected by board of mayor and aldermen with mayor having power to veto election by aldermen).

W. Va. Broadwater v. Booth, 116 W Va 274, 180 SE 180.

[11] **Pa.** Commonwealth v. Crogan, 155 Pa St 448, 26 A 697.

[12] **Mass.** Tierney v. Mayor of Boston, 10 Mass App 404, 408 NE2d 659.

[13] **Ohio.** Board of Health of St. Bernard v. St. Bernard, 19 Ohio St 2d 49, 249 NE2d 888.

[14] **Mass.** See Kidder v. Mayor of Cambridge, 304 Mass 491, 24 NE2d 151 (election commissioners required to be appointed by mayor from list submitted by city committee of political party).

[15] **Tex.** Brumby v. Boyd, 28 Tex Civ App 164, 66 SW 874.

[Section 12.72]

[1] **Minn.** Anderson v. Police Civil Service Commission of City of Willmar, 414 NW2d 389 (Minn App 1987).

See ch 10.

[2] **Ariz.** Paddock v. Brisbois, 35 Ariz 214, 276 P 325.

Ga. Tietjen v. Savannah, 161 Ga 125, 129 SE 653.

Where the council has power over job positions it may not make a binding contract with the mayor to hold a referendum as to whether the mayor

egation may be sanctioned by statute,[3] or where the conferment of appointive power does not add up to a delegation.[4]

The authority which confers the power of appointment may suspend such power and transfer it to another.[5] Where the charter

needs a secretary. Patterson v. City Council of Sparta, 175 Ga App 819, 334 SE2d 725.

Ill. People v. Krupicka, 279 Ill App 269.

Ky. White v. Hopkinsville, 280 Ky 661, 134 SW2d 236; Millikin v. George L. Gillum & Son, 135 Ky 280, 122 SW 151.

La. Dickson v. Hardy, 177 La App 447, 144 So 519.

Minn. Anderson v. Police Civil Service Commission of City of Willmar, 414 NW2d 389 (Minn App 1987) (police captain).

N.J. Gillson v. Heffernan, 40 NJ 367, 192 A2d 577 (mayor not to delegate to council authority to make appointments granted by statute); McAvoy v. Trenton, 82 NJL 101, 80 A 950; Follari v. State, Department of Civil Service, 102 NJ Super 598, 246 A2d 486 (council having no right to cede appointing power to mayor).

Ohio. Industrial Commission v. Turek, 129 Ohio St 545, 2 Ohio Op 550, 196 NE 382.

S.C. Ashmore v. Greater Greenville Sewer Dist., 211 SC 77, 44 SE2d 88 (statute creating auditorium district not constitutionally providing for "representatives of" who are "elected by" sundry organizations entirely unconnected with government in any form, such as service clubs, chambers of commerce, trades and labor councils, etc.).

Wash. State v. Seattle, 50 Wash 2d 94, 309 P2d 751.

[3] **Ill.** People v. Tighe, 11 Ill App 2d 1, 135 NE2d 811 (under statute providing that council operating under commission form of government could vest its appointive power in commissioners of various departments, council reserving right to confirm appointments made by commissioners to whom appointive power had been given).

Minn. Anderson v. Police Civil Service Commission of City of Willmar, 414 NW2d 389 (Minn App 1987).

See Sands & Libonati Loc Govt Law § 10.09.

[4] **Cal.** Scott v. Boyle, 164 Cal 321, 128 P 941 (giving mayor power to appoint sealer of weights and measures, under legislative authority granting power to appoint such officer to counties and municipalities, as not delegation of legislative power of city but executive act).

Iowa. Hathaway v. Des Moines, 97 Iowa 333, 66 NW 188 (when board of public work's conferment of power to employ is not delegation).

Minn. Anderson v. Police Civil Service Commission of City of Willmar, 414 NW2d 389 (Minn App 1987) (some delegation acceptable if ultimate authority to decide retained).

[5] **N.J.** See Orre v. Roosma, 14 NJ Misc 529, 185 A 922.

N.Y. Transfer of power to appoint the city's corporation counsel from the city manager, himself an appointee of the council, to the city council was within the power of the council under statute and city charter. Meredith v. Connally, 38 AD2d 385, 330 NYS2d 188.

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thorized limitation on the

[6] **Mo.** Pearson v. Wasl
439 SW2d 756 (Mo).

[7] **Cal.** Ex parte Guerrer
88, 10 P 261.

[8] **Conn.** Donnelly v.
Haven, 95 Conn 647, 111 A

Ill. Sullivan v. Cloe, 27
115 NE 135; People v. McCa
Ill 130, 143, 93 NE 100.

Ky. Blanks v. Toombs,
15, 14 SW2d 153; Harlan v.
Land Co., 199 Ky 87, 250
Jameison v. Paducah, 195
241 SW 327.

Minn. Anderson v. Poli
Service Commission of City
mar, 414 NW2d 389 (Mi
1987) (civil service commi
choose police captain).

N.J. Schwartz v. Camde
Eq 135, 75 A 647; State v.
NJ Super 599, 68 A2d 352.

[9] **N.J.** State v. Atlantic
NJL 537, 42 A 852.

gives the council powers to impose on its officers duties other than those prescribed by law it has no power to confer on one officer powers or duties imposed upon another officer, without express legal authority.[6] However, the principle does not forbid the council from delegating to its clerk power to perform ministerial acts, as that of issuing and collecting licenses imposed by ordinance.[7]

Under the rule as stated, if the charter confers power on the council to appoint or elect an officer or officers, or a municipal employee or employees, the power cannot be delegated,[8] e.g., to a chief engineer,[9] city administrator[10] or clerk of a department.[11] So the council cannot delegate to the mayor power vested in it to appoint an attorney.[12] Nor can the council delegate to its committee authority to employ a superintendent of a public utility operated by the city in charge of the council, and fix his or her compensation.[13] But the selection of an officer or employee upon the recommendation of a business organization, for example, a chamber of commerce or other civic association, is not a delegation of the power to appoint.[14] Nor does a requirement that the appointing authority choose from a specified number of recommended candidates constitute an unauthorized limitation on the power of appointment nor a delegation of a

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[6] **Mo.** Pearson v. Washington, 439 SW2d 756 (Mo).

[7] **Cal.** Ex parte Guerrero, 69 Cal 88, 10 P 261.

[8] **Conn.** Donnelly v. New Haven, 95 Conn 647, 111 A 897.

Ill. Sullivan v. Cloe, 277 Ill 56, 115 NE 135; People v. McCann, 247 Ill 130, 143, 93 NE 100.

Ky. Blanks v. Toombs, 228 Ky 15, 14 SW2d 153; Harlan v. Coombs Land Co., 199 Ky 87, 250 SW 501; Jameison v. Paducah, 195 Ky 71, 241 SW 327.

Minn. Anderson v. Police Civil Service Commission of City of Willmar, 414 NW2d 389 (Minn App 1987) (civil service commission to choose police captain).

N.J. Schwartz v. Camden, 77 NJ Eq 135, 75 A 647; State v. Jones, 4 NJ Super 599, 68 A2d 352.

[9] **N.J.** State v. Atlantic City, 63 NJL 537, 42 A 852.

[10] **Mo.** Pearson v. Washington, 439 SW2d 756 (Mo).

[11] **N.J.** McAvoy v. Trenton, 82 NJL 101, 80 A 950.

[12] **Ill.** East St. Louis v. Thomas, 11 Ill App 283.

[13] **Ind.** Stewart v. Goshen, 81 Ind App 314, 143 NE 301.

[14] **Cal.** In re Bulger, 45 Cal 553 (law providing for appointment of board of fire commissioners by board of underwriters composed of agents of various companies doing business in state).

Mass. Bradley v. Board of Zoning Adjustment of City of Boston, 255 Mass 160, 150 NE 892.

Minn. Anderson v. Police Civil Service Commission of City of Willmar, 414 NW2d 389 (Minn App 1987) (recommendation of investigatory committee).

substantial portion of such power.[15]

§ 12.73 — Mayor's or city manager's authority.

Unless the law so directs, the mayor or city manager has no authority to appoint municipal officers.[1] Thus if the law authorizes the officer or the heads of departments to appoint their own assistants and subordinates, which is true of many charters, the power of selection, of course, cannot be exercised by the mayor.[2] Some charters vest in the mayor as the chief executive officer of the city exclusive power of appointment;[3] some vest it in the mayor and

[15] **Wis.** Grambling v. Wauwatosa, 44 Wis 2d 634, 171 NW2d 897 (appointment of city attorney from list submitted by advisory panel of attorneys selected by city personnel agent).

[Section 12.73]

[1] **Conn.** Giusti v. Barbino, 170 Conn 113, 365 A2d 408 (mayor prohibited from appointing members to certain municipal boards without regard to recommendations of minority leader pursuant to city charter).

Ga. Peterson v. City Council of Sparta, 175 Ga App 819, 334 SE2d 725 (mayor having no authority to hire secretary).

La. Foti v. Montero, 136 So 2d 784 (La App).

N.J. See Robertson v. Washington Tp. Municipal Utilities Authority, 211 NJ Super 504, 511 A2d 1296 (analyzing statutes and finding council having power to appoint members to municipal utility authority).

Ohio. State v. Lynch, 123 Ohio St 676, 177 NE 765 (ordinance not to confer power upon mayor to appoint where it conflicts with general law); State v. Donahey, 108 Ohio St 440, 140 NE 609 (police officer); State v. Brunswick, 12 Ohio App 2d 178, 231 NE2d 495 (mayor of noncharter city, whose status as mayor created by statute, without authority to appoint police officer to office of chief of police of newly created city after village of which he had been mayor advanced to city).

Pa. Mack v. Hoover, 342 Pa 291, 20 A2d 757 (mayor's power to detail police from regular force to be known as sanitary police not conferring on mayor power to give them status of police officers).

Tex. Dallas v. McDonald, 130 Tex 299, 103 SW2d 725, 107 SW2d 987 (city manager not to appoint police officers).

[2] **Colo.** Cutshaw v. Denver, 19 Colo App 341, 75 P 22.

La. Peters v. Bell, 51 La Ann 1621, 26 So 442.

[3] **Cal.** Scott v. Boyle, 164 Cal 321, 128 P 941 (sealer of weights and measures).

Colo. People v. Sabin, 75 Colo 545, 227 P 565; People v. Lindsley, 37 Colo 476, 86 P 352.

Ill. People v. Welsh, 260 Ill 532, 103 NE 578; People v. Mueller, 328 Ill App 593, 66 NE2d 516 (fire marshall).

La. Gros v. Thibodaux, 116 So 2d 161 (La App).

Mass. King v. Quincy, 270 Mass 185, 169 NE 894; Ellis v. Civil Service Commission, 229 Mass 147, 118 NE 231 (police officers from list cer-

council acting together;[4] c
of the council.[5] Frequentl
without the consent of the
times vested in the mayo
methods,[7] or in emergen
ment.[9] A city manager,

tified by Civil Service Comm
Tierney v. Mayor of Boston, 1
App 404, 408 NE2d 659.

Mich. Bostedor v. Eaton I
273 Mich 426, 263 NW 416 (di
of library board); Attorney G
v. Corliss, 98 Mich 372, 57 N
Speed v. Detroit, 97 Mich 1
NW 510.

Minn. State v. Eveleth
Minn 44, 260 NW 223.

Mo. Sales v. Barber A
Paving Co., 166 Mo 671, 66 S

Mont. Grush v. Bishop, 4
97, 126 P 619.

N.J. Morrow v. Somers
112 NJL 291, 170 A 624; Wal
Rowe, 91 NJL 71, 106 A 212.

Appointment of municipal
ney and municipal engine
township council was not pe
ble where the governing s
required that all administ
functions be allocated to c
another of municipal depart
with the department heads
appointed by the mayor. In
Klink, 121 NJ Super 314, 297

N.Y. People v. Lacombe,
43, 1 NE 599; Maickel v. Lu
Misc 2d 98, 155 NYS2d 581.

R.I. In re Building Insp
17 RI 819, 21 A 913.

W. Va. State v. Neal, 104
259, 139 SE 757.

Powers and duties of mayor
ally, see § 12.43.

Authority to fill vacancie
§ 12.101.

[4] **Ill.** People v. Rogers, 3
187, 73 NE2d 316.

Exhibit 15

LAWYERS ARE ASKED TO AID FREEHOLDERS

7 To 7 Deadlock On City Attorney Will Be Put To Attorneys

Local attorneys are invited to attend the meeting of the board of freeholders in the director's room of the San Diego Museum, Balboa park, tonight at 7 o'clock, to help the charter framers solve this question:

Under the new charter, should the city attorney be elected by the people or should he be chosen by the council?

With John Snyder out of the city, the board found itself first standing 7 to 7 on this question, when it met at 7 o'clock and after seven motions of one sort or another, still stood 7 to 7. As the net result of this supposedly lucky number, the press was asked to extend an invitation to local attorneys to attend tonight's meeting and express their views.

Those of the freeholders who favor election by the people feel that the city attorney should be a check on the council and the city manager, and that only his election by the people will give him the necessary independence of action.

Those who favor this selection by the council feel that a more competent lawyer can be induced to take this important office if he is not required to go to the trouble and expense of an election campaign, and that he is, basically, the council's lawyer and should be one who can work in harmony with the council and manager.

In addition to discussion of the city attorney, the board voted to have the city treasurer appointed by the manager with the approval of the council. It decided to make an exception of the police and fire departments in the section giving the manager power to direct one department to do work for another and to transfer employes from one department to another.

A proposal to have the superintendent of streets in the city engineer's department was discussed

Exhibit 16

MINUTES November 12, 1930.

MINUTES of the regular meeting of the Board of Freeholders of the City of San Diego, held at the regular meeting place on Wednesday evening, November 12th, 1930, convening at 7:00 o'clock.

Meeting called to order by the Chairman.

Absent: Messrs. Ferguson and Snyder.

The secretary reported that the minutes of the previous meeting were not ready, but that they would be ready for the next meeting.

The following communications were then read:
Letter from Oscar Jensen, dated Nov. 4, 1930;
Letter from Pacific Beach Chamber of Commerce, dated Nov. 10th and signed by G. O. Thrailkill, President, and F. E. Humphreys, Secretary;
Letter from Dr. Charlotte J. Baker, President of the Civil Service Commission, dated Nov. 10, 1930. The Secretary was instructed to write Dr. Baker giving her a verbatum copy of the section that had been adopted todate bearing on Civil Service and explain to her that the final set up of the Commission had not yet come up for consideration.

THE SECRETARY then reported that he had extended invitations to Judge Shelley J. Higgins to attend tonight's meeting, but that it was impossible for him to come on account of a previous engagement, but that he would be pleased to come at another date if it was the wish of the Board. That he had endeavored to get in touch with attorney James G. Pfanstiel, but found he was out of the city for an indefinite period. That Dean Peterson of the State College was tied up with a former engagement because of Educational WEek, but would come at another time if ample notice were given hom. That he had been unable to get in touch with Judge Conkling, present City Attorney, but that he had left messages for him.

The Board then proceeded with regular business to allow more time for other members of the Bar to arrive, if

SECTION 20, ARTICLE V. Mr. Barnson asked that an additional sentence be added to that paragraph as adopted at the previous meeting, the addition to read as follows:
"The Manager shall have the power to place any of the foregoing Divisions under the control and supervision of the Ci Engineer, or any other Department."
After a short discussion it was MOVED BY MR. ANDERSON, and seconded by Mr. Merkley that the paragraph be adopted. Motion carried.

SECTION 21, ARTICLE V. DIVISION OF STREETS.
Moved by Mr. Barnson, seconded by Mr. Klicka, that Section 21 of Article V be adopted as it reads in the December Charter. Motion carried.

SECTION 22, ARTICLE V. DIVISION OF SEWERS.
MOVED BY MR. BENNETT, seconded by Mr. Anderson, that the Section be adopted as is. Motion carried.

SECTION 23, ARTICLE V. DIVISION OF REFUSE COLLECTION AND DISPOSAL.

Moved by Mr. Barnson, seconded by Mr. Klicka that the Section be adopted as is. Motion carried.

SECTION 24, ARTICLE V. DIVISION OF BUILDING CONSTRUCTION AND MAINTENANCE.

MOVED BY MR. BARNSON, seconded by Mr. Klicka, that the Section be adopted as is. Motion carried.

SECTION 25, ARTICLE V. DIVISION OF GARAGE.

MOVED BY MR. BARNSON, seconded by Col. Jones, that the Section be adopted as is. Motion carried.

SECTION 26, ARTICLE V. DIVISION OF PUEBLO LANDS AND UNIMPROVED CITY PROPERTY.

MOVED BY Mr. Graham, seconded by Mr. Bennett that the Section be adopted without alteration. Motion carried.

SECTION 27, ARTICLE V. WATER DEPARTMENT.

At the request of Mr. Richards the consideration of this Section was held over for consideration until a later date, and the Secretary was asked to get in touch with Mr. Savage and try to arrange to have Mr. Savage come before the Board on November 18th.

SECTION 28, ARTICLE V. HARBOR DEPARTMENT.

Col. Jones reminded the Chair that the Harbor Department had been notified that they would be advised when this section came up for consideration. The Secretary was then instructed to notify the Harbor Department that this was set for Friday, the 14th of November, and ask them to please appear before The Board at that time to present any views they wished on the subject.

SECTION 29, PARK DEPARTMENT. There was considerable discussion regarding this Section. Col. Jones and Mr. Richards were appointed as a Committee to redraft a Section embodying the points that had been discussed, and present same at an early meeting.

See 15 ART V

By this time a number of the attorneys of the city had arrived, and were invited to talk before The Board. The Chairman explained that the matter in mind was in regard to the an election of the City Attorney by the people or to provide for the appointment by the Common Council, bearing in mind that the Board had already decided upon a Council-Manager form of government, leaving all administrative duties in the hands of the Manager, the Council being purely a legislative body.

The following attorneys spoke: Messrs. Charles Quitman, Herman Freeze, Edward Goodman, and Wm. P. Mayer, answering various questions asked by The Board.

MOVED BY MR. BARNSON, seconded by Mr. Klicka, that the City Attorney be elected by the people.

Further discussion followed. A rollcall vote was taken.

Voting AYE: Messrs. Anderson, Barnson, Bennett, Graham, Klicka, Mathewson, and Mrs. Dunham and Mrs. Ranney.

Voting NO: Messrs. Hartley, Jones, Martin, Merkley and Richards.

Absent: Messrs. Ferguson and Snyder.

Motion carried, eight in favor, five opposed, two absent.

SECTION 30, ARTICLE V. DEPARTMENT OF SAFETY.

MOVED BY MR. ANDERSON, seconded by Mr. Barnson that the Section be adopted as is. Vote taken by raise of hands. Nine in favor, two opposed.

Mrs. Ranney raised the question that there had been some objection about using the word Division in connection with either the Fire or Police Department, and the Chairman explained that if following Sections made any change advisable in this Section 30, a reconsideration would be taken up at that time.

SECTION 31, ARTICLE V. POLICE DIVISION.

MOVED BY MR. BARNSON, that the Chief of Police be appointed by the City Council. No second.

MOVED BY MR. KLICKA, seconded by Mr. Barnson, that the Chief of Police be appointed by the City Manager and the appointment confirmed by a majority of the City Council.

Discussion followed.

MOVED BY MR. ANDERSON, seconded by Mr. Hartley, to amend the motion by adding another clause providing that the Manager shall have power to remove the Chief of Police without the Council's approval.

A vote was taken on the amendment and carried.

Following this a vote was taken on the complete motion as follows: That the Chief of Police shall be appointed by the City Manager and confirmed by a majority of the City Council, provided however that the City Manager shall have the power to remove the Chief without the Council's approval.

Vote was taken by raise of hands; Nine in favor, Four opposed. Motion carried. During the discussion, Mr. Merkley raised the question as to why the same provision as to removal should not be provided for the City Treasurer. The Chairman stated that he thought it best to pass it by at this time and then pass a later clause that in case of any appointments by the Manager which are subject to confirmation by the Council, that the Manager will have the power of removal without the Council's confirmation, so that it would all be taken care of at one time, and we would not have to be watching for it in all of these cases.

MR. RICHARDS stated that he would like to see something provided in both the Police and Fire Divisions so that the method of training they have, especially in the Fire Division, will not be interfered with. Considerable discussion followed.

MOVED BY MR. BARNSON, seconded by Mr. Klicka, that a Committee be appointed to draft an appropriate paragraph to express the idea as just expressed by Mr. Richards. Motion carried.

The Chairman thereupon appointed Mr. Mathewson and Mr. Klicka to serve on the Committee.

A general discussion of the matter was entered into in order that the Committee would have the views of the Board to work on.

SECTION 32, ARTICLE V. FIRE DIVISION.

MOVED BY MR. BARNSON, seconded by Col. Jones, that the Fire Chief shall be appointed by the City Manager and confirmed by a majority of the City Council, provided however that the City Manager shall have the power to remove the Chief without the Council's approval.

Motion carried.

SECTION 33, ARTICLE V. DIVISION OF BUILDING INSPECTION.

There was a short discussion regarding the qualifications of a Chief Building Inspector, but no action taken.

MOVED BY MR. BARNSON, seconded by MR. RICHARDS that we adjourn. Motion carried.
Whereupon the meeting adjourned at 9:40 P.M.

Nicholas J. Morton
Chairman.

E. A. Jones
Secretary.

Approved November 14, 1930.

SECTION 23, ARTICLE V. DIVISION OF REFUSE COLLECTION AND DISPOSAL.

Moved by Mr. Barnson, seconded by Mr. Klicka that the Section be adopted as is. Motion carried.

SECTION 24, ARTICLE V. DIVISION OF BUILDING CONSTRUCTION AND MAINTENANCE.

MOVED BY MR. BARNSON, seconded by Mr. Klicka, that the Section be adopted as is. Motion carried.

SECTION 25, ARTICLE V. DIVISION OF GARAGE.

MOVED BY MR. BARNSON, seconded by Col. Jones, that the Section be adopted as is. Motion carried.

SECTION 26, ARTICLE V. DIVISION OF PUEBLO LANDS AND UNIMPROVED CITY PROPERTY.

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The following attorneys spoke: Messrs. Charles Quitman, Herman Freeze, Edward Goodman, and Wm. P. Mayer, answering various questions asked by The Board.

MOVED BY MR. BARNSON, seconded by Mr. Klicka, that the City Attorney be elected by the people.

Further discussion followed. A rollcall vote was taken.

Voting AYE: Messrs. Anderson, Barnson, Bennett, Graham, Klicka, Mathewson, and Mrs. Dunham and Mrs. Ranney.

Voting NO: Messrs. Hartley, Jones, Martin, Merkley and Richards.

Absent: Messrs. Ferguson and Snyder.

Motion carried, eight in favor, five opposed, two absent.

Exhibit 17

COUNCIL MUST ELECT MANAGER IN TWO MONTHS

New Charter Provides For Action 60 Days After Passage

EDITOR'S NOTE: This is the third of a series of articles on the proposed city charter, to be voted on Tuesday, April 7. The series is being written by a member of the board of freeholders.

By RAY MATHEWSON
Member Board of Freeholders

Within 60 days after the council starts functioning under the new plan, it must elect a city manager. He need not be a resident of the city. He may be obtained from anywhere in the United States. He may be chosen for an indefinite term, and he can be removed at any time by a majority vote of the council.

However, in case of removal, he may demand, and must be given a public hearing in his own defense, but the action of the council in discharging him may be final.

The manager shall receive a salary to be fixed by the council in the annual appropriation ordinance. The manager will have complete charge, and will be responsible for practically all the administrative business of the city.

Many Bureaus

All the major departments, save one, are under the manager. At the head of each department will be a director, appointed by and serving at the pleasure of the manager. The manager may act as director of any department under his control. The new charter provides for the appointment of advisory commissions for some of these departments. The manager may appoint advisory commissions to advise with any other department under his control. All administrative commissions have been abolished, except the harbor department.

[illegible] points a personnel director. He will have complete charge of the employment policy of the city. All classified employees will be under civil service. Unclassified employees may be hired and fired by the various appointing powers, but no civil service employee may be discharged, suspended or laid off without recourse to the civil service commission, whose word in each case shall be final.

The city attorney is elected by the people. At the present time he is appointed by the council. It was felt that if the attorney were elected by the people, he would be in a much more independent position than if he were appointed by the council. The council may employ special water counsel to aid the city attorney.

Exhibit 18

ROUGH DRAFT OF A PROPOSED "STRONG MAYOR"- COUNCIL FORM OF GOVERNMENT

The council-mayor plan of city government is the oldest and perhaps the best known form of municipal government. However, it came into being at a time when there were no cities in the United States of over 100,000 population, while today there are over a hundred cities with a population of at least 100,000. The chief fault of the council-mayor plan is that it has not kept pace with this enormous growth of population.

As the functions of city government increased in number, importance and complexity throughout the years, unsound principles have continued with or crept into this type of government. Among these are the over-lapping and decentralization of administrative and legislative powers among the chief executive, the common council, and various boards and commissions.

The following proposed plan would eliminate these faults from the mayor-council form of government:

(1) An elective mayor with the power of appointment and removal of the heads of all administrative departments, and the veto power;
(2) A common council to be the legislative or policy-making body only;
(3) An elective fiscal officer who would be the head of the department of finance, and,
(4) An elective city attorney; all of the officials to be nominated and elected on a non-partisan ballot by the city at large for a four yearcterm, such terms to be so arranged that changes in personnel would not handicap efficient administration and legislation by a complete lack of experience;
(5) A board of estimate or control vested with absolute power over salaries and wages of all appointive officers not included in the civil service, and concurrent power with the council over appropiations and loans, such body to consist of the mayor, the chairman of the council, and the fiscal officer.

Such a plan would provide municipal government by a limited council, and an unhampered, responsible executive.

With the power to appoint and remove the heads of all administrative departments, except finance and law, the mayor under the proposed plan would be absolutely responsible for the administration of all the city's business, except that under the jurisdiction of the fiscal officer, and the city attorney. He alone would be answerable to the people for giving to them a dollar's worth of service for every dollar they paid in taxes. Policy-executing power and responsibility would be centralized.

Experience has emphasized the need for vesting the power of veto in the head of the government. It is a safe and sure check against

hasty or ill-advised action by the policy-making body and gives the opportunity for as complete deliberation as the needs demand. It is an effective agent for city administrations to use in correctly interpreting the will of the people, whenever doubt exists. A two-thirds vote of the council should be required to overrule the veto of the mayor.

There should be a council of seven members elected at large. Each councilman would represent the whole city in determining its municipal policies. If the council were composed of seven persons each elector would have seven representatives in the legislative body, whereas under the plan whereby members of the council are elected by districts, each elector is represented only by the councilman elected by his district. The council should be only the policy-determining body of the city and it should be deprived of all administrative powers. It has been said that a council stripped of all powers except legislative would have little to do. If it does its work as thoroughly as the needs of the modern city demand, not only will its members have all they can do, but they will also have to use judgment, forethought, and wisdom.

The matters over which the council has jurisdiction are the most important of all, and are sufficient in number and difficulty to occupy all the time and attention its members can give. If the election and tenu of each councilman are arranged so as to guarrantee the shortest possible ballot and to prevent the possibility of a violent change of policy following an election, the people would be aided in making a better selection of their public servants, than if they had to select a large number at one time, and municipal policies and affairs would in a measure be stabilized. Such a plan would also assist in developing and better insure the carrying out of definite and progressive city policies.

The chief fiscal officer, who would be known as controller or auditor, should be elcted by the people so as to serve as a check on the mayor and council. In addition to being the collecting and disbursing officer, it has been found advisable to give to the fiscal officer the power of audit. As a safeguard the counter-signature of the mayor or some other elective officer or his representative, should be required on all warrants issued by the chief fiscal officer, when he collects and disburses public funds. An elected fiscal officer with the power of audit would be an effective check on all administrative departments, bureaus and officials under the jurisdiction of the mayor. He would also be in position to give an independant opinion either to the public or to the policy-determining body of the city on all policies affecting city finances.

The duty of the city attorney is to give legal advice to every department and offical of the city government on municipal matters. He also must act as the representative of the various departments before the courts. He should occupy an independant position so that his opinions would not be influenced by any appointive power. For this reason he should be elected by the people. If elected, the city attorney is in a position of complete independance and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.

The proposed board of estimate or control should be composed of the heads of the three main divisions of the city government, all of

whom would be elective officials. By placing in such a body absolute power to fix salaries and wages of all appointive officials and employees not in civil service, favoratism would be reduced to a minimum in determining the compensation of individuals and groups. To the powers and responsibilities of such a body would be added the authority to approve loans, and to prepare the annual budget, which after adoption should be presented to the council for its consideration.

The power in the legislative body should be limited to a reduction of any item in the budget, except those for salaries and fixed charges, which cannot be altered. The council should not be allowed to add any item or increase any appropiation. The board and council should have concurrent powers over loans.

The budget is the most important annual document prepared by a city administration. It is the sailing chart and a document of public information. It should be an adequate means of planning and control of public information. Because of its importance both to the administration and to the public, it must be prepared with great care, and in the first instance by a body whose members have a broad understanding of all the cities needs, can consider all the controlling factors together and can determine without bias the proportionate emphasis to be placed upon the various services under the then existing conditions. Such a body as is proposed possesses all of these qualifications.

There should not be more than six or seven main administrative departments for the city of San Diego. These should be:

(1) A department of safety, including the police, fire, and building inspection departments;
(2) A department of public works, including streets, sewers, refuse collection and disposal, and building construction and maintenance;
(3) A department of welfare, including health, parks, playgrounds;
(4) A department of water;
(5) A department of finance, and,
(6) A department of law.

The heads of these departments, excepting the fiscal officer and the city attorney who would be elective, would hold office at the pleasure of the mayor. These department heads would constitute a sort of mayor's "cabinet". They could meet as a group with the mayor as often as the business of the city required, and unofficially discuss the business of the city.

This proposed plan contains nothing experimental or theoretical. It provides for the short ballot, non-partisan primaries and elections, concentration of power and responsibility for legislative and executive work, separately, in officials directly accountable to the community as a whole. It supplies a check against extravagent appropiations and loans, and provides for the selection of trained officials and experts by appointment. Its governmental structure is simple and its departmental organization may easily be made to fit the needs of the city of San Diego.

It would eliminate a present local serious situation because it would not require municipal democracy to try to function through a complicated organization, such as we now have.

Exhibit 19

8 2 X 14
Cate. DS

JAMES G. PFANSTIEL
ATTORNEY AT LAW — caps
UNITED STATES NATIONAL BANK BUILDING — caps.
SAN DIEGO, CALIFORNIA — caps.

September 12, 1930

Mr. Nicholas J. Martin,
San Diego,
California.

Dear Mr. Martin:

In accordance with your request I take pleasure in enumerating below the various objections and criticisms to our former proposed charter that came to my attention during the campaign for its adoption and during my work on the Citizens' Committee subsequent to the election.

ARTICLE ONE, SECTION ONE. - Some attorneys raised the question as to whether or not the corporate powers set forth were broad enough to include the operation of utilities, especially the Water Department. The powers should not be limited to municipal functions, but should include proprietary functions.

ARTICLE ONE, SECTION THREE. - Union labor argued that the provision embodied in this section to the effect that all general laws of the state were applicable which were not in conflict with the provisions of the charter or with the ordinances of the city would give the people of San Diego by charter or the Council by ordinance the power to abrogate so called humanitarian laws such as the eight hour law, minimum wage law, health and safety regulations, and other laws favorable to labor. This objection to the former charter was strenuously urged by labor speakers. The objection would be avoided by proper change and the same result obtained.

ARTICLE TWO, SECTION ONE. - The three district plan was never fully understood and met with unfriendly reception both through the charter campaign and with the Citizens' Committee subsequent thereto. I believe the outlying sections have now become largely reconciled to the fact that a seven or nine district plan is impractical, if not impossible, and would be satisfied with the circulation of petitions, nominations and elections at large.

ARTICLE TWO, SECTION FIVE. - The provision of this section to the effect that petitions for nominations shall be placed at sufficient convenient and central

public places determined by the Council and the City Clerk was very severely criticised. It would seem that to avoid criticism it would be wise to adopt the system that now prevails. There is some feeling that the number of signatures on a petition should be reduced from the present requirement. I believe the Citizens' Committee voted upon this point, and if so this information could be obtained from Mr. Bowman who wrote up the minutes.

ARTICLE TWO, SECTION SIX. - The City Clerk strongly urges that the regular primary election be held in March so that there will be four weeks intervening between the primary and the regular municipal election. Mr. Wright, the City Clerk, has very cogent argument in favor of this change.

ARTICLE THREE, SECTION ONE. - Union labor objects to the language of this section upon the same ground as Section Three of Article One. These folks contend that by making the laws of the State of California inoperative by order of Council, Council may have power to abrogate all laws favorable to labor.

ARTICLE THREE, SECTION TWO. - The Citizens' Charter Committee was of the opinion that seven councilmen would be sufficient in the event they were nominated and elected at large.

ARTICLE THREE, SECTION TWELVE. - With reference to the first portion of this section, it has been suggested by some and very favorably received that the heads of departments shall be appointed by the manager subject to confirmation by the Council. This point will arise later.

ARTICLE THREE, SECTION THIRTEEN. - The Initiative and Referendum and Recall provisions in this section were severely criticised. The first portion of this section provides that the initiative, referendum and recall are reserved to the people and shall be exercised in the manner provided by the Constitution and general laws of the State of California. Then following the procedure is outlined which is not like that embodied in the general laws. Clearly an ambiguity here exists. The provision in this section to the effect that petitions for initiative, referendum and recall shall be placed for signatures at sufficient convenience public places as determined by the Council and the City Clerk is obnoxious, and is open to criticism. Under the Council-Manager form of govern-

ment the Councilmen are the only officials subject to recall, and the charter gives them the power to provide for the obtaining of signatures to recall themselves. It would seem that to avoid criticism the wise thing to do would be to adopt the procedure already set up by the general laws which I believe is embodied in the present city charter. Some favor a smaller percentage than 25% of signatures for recall; others insist upon retaining this percentage.

ARTICLE FOUR, SECTION ONE. - During the charter campaign there were advocates of an elective mayor with veto power. I believe there are some proponents of this system now. The Citizens' Charter Committee, made up of proponents and opponents of the proposed charter, I believe unanimously voted in favor of the Council electing a mayor from its own body without veto power as embodied in this section.

ARTICLE FIVE, SECTION TWO. - It has been suggested by several friends of the Council-Manager plan that the six months' probation period before the Manager can be removed is unnecessary and open to criticism. The argument is that the responsibility is fixed solely and absolutely upon the Council which for the first six months is without power to discharge the Manager in case same may be necessary to carry out this responsibility. From a practical standpoint it would seem that this six months' period of probation is unnecessary.

Also the minimum salary of $10,000 per year for the Manager was criticised, and the Citizens' Committee voted to eliminate this minimum salary, leaving the salary in the hands of the Council.

ARTICLE FIVE, SECTION FOUR. - As before mentioned, it has been suggested that the Manager's appointment of department heads be confirmed by Council, this confirmation provision to be limited only to department heads, and leave the provision as it is with reference to discharge; that is, the Manager shall have the power to lay off, suspend or discharge as now provided. The purpose of this suggestion is to alleviate the fear of a good many people regarding the powers of the Manager and the possibility of his building up a political machine through his departmental heads. As I remember, the Citizens' Charter Committee voted in favor of this qualification.

ARTICLE FIVE, SECTION FIFTEEN. - Some advocated with considerable degree of force that the city attorney should be elected by the people. The argument is that the city attorney is the attorney for the entire city and each and every elective and appointive officer thereof upon all questions pertaining to the municipality, and he should occupy an independent position so that his opinions may be uninfluenced by any appointive power. It would seem that if the city attorney is elected by the people he should have the power to appoint his deputies without civil service regulations, subject, of course, to budget control.

ARTICLE FIVE, SECTION EIGHTEEN. - The first part of this section provides that at the head of each department there shall be a director or administrative commission. A great many advocate the abolition of all administrative commissions and make all commissions advisory only.

ARTICLE FIVE, SECTION TWENTY-SEVEN. - This section provides for a separate department known as the Water Department. While there seemed to be no criticism of this section in principle, some criticism was directed toward the provision requiring that "all funds collected for the department shall be deposited with the City Treasurer, and shall be used for water purposes exclusively." Certain people contended that this empowered the Council to use receipts from the Water Department to purchase new dam sites and construct dams without a vote of the people. Others argued from a legal standpoint that the receipts from the Water Department could not be used to retire water bonds. They contended that these bonds constitute a contract between the purchaser and the city, and that the mandate of the Constitution to the effect that the Council must levy sufficient taxes to pay all interest and sinking fund is violated by this provision of the charter. This is a legal question.

All the criticism that I encountered regarding this section was directed to these features I have pointed out and not to the principle which it contains.

ARTICLE FIVE, SECTIONS TWENTY-EIGHT and TWENTY-NINE.- As before pointed out, some criticise these administrative commissions and contend that they should be advisory.

ARTICLE FIVE, SECTION THIRTY-TWO. - The Fire Department severely criticised this section for the reason that it omitted certain important officials, failed to include platoon system, and provided for a superintendent of fire prevention which, it is claimed, is unknown in a city of this size. The Fire Department is rather jealous of its present set up, and naturally wants to know that the structure which it has built will be preserved in the charter. For this reason it would seem wise to preserve the present structure with, of course, general phrases providing for expansion or elimination as requirements may demand.

ARTICLE SEVEN, SECTION SEVEN. - This section should be considered in connection with the application of funds in the Water Department to the payment of water bonds. This section seems to make it mandatory that an appropriation shall be included in the annual appropriation ordinance sufficient to pay all interest and serial payment accruing upon the city debt for the fiscal year. Naturally, if receipts from the operation of departments are going to be used to apply upon city debt, the plan should be worked out so there would be no ambiguity or uncertainty in the charter.

ARTICLE SEVEN, SECTION NINE. - This section provides a general fund limit of ninety cents, and further provides for special funds to be raised by a rate fixed between a minimum and maximum set forth. I encountered strong opposition to any special funds. Many who have given this subject considerable thought believe that no department or activity should be operated by a special fund fixed and determined in the charter, for the reason that it is unscientific in principle and creates jealousy and discord with other departments of the city that must rely upon the general fund. It must be admitted that operating departments through special funds largely takes away the opportunity for economy through rigid budget control. Moreover, it impairs the coordinating of all the departments of the administrative service. Of course, others defend the special funds upon the ground of expediency and the fact they have been voted by the people and express the people's will.

ARTICLE EIGHT, SECTION FIFTEEN. - Of course, certain proponents of civil service criticised this provision which gives the Manager the last word in cases of lay off, suspension or removal. The criticism I encountered practically all emanated from the present civil service officials, and did not seem to be general.

ARTICLE EIGHT, SECTION TWENTY-SEVEN. - This section

was criticised, and properly so, because it does not expressly carry into the new government under the charter the employees of the Fire Department without civil service examination. While the heading of the section shows that to be the intent, the body of the section is confined to all persons now holding positions in the civil service of the city, and this does not include the Fire Department as this department is not under civil service at the present time.

It will be observed that the objections and criticisms which I have above pointed out, with only a few exceptions, do not get to the fundamental principles of the charter, but are detail in their nature. Of course, the Council-Manager plan itself was criticised, but I know you are as familiar with these objections and criticisms as I am.

In looking back over this letter I find I have injected into some of the paragraphs what seems to be my personal opinion, but I hope you will not feel that this is presumptuous upon my part, as it is my desire herein to simply state to you the criticisms and objections which I have encountered to the charter before proposed.

Yours very truly,

Jas G Ranstead Type the signature

JGP:M

ARTICLE THREE, SECTION TWO. - I overlooked a criticism to this section which was quite general, and that is the provision that "each Councilman shall receive as compensation $10.00 per meeting and not more than $600.00 in any fiscal year." During the charter campaign it was strongly urged that this provision would not secure the best material for the Council; that you get what you pay for in a Councilman the same as any other employee or official; and that it is unfair to ask any man capable of being a Councilman to give his time and attention for $600.00 a year. Of course, there is argument on both sides. I believe the Charter Committee was of the unanimous opinion that a fair salary somewhere in the neighborhood of $300.00 per month would be better than $600.00 per year. The theory upon which the $10.00 per diem salary is based is not understood by the people generally, and it is very questionable in my mind whether it is sound in principle.

Exhibit 20

CITY ATTORNEY TO BE ELECTIVE, BOARD DECIDES

Freeholders Also Put Police And Fire Chief Appointments Up to Manager.

The board of freeholders last night passed a motion that the city attorney shall be elected by the people under the provisions of the proposed new city charter.

Other motions passed were that the city manager shall appoint the chief of police and the chief of the fire department, both subject to confirmation by a majority of the council. It was provided, however, in an amendment to the motions that the city manager shall have power to remove the chief of police and the chief of the fire department without the approval of the council. Both motions were opposed by Ray Mathewson, Charles O. Richards and Nicholas J. Martin, chairman of the board.

Mathewson and Emil Klicka were named on a committee to prepare a draft of a paragraph embodying a provision that police and fire department training schools and merit systems shall be retained without interference. Fear that the provisions in the 1929 charter regarding the training school feature and the merit system might seriously affect those schools and systems, was said to be instrumental in defeating the 1929 charter. Richards pointed out that the firemen have a merit system that has functioned satisfactorily for 22 years and that some fear had been expressed that the civil service provisions might disturb the system.

The action of the board relative to the election by the people of the city attorney followed considerable discussion between the freeholders and local attorneys.

Sections of the 1929 charter that were adopted subject to only one or two minor changes are those concerning the department of public works, division of streets, division of sewers, division of refuse collection and disposal, division of building construction and maintenance, division of garage, division of pueblo lands and unimproved city property and the department of safety.

Consideration of the water and harbor departments was put over until the meeting tomorrow night.

Exhibit 21

NEW CHARTER FOR S. D. GETS ENDORSEMENT

Member Of 1929 Board Of Freeholders Approves City Proposal

Two more endorsements of the proposed new city charter were given today by James G. Pfanstiel, member of the 1929 Board of Freeholders, and Horace E. Rhoads.

"I have carefully studied the proposed charter for San Diego and heartily endorse it," Pfanstiel announced. "The freeholders have done an excellent job.

"The form of government the charter sets up is modern in every respect and is based upon sound business and governmental principles. The powers and duties of all officials are clearly defined and fixed.

"There is a definite and unified control running from the people down through every department of the government. The city government, under such a charter, will most readily respond to the will of the people, which in the last analysis is the purpose of government.

"If adopted, the charter will go a long way in correcting many of the evils now existing, most of which are the result of the kind of government we have rather than the men and women who administer it.

Rhoads announced he favored the proposed new charter "because it is a forward step in the economics of city government.

"It provides for closer and more intimate representation of the people through district councilmen. It sets up an efficient and more ideal form of administering San Diego's business affairs, through a modified form of city managership, without autocratic powers attached thereto.

"Under the proposed new charter, economies should be effected which will give us nearer 100 cents return on each tax dollar we spend. To the good features of the present charter are added those making for a more business-like government.

"Finally, the new charter still rests with the people, the power to govern themselves, through their elected councilmen, putting it squarely up to ourselves to secure good representatives in office. I am for its adoption April 7."

Exhibit 22

PEOPLE TAKE RULE INTO OWN HANDS AND SHOULD KEEP IT

(By A. R. SAUER)

In all my life I never was so happy as I was in preparing the extra edition of The Herald which announced the defeat of the freeholders' charter. I was happy not only because the charter had been defeated and the way paved for a new and better instrument, but because that defeat was the sign of a new era in civic affairs here—an era in which the voice of the people is going to be heard, with a consequent silence on the part of the high-hatted Charlie boys who have been making fools out of the rest of us since Father Horton staked out the town.

I love San Diego, and I have pr[illegible] that love in nearly a h[illegible]entury of endeavor for my city. Last election day saw that endeavor bear its greatest fruit—the awakening of the common people of San Diego to a realization of their importance and their power. One of the strangest things in the history of Southern California has been the fact that San Diego has permitted itself, almost without interruption, to be led around by the nose by a self-centered clique of bacterial growths whose only claim to fame was their overweening avariciousness. In every public movement which has arisen here, this bunch of nonpareils has seized control of the impelling factors, forced the Chamber of Commerce and the newspapers to do their bidding, and walked off [illegible] the spoils. As a conseq[illegible], we are overburdened with debt; our tax rate is a shameful thing, known the length and breadth of the land; our property owners face bankruptcy and our future is [illegible] than we really deserved. THIS SAME CROWD WAS THE CROWD WHICH DREW UP THE FREEHOLDERS' CHARTER.

The charter committee, as my readers will remember, was made up of practically the same outfits that handed us Hodges dam, that brought about the Sutherland fiasco—costing us millions of dollars—that has given us a bonded indebtedness of about $5,000,000 FOR WATER THAT HAS NOT TRICKLED TO US IN AS GREAT A QUANTITY AS ONE SINGLE DROP.

Who gave us Hodges dam—that white elephant which John Trainor got from the Santa Fe for $2,000,000 in bonds, which was a boost in price from $500,000, and which he and the bankers of the city again boosted to $3,750,000 because they had a sucker in the person of Miss San Diego to pay the price—a dam which is weak in the knees, liable to rupture, cracked in the dome and which is showing in its youth a general senility and debility which will only be cured when the structure floats on its sins down to the Pacific Ocean? Who gave us that dam?

The San Diego Sun, the Chamber of Commerce, Jack Thompson, Stanley Hale, J. Frank Cullen, Ed Head, Robert Hamilton, L. A. Wright, the San Diego Realty Board, the Merchants' Association, the Kiwanis Club, A. E. Holloway, John L. Fox and Julius Wangenheim.

Who gave us Sutherland dam—The greatest hoax ever perpetrated upon an unsuspecting people, a municipal crime which should have landed the criminals in little iron cells? Who tried to make us build a dam where a dam couldn't stand; who grabbed the money as it was poured out by a city [illegible] mittee, Jack Thompson, Stanley Hale, Fred Jewell, Jerry Sullivan, Herb Sullivan, W. E. Harper, J. Frank Sullen, Ed Fletcher and Dusty Rhoads.

Who put across—or tried to put across—the freeholders' charter? THE SAME BUNCH—ONE-THIRD OF THEM CROOKED, ONE-THIRD OF THEM INCOMPETENT AND ONE-THIRD OF THEM HONEST BUT MUZZLED. An examination of the list is simply a repetition of the same names with which we have been familiar—to our sorrow—a dozen times before. The only two lacking were those of JACK THOMPSON AND STANLEY HALE—ONE OF WHOM HAS LEFT TOWN AHEAD OF THE SHERIFF AND THE OTHER IS UNDER A FEDERAL INDICTMENT.

I have mentioned the Chamber of Commerce. The directors of the Chamber of Commerce have been, in the main, honest men. But they have been under a terrific handicap. Conscientious though they may be, they are under the thumbs of a few Fifth Avenue and Broadway pirates, most of whom are listed in the Bankers' Association and the Sciots. It is these organizations—with the Sciots now at the head of the class—which are kicking San Diego in the face for two good reasons according to their standards—because she is down and because she is their mother city.

The Sciots and the bankers clamp down on the directors of the Chamber of Commerce, and when the thievery begins the people damn the directors, when in truth they should damn the men in real control—the business men who are in San Diego to get on freeholders' committees, to grab as much as they can while the grabbing is good, and who hate the common people like the devil hates holy water. Page the Bankers' Association and the Sciots again.

What, then, has happened to San Diego has not been the fault of the Chamber of Commerce directors, nor of the nincompoops in the city council, nor of the flatheads we [illegible] the Sciots, the unchang[illegible] "citizens' committees," [illegible] handful of cooties who cont[illegible] the Chamber of Commerce [illegible] the weak weeklies which a[illegible] deceived by the propagand[illegible] handed them, and the eight[illegible] lipped pirates whose eyes are glued to the treasure chests.

The Herald was the ONLY newspaper in the city to fight the Hodges dam bonds and option. The Herald was the ONLY newspaper in the city to fight the Sutherland dam steal. I not only fought them—I gave definite reasons for every objection I raised—and every objection I made has been proved by the event. I did the same with the freeholders' charter.

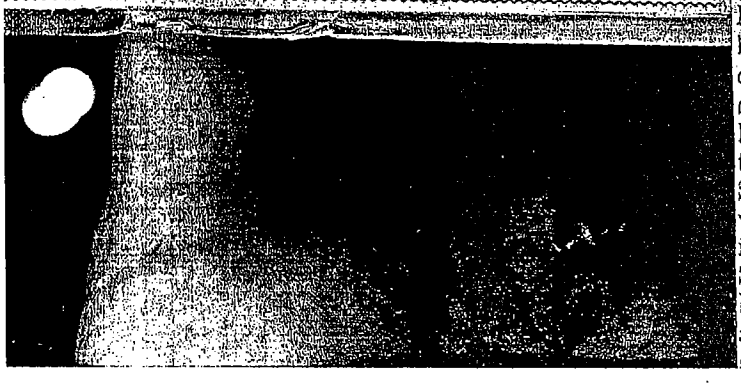
Now, here is the rub: IN THE FIGHT AGAINST THE FREEHOLDERS' CHARTER THE PEOPLE AT LAST HAVE SEEN THE LIGHT, AND WE MAY HOPE THAT THE INFAMOUS CLIQUE IS BROKEN FOR GOOD.

At last San Diego has united against the gang which has been in secret but unassailable control here, and, as I predicted, that unity resulted in a definite victory for the men and women who pay the bills. We have whipped them decisively, and we can whip them every time they raise their heads. We could have whipped them on the Hodges dam issue, and on Sutherland. We whipped them on the first Otay pipe line fight, and in the second election we got what we wanted.

We are now riding high. We must demand a charter committee which will work WITH the people and not AGAINST them. We want a charter committee which will begin its work by sitting back and doing only one thing—ASKING THE PEOPLE OF SAN DIEGO TO SEND THEM SUGGESTIONS. With these in hand, they can get down to business. They do not need lawyers on the committee—BUT THEY NEED ONE GOOD LAWYER TO GIVE AN O. K. TO THEIR WORK WHEN IT IS FINISHED. They need to incorporate in the charter WHAT THE PEOPLE WANT IN IT—and then

nose by a self-centered clique of bacterial growths whose only claim to fame was their overweening avariciousness. In every public movement which has arisen here, this [illegible] nonpareils has seized control of the impelling factors, forced the Chamber of Commerce and the newspapers to do their bidding, and walked off with the spoils. As a consequence, we are overburdened with debt; our tax rate is a shameful thing, known the length and breadth of the land; our property owners face bankruptcy and our future is as black as the facial lineaments of Harry C. Clark.

For 20 years the same congregation of hypocrites and shams, with a sprinkling of honest men who were decidedly uncomfortable until they were released from their duties to the city, have Mussoinied us into more trouble



that dam?

The San Diego Sun, the Chamber of Commerce, Jack Thompson, Stanley Hale, J. Frank Cullen, Ed Head, Robert Hamilton, L. A. Wright, the San Diego Realty Board, the Merchants' Association, the Kiwanis Club, A. E. Holloway, John L. Fox and Julius Wangenheim.

Who gave us Sutherland dam—The greatest hoax ever perpetrated upon an unsuspecting people, a municipal crime which should have landed the criminals in little iron cells? Who tried to make us build a dam where a dam couldn't stand; who grabbed the money as it was pored out by a city striving anxiously to complete an adequate water supply but doomed to be frustrated at every turn; who are sitting and watching now for another opportunity to rob us EVEN IF IN DOING SO THEY DESTROY THE CITY?

Sutherland dam was put across by the San Diego Sun, the Women's Republican Club, the citizens' campaign committee, [illegible] the directors of the Chamber of Commerce, and when the thievery begins the people damn the directors, when in truth they should damn the men in real control—the business men who are in San Diego to get on freeholders' committees, to grab as much as they can while the grabbing is good, and who hate the common people like the devil hates holy water. Page the Bankers' Association and the Sciots again.

What, then, has happened to San Diego has not been the fault of the Chamber of Commerce directors, nor of the nincompoops in the city council, nor of the flatheads we have had in the mayor's office. It has been the fault of a particular gang of hoodlums, two of whose number are now under a cloud and the rest of which will drift into the county jail singly and doubly as time lengthens its inexorable course and justice gets a final whack at them.

Deceived by these people, the city council, the mayor and the Chamber of Commerce have driven us from one debacle to another—each debacle costing us a couple of million dollars. In the background has been the San Diego Sun—the Scrub Lady of Seventh Street—with a bucket of dirty water in one hand and a mop in the other. The citizens of San Diego, therefore, have not been responsible for what they apparently have done. The responsible parties are the Sun [illegible]

We are now riding high. We must demand a charter committee which will work WITH the people and not AGAINST them. We want a charter committee which will begin its work by sitting back and doing only one thing—ASKING THE PEOPLE OF SAN DIEGO TO SEND THEM SUGGESTIONS. With these in hand, they can get down to business. They do not need lawyers on the committee—BUT THEY NEED ONE GOOD LAWYER TO GIVE AN O. K. TO THEIR WORK WHEN IT IS FINISHED. They need to incorporate in the charter WHAT THE PEOPLE WANT IN IT—and then they can rest assured that their charter will be accepted, that they will win instant and lasting commendation, and that they will accomplish something for the continuing good of the community.

The San Diego Sun, the Bankers' Association and the Sciots need not apply.

The San Diego Union, having acted pretty decently the last time, may sit in. The Union has been wrong steadily for 50 years, but when Col. Copley saw the truth in the charter fight, neither James MacMullen nor Ed Fletcher could swerve him from his determination to get on the right side for once. The Union was more than fair in the charter fight, and it may sit on the preparation of the new one.

And Mayor Clark can look at the pictures [illegible]

Exhibit 23

Plan for Progress

Give San Diego a Modern City Charter and Profit by Growth!

Functioning under a charter drawn in 1889—**more than 40 years old**—the City of San Diego today is greatly handicapped in present and future progress.

When the present city charter was adopted, San Diego had a population of about 15,000. **Today the City of San Diego numbers its residents at approximately 160,000.**

Progressive citizens, realizing this handicap, elected a Board of Freeholders who now offer San Diego a new Charter designed to promote the economic development of what promises to be "the nation's next great city."

--- San Diego Straight Ahead ---

The adoption of the Proposed Charter will provide San Diego with adequate and modern machinery **to permit acceptance of new opportunities in our rapidly-changing commercial and industrial conditions.**

The Board of Freeholders submits a most **efficient and economical machinery** in a charter that will promote the City's progress.

--- San Diego Straight Ahead ---

Consider the material presented in this pamphlet and you, Mr. and Mrs. Taxpayer, will realize that the **Proposed Charter** is offering San Diego a plan of operation **designed not only for today, but for many years to come.**

The facts presented must be **your guide at the polls on April 7th, with San Diego's future prosperity as the vital issue.**

--- San Diego Straight Ahead ---

The Proposed Charter Provides New Machinery for Needed Growth

Under our present 42-year-old City Charter, regardless of the personnel of our municipal offices, **the taxpayers' increasing business in our city cannot be handled to the best advantage.**

The proposed charter **centralizes responsibility, eliminates duplication, offers improved and efficient service and will annually save taxpayers hundreds of thousands of dollars!**

--- San Diego Straight Ahead ---

Every objectionable phase of the proposed charter rejected by the people in 1929 **has been eliminated from the present proposed charter.**

The new plan is one in which **every profit has been taken from past mistakes.**

--- San Diego Straight Ahead ---

San Diegans will have an opportunity on April 7th to demonstrate their appreciation for the months of unselfish and effective work of their elected Freeholders by voting YES on the Proposed City Charter.

--- San Diego Straight Ahead ---

Vote

April Seventh

To Keep San Diego Moving Straight Ahead!

25

Facts About the Proposed City Charter

HUGE ANNUAL SAVING

Local financial experts predict that the charter's business-like features, in the first year of its operation, will **cut at least five per cent from the present city budget of $5,000,000** without crippling any municipal department.

Such a reduction would amount to $250,000 and would be **equivalent to cutting the present city tax rate by about 17 cents.**

BUCK-PASSING ELIMINATED

The City Manager is given direct charge and supervision over administrative departments. Thus **entire responsibility for success of the City Government is placed directly on one man's shoulders.** This eliminates dodging issues and **"buck-passing."**

TAXPAYERS STILL IN CONTROL

The City Manager is to be appointed for an indefinite period, **a provision designed as a curb to unwarranted activities. His removal can be effected at any time the Council** (the elected representative body of the people) **sees fit.** He holds office only so long as he produces the goods.

WATER DEPARTMENT SELF-SUSTAINING

That equitable rates can be charged consumers and that taxpayers can obtain accurate development and operating costs, **a Water Development Department is created.**

A sliding scale of rates is provided, but Section 53 stipulates that after all operating costs have been charged off **surplus water revenues shall be applied on bond and interest charges.**

PROTECTION FOR EMPLOYEES

Section 129 provides that any employee in classified service who is "laid off, suspended or removed for cause by the appointed authority" shall have the **right of a public trial** and that the decision of the Civil Service Commission, in any case, shall be final.

PADDED PAYROLLS IMPOSSIBLE

In addition to having supervision of all budget estimates and expenditures, **the budget officer is given power to investigate and report on conditions and operations in all municipal departments.**

THOUSANDS SAVED--MATTOON ACT OUT

Section 79 provides that when outside attorneys or engineers prepare street proceedings, a sum sufficient to cover such work shall be deposited with the City Clerk, and **in no case shall the city be liable for costs and fees of outside engineers and attorneys who promote work.**

SPECIAL FUNDS ELIMINATED

All commissions are advisory and **actual administration and budget spending of these units are in control of the Manager, Council and Budget Officer.** This does not apply to Harbor Department, for which special provision is made.

EQUITABLE REPRESENTATION

Six clearly-defined municipal districts are prescribed, from each of which one Councilman is elected. **To prevent ward-system of government,** two candidates for Councilman will be nominated from each district, one of whom is elected at large.

INDEPENDENT CITY ATTORNEY

The city attorney is to be elected by the people. This is **a guarantee that the legal head of the government will be able to fearlessly protect interests of all San Diego and not merely be an attorney appointed to carry out wishes of council or manager.**

LOCAL LABOR AND INDUSTRY FAVORED

Section 95 provides that all products and materials used and employed in municipal contracts and work **shall be purchased from San Diego merchants** and that **all labor shall be performed by citizens** of the municipality.

Prepare San Diego to Accept Opportunities!

Exhibit 24

AGREEMENT ~~for~~ RETIREMENT SYSTEM LEGAL SERVICES

THIS ~~AGREEMENT for legal services for the Board of Administration~~ ("Board") for the San Diego City Employees' Retirement System dated April 9, 1997, is made by and between the CITY ATTORNEY and the BOARD OF ADMINISTRATION.

RECITALS

A. Pursuant to section 40 of The Charter For The City of San Diego ("Charter section 40"), the City Attorney is the attorney for the City and the Board.

B. Pursuant to Charter section 144, the Board is an independent entity empowered to manage the Retirement System, invest its trust fund and administer the benefits set forth in the Charter and the San Diego Municipal Code.

C. In fulfilling its Charter-mandated responsibilities, the Board is uniquely situated. Pursuant to Charter section 144, it has the power to appoint employees as necessary to assist it with its responsibilities. In addition, and unlike any other City Department, Board or Commission, it has the power to sue and be sued, in its own name.

D. This unique fact raises ethical considerations for the City Attorney when the interests of either the City or the Board are not in harmony with each other. This can happen in a variety of recurring situations involving funding issues, contribution rates and benefit determinations.

E. In these situations, the City Attorney cannot choose which client to represent. Under cannons of ethics, the City Attorney may not represent either. Two sets of outside counsel are required. This is both expensive and unnecessary.

Ex 6. A's NOL 15 Jan 2004

F. Proposition 162, a ballot initiative titled the California Pension Protection Act of 1992, amended the California State Constitution, Article XVI, Section 17, to permit boards of public employee retirement systems sole and exclusive authority over investment decisions and administration of their systems. The independence of legal representation for boards of public retirement systems is a necessary component.

G. Charter section 40 permits the City Attorney to enter into an agreement with the Board for the provision of separate legal services to the Board.

H. In recognition of the Charter-mandated duties and responsibilities of the City Council and the Board, the unique legal character of the Board, the ethical considerations and cost of outside counsel when the interests of the City and the Board are not in harmony, Proposition 162 and the latitude within Charter section 40 to provide separate legal services to the Board, the City Attorney and the Board have agreed to the creation of a Legal Services Division for the Board as described in this Agreement.

I. The City Attorney will continue to provide legal assistance to the Board for Domestic Relations Orders, disability retirement applications, disability-related litigation involving City employees as set forth in this Agreement, and any other areas identified by the Board and the City Attorney in the future. The City Attorney will be compensated for these services pursuant to a memorandum of understanding prepared on an annual basis.

J. This Agreement sets forth the terms, conditions duties and responsibilities for the Board's Legal Services Division and the City Attorney as they relate to the provision of legal services to the Board.

AGREEMENT

1. GENERAL. A separate Legal Services Division for the Board will be created. It will consist of the positions of General Counsel, Assistant General Counsel and Administrative Legal Secretary. The General Counsel position will be appointed by and serve at the pleasure of the Board. The General Counsel will appoint the remaining positions in the Legal Services Division, subject to the Board's approval.

2. SCOPE OF SERVICES. The Legal Services Division shall provide legal assistance to the Board to assist it with its Charter-mandated duties and responsibilities. This includes:

- General trust law, tax law, contract law, Political Reform Act and Proposition 162.
- Board operations, open meetings law, open records law, administrative law, Model Public Pension Fund Management Act and Robert's Rules of Order.
- Investments, funding issues, contribution issues, actuarial assumptions, specific investment vehicles, corporate governance and asset allocation.
- Benefit eligibility determinations.
- Personnel and other administration issues.

The City Attorney shall provide legal assistance to the Board, at Board expense, in the following areas:

- Domestic Relations Orders (DRO's) and related matters involving City of San Diego employees.
- Disability retirement applications involving City of San Diego employees.
- Litigation related to disability applications and appellate review.

- Any other areas identified by the Board and the City Attorney in the future.

3. COMPENSATION. The compensation for the positions within the Board's Legal Services Division shall be established by the Board. The salary ranges shall be set forth in the City's Salary Ordinance. The Board shall be responsible for all costs associated with these positions. The Board shall have the sole discretion to make changes in the compensation within the ranges set in the City's Salary Ordinance.

IN WITNESS WHEREOF, this Agreement for the provision of legal services to the Board is executed by the City Attorney and by Board of Administration, acting through its President.

Dated this 9th day of April, 1997.

CITY ATTORNEY

By _____
Casey Gwinn
City Attorney

BOARD OF ADMINISTRATION
San Diego City Employees' Retirement System

By _____
Keith Enerson
President

LEC:l
04/09/97
w:\atty\admin\lsd

Exhibit 25

MEMORANDUM OF UNDERSTANDING

This MEMORANDUM OF UNDERSTANDING for legal services is made and entered into this 25th day of August, 1995, by and between the Office of the City Attorney for The City of San Diego ("City Attorney") and the Board of Administration for the City Employees' Retirement System ("Board") upon the following terms and conditions.

RECITALS

1. The City Attorney provides legal services to the Board pursuant to the mandate of Section 40 of the San Diego City Charter; and

2. The City Attorney has assigned two Deputy City Attorneys, Loraine Etherington Chapin and Jennifer K. Hooper, to provide legal services to the Board; and

3. These Deputy City Attorneys currently maintain offices at both the City Attorney's office and the Retirement Office; and

4. Secretarial support for these deputies is currently maintained in the City Attorney's office; and

5. The Board has informed the City Attorney of its desire to have its legal counsel and secretarial support located on site at the Retirement office; and

6. The City Attorney has agreed to the Board's request on a one year trial basis, subject to certain terms and conditions set forth in this Memorandum of Understanding.

In consideration of the recitals of the parties as herein expressed, the City Attorney and the Board agree as follows:

15 Jan 2006 NOL & A

1. Deputy City Attorneys Loraine Etherington Chapin and Jennifer K. Hooper and legal secretary Merlita Hilario will continue to provide legal services to the Board consistent with past practice.

2. For a trial period of one year, they will be housed exclusively and entirely at the Retirement office. They will no longer maintain offices in the City Administration Building.

3. Although located in the Retirement office, they will remain on the payroll of the City Attorney's office and be subject to the City Attorney's supervision.

4. The City Attorney maintains the right to transfer or reassign staff under his supervision if the need arises. Such personnel actions, however, would not be made without consulting with the Board.

5. All Opinions, Memoranda of Law, Resolutions and Ordinances regarding the Board or the San Diego City Employees' Retirement System will be prepared and reviewed in accordance with the guidelines and procedures established by the City Attorney.

6. Salaries and promotions will be set by the City Attorney.

7. The Board will reimburse the City Attorney for the actual salaries and fringe benefits for Loraine Etherington Chapin, Jennifer K. Hooper and Merlita Hilario.

8. The Board will reimburse the City Attorney for the costs of computer assisted legal research for legal issues concerning

retirement matters.

This **MEMORANDUM OF UNDERSTANDING** is executed by The City Attorney and the Board of Administration, acting through its President this 25 day of August, 1995.

THE CITY ATTORNEY

By _____
John W. Witt
City Attorney

THE BOARD OF ADMINISTRATION

By _____
Keith W. Enerson
President

LEC:mrh
08/15/95

Exhibit 26

EVIDENCE CODE SECTION 1220-1228.1

1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

1221. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.

1222. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and

(b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

1223. Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

(a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;

(b) The statement was made prior to or during the time that the party was participating in that conspiracy; and

(c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

1224. When the liability obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is as admissible against the party as it would be if offered against the declarant in an action involving that liability, obligation, duty, or breach of duty.

1225. When a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest exists or existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is as admissible against the party as it would be if offered against the declarant in an action involving that right,

title, or interest.

1226. Evidence of a statement by a minor child is not made inadmissible by the hearsay rule if offered against the plaintiff in an action brought under Section 376 of the Code of Civil Procedure for injury to such minor child.

1227. Evidence of a statement by the deceased is not made inadmissible by the hearsay rule if offered against the plaintiff in an action for wrongful death brought under Section 377 of the Code of Civil Procedure.

1228. Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

(a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.

(b) The statement describes the minor child as a victim of sexual abuse.

(c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.

(d) There are no circumstances, such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.

(e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.

(f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness pursuant to this section, the prosecution shall serve a written notice upon the defendant at least 10 days prior to the hearing or trial at which the prosecution intends to offer the statement.

If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

1228.1. (a) Except as provided in subdivision (b), neither the signature of any parent or legal guardian on a child welfare services case plan nor the acceptance of any services prescribed in the child welfare services case plan by any parent or legal guardian shall constitute an admission of guilt or be used as evidence against the parent or legal guardian in a court of law.

(b) A parent's or guardian's failure to cooperate, except for good cause, in the provision of services specified in the child welfare services case plan may be used as evidence, if relevant, in any hearing held pursuant to Section 366.21, 366.22, or 388 of the

Welfare and Institutions Code and at any jurisdictional or dispositional hearing held on a petition filed pursuant to Section 300, 342, or 387 of the Welfare and Institutions Code.

Exhibit 27

only for the purpose of administering the System. It is a misdemeanor for any Board or System staff member to divulge this information to any person not authorized by this section to receive it.
("Confidentiality of Member Records" repealed; "Confidentiality of Member Records" added 4–2–2002 by O–19043 N.S.)

§24.0910 Legal Advisor to Board of Administration

Unless otherwise provided by Memorandum of Understanding between the City Attorney and the Board of Administration, the City Attorney will designate one or more Assistant or Deputy City Attorneys to advise and represent the Board in the administration of the System.
("Legal Advisor to Board of Administration" repealed; "Legal Advisor to Board of Administration" added 4-2-2002 by O-19043 N.S.)

§ 24.0911 Annual Report

(a) The Retirement Board shall prepare an Annual Report at the end of each fiscal year to provide information to all Members concerning the System. Copies of the Annual Report shall be distributed to all Members. The Retirement Administrator shall keep a copy of the Annual Report in his or her office.

(b) The President of the Retirement Board shall provide the Annual Report to the City Manager and the City Council, shall inform the City Manager and the City Council semi-annually of the funding status of the pension system, the impact of any demographic or actuarial issues, and any other changes affecting the benefits or funding of the Retirement System that have occurred since the date of the previous semi-annual report pursuant to this section.

(c) The President of the Retirement Board and the Retirement Administrator shall promptly inform the City Manager and the City Council of all material facts or significant developments relating to all matters under the jurisdiction of the Board, except as may be otherwise controlled by the laws and regulations of the United States or the State of California.

(d) The President of the Retirement Board, the Retirement Administrator, and all officers and employees of the Retirement System shall comply promptly with all lawful requests for information by the City Council, the City Manager, the City Attorney, or their designees.

("Annual Report" added 4-2-2002 by O-19043 N.S.)
(Amended 10-11-2004 by O-19320 N.S.)

Exhibit 28

SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM

RULES OF THE RETIREMENT BOARD OF ADMINISTRATION

Rule 2.01 Duties of the President

The President:

(a) presides at all Board meetings;

(b) appoints the Vice President of the Board;

(c) appoints the members of all of the Board's standing committees;

(d) is a member of all Board committees;

(e) sets the agenda for all Board meetings, with advice from the Retirement Administrator and the Executive Committee;

(f) signs agreements on the Board's behalf, consistent with the Board's current resolution designating the authorized signatories for executing contracts, agreements and financial documents; and

(g) performs other duties as directed by the Board.

Amended December 14, 2001

Rule 2.02 Duties of the Vice President

The Vice President:

(a) assumes and discharges the President's duties when the President is absent or otherwise unable to perform them, or when directed by the President;

(b) is the chairperson of the Rules Committee, and,

(c) performs other duties as directed by the Board.

Amended December 14, 2001

Rule 2.10 Secretary

The Board shall appoint a secretary for an indefinite term and the secretary shall serve until his or her successor has been appointed. The Retirement Administrator, or any other employee appointed by the Board under the provisions of Article VIII of the City Charter, may be appointed and may serve as secretary to the Board.

Adopted July 22, 1994

Exhibit 29

FILED
JAN - 6 2005
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

January 2004 Grand Jury

UNITED STATES OF AMERICA, Plaintiff, v. RONALD SAATHOFF (1), CATHY LEXIN (2), TERESA WEBSTER (3), LAWRENCE GRISSOM (4), LORAINE CHAPIN (5), Defendants.	Criminal Case No. 06CR0043-BEN I N D I C T M E N T Title 18, U.S.C., Sec. 371 - Conspiracy to Commit Wire and Mail Fraud; Title 18, U.S.C., Secs. 1343 and 1346 - Wire Fraud; Title 18, U.S.C., Secs. 1341 and 1346 - Mail Fraud; Title 18, U.S.C., Sec. 2 - Aiding and Abetting

The grand jury charges:

INTRODUCTORY ALLEGATIONS

At all times relevant to this Indictment:

The San Diego City Employees' Retirement System

1. The San Diego City Employees' Retirement System (hereinafter "SDCERS") administered the funds used to provide retirement, health insurance, disability and death benefits to current, former, and retired city employees and their beneficiaries. The City of San Diego (hereinafter "the City") was SDCERS' plan sponsor. As the plan sponsor, the City was responsible for providing SDCERS with sufficient

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funds to pay for the retirement, health insurance, disability, and death benefits to current, former, and retired city employees and their beneficiaries.

2. With the assistance of an outside actuary, SDCERS determined how much the City needed to pay each year to ensure that SDCERS had sufficient funds to pay for the retirement, health insurance, disability, and death benefits of the City's current, former, and retired employees. The outside actuary also calculated SDCERS' funding ratio on an annual basis. SDCERS' funding ratio was the ratio between its assets and liabilities. A funding ratio of less than 100% meant that SDCERS did not have sufficient assets to cover its liabilities.

3. Until its reorganization in April 2005, a Board of Administration (hereinafter "SDCERS Board") with 13 trustees governed the administration ~~of~~ SDCERS' funds. The SDCERS Board included four trustees appointed by the City Council, three city officials serving as ex-officio trustees, one trustee elected by city firefighters, one trustee elected by city police officers, three trustees elected by city general employees, and one trustee elected by retired city employees. The SDCERS Board had to approve by majority vote any city proposal that would change the City's contribution requirements to SDCERS.

4. Each trustee of the SDCERS Board had a fiduciary duty to the Board and public. The primary fiduciary duty of the SDCERS Board was to ensure that SDCERS had sufficient funds to pay for the retirement, health insurance, disability, and death benefits of the City's current, former, and retired employees. This fiduciary duty required each SDCERS Board Trustee to disclose all material information to

their fellow SDCERS Board Trustees, including all information about proposals that could affect the funding of SDCERS and all information about whether an SDCERS Board decision could impact the financial interests of an SDCERS Board Trustee.

5. Consistent with this fiduciary duty, the SDCERS Board enacted its "Rules of the Retirement Board of Administration." According to these Rules, each SDCERS Board Trustee had a fiduciary duty to "avoid any activity which may be interpreted as a conflict of interest," to "conduct all SDCERS business responsibilities in a fair manner and be honest in all business negotiations," and to "communicate to an appropriate Board or staff member information on actions that may be violations of the law, [the Rules of the Retirement Board of Administration], or actions which may be conflicts of interest." The Rules of the Retirement Board of Administration also prohibited each SDCERS Board Trustee from "directly or indirectly seek[ing] or accept[ing] gifts, money or property that would influence or appear to influence the conduct of his or her duties" and from "knowingly engag[ing] in any serial, rotating, or seriatim meeting through which a quorum of the Board becomes involved in the acquisition of information or deliberation of any issue, unless the notice and public access provisions of the open meeting laws are satisfied."

6. Defendant RONALD SAATHOFF (hereinafter "defendant SAATHOFF") was an SDCERS Board Trustee from the 1980s until 2005 as the firefighters' representative, and was subject to the fiduciary duties described above. Defendant SAATHOFF also was president of Local 145, the firefighters' labor union, and was the lead negotiator for Local 145 during the 2002 labor negotiations with the City.

7. Defendant CATHY LEXIN (hereinafter "defendant LEXIN") was an ex-officio SDCERS Board Trustee from 2001 until 2004, and was subject to the fiduciary duties described above. Defendant LEXIN also was the City's Human Resources Director, and was the City's lead labor negotiator with Local 145 and defendant SAATHOFF during the 2002 labor negotiations.

8. Defendant TERESA WEBSTER (hereinafter "defendant WEBSTER") was an ex-officio SDCERS Board Trustee from 1995 until 2005, and was subject to the fiduciary duties described above. Defendant WEBSTER also was the City's Assistant Auditor and Comptroller, and later became the City's acting Auditor and Comptroller.

9. The Administration Division of SDCERS managed the daily affairs of SDCERS and directly interacted with the SDCERS Board. Defendant LAWRENCE GRISSOM (hereinafter "defendant GRISSOM") was the Administrator of SDCERS and in charge of its Administration Division from 1987 until 2005. According to the Rules of the Retirement Board of Administration, defendant GRISSOM was to "be solely responsible to the Board." As the Administrator of SDCERS, defendant GRISSOM had the duty to keep the SDCERS Board fully informed of all material information, including information about proposals that could affect the funding of SDCERS and information about whether an SDCERS Board decision could impact the financial interests of an SDCERS Board Trustee.

10. The Legal Services Division of SDCERS had the duty to provide legal advice and assistance to the SDCERS Board. Defendant LORAINE CHAPIN (hereinafter "defendant CHAPIN") was the General Counsel of SDCERS and in charge of its Legal Services Division from 1997 until 2006. As the General Counsel of SDCERS, defendant CHAPIN

had the duty to keep the SDCERS Board fully informed of all material information, including information about (a) proposals that could affect the funding of SDCERS, (b) SDCERS Board decisions that could impact the financial interests of an SDCERS Board Trustee, (c) whether SDCERS Board Trustees and staff were complying with state and federal laws, and (d) whether an SDCERS Board Trustee had a conflict of interest.

Manager's Proposals 1 and 2, and the 2002 Labor Negotiations

11. In 1996, the City and the SDCERS Board entered into an agreement called "Manager's Proposal 1" (hereinafter "MP1"). Under MP1, the SDCERS Board agreed to permit the City to pay less than the actuarially recommended amount of money necessary to ensure a funding ratio of 100%. If the funding ratio fell below 82.3%, then a "trigger" would be hit, and the City would be required to pay to SDCERS an imminent multi-million dollar balloon payment. Under one interpretation of MP1, the City would have been required to restore the funding ratio to 82.3%, requiring the City to pay approximately $25 million for each percentage point that the funding ratio fell below 82.3%. If the funding ratio fell below 78%, the City would have faced a balloon payment of more than $100 million.

12. In 2002, the City was scheduled to negotiate city employee benefits with four labor unions: Local 145 (the firefighters' union), the Police Officers' Association, Local 127 (blue collar city employees), and the Municipal Employees Association (white collar city employees). The blue collar city employees and white collar city employees were commonly called the "general members." These labor negotiations were commonly called "meet and confer." The four labor unions wanted increased retirement benefits. The general members'

labor negotiators wanted the City to increase the general members' retirement multiplier from 2.25% to 2.5%. This increase from 2.25% to 2.5% would have raised the yearly retirement for defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN by thousands of dollars each year.

13. An issue in the Local 145 negotiations was whether the firefighters would receive certain benefits, including whether defendant SAATHOFF would receive the "presidential leave retirement benefit." The presidential leave retirement benefit would permit defendant SAATHOFF to base his retirement calculation on the combination of his fire captain salary and his union president salary. Without the presidential leave retirement benefit, defendant SAATHOFF's retirement benefit would have been based solely on his fire captain's salary. With the presidential leave retirement benefit, defendant SAATHOFF's retirement would have increased by more than $25,000 per year.

14. In 2002, the City and some of the labor unions reached tentative labor agreements to grant numerous retirement benefit increases to some of the labor unions, including increasing the general members' retirement benefit multiplier from 2.25% to 2.5% and giving defendant SAATHOFF the presidential leave retirement benefit. If enacted, these increased benefits would have raised the retirement benefits for defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN. The tentative increased retirement benefits were made "contingent" on the SDCERS Board agreeing to modify MP1 so the City would avoid making the imminent required multi-million dollar balloon payment if SDCERS' funding ratio fell below 82.3%. If the SDCERS Board did not agree to modify MP1, then the City would not be required to implement the increased retirement benefits, including the 2.25% to 2.5% increase

and the presidential leave retirement benefit. If MP1 had remained unchanged, defendant SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN would have lost thousands of dollars each year in increased retirement benefits. The proposal to modify MP1 and to make increased retirement benefits contingent upon that modification became known as "Manager's Proposal 2" (hereinafter "MP2").

15. In 2002, the City presented the SDCERS Board with multiple versions of MP2, each of which would have modified MP1's trigger so the City would only have paid the "full actuarial rate" (estimated at a total of between $25 and $40 million) phased in over a series of years if the funding ratio fell below the trigger, rather than the imminent multi-million dollar balloon payment that could have exceeded $100 million if MP1 remained unmodified. In these versions of MP2, the City also proposed lowering the MP1 trigger from 82.3% to 75%.

16. On or about Friday, June 21, 2002, the SDCERS Board met and reviewed a version of MP2. Defendant GRISSOM told the SDCERS Board that the recently negotiated retirement benefits were contingent upon the SDCERS Board agreeing to adopt MP2. At this meeting, the City Manager's Office proposed reducing the MP1 trigger from 82.3% to 75%. At this meeting, defendant SAATHOFF reviewed the text of MP1 and stated that MP1 "could be very easily interpreted" to require the City to pay SDCERS the funds necessary to restore SDCERS' funding ratio to 82.3% if the funding ratio fell below 82.3%. Under this interpretation of MP1, the City would be required to make an imminent balloon payment, possibly exceeding $100 million, if the trigger were hit. After extensive discussion, the SDCERS Board did not reach a decision on the City's proposal, and agreed to revisit the issue in July 2002.

17. On or about Monday, June 24, 2002, defendant SAATHOFF met with defendant GRISSOM for several hours and discussed the status of his presidential leave retirement benefit. After the meeting, defendant GRISSOM sent an e-mail to defendant LEXIN, and asked about the status of the presidential leave retirement benefit. In response, defendant LEXIN sent an e-mail to defendant GRISSOM: "we agreed to 'presidential leave' subject to attorneys working out the bugs, Ron knows (as recently as discussions today) that the attorneys and auditors are working with Dan on language . . . not yet in place. . . . TELL RON TO COOL HIS JETS."

18. On or about July 1, 2002, defendant LEXIN drafted a memorandum for the SDCERS Board about MP2 which she shared with defendants WEBSTER and GRISSOM, and others. The memorandum, written in the name of a Deputy City Manager, stated that the recently negotiated retirement benefits were "contingent" upon the SDCERS Board's modification of MP1 and its trigger. After receiving edits and suggestions from defendants WEBSTER and GRISSOM, and others, defendant LEXIN caused the memorandum to be sent by e-mail to the SDCERS Board on or about July 8, 2002.

19. On or about July 9, 2002, defendant LEXIN briefed the City Council in a closed session meeting. Defendant LEXIN informed the City Council that the SDCERS Board might not adopt MP2 with a 75% trigger. She also informed the City Council that, according to defendant GRISSOM, an SDCERS Board Trustee would be making a motion on July 11, 2002, to maintain the trigger at 82.3%, but "phase-in" the "full actuarial rates" over a series of years. Under the 82.3% "phase-in" proposal, "the practical impact on the City would be no different than the previously authorized" 75% MP2 proposal. Based on

defendant LEXIN's recommendation, the City Council agreed to accept the 82.3% "phase-in" MP2 proposal, but only as a "backup" if the SDCERS Board refused to adopt the 75% MP2.

20. On or about July 11, 2002, the SDCERS Board met again to consider MP2. Defendant GRISSOM reminded the SDCERS Board that the recently negotiated benefit enhancements were contingent on the SDCERS Board agreeing to modify MP1. At the meeting, the City Manager's Office continued to propose a version of MP2 which would reduce the trigger from 82.3% to 75%. After extensive discussion about the 75% MP2 proposal, defendant SAATHOFF made a motion to "amend" the City's MP2 proposal (hereinafter "SAATHOFF's MP2 proposal"). Under defendant SAATHOFF's MP2 proposal, the 82.3% trigger would remain in place. However, if the funding ratio fell below 82.3%, the City's balloon payment would be phased in over a series of years, and would be limited to the "full actuarial rate," which was far less than the over $100 million payment that could have been required if MP1 remained unchanged. Defendant SAATHOFF's motion to amend MP2 was the motion that defendant LEXIN had described during the July 9, 2002 City Council closed session meeting. After limited discussion, the SDCERS Board voted 8-2, with one abstention and two members absent, to approve defendant SAATHOFF's MP2 proposal, subject to further review by SDCERS' outside fiduciary counsel and actuary.

21. Shortly after the July 11, 2002 vote, defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, took the steps to create the legislation and other documents necessary to implement defendant SAATHOFF's MP2 proposal and the contingent retirement benefits negotiated in 2002, including defendant SAATHOFF's presidential leave retirement benefit, which later became Resolution 297212.

22. On or about October 21, 2002, the City Council adopted Resolution 297212 on its consent agenda without public comment. Resolution 297212 gave defendant SAATHOFF the presidential leave retirement benefit.

23. On or about November 15, 2002, the SDCERS Board formally approved defendant SAATHOFF's MP2 proposal by a 10-2 vote. During the meeting, defendant SAATHOFF stated that his July 11, 2002 MP2 proposal was an "off-the-seat-of-the-pants" motion.

24. On or about November 18, 2002, the City Council heard public comment in favor of and against the ordinances necessary to put into effect defendant SAATHOFF's MP2 proposal, as well as the increased retirement benefits that were contingent on the SDCERS Board adopting MP2. After hearing the arguments of defendants SAATHOFF and LEXIN, and others, the City Council approved the ordinances necessary to implement the retirement benefits contingent on defendant SAATHOFF's MP2 proposal.

Count 1

18 U.S.C. § 371

The Conspiracy

25. The allegations set forth in paragraphs 1 through 24 above are realleged as if fully set forth herein.

26. Beginning in or before January 2001, and continuing up to and including January 6, 2006, within the Southern District of California, and elsewhere, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN did knowingly conspire with each other and others known and unknown to the grand jury to commit offenses against the United States, that is, honest services mail and wire fraud, by conspiring and agreeing to devise a material scheme and artifice to

defraud and to deprive the SDCERS Board Trustees, members of SDCERS, and the citizens of the City of San Diego of their intangible right of honest services of their public officials to be performed free from corruption, fraud, undue influence, conflict of interest, and deceit, and, in executing said scheme, deposited and caused to be deposited matters and things to be sent and delivered by private and commercial interstate carriers, and caused matters and things to be delivered by the United States Postal Service and private and commercial interstate carriers according to the direction thereon, and caused writings, signs, signals, and sounds to be transmitted by means of wire in interstate commerce; in violation of Title 18, United States Code, Sections 1341, 1343, and 1346.

Manners And Means

27. In furtherance of this conspiracy, and to effect the objects thereof, the defendants utilized the following manners and means, among others:

a. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently devised a plan to modify MP1 and its trigger in sufficient time so the City would avoid making the imminent multi-million dollar balloon payment to SDCERS that MP1 required.

b. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently agreed to obtain the presidential leave retirement benefit for defendant SAATHOFF in exchange for his support of a proposal to modify MP1 so the City would avoid the imminent multi-million dollar balloon payment that it owed SDCERS under MP1.

c. Defendants SAATHOFF, LEXIN, and WEBSTER, and others, negotiated and agreed to accept increased retirement benefits,

including defendant SAATHOFF's requested presidential leave retirement benefit and the increase in the retirement multiplier from 2.25% to 2.5% for general members, in exchange for their support of a proposal to modify MP1 so the City would avoid the multi-million dollar balloon payment that it owed SDCERS under MP1.

d. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently concealed material information about the increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, from SDCERS Board Trustees, so that the other SDCERS Board Trustees would vote to approve the modification of MP1, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

e. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently concealed material information concerning MP2 and other proposals from SDCERS Board Trustees, so that the other SDCERS Board Trustees would vote to approve the modification of MP1, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

f. Defendants SAATHOFF, LEXIN, and GRISSOM, and others, fraudulently concealed from the SDCERS Board a prearranged plan for

defendant SAATHOFF to submit his MP2 proposal, which, if approved, guaranteed defendant SAATHOFF his presidential leave retirement benefit.

g. Defendants SAATHOFF, LEXIN, and WEBSTER, and others, fraudulently voted in favor of defendant SAATHOFF's MP2 proposal, and by concealing material information from the other SDCERS Board Trustees, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN deceived and fraudulently induced the other SDCERS Board Trustees to vote in favor of defendant SAATHOFF's MP2 proposal, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

h. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, drafted and assisted in the drafting of legislation implementing defendant SAATHOFF's MP2 proposal and the contingent retirement benefits negotiated in 2002, knowing that defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others had concealed material information from the SDCERS Board Trustees, including the nature and existence of the presidential leave retirement benefit.

i. Defendants SAATHOFF, GRISSOM, and CHAPIN, and others, fraudulently concealed from SDCERS Board Trustees material information concerning defendant SAATHOFF's purchase of service credits that enhanced defendant SAATHOFF's retirement benefits.

j. By deceiving the SDCERS Board Trustees and fraudulently concealing material information from SDCERS Board Trustees, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN caused significant harm to the financial integrity of SDCERS.

OVERT ACTS

28. In furtherance of said conspiracy and to effect and accomplish the objects thereof, the following overt acts, among others, were committed within the Southern District of California, and elsewhere:

a. On or about January 8, 2001, defendant SAATHOFF sent a letter to a city employee requesting that he receive the presidential leave retirement benefit "consistent with the current procedure followed by the P.O.A. and the M.E.A."

b. On ~~or~~ about September 18, 2001, defendant SAATHOFF told a city employee that, as part of the presidential leave retirement benefit, he wished to combine his city salary with his union president salary to increase his high one year retirement calculation from $80,881.16 to $114,964.66.

c. On or about October 11, 2001, defendant WEBSTER sent an e-mail to defendant LEXIN entitled "EEEK," expressing defendant WEBSTER's concerns about SDCERS' funding ratio and decreasing earnings.

d. On or about November 5, 2001, defendant WEBSTER sent an e-mail to a city labor negotiator discussing "Ron's Plan B" and that city labor negotiators should "keep the bargaining chip in your pocket."

e. On or about November 13, 2001, defendant LEXIN wrote a memorandum recommending that the presidential leave retirement benefit be discussed in the context of the 2002 labor negotiations with Local 145 and the other labor unions.

f. On or about January 3, 2002, defendant WEBSTER sent an e-mail to defendant LEXIN, and others, stating that the SDCERS fund earnings from November 2000 until November 2001 had decreased by 85%, and that "these are SERIOUS consequences and needs attention."

g. On or about February 27, 2002, defendant WEBSTER wrote an e-mail to defendant LEXIN, and others, stating: "OH BOY . . . . the CERS earnings for Jan is negative ($1.7) . . . we're moving in the wrong direction!"

h. On or about February 28, 2002, defendants LEXIN and WEBSTER, and others, discussed via e-mail a plan "to use Ron Saathoff to get" the SDCERS Board's "attention."

i. On or about March 7, 2002, defendant GRISSOM sent an e-mail to defendant WEBSTER stating that a reporter had inquired about the City underfunding SDCERS, and asked defendant WEBSTER "is there any 'party line' for me to communicate?"

j. On or about March 13, 2002, defendant WEBSTER sent an e-mail to defendants LEXIN and GRISSOM, and others, about the SDCERS funding ratio, and stated that: "This is a big and serious problem. . . . . especially since the $20m+ trigger is getting closer."

k. On or about April 15, 2002, defendant GRISSOM sent an e-mail to defendant WEBSTER estimating that the funding ratio would fall below the 82.3% MP1 trigger, and asked defendant WEBSTER to "[p]lease treat this as confidential for the moment . . . . . haven't shared with any of the other Board members - yet."

l. On or about April 17, 2002, defendant WEBSTER sent an e-mail to defendant LEXIN, and others, stating that if modifying the MP1 trigger were "tied to benefit increases I think it would pass."

m. On or about May 21, 2002, defendant WEBSTER sent an e-mail to a city employee stating: "The Local 145 write up you sent out did not state that their increased offset was contingent on the Board laxing the trigger. . . . . I thought ALL retirement improvements (including the preside[n]tial leave(?)) were contingent on the trigger. . . . especially need Ron behind releasing the trigger since he runs the show at CERS."

n. On or about June 14, 2002, defendant LEXIN wrote a memorandum stating that the retirement benefits negotiated during the 2002 labor negotiations were contingent upon the SDCERS Board approving a modification of MP1.

o. On or about June 21, 2002, defendant SAATHOFF told the SDCERS Board that MP1 "could be very easily interpreted" to require the City to pay SDCERS the

funds necessary to restore SDCERS' funding ratio to 82.3% if funding ratio fell below 82.3%.

p. On or about June 25, 2002, defendant LEXIN sent an e-mail to an SDCERS Board Trustee who did not attend the June 21, 2002 SDCERS Board meeting, stating that defendant LEXIN and others "REALLY do need you!" at the July 11, 2002 SDCERS Board meeting to vote on MP2.

q. On or about July 1, 2002, defendant LEXIN sent via e-mail a draft memorandum to defendant GRISSOM, which contained proposed answers to the questions of an SDCERS Board Trustee about MP2.

r. On or about July 2, 2002, defendant WEBSTER reviewed defendant LEXIN's July 1, 2002 draft memorandum, and sent an e-mail stating: "FYI Regarding cathy's letter my biggest suggestion to her ~~is~~ to eliminate any reference to fitch and rating agencies in #6. This letter will be seen by press and the city does not need to telegraph its pension problems to the rating agencies who don't research the topic to any great level now."

s. On or about July 8, 2002, defendant LEXIN wrote a memorandum urging the City Council to preapprove a motion to amend MP2 that an SDCERS Board Trustee would be making on July 11, 2002.

t. On or about July 11, 2002, defendant SAATHOFF made a motion before the SDCERS Board to amend the City's version of MP2.

u. On or about July 11, 2002, defendants SAATHOFF, LEXIN, and WEBSTER, and others, voted in favor of defendant SAATHOFF's MP2 proposal, and defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN did not disclose defendant SAATHOFF's presidential leave retirement benefit to the other SDCERS Board Trustees.

v. On or about July 18, 2002, defendants CHAPIN and GRISSOM, and others, met to discuss how to implement benefits conveyed under MP2, including the presidential leave retirement benefit.

w. On or about August 26, 2002, defendants LEXIN, CHAPIN, and GRISSOM, and others, met to discuss how to implement benefits conveyed under MP2, including the presidential leave retirement benefit.

x. On or about September 6, 2002, defendant CHAPIN sent an e-mail to defendants LEXIN, WEBSTER, and GRISSOM, and others, stating: "The Board has not reviewed the Presidential Leave issue and does not have to."

y. On or about November 5, 2002, defendant WEBSTER sent an e-mail to defendant LEXIN suggesting that they try to convince the SDCERS Board to reduce the MP1 82.3% trigger "BEFORE the actuary report comes out with the ratio news."

z. On or about November 15, 2002, defendants SAATHOFF and WEBSTER, and others, voted in favor of defendant SAATHOFF's MP2 proposal, and defendants SAATHOFF, WEBSTER, GRISSOM, CHAPIN, and others, did not disclose

defendant SAATHOFF's presidential leave retirement benefit to the other SDCERS Board Trustees.

aa. On or about November 18, 2002, defendants SAATHOFF and LEXIN, and others defended MP2 before the City Council.

bb. On or about December 6, 2002, defendant LEXIN, and others, drafted a letter that defended MP2 against allegations made publicly that MP2 was "corrupt."

cc. On or about December 20, 2002, defendant SAATHOFF told the SDCERS Board that under MP1, the City would not have been required to pay SDCERS the funds necessary to restore SDCERS' funding ratio to 82.3% if the funding ratio fell below 82.3%.

dd. On or about August 15, 2003, defendant SAATHOFF, during a SDCERS Board meeting, falsely denied that he had received increased benefits as a result of MP2.

All in violation of Title 18, United States Code, Section 371.

Counts 2 - 5

18 U.S.C. §§ 1343, 1346, and 2

Honest Services Wire Fraud

29. The allegations set forth in paragraphs 1 through 24 above are realleged as if fully set forth herein.

30. Beginning in or before January 2001, and continuing up to and including January 6, 2006, within the Southern District of California, and elsewhere, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN did knowingly devise and intend to devise a material scheme and artifice to defraud, to wit, to act with the intent to deprive the SDCERS Board Trustees, members of SDCERS, and

the citizens of the City of San Diego of their intangible right of honest services of their public officials to be performed free from corruption, fraud, undue influence, conflict of interest, and deceit.

The Scheme to Defraud

31. It was part of the scheme to defraud that defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, did, among other things, the following:

a. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently devised a plan to modify MP1 and its trigger in sufficient time so the City would avoid making the imminent multi-million dollar balloon payment to SDCERS that MP1 required.

b. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently agreed to obtain the presidential leave retirement benefit for defendant SAATHOFF in exchange for his support of a proposal to modify MP1 so the City would avoid the imminent multi-million dollar balloon payment that it owed SDCERS under MP1.

c. Defendants SAATHOFF, LEXIN, and WEBSTER, and others, negotiated and agreed to accept increased retirement benefits, including defendant SAATHOFF's requested presidential leave retirement benefit and the increase in the retirement multiplier from 2.25% to 2.5% for general members, in exchange for their support of a proposal to modify MP1 so the City would avoid the multi-million dollar balloon payment that it owed SDCERS under MP1.

d. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently concealed material information about the increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, from SDCERS Board Trustees, so

that the other SDCERS Board Trustees would vote to approve the modification of MP1, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

e. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently concealed material information concerning MP2 and other proposals from SDCERS Board Trustees, so that the other SDCERS Board Trustees would vote to approve the modification of MP1, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

f. Defendants SAATHOFF, LEXIN, and GRISSOM, and others, fraudulently concealed from the SDCERS Board a prearranged plan for defendant SAATHOFF to submit his MP2 proposal, which, if approved, guaranteed defendant SAATHOFF his presidential leave retirement benefit.

g. Defendants SAATHOFF, LEXIN, and WEBSTER, and others, fraudulently voted in favor of defendant SAATHOFF's MP2 proposal, and by concealing material information from the other SDCERS Board Trustees, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN deceived and fraudulently induced the other SDCERS Board Trustees to vote in favor of defendant SAATHOFF's MP2 proposal, which would allow

the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

h. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, drafted and assisted in the drafting of legislation implementing defendant SAATHOFF's MP2 proposal and the contingent retirement benefits negotiated in 2002, knowing that defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others had concealed material information from the SDCERS Board Trustees, including the nature and existence of the presidential leave retirement benefit.

i. Defendants SAATHOFF, GRISSOM, and CHAPIN, and others, fraudulently concealed from SDCERS Board Trustees material information concerning defendant SAATHOFF's purchase of service credits that enhanced defendant SAATHOFF's retirement benefits.

j. By deceiving the SDCERS Board Trustees and fraudulently concealing material information from SDCERS Board Trustees, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN caused significant harm to the financial integrity of SDCERS.

Execution Of The Scheme

32. On or about the dates set forth below, according to each count, within the Southern District of California, and elsewhere, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, for the purpose of executing the aforesaid material scheme to defraud, knowingly transmitted and caused to be transmitted by means of a wire

communication in interstate commerce, certain writings, signs, signals, and sounds, that is, e-mails, as alleged below:

COUNT	DATE	WIRE COMMUNICATION
2	6/19/2002	E-mail entitled "Fwd: Report," sent from an e-mail account located in San Diego, California, to an America Online e-mail account of an SDCERS Board Trustee, located in Dulles, Virginia
3	7/8/2002	E-mail entitled "City's Proposal re SDCERS," sent from an e-mail account located in San Diego, California, to an America Online e-mail account of an SDCERS Board Trustee, located in Dulles, Virginia
4	7/15/2002	E-mail entitled "Re: He's Baaack!," sent by defendant GRISSOM from an e-mail account located in San Diego, California, to an America Online e-mail account of an SDCERS Board Trustee, located in Dulles, Virginia
5	10/4/2002	E-mail entitled "Resolution for Incumbent Presidential Retirement Benefits," sent from an e-mail account located in San Diego, California, to an America Online e-mail account of defendant SAATHOFF, located in Dulles, Virginia

All in violation of Title 18, United States Code, Sections 1343, 1346 and 2.

Counts 6 - 20

18 U.S.C. §§ 1341, 1346, and 2

Honest Services Mail Fraud

33. The allegations set forth in paragraphs 1 through 24 above are realleged as if fully set forth herein.

34. Beginning in or before January 2001, and continuing up to and including January 6, 2006, within the Southern District of California, and elsewhere, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN did knowingly devise and intend to devise a material scheme and artifice to defraud, to wit, to act with the intent to deprive the SDCERS Board Trustees, members of SDCERS, and

the citizens of the City of San Diego of their intangible right of honest services of their public officials to be performed free from corruption, fraud, undue influence, conflict of interest, and deceit.

The Scheme to Defraud

35. It was part of the scheme to defraud that defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, did, among other things, the following:

a. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently devised a plan to modify MP1 and its trigger in sufficient time so the City would avoid making the imminent multi-million dollar balloon payment to SDCERS that MP1 required.

b. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently agreed to obtain the presidential leave retirement benefit for defendant SAATHOFF in exchange for his support of a proposal to modify MP1 so the City would avoid the imminent multi-million dollar balloon payment that it owed SDCERS under MP1.

c. Defendants SAATHOFF, LEXIN, and WEBSTER, and others, negotiated and agreed to accept increased retirement benefits, including defendant SAATHOFF's requested presidential leave retirement benefit and the increase in the retirement multiplier from 2.25% to 2.5% for general members, in exchange for their support of a proposal to modify MP1 so the City would avoid the multi-million dollar balloon payment that it owed SDCERS under MP1.

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d. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently concealed material information about the increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, from SDCERS Board Trustees, so that the other SDCERS Board Trustees would vote to approve the modification of MP1, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

e. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, fraudulently concealed material information concerning MP2 and other proposals from SDCERS Board Trustees, so that the other SDCERS Board Trustees would vote to approve the modification of MP1, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

f. Defendants SAATHOFF, LEXIN, and GRISSOM, and others, fraudulently concealed from the SDCERS Board a prearranged plan for defendant SAATHOFF to submit his MP2 proposal, which, if approved, guaranteed defendant SAATHOFF his presidential leave retirement benefit.

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g. Defendants SAATHOFF, LEXIN, and WEBSTER, and others, fraudulently voted in favor of defendant SAATHOFF's MP2 proposal, and by concealing material information from the other SDCERS Board Trustees, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN deceived and fraudulently induced the other SDCERS Board Trustees to vote in favor of defendant SAATHOFF's MP2 proposal, which would allow the City to avoid the imminent multi-million dollar balloon payment that it owed SDCERS, would allow the defendants and others to receive increased retirement benefits, including defendant SAATHOFF's presidential leave retirement benefit, and would allow defendants LEXIN, WEBSTER, GRISSOM, and CHAPIN to maintain their positions with the City and SDCERS.

h. Defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others, drafted and assisted in the drafting of legislation implementing defendant SAATHOFF's MP2 proposal and the contingent retirement benefits negotiated in 2002, knowing that defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, and others had concealed material information from the SDCERS Board Trustees, including the nature and existence of the presidential leave retirement benefit.

i. Defendants SAATHOFF, GRISSOM, and CHAPIN, and others, fraudulently concealed from SDCERS Board Trustees material information concerning defendant SAATHOFF's purchase of service credits that enhanced defendant SAATHOFF's retirement benefits.

j. By deceiving the SDCERS Board Trustees and fraudulently concealing material information from SDCERS Board Trustees, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN caused significant harm to the financial integrity of SDCERS.

Execution Of The Scheme

36. On or about the dates set forth below, according to each count, within the Southern District of California, and elsewhere, defendants SAATHOFF, LEXIN, WEBSTER, GRISSOM, and CHAPIN, for the purpose of executing the aforesaid material scheme to defraud, knowingly deposited and caused to be deposited matters and things to be sent and delivered by private and commercial interstate carriers, and caused matters and things to be delivered by the United States Postal Service and private and commercial interstate carriers according to the direction thereon as alleged below:

COUNT	DEFENDANTS	DATE	MAIL MATTER
6	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	6/13/2002	SDCERS Board Packet For June 21, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
7	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	6/13/2002	SDCERS Board Packet For June 21, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
8	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	6/13/2002	SDCERS Board Packet For June 21, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
9	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	7/9/2002	SDCERS Board Packet For July 11, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
10	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	7/9/2002	SDCERS Board Packet For July 11, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express

COUNT	DEFENDANTS	DATE	MAIL MATTER
11	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	7/9/2002	SDCERS Board Packet For July 11, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
12	SAATHOFF	8/12/2002	Check No. 013011081 For $3,529.89, payable to San Deigo [sic] City Employees Ret Sys FBO Ronald L Saathoff, Delivered to SDCERS via United States Mail
13	SAATHOFF	8/12/2002	Check No. 013010714 For $8,090.44, payable to San Deigo [sic] City Employees Ret Sys FBO Ronald L Saathoff, Delivered to SDCERS via United States Mail
14	SAATHOFF	8/29/2002	Check No. 78697 For $1,736.71, payable to SDCERS PLAN, Delivered to SDCERS via United States Mail
15	SAATHOFF	9/13/2002	Check No. 2583879 For $51,236.79, payable to City of San Diego For Plan to Plan Transfer FBO Ronald Saathoff, Delivered to SDCERS via United States Mail
16	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	11/7/2002	SDCERS Board Packet For November 15, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
17	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	11/7/2002	SDCERS Board Packet For November 15, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
18	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	11/7/2002	SDCERS Board Packet For November 15, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express
19	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	11/7/2002	SDCERS Board Packet For November 15, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express

COUNT	DEFENDANTS	DATE	MAIL MATTER
20	SAATHOFF LEXIN WEBSTER GRISSOM CHAPIN	11/7/2002	SDCERS Board Packet For November 15, 2002 SDCERS Board Meeting, Delivered to SDCERS Board Trustee via Adcom Express

All in violation of Title 18, United States Code, Sections 1341, 1346 and 2.

DATED: January 6, 2006.

A TRUE BILL:

_____
Foreperson

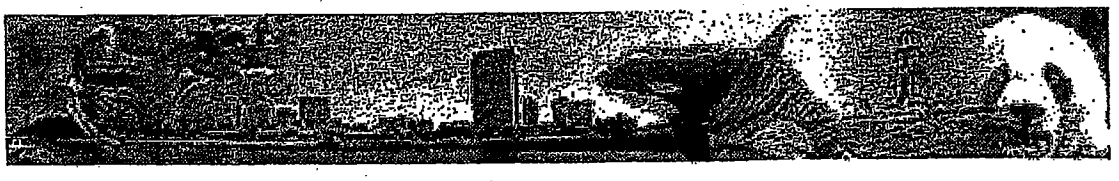
CAROL C. LAM
United States Attorney

By: _____
G. MICHAEL STILL
Special Assistant U.S. Attorney

By: _____
JOHN B. OWENS
Assistant U.S. Attorney

Exhibit 30

SAN DIEGO CITY
EMPLOYEES' RETIREMENT SYSTEM
ANNUAL ACTUARIAL VALUATION
June 30, 2004



Submitted to

THE RETIREMENT BOARD

San Diego City Employees' Retirement System

San Diego, California

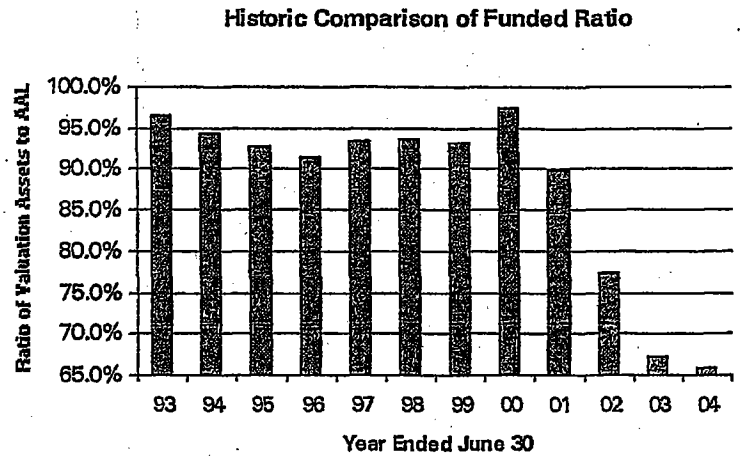
EXHIBIT # 4

San Diego City Employees' Retirement System
Funding Process Indicators - Historic Comparison

($ in Thousands)

Valuation Date	Valuation Assets	Continuation Indicators: AAL	Funded Ratio	UAAL	Member Payroll	Ratio to Payroll
6/30/93	$1,137,019	$1,178,311	96.5%	$41,292	$320,624	12.9%
6/30/94[1]	$1,216,063	$1,290,927	94.2%	$74,864	$338,440	22.1%
6/30/95	$1,316,903	$1,421,150	92.7%	$104,247	$350,584	29.7%
6/30/96[2]	$1,480,772	$1,620,373	91.4%	$139,602	$365,089	38.2%
6/30/97	$1,632,361	$1,748,868	93.3%	$116,507	$382,715	30.4%
6/30/98[1]	$1,852,151	$1,979,668	93.6%	$127,517	$399,035	32.0%
6/30/99	$2,033,153	$2,181,547	93.2%	$148,394	$424,516	35.0%
6/30/00	$2,459,815	$2,343,400	105.0%	($116,414)	$448,502	(26.0)%
6/30/00[3]	$2,459,815	$2,528,774	97.3%	$68,959	$448,502	15.4%
6/30/01	$2,525,645	$2,809,538	89.9%	$283,893	$481,864	58.9%
6/30/02	$2,448,208	$3,168,921	77.3%	$720,713	$535,157	134.7%
6/30/03	$2,375,431	$3,484,832	68.2%	$1,109,401	$533,595	207.9%
6/30/03[4]	$2,375,431	$3,532,626	67.2%	$1,157,194	$533,595	216.9%
6/30/04	$2,628,680	$3,962,237	66.3%	$1,333,557	$540,181	246.9%
6/30/04[5]	$2,628,680	$3,997,328	65.8%	$1,368,648	$540,181	253.4%

AAL - Actuarial Accrued Liability
UAAL - Unfunded Actuarial Accrued Liability



[1] Reflects revised actuarial and economic assumptions
[2] Reflects Manager's Proposal
[3] Reflects Corbett non-contingent benefit increases
[4] Includes change in benefits for General Members
[5] Reflects revised actuarial assumptions

Exhibit 31

Office of
The City Attorney
City of San Diego

MEMORANDUM

236-6220

DATE: April 25, 1996

TO: Les Girard, Chief Deputy

FROM: Lori Chapin, Deputy

SUBJECT: Legal Services for the Retirement Board

Recently, you and I met with John Witt, Casey Gwinn, John Kaheny and Stu Swett to discuss legal services for the Board of Administration ("Retirement Board") for the San Diego City Employees' Retirement System ("SDCERS"). At that meeting, I suggested that the City Attorney consider changing the way in which legal services are provided to the Retirement Board.

Specifically, I recommended that the City Attorney permit the Retirement Board to secure the services of legal counsel of its choice to assist it with its charter-mandated investment and administrative duties. The City Attorney would continue to advise the Mayor, Council and City Manager with their respective charter-mandated "plan-sponsor" responsibilities. After a general discussion of Sections 40 and 144 of the Charter for The City of San Diego ("Charter"), I agreed to prepare a memorandum outlining the reasons and support, legal and otherwise, for this recommendation.

For discussion purposes, I have analyzed the recommendation by addressing two general questions. The first question, addressing the "legal" ability to support this recommendation, examines Charter section 40. The second question, assuming that there is latitude under Charter section 40 to support the recommendation, addresses the desirability of implementing a change in the provision of legal services to the Board.

Questions Presented

1. Can the City Attorney permit the Retirement Board to hire legal counsel of its choice to assist it with its Charter-mandated investment and administrative responsibilities without violating Section 40 of the Charter of The City of San Diego? No

2. Assuming the answer to the first question is yes, should the City Attorney permit the Retirement Board to hire legal counsel of its choice to assist it with its Charter-mandated investment and administrative responsibilities? NO

PERMIT

Short Answer

1. Yes. The City Attorney has the latitude necessary under Charter section 40 to permit the Retirement Board to secure the legal counsel of its choice to assist it with its charter-mandated investment and administrative responsibilities.

2. Yes. Ethical, political, practical and financial considerations favor a recommendation by the City Attorney to permit the Retirement Board to secure the legal counsel of its choice to assist it with its charter-mandated investment and administrative responsibilities.

ANALYSIS

A. Charter section 40

Charter section 40 sets forth the duties and responsibilities for the elected City Attorney. It provides in pertinent part:

> The City Attorney shall be the chief legal adviser of, and attorney for the City and all

> Departments and offices thereof in matters relating to their official powers and duties . . . .
>
> . . . .
>
> It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusions expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law; to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof; . . . .
>
> . . . .
>
> The Council shall have the authority to employ additional competent technical legal attorneys to investigate or prosecute matters connected with the departments of the City when such assistance or advice is necessary in conjunction therewith. The Council shall provide sufficient funds in the annual appropriation ordinance for such purposes, and shall charge such additional legal service against the appropriation of the respective Departments.

Focusing on the specific language used, Charter section 40 does not expressly address the City Attorney's responsibility

Admission

with respect to Boards generally or the Retirement Board specifically. In this regard, it does not require that the City Attorney provide legal services to the Retirement Board either generally or exclusively. More importantly, there is no restriction or prohibition against the City Attorney permitting the Retirement Board to secure the counsel of its choice to assist it with its charter-mandated duties and responsibilities.

It is this very absence of any such restriction or prohibition which gives the City Attorney the latitude necessary to permit the Retirement Board to hire the legal counsel of its choice to assist it with its Charter-mandated responsibilities. The City Attorney has this flexibility with the Retirement Board because of the Retirement Board's unique situation.

Unlike any other City department, Board or Commission, the Retirement Board enjoys considerable charter-created autonomy and independence. Charter section 144. This independence coupled with the application of well-settled principles of statutory construction provide the support and latitude necessary to permit the City Attorney to revisit and change the manner in which legal services are provided to the Board.

We Resisted You are OUT

B. Principles of Statutory Construction

Well-settled rules of statutory construction support the recommendation that the City Attorney could permit the Retirement Board to hire the legal counsel of its choice to assist it with its Charter-mandated investment and administrative duties and responsibilities. As recognized by the Court of Appeal when construing the City's Charter:

> The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. All rules of statutory construction as applied to charter provisions are subordinate to this controlling principle. A

> construction in favor of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied.

Grimm v. City of San Diego, 94 Cal. App. 3d 33, 38 (1979) (citations omitted) (emphasis added).

Other well-settled principles of statutory construction provide additional support. They include:

> [E]ffect should be given, if possible, to every section, paragraph, sentence, clause and word in the instrument and related laws . . . . When the words used are explicit, they are to govern . . . . Words must be interpreted in the sense in which they are ordinarily used and understood, unless some other interpretation is clearly indicated by the charter.

2 McQuillin, The Law of Municipal Corporations 916 (3d ed. 1988).

Applying these principles to the City Attorney's duties and responsibilities set forth in Charter section 40, there is no prohibition against the City Attorney permitting the Retirement Board, with the City Attorney's concurrence, to hire the legal counsel of its choice to assist it with its Charter-mandated responsibilities.

E.C.A. CONCURRENCE

Focusing on the specific language of Charter section 40, there are no express or implied references to the Retirement Board. Importantly, the Retirement Board is neither a "department" nor an "office" of the City, both of which are expressly identified in Charter section 40. It is also not the "City" with respect to any litigation involving the Retirement Board or its trust fund. Finally, there is neither an express requirement that the City Attorney provide legal services to the Retirement Board on a general or exclusive basis nor a

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prohibition against separate legal counsel for the Retirement Board.

In sum, the City Attorney has the latitude within Charter section 40 to permit separate legal counsel for the Retirement Board. Absent an express provision to the contrary, well-settled rules of statutory construction support this recommendation. Charter section 40 is not and should not be an insurmountable hurdle.

C. SDMC section 24.0901

Pursuant to Charter section 144, the Retirement Board is an independent Charter-created entity empowered to manage the retirement system, administer the existing benefits and invest the trust fund. Bianchi v. City of San Diego, 214 Cal. App. 3d 563, 571 (1989). This distinction is significant when evaluated in light of the express language of SDMC section 24.0910 which sets forth the only express reference to legal representation of the Retirement Board by the City Attorney.

This SDMC section provides:

§ 24.0910 Legal Advisor to Board of Administration

> The City Attorney shall designate one of his staff to advise and represent the Board of Administration in the administration of the Retirement System. (Emphasis added).

On its face, SDMC section 24.0501, appears to be limited in its scope. The express responsibilities for the deputy designated by the City Attorney to provide advice and representation of the Retirement Board appear to be limited to the "administration of the Retirement System." According to Charter sections 144 and 145, however, the Retirement Board has additional Charter-mandated responsibilities. These additional responsibilities include the administration and investment of the trust fund and benefit eligibility determinations.

Although the reference to "administration of the Retirement System" in SDMC section 24.0910 is probably broad enough to cover benefit eligibility determinations, I question whether it encompasses the administration and investment of the trust fund. Historically, the tension between the Retirement Board and the City Council/City Manager concerning contribution rates, funding mechanisms and investment choices would suggest otherwise.

No other entity within the City oversees a trust fund currently valued at over one billion dollars. The size of this fund alone warrants careful scrutiny and consideration of the legal representation of not only the Retirement Board, but the City as well. The City Attorney's current role as legal advisor to both the plan sponsor (Mayor, Council and City Manager) and the plan administrator (the Retirement Board) can and should be closely reexamined.

In my view, the interests of the Retirement Board, the Mayor and Council and the City Manager could be better served by separate legal counsel for the Retirement Board. SDMC section 24.0901 could be amended to clearly delineate the lines of authority and responsibility for these entities, each of which has been assigned specific charter-created responsibilities. Under such an amendment, the Retirement Board as well as the "City" could be provided the unfettered guidance necessary to carry out their respective Charter-mandated responsibilities.

D. Charter Section 144

As mentioned earlier, Charter section 144 sets forth the duties and responsibilities of the Retirement Board. Established as an independent entity, the Retirement Board has the sole authority to determine the rights to benefits from the System, administer the Retirement System, and invest[1] the SDCERS trust

[1]The Retirement Board's authority to exclusively invest and manage the trust fund are contained in Charter sections 144 and 145.

fund. See also Bianchi v. City of San Diego, 214 Cal. App. 3d 563, 571 (1989).

With respect to the authority to make eligibility determinations for existing benefits, however, the Retirement Board's power is not absolute. This is so even though the Retirement Board has the sole authority to make these determinations. According to the express language of Charter section 144:

> The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; . . . . (Emphasis added.)

In light of the foregoing, the Retirement Board has the authority to act on individual benefit applications. The City Council, however, has the authority to control the Retirement Board's activities on a broad scale by its authority to adopt general ordinances which define the conditions under which benefits can be awarded. Grimm, 94 Cal. App. 3d at 39. As further explained in Grimm, at page 39:

why doesn't city council act.

> This latter determination of the City Council's role is supported by the presence of section 146 within the Charter empowering the Council "to enact any and all ordinances necessary in addition to the ordinance authorized in section 141 of this Article, to carry into effect the provisions of this Article . . . ." (Citation omitted.)

The City Council's power here is not unbounded either. Its power to define benefits is limited by, and must be consistent with the requirements set forth in Charter section 141. This Charter provision sets forth the vesting requirements for service retirements, disability retirements and death benefits. Charter section 143.1 provides further that ordinances amending the

Retirement System must also be approved by a majority vote of the members of the Retirement System.

In sum, the Retirement Board and the City Council have separate and distinct roles with the Retirement System. With respect to the benefits available under the Retirement System, the City Council establishes them, the Retirement Board administers them. With respect to the funding of the Retirement System, the Retirement Board sets the contribution rates (upon the advice of the System's actuary), the City Council pays the rates set.

Although this division of Charter-mandated responsibilities seems relatively simple and straight forward on the surface, it is not. Historically, there has been considerable tension between the Retirement Board and the City Council over their respective roles. This tension has been exacerbated by the presence of the City Attorney on all sides of the equation. As a result, there has been a tremendous amount of confusion, suspicion and anxiety over what should be relatively simple tasks.[2]

Going forward, I recommend that the City Attorney advocate a "return to basics" approach for efficient use of resources and effective plan management. Under such an approach, the City Attorney would focus his attention on the interests of the City Council, City Manager and ultimately the taxpayer. Instead of actively advising the Retirement Board, he would act as the "watchdog" over the fund and the Retirement Board's activities.

With respect to the day-to-day administration and management of the trust fund and the Retirement System, he would permit the Retirement Board to secure separate legal counsel of its choice. I have no doubt that the lines of authority would become much

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[2] The annual setting of contribution rates comes readily to mind. Although this annual exercise has been a recurring source of tension historically, the last four years have witnessed increasing tensions. The current year is no exception.

clearer and easier to enforce. Separate legal counsel would also increase the opportunity for a more informed decisionmaking process for all concerned.

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E. Proposition 162

Proposition 162 provides additional support for the need and desirability of separate independent legal counsel for the Retirement Board. This proposition, approved by the voters on November 3, 1992, was a ballot initiative entitled "The California Pension Protection Act of 1992." It amended Section 17 of Article XVI of the California Constitution. Pursuant to this proposition, public pension boards were given the "plenary authority and fiduciary responsibility for the investment of moneys and administration of the [public retirement] systems" subject to certain considerations.

As set forth in the amended version of Article XVI, section 17, those considerations addressed the responsibilities of the trustees of public pension boards to:

1. Administer the system in a manner to ensure the prompt delivery of benefits;

2. Hold the trust funds for the exclusive purpose of providing benefits to the participants and their beneficiaries;

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3. Defray the reasonable expenses of administering the system;

4. Discharge their duties with respect to the retirement system solely in the interest of, and providing benefits to, the participants and their beneficiaries;

5. Minimize employer contributions;

6. Discharge their duties with respect to the system with the care, skill, prudence, and

diligence under the circumstances then prevailing of a prudent person acting in a similar capacity;

7. Diversify the investments of the system so as to minimize the risk of loss and maximize the rate of return; and

8. Have the sole and exclusive power to provide for actuarial services.

To date, this constitutional amendment has had little impact on the way the Retirement System currently operates because it so closely tracks the requirements set forth in the City's Charter. To the credit of the framers of the City's Charter, most of the checks and balances found in Proposition 162 had already been included sixty years earlier in the City's Charter. The resolution of the issue involving the provision of legal services to the Retirement Board remains one of the last hurdles for the complete autonomy envisioned by Proposition 162.

In this regard, Proposition 162 suggests generally that public pension boards should have the authority to retain independent legal counsel. This "suggestion" is not new. Under common trust law principles, trustees have the implied power to do all acts necessary or appropriate to carry out their responsibilities, including the employment of legal counsel when necessary. Restatement Second of Trusts, § 188, comment c (1959).[3]

In addition, administrative agencies have the implied power to hire personnel when it is necessary for them to carry out their legal responsibilities. As recognized by our state Supreme Court:

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[3]According to this comment, "[T]he trustee can properly incur expenses in employing attorneys, brokers or other agents or servants so far as such employment is reasonably necessary in the administration of the trust."

> It is well settled in this state that governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers.

Dickey v. Raisin Proration Zone No. 1, 24 Cal. 2d 796, 810 (1944) (emphasis in original).

In my view, the ability to hire separate legal counsel is within the powers impliedly appropriate and necessary to manage the Retirement System, administer the existing benefits and invest the trust fund. This is especially true if the Retirement Board is to remain a truly autonomous body. Creighton v. City of Santa Monica, 160 Cal. App. 3d 1011, 1020 (1984). Both Proposition 162 and Charter section 144 bolster this conclusion.

Finally, there has been a growing trend at both the state and federal level to provide separate counsel to public pension boards. The Los Angeles County Employees' Retirement Association ("LACERA") is a prime example. There, a house legal counsel position was created. The position was filled by a Deputy County Counsel who had previously provided legal services to the LACERA Board. Although he has remained a county employee under Civil Service, he is no longer with the County Counsel's office.[4]

In light of the foregoing and absent any express provision to the contrary in Charter section 40, the City Attorney can and should permit the Retirement Board to secure the services of

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[4]I am not advocating any position for the Retirement Board's legal services. In my view, this decision should rest with them, no strings attached. Most likely, they would investigate the advantages and disadvantages of house counsel versus contract counsel before making their decision. Historically, the Retirement Board has utilized the specialized services of outside fiduciary counsel, real estate counsel and tax counsel on a contract basis.

separate legal counsel to assist it with its investment and administrative responsibilities mandated by Charter section 144.

F. ETHICAL CONSIDERATIONS

Ethical considerations strongly favor the use of separate and independent counsel for the Retirement Board. Here, the courts have enunciated the principle that public lawyers have special ethical obligations to further justice. Rule 3-600, Rules of Professional Conduct of the State Bar of California, governs the ethical obligations of a lawyer who represents an entity rather than a natural person. The Rule makes it clear that the client in such a representation is the entity itself as embodied in the "highest authorized officer, employee, body or constituent overseeing the particular engagement."

Although it is clear that an organization rather than its officers is the client under Rule 3-600, the more murky issue is whether a city can have more than one organization, each of whom is the client of the public lawyer. If the answer is yes, the next question is whether these "different" organizations could end up having conflicting interests with respect to one another necessitating the disqualification of the public lawyer from representing one or both of the entities. The answer is yes. The City Attorney's role with respect to the Retirement Board and the City is a prime example.

Rule 3-310 prohibits an attorney from representing "more than one client as to any matter in which the interest of the clients actually conflict" or "potentially conflict" without disclosure to them of the actual foreseeable consequences of continued joint representation and the clients' written consent to the representation. Thus, in the case of the Retirement Board and the City, each is a separate organizational client of the public lawyer, and in the absence of their informed written consent, the City Attorney would have a conflict of interest representing EITHER with respect to the dispute between them.

Significantly, the City Attorney would be required to withdraw from representation of either client entity if the suit

Special deputy in charge of Pension affairs.

BEST ARGUMENT = ETHICS waiver by Both

involved a matter on which the attorney had already provided advice to either entity or advice which was "substantially related" to that matter. This could be avoided if prior written and informed consent had been obtained from both clients indicating that the City Attorney could continue to represent one of them even after their interests became adverse.

Obviously, the financial consequences of a law suit between the City and the Retirement Board are severe. TWO SETS OF OUTSIDE COUNSEL WOULD BE REQUIRED. This could be avoided in one of two ways. The City Attorney could recommend that the decision of the Retirement Board (if it had final authority on the disputed issue) be allowed to stand without litigation. Under this course of action, the disputed issue could then be resolved prospectively by a recommendation to the City Council that it amend, clarify or repeal the underlying law administered or enforced by the Retirement Board which gave rise to the dispute.

ethical wall

Alternatively, the Retirement Board could be given the authority to retain the legal counsel of its choice to assist it with its Charter-mandated responsibilities. In my view, the latter course of action is the more desirable of the two. Not only does it remove the City Attorney from this ethical quagmire, but it offers the opportunity for a more informed decision-making process. In addition, the lines of authority would be easier to identify and articulate.

There are other ethical wrinkles with the City Attorney's continued joint representation of the City Council, the City Manager, the City Auditor, the City Treasurer and the Retirement Board. Although the governmental entity itself and not its constituent parts is deemed to be the client of the public lawyer under Rule 3-600, case law suggests that the different constituent elements of an entity be represented by two or more separate lawyers in order to protect the due process rights of the individual who is subject to the administrative procedure in question. This is precisely the issue and concern in the disability hearings before Board Adjudicators.

In this situation, separate deputies are used to represent the dual functions of the Retirement Board when making benefit determinations. One deputy advises the Retirement Board's function as an investigator/fact finder. A different deputy advises the Retirement Board as the ultimate decision maker. This same analysis would apply to the Retirement Board even if it were to secure its own counsel.

The attorneys representing the Retirement Board's dual functions with respect to benefit determinations would need to be appropriately screened. This would not be a problem, however, if the Board had its own counsel and hired the City Attorney on a reimbursable basis to handle the disability hearings. Such an arrangement would also be conducive to and supportive of the Council's role in defining the Plan document.

In sum, the ethical considerations strongly suggest the use of separate and independent legal counsel for the Retirement Board. The potential for conflict is real and substantial. The increasing frequency of "raids" on public pension funds at the state and federal level cannot be ignored. There's just too much money involved. The temptations are too great.

Locally, the setting of contribution rates is another example. In this situation, the City Attorney, under current practice, is called upon to advise both the debtor (City) and the creditor (Retirement Board). This is a recipe for disaster. The interests of these clients are not in harmony.

The same is true in the benefits arena. The City Council sets the benefits, the Retirement Board administer them. The presence of the City Attorney on both sides of the equation has clouded this critical distinction. Clarity needs to be restored. The lines of authority need to be reestablished and maintained by the use of separate and independent counsel at the Retirement Board. The potential for serious financial consequences can and should be avoided. The foregoing ethical considerations provide the opportunity and support for this recommendation.

G. OTHER MISCELLANEOUS CONSIDERATIONS

1. Political Considerations

There is a real danger in sending the message that the attorney issue for the Retirement Board can only be resolved by a Charter change. It may alert other departments who may be desirous of such an action to this approach and "invite" unintended requests for Charter changes. The Retirement Board's situation is unique. It has its "independence" expressly secured by other Charter provisions. In light of the absence of any prohibition in Charter section 40, is a Charter change really necessary to permit the Retirement Board from obtaining its own counsel? I think not.

In my view, the City Attorney is in a much better position by proactively advocating a course of action rather than responding to a request by the Retirement Board. Lots of good "public relations" could be enjoyed. In essence, the City Attorney could take the "high road" to resolve an issue which has "marred" the relationship between this office and the Retirement Board for many years. A spirit of cooperation within the bounds of the Charter could be the guiding post of a new and improved professional relationship going forward.

In addition, the lines of authority and responsibility could be clarified. The City Attorney could then concentrate his energies on his Charter-mandated duty to advise the Plan sponsor (the Council) and also the City Manager with respect to the setting of new benefits and the requirements for existing benefits. The Retirement Board, with independent legal representation, would be responsible only for the administration of the existing benefits, the management of the Retirement System and the investment of the trust fund. More importantly, each entity could then receive the "attention" necessary for informed decision-making.

2. Financial Issues

The loss of certain reimbursable positions at the Retirement Board can be mitigated. There are other opportunities for the City Attorney to work with the Retirement Board on a reimbursable basis. The processing of Domestic Relations Orders (DROs) comes readily to mind. This is a labor intensive chore. The City Attorney can and should do it, even if the Retirement Board were to secure independent counsel. Why? Because of the overlap with the City's other qualified and nonqualified plans.

In addition, the City Attorney could offer to provide on a reimbursable basis the legal services for the administrative hearings before Adjudicators. This is especially pertinent because the City Attorney provides the guidance on plan interpretation with or without an independent attorney for the Retirement Board. The City Attorney could also handle the litigation services resulting from appeals of the disability decisions. The deputy handling the initial administrative hearing would handle the Writ. I'm confident that we could offer a better product for a better price than the private sector.

The opportunity for independent counsel for the Charter-mandated responsibilities could also facilitate the opportunity for the City Attorney to provide the other services described above. Comfortable that it is getting "independent" advice, the Retirement Board may be more inclined to use the services of the City Attorney in these other areas. The possibilities are endless.

3. Personal Considerations

The last five years have been both rewarding and frustrating. I have become very knowledgeable in a very technical area. My learning curve is still rising with no end in sight. There is an incredible amount of work to be done which covers a vast arena of legal, political and ethical issues. The persistent turnover in the assistant position has been problematic. There are many reasons for this.

The turnover is due in part to the opportunities available in our office. Deputies move onto "more desirable" or more "visible" areas. The attitude of the Retirement Board is also an issue. It has been a real problem creating a very hostile workplace at times. There is also so much to know and learn. As the Retirement System deputy, I am under increased scrutiny from the Retirement Board, staff, the City Manager and our office. It just doesn't work. Unclear lines of authority have been the most serious and problematic issue.

The turnover has also frustrated the Retirement Board and staff who would like to have more say in the salary and working conditions of its attorney(s). I have trained three different deputies in the last four years. The training involved is extensive and expensive. It takes about eighteen months to two years to get up to speed. I've been doing this for five years and only now am I beginning to see the big picture and the difficulties with our past practices. Going forward, I don't have the time or inclination to keep training deputies under this revolving door approach.

Although I realize that many of these issues won't necessarily disappear with independent counsel for the Retirement Board, they can be better controlled and perhaps mitigated by clearing up the lines of authority and concentrating our attention on the City-side of the equation. We can deal with the turnover in our office. We should let the Retirement Board deal with the turnover in their shop. By letting the Retirement Board have independent counsel, we would be doing ourselves, the City and the Retirement Board a big favor.

In my view, we should either have separate deputies advising the Retirement Board and the City Council or we should let the Retirement Board retain the counsel of its choice and concentrate our time, energy and resources on providing more comprehensive legal guidance to the City Council, City Manager and ultimately the taxpayer. We are in the perfect position to be the watchdog of the Retirement System. We should seize upon this opportunity and run with it.

OUR DEPUTIES would be Separate

4. Practical Considerations: Isn't it the right thing to do?

Charter section 40 sets forth specific tasks and responsibilities for the City Attorney. The responsibility to advise to the Council as the plan sponsor of the Retirement System is expressly included within these responsibilities. By virtue of the City Attorney's role as the legal adviser to the Board, this commitment has been overlooked. Historically, the mere presence of the City Attorney in all aspects of both the administration and creation of benefits has indirectly clouded the lines of authority. Separate counsel would remove this and clear up the lines of authority.

This becomes even more apparent when you consider the problems which have arisen with the Retirement Board's current utilization of outside counsel. Outside real estate counsel, Henry Klinker, was retained by us under Charter section 40. His contract is currently up for renewal. There have been comments that this contract should be between the Retirement Board and Mr. Klinker not the City Attorney and Mr. Klinker. There's merit to this.

With respect to outside fiduciary counsel, Joe Wyatt, there is no written contract. He was retained, with our approval, by the Retirement Board. The "contract" here, however, is between the Retirement Board and Joe Wyatt, not our office. Mr. Wyatt feels that Proposition 162 allows this. Because of this arrangement, the City Attorney has been unable to realistically challenge any of his opinions. After all, we're supposedly on the same side of the issue. Not so. Yes, we are sometimes on the same side with respect to the Retirement Board. No, we are not in our role as advisor to the Manager.

The Manager's position is often dramatically opposed to that of the Retirement Board, right or wrong. To best advise him, we need the separation. A clean break from the Retirement Board would remove this confusion and inability to objectively evaluate and test the opinions of outside counsel. A clean break would also allow us to have more direct communications with the Manager

on the sum and substance of these opinions, all of which would lead to more informed decisionmaking.

There is also a real opportunity to educate the Council and bring to their attention the need to evaluate, review and consider changes to the plan resulting from changes in state and federal law. Rather than rely on the Board to bring recommended changes to the plan to the Council's attention, the elected City Attorney could and should do this. This is relevant and timely now in the context of disability, purchase of service credit, death benefits and community property.

For example, a generic resolution could be fashioned wherein the City Attorney could alert the Council to its legal concerns. The City Council could then direct the Retirement Board to review the areas of concern identified by the City Attorney and report back to the Council on the status of these areas, including any recommendations, if requested. The City Attorney could also be asked to actively participate in this process. A joint committee could be created to study these areas for recommendations to the manager for meet and confer. The possibilities are limitless. Significantly, the lines of responsibility are clear and unambiguous.

In short, we need to become more efficient and effective in the area of retirement. We need to improve our credibility. We can do this by clearing up the lines of authority and removing the potential for conflicting interests with the Retirement Board and the City Council in both the benefits and funding arenas. The Retirement Board can and should be given the authority to retain legal counsel of its choice.

CONCLUSION

The City Attorney can and should allow the Retirement Board to retain the legal counsel of its choice to assist it with its Charter-mandated responsibilities. Charter section 40 is not, nor should it be, an obstacle. Absent an express provision to the contrary, Charter section 40 permits the City Attorney the latitude to allow this course of action.

They have abused Power of Sep. Council The Law-suit is Perfect e.g.

Sound public policy considerations founded in trust law, the unique Charter-based independence enjoyed by the Retirement Board, the recently amended Article XVI, Section 17 of the California Constitution and the ethical constraints placed on the City Attorney with diverse organizational clients favor independent counsel for the Retirement Board. If this were not enough, the possibility for enormous legal bills resulting from the need for two sets of outside counsel in the event a dispute arose between the Retirement Board and the City dictates serious consideration of independent counsel for the Retirement Board.

In addition, any attempt to force a charter change when one is not necessary may invite unintended results and disastrous consequences. All of this can and should be avoided by letting the Retirement Board have its own counsel. Under this approach, the City Attorney could better fulfill his responsibilities as the legal adviser to the City and ultimately to the taxpayer as the "watchdog" of the fund.

Finally, the loss of any revenue due to the loss of the reimbursable positions resulting from the use of independent counsel for the Retirement Board could be substantially mitigated with careful planning and the continued provision of other legal services. The handling of Domestic Relations Orders, disability hearings and benefits-related litigation could help offset this lost revenue. By taking the "high road," the City Attorney is in a much better position.

In my view, the answer is simple. The City Attorney should permit the Retirement Board to secure the services of separate legal counsel of its choice to assist it with its charter-mandated investment and administrative responsibilities. Simply stated, it's a different world. It's the right thing to do.

Please let me know if you need any additional information. I am available to further discuss this matter with you at your earliest convenience.

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Exhibit 32

San Diego City Employees' Retirement System
Legal Services Division

MEMORANDUM

DATE: May 6, 1998

TO: The Business and Procedures Committee, via Lawrence B. Grissom, Retirement Administrator

FROM: Lori Chapin, General Counsel

SUBJECT: Revised Executive Summary of Recommended Housekeeping Changes to Municipal Code

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Last month Roxanne prepared an ordinance setting forth five "housekeeping" changes to the San Diego Municipal Code. Pursuant to the board's direction at the April meeting, the proposed revision to Division 5, regarding the COLA has been removed. The other four revisions remain. The ordinance is on this month's agenda for action.

An Executive Summary of these proposed changes follows:

1. SDMC § 24.0403 (g) Staff recommends a repeal of this subdivision and a corresponding renumbering of the remaining subdivision. The repeal is recommended to conform the SDMC to the practical application of the 90% cap limitation in certain DROP situations, as negotiated by Labor and Management.

2. SDMC 24.1011 Staff recommends amending this section governing Reciprocity with PERS. There are several references to California Government Code sections in this section which have been renumbered by PERS legislation. The recommendation merely replaces the old references with the new section numbers. There are no changes to the text.

3. SDMC § 24.0910 Staff recommends the repeal of this section to reflect the creation of the General Counsel and Assistant General Counsel positions in July, 1997. This section describes the historical relationship between the City Attorney and the Board prior to the creation of the in-house counsel positions.

4. SDMC § 24.1312 Staff recommends the following changes to the newly enacted five-year purchase of service credit provision. First, all references to "person" should be changed to "Member," to clarify that only a Member of the system may purchase service.

   In addition, we recommend the addition of a ten year reference with respect to the vesting requirements of Charter section 141 specifically mentioned in this section. This is identical to the change approved by the Board in March with respect to the Board rule clarifying the vesting requirement for the five-year purchase.

Finally, please note the signature line for the City Attorney at the end of the proposed Ordinance. All proposed ordinances must be reviewed and approved by a Deputy City Attorney.

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Exhibit 33

CITY OF SAN DIEGO
CITY EMPLOYEES' RETIREMENT SYSTEM
MEMORANDUM

FILE: W:\EXEC\GENCOUNSEL2.wpd

DATE: January 16, 1997

TO: Business and Procedures Committee

FROM: Keith Enerson, Board President

SUBJECT: Process Regarding Legal Services to the Retirement Board

BACKGROUND

At our December 20, 1996 meeting, the Board approved the establishment of the positions of General Counsel, Assistant General Counsel, and Legal Secretary to provide legal services for the Board. At that Board meeting, Staff was directed to provide recommendations regarding the process and steps necessary to accomplish this. In view of the importance of this issue, I have chosen to make my recommendations to the Board directly.

RECOMMENDATION

I would recommend that we direct Staff to move forward with the steps necessary to convert by July 1, 1997, current Deputy City Attorney Lori Chapin, to Board personnel, in the position of General Counsel.

For a variety of reasons which I will detail to some extent below, I think this is the best and most logical course for the Board to take. We need to make this decision sooner rather than later in order to provide continuity in the provision of our legal services. I have discussed this issue with Dwight Hamilton, our current fiduciary counsel, who has indicated to me that there is no requirement that the Board go through any sort of RFP process since the decision on who to appoint to these positions is essentially a personnel matter well within the scope of the Board's discretionary authority.

There are many considerations, including those items that must be accomplished in the near term by the Board and Staff, that brought me to the decision to make this recommendation. These considerations include:

* the implementation of our new Membership and Benefits Computer System.

* the relocation of our offices to the First Interstate Building.

* the implementation of the City Manager's proposal, which will include preparation of new and revised sections of the Municipal Code, Board Rules and System operating procedures, conducting the required membership election, recalculation of benefits already approved

retroactive to January 1, 1997, a significant increase in the number of applications for retirement, and implementation of the DROP and retiree health insurance programs.

* determining and completing a recruitment process for the recently vacated position of Assistant Retirement Administrator.

* completion of outstanding RFP's for Actuarial and Fiduciary Counsel services.

* the completion of one of our primary strategic goals.

* the continuation of uninterrupted legal services.

* the efficient use of the resources we have expended in the training and education of our current legal staff.

PROJECTED TIME LINE

If this recommendation is adopted, the time line to accomplish the necessary steps for implementation would be as follows:

1/16/97-2/21/97:	Recommendation approved at January Board meeting. Staff researches and prepares recommendations regarding the job description for General Counsel, the salary ranges and budget for the Legal Services Division, and the Board positions to be created in the FY 98 Salary Ordinance, effective July 1, 1997.
2/21/97-3/21/97:	Staff submits its recommendations to the Board.
April 3, 1997:	The Board submits its proposal for the creation of new Board positions to the CSC at the CSC's April meeting (first Thursday of each month).
May 12, 1997:	The FY 98 Salary Ordinance is introduced before the City Council.
May 26, 1997:	First reading of the FY 98 Salary Ordinance.
June 25, 1997:	Effective date for the FY 98 Salary Ordinance.
July 1, 1997:	New Board positions officially established.

SUMMATION

I think this recommendation is not only prudent, but is a sound business decision and would urge your committee to forward this recommendation to the full Board.

Exhibit 34

SDCERS' RETIREMENT BOARD MINUTES
JANUARY 17, 1997

The Retirement Board of Administration held its regularly scheduled meeting in the System's Board Room. Location: 525 "B" Street, Suite 1120, San Diego, CA 92101. The meeting was called to order at 1:31 p.m. by Keith Enerson.

THOSE IN ATTENDANCE

Trustees: Keith Enerson, Chair; Ron Saathoff, Bruce Herring, Jack Katz, John Casey, Paul Barnett, Terri Webster, Conny Jamison, Robert Scannell, John Torres

Staff: Lawrence Grissom, Lori Chapin, Christine Folsom, Roxanne Parks, Cynthia Hilliard, Doug McCalla, Dawne Clark, Patrick Lane, Judy Folsom, Christine Imhoff, Merlita Hilario

Public: Edward Faunce, Tom Rhodes, Manuel Nieto, Frederick Taylor, Rosalie Metcalf, Bob Sneed, Randy Levitt, Diane Wendell, Cindy Titgen, Butch Bubble

Excused: Ann Parode; Sharon Wilkinson

I.	CONSENT AGENDA ITEMS #1 - 5 (ACTION REQUESTED)

MOTION TO APPROVE CONSENT AGENDA ITEMS #1-5:

JACK KATZ
SECOND: CONNY JAMISON
BOARD: UNANIMOUS
MOTION TO APPROVE PASSED.

1. SERVICE RETIREMENTS - APPROVAL RECOMMENDED

A. Martin Howerton, Fire Engineer, Fire Department. Age 55.75. 31.06 years of creditable service. Effective date 1/24/97. Estimated monthly allowance $3,400.96 plus $109.26 COLA, maximum benefit with surviving spouse provisions. (Option II) (Board Rule 17B)

B. Janice B. Wright, Associate Administrative Analyst, Park & Recreation Department. Age 69.75. 23.05 years of creditable service. Effective date 1/11/97. Estimated monthly allowance $2,107.71 plus $102.81 COLA, maximum benefit with surviving spouse provisions.

C. James Palovchik, Fire Fighter, Fire Department. Age 54.50. 25.76 years of creditable service. Effective date 1/4/97. Estimated monthly allowance $2,622.16 plus $120.13 COLA, maximum benefit with surviving spouse provisions. (Board Rule 17B)

Mr. Katz questioned whether this should have been addressed by the Rules Committee and asked when that Committee would meet again.

Mr. Enerson responded it is his intention to continue the Rules Committee. However, he indicated the composition of that Committee may change.

2. 1996 ACTUARIAL VALUATION

Mr. Roeder provided a brief overview of the information which he had presented at the Business Procedures Committee. For a full report, please refer to the Business Procedures Committee Minutes of 1/17/97 and SDCERS's Actuarial Valuation dated 6/30/96.

This item will be brought back for action at the February 21, 1997 meeting.

B. APPROVAL RECOMMENDED

1. APPROVAL OF EARNINGS DISTRIBUTIONS FOR FY 95 AND FY 96 PER S.D.M.C. 24.0907.1

This item was continued pending the outcome of the City Manager's proposal.

2. PROCESS REGARDING LEGAL SERVICES TO THE RETIREMENT BOARD

Mr. Saathoff stated Staff's recommendations regarding this issue had been distributed. He summarized by saying Staff is recommending that the Board retain Lori Chapin as in-house legal counsel to this Board. If this recommendation is approved, Ms. Chapin would forfeit her position with the City Attorney's office and work directly for this Board.

Mr. Saathoff stated the Committee had voted unanimously to approve Staff's recommendation.

MOTION TO APPROVE STAFF'S RECOMMENDATION TO HIRE LORI CHAPIN AS IN-HOUSE COUNSEL: RON SAATHOFF
SECOND: JACK KATZ

DISCUSSION:
Mr. Barnett stated in a perfect world, this process would be undertaken through an actual search. However, he stated he would be inclined to vote in favor of this motion from the stand-point that the Board could pursue this through the search process and

not find a more competent attorney. He said this could negatively impact this Board because they could potentially lose Ms. Chapin to the City Attorney's office.

Mr. Casey stated he is not opposed to Staff's recommendation. However, he said he does not believe this is being appropriately pursued. He recommended the motion be amended to direct the administrator to hire general counsel.

SUBSTITUTE MOTION TO DIRECT THE ADMINISTRATOR TO HIRE GENERAL COUNSEL:
JOHN CASEY
MOTION FAILED FOR LACK OF A SECOND.

Mr. Katz stated he agrees with Mr. Barnett but believes this position should report directly to the Retirement Board, not the Administrator.

Mr. Saathoff stated similar discussion had occurred at the Committee meeting. However, due to the timing, the Committee agreed to move forward with Staff's recommendation and to bring this issue back at a later date.

CALL FOR THE QUESTION.

BOARD: UNANIMOUS
MOTION TO APPROVE STAFF'S RECOMMENDATION PASSED.

3. SOCIAL SECURITY INTEGRATED OPTION AND ALTERNATIVE RETIREMENT OPTIONS

MOTION TO APPROVE STAFF'S RECOMMENDATIONS (INCLUDED AS "ATTACHMENT A" OF THESE MINUTES)AND, TO ENSURE THE CHANGES TAKE INTO CONSIDERATION INDIVIDUALS WHO WOULD BE EXCLUDED FROM THE SOCIAL SECURITY WINDFALL BY THEIR 30-YEAR PARTICIPATION IN SDCERS:
RON SAATHOFF
BOARD: UNANIMOUS
MOTION TO APPROVE STAFFS RECOMMENDATION PASSED.

4. DEATH MATCH AUDIT REPORT

MOTION TO APPROVE STAFFS RECOMMENDATIONS (INCLUDED AS "ATTACHMENT B" OF THESE MINUTES):
RON SAATHOFF
SECOND: JACK KATZ
BOARD: UNANIMOUS.
MOTION TO APPROVE STAFFS RECOMMENDATION PASSED.

Exhibit 35

CONFIDENTIAL

Office of
The City Attorney
City of San Diego

MEMORANDUM

533-5800

DATE: January 22, 1997

TO: Casey Gwinn, City Attorney

FROM: Lori Chapin, Deputy

SUBJECT: Legal Services to the Retirement Board

Last Friday, January 17, 1997, the Retirement Board unanimously approved a recommendation made by Keith Enerson, the Board's President to direct Retirement Staff to move forward with the steps necessary to convert by July 1, 1997, my position as a deputy city attorney advising the Board to the position of General Counsel to the Board, a position yet to be created. This action was in response to your oral and written requests to the Board President in June and November, 1996, respectively to fashion a new relationship for the provision of legal services which would meet the Board's concerns and your responsibilities as the City Attorney providing legal advice to the City Council, Retirement Board and ultimately the taxpayer.

This confidential memorandum highlights the background information for this issue, the process used in reaching the Board's recommendation, the proposal recommended by Staff regarding legal services generally and my understanding of the specifics of the Board President's recommendation to take the steps necessary to make me the Board's General Counsel.

Background

As you are no doubt aware, the subject of legal services to the Retirement Board as well as public retirement systems generally, has been an area of concern for a long time. As the complexities of the administration of public retirement systems and investment

of their trust funds has increased, there has been a growing recognition at both state and federal levels to provide legal services to the boards which manage these systems which combines a high degree of expertise and removes any potential conflict of interest. This has resulted in more and more public retirement systems employing independent legal counsel. Although the process used by these systems has been varied, the result has been fairly universal. Independent counsel has been secured for a growing number of public funds.

As the deputy city attorney advising the Retirement Board for the past six years, I have personally experienced the real and substantial practical, legal and ethical difficulties resulting from the City Attorney providing legal representation to both the City Council and the Retirement Board. These difficulties have arisen in numerous situations involving the setting of contribution rates or the establishment and interpretation of benefits.

In either of these areas, and there are more, the City Council/Manager and the Board have very different duties and responsibilities. Their interests are often not in harmony. This has been particularly true in the last few years where the City Manager has recommended significant proposals which involve both the creation of new benefits and alternative contribution rates and funding considerations.

As the result of my personal experience, I prepared confidential memoranda to you and Les Girard in April through June, 1996, regarding the City Attorney's legal responsibilities under Charter § 40. I shared with you the need to educate the Council and bring to its attention the need to evaluate, review and consider changes to the plan document resulting from changes in federal, state and local law. I stressed the need to become more effective and efficient in the retirement arena and improve our credibility. I mentioned the real possibility of substantial legal bills in the event a dispute arose between the City and the Retirement Board. (As you recall, this happened with the FY 97 Manager's Proposal. Two sets of outside counsel were used.)

I also noted the substantial differences between the Retirement Board and other City departments, boards or commissions. Unlike any of these other entities, the Retirement Board enjoys considerable charter-created autonomy and independence. Importantly, the Board has the power to sue and be sued. This fact alone sets it apart. This fact also has special significance in light of forthcoming ethics opinions. In short, then as now I remain convinced the City Attorney can under Charter § 40 and should for lots of reasons, allow the Retirement Board to have independent counsel. I took no position then on who would be independent counsel or how this independent counsel position would be established. I noted only it was the right thing to do. You were very receptive.

The Process

In June, 1996, you, John Witt, John Kaheny and I met with Keith Enerson and Larry Grissom regarding legal services for the Retirement Board. Keith informed the group of the Board's desire to retain legal counsel of its choice to assist it with its Charter-mandated investment and administrative responsibilities. You asked the Board to evaluate its needs and submit a request for legal services. As the future City Attorney for the City Council, Retirement Board and ultimately the taxpayer, you indicated your willingness to work with the Retirement Board to fashion a new relationship for the provision of legal services which met both the Board's concerns and your responsibilities to the Board, City Council and the taxpayer.

In response, the Board President formed a subcommittee of Board members to study and report back on the issue. A consultant was retained. Unfortunately a series of logistical problems (the Republican National Convention, Board member vacations and schedules and the consultant's serious automobile accident) made it difficult for the subcommittee to meet. Staff's recommendation was instead forwarded to the Business and Procedures Committee for review.

The Proposal

Under Staff's recommendation, legal services would be provided through a combination of in-house and outside counsel. Outside counsel included the services of the City Attorney. Specifically, in-house counsel would provide guidance on the Board's Charter-mandated duties and responsibilities. This would include advice on:

- general trust law, tax law, contract law and Proposition 162
- Board operations: open meetings law, open records law, administrative law, Model Public Pension Fund Management Act (FYI, I have attended drafting sessions), Robert's Rules
- investments (funding issues, contribution issues, actuarial assumptions, specific investment vehicles, asset allocation . . . .)
- benefit eligibility determinations
- personnel and other administration issues

The above responsibilities would be accomplished through the creation of a Legal Services Division consisting of three full time Board positions: a General Counsel, Assistant General Counsel and Administrative Legal Secretary.

Outside counsel, retained on a contractual basis, would provide guidance in the following areas:

- QDRO's and litigation (in particular - disability retirement matters). FYI, this is currently provided by the City Attorney through FY 97. Litigation deputies handle disability retirement-related litigation. Roxanne has been handling the QDROs.

Staff's recommendation expressly contemplated the Board would continue to contract with the City Attorney to provide these services in FY 98. In particular, the QDRO function would be changed to accommodate this. Roxanne would no longer handle them. Instead, they would be handled by the City Attorney to ensure coordination with the City's other savings and retirement plans.

- Fiduciary matters (currently provided by Dwight Hamilton. An RFP, however, is in progress).

- Tax matters (currently, the Board does not have Tax counsel. Bob Blum, formerly a tax attorney with Orrick, Herrington & Sutcliffe, now a consultant with Mercer, provides informal guidance). An RFP is anticipated for tax counsel.

- Real estate matters (currently, Henry Klinker with Hillyer & Irwin).

At its December 20, 1996 meeting, the Retirement Board adopted Staff's recommendation and approved the establishment of a Legal Services Division consisting of the positions of General Counsel, Assistant General Counsel and Administrative Legal Secretary. Staff was directed to provide recommendations regarding the process and steps necessary to accomplish this. Staff initially prepared a recommendation which called for an RFP process for general counsel and a 6-month time line to accomplish this. This recommendation, however, was <u>not</u> submitted to the Board.

Instead, the Board President submitted a recommendation to direct Staff to move forward to take the steps necessary to convert by July 1, 1997, my position as a deputy city attorney advising the Board to the position of General Counsel to be appointed by the Board, effective July 1, 1997. At its January 17, 1997 meeting, the Retirement Board unanimously adopted the Board President's recommendation. A copy of Mr. Enerson's recommendation is attached.

My Understanding of the Proposal

The Board's action has sparked a flurry of activity and questions. This confidential memorandum provides you with my understanding of the Board's action. The Board wants to have independent legal services provided through the three positions discussed above. The Board wants me to be the General Counsel. The Board will continue to reimburse the City Attorney's office for legal services until the Board's positions can be officially created and appointed.

During the transition period necessary to accomplish this, the Board wants its legal services to continue to be provided by current personnel with no interruptions. I have been informed that as general counsel I would have the authority, subject to the Board's actual appointment, to select the assistant general counsel and administrative legal secretary. With this in mind, and assuming they were in agreement, I would select Roxanne and Merlita to fill these positions. I cannot envision providing the high level of service provided to date without their continued assistance.

Specifically, under the Board's action and with your approval and assistance, it is my understanding:

- I would remain a deputy city attorney until July 1, 1997. I would remain located in the Retirement Office. I would continue to provide legal services to the Board. The same would be true with Roxanne Parks and Merlita Hilario. (They are tied into the reimbursement process as well. They are an integral part of by ability to provide the level of service the Board has grown accustomed to expect and demand.)

- You would continue to be reimbursed for my services, as well as those of Roxanne Parks and Merlita Hilario until July, 1997.

- From now until July 1, 1997, Staff would prepare the paperwork necessary, with your assistance as you feel necessary, to create the positions recommended by the Board for inclusion in the FY 98 Salary Ordinance. This would include the steps necessary to submit these positions to the Civil Service Commission prior to their inclusion in the Salary Ordinance.

  Staff would also work with you regarding its FY 98 Budget and the City Attorney's continued provision of legal services for disability retirement hearings and related litigation as well as a new request to provide legal services for QDROs.

- Staff would anticipate submitting its recommendations concerning job descriptions and salary ranges for the new Board positions to the Board as early as its February 21, 1997 meeting, but no later than its March 21, 1997 meeting.

  This would accommodate submittal to the Civil Service Commission no later than the Commission's meeting on April 3, 1997.

- The new Board positions could then be included in the FY 98 Salary Ordinance which must be introduced no later than mid-May to accommodate a July 1, 1997, effective date.

- Effective July 1, 1997, the new Board positions would be officially established. The Board would make its appointments. Roxanne, Merlita and I would be removed from the City Attorney payroll.

<u>Employment Services Unit Head Deputy Appointment</u>

With respect to my appointment as the head of the Employee Services Unit, I have conflicting emotions. I was honored you selected me to fill this position. At the time, it seemed such a

perfect fit. The Retirement Board had not taken any official action on your request for a legal services proposal. I wanted to remain in this area of law. With the ESU appointment, I thought I could keep my finger on the pulse of retirement issues as well as participate in a project I have long advocated involving Office reorganization. I was wrong.

The work for each position is too demanding. A full-time commitment for each is required. The ESU responsibilities are enormous, so much so I was unable to devote any real attention to my retirement responsibilities. Those responsibilities were not being met. Recognizing the need to provide quality retirement legal services in order to maintain the reimbursement payment stream so necessary for the City Attorney FY 97 budget, I worked extraordinary hours. I came in early, worked very late, worked on weekends. I have never worked so hard as I did in the past two and one-half months. The work was so demanding and unending it began to cause health problems. My family and I suffered.

Absent the Board action last Friday, I was prepared to offer my resignation as the head of ESU or ask you to consider a reappointment to someone else. I could not see my way out of the box I found myself in. It became very clear to me the reimbursement from Retirement our Office was dependent upon <u>me</u> providing the legal services to the Board. After two and one-half months, I realized I couldn't do both. There is just too much going on in Retirement, our Office and the City. In my view, ESU needs a full-time head now.

In closing, I did not fully realize the enormity of the pressure and strain I had been laboring under until the Board action on Friday. For the first time I was reminded of the possibilities and incredible opportunities for you, me, the Office, the Council and the City available with a reconsideration of the way legal services are provided to the Board. A weekend in Big Bear with my family provided the perfect opportunity for these ideas to resurface and take form. The creative juices began to flow. So many ideas surfaced I had to grab a pen and pencil and write them down before they got lost in the crowd!

Exhibit 36

Office of
The City Attorney
City of San Diego

MEMORANDUM

236-6220

DATE: March 11, 1997

TO: Casey Gwinn, City Attorney

FROM: Lori Chapin, Deputy

SUBJECT: Status of Legal Services for the Retirement Board; Request For Assistance with Civil Service Commission Process; Memoranda of Law on Legal Services for Retirement Board

---

Under your direction, an Agreement For Retirement System Legal Services ("Agreement") has been drafted and signed by the President of the Retirement Board. It awaits your signature. This Agreement authorizes the creation of a separate Legal Services Division for the Retirement Board consisting of three positions, General Counsel, Assistant General Counsel and Administrative Legal Secretary. It is contemplated the positions will be included in the FY 98 Annual Appropriations Ordinance, effective July 1, 1997. To accomplish this in the most efficient and timely manner, I need your help.

First, the positions need to be created, if they are to be included in the upcoming Annual Appropriations Ordinance. As you are no doubt aware, there is an established procedure for this. A Memorandum to the Civil Service Commission from the Appointing Authority regarding the need for, description of and request for the positions is needed. Job descriptions and salary ranges are required. In normal situations, the Retirement Board would provide the Memorandum and supporting information. This situation, however, is not typical.

Since the General and Assistant Counsel positions are legal positions not associated with the City Attorney's Office, their creation represents a substantial break with past precedent. As

such, I anticipate many questions and a higher level of scrutiny. Although the Retirement Board is prepared to submit the required job descriptions, salary ranges and supporting Memorandum, including an opinion from Fiduciary Counsel supporting the need for the Legal Services Division, the Board is neither prepared nor in the best position to respond to the legal questions specific to the City Attorney which will certainly arise.

Your input is especially important to address the unique character and position of the Retirement Board which allowed you to break with past precedent and permit the Retirement to have separate and independent legal counsel. As potential support for this decision, I prepared confidential memoranda on April 25, 1996, June 5, 1996 and January 22, 1997, regarding the Retirement Board's need for separate and independent legal counsel and the City Attorney's legal responsibilities under Charter § 40.

In these Memoranda I shared the need to educate the Council regarding its responsibilities to evaluate, review and consider changes to the plan document resulting from changes in federal, state and local law. I stressed the need to become more effective and efficient in the retirement arena and improve our credibility. I mentioned the real possibility of substantial legal bills in the event a dispute arose between the City and the Retirement Board. This happened with the FY 97 Manager's Proposal. Two sets of outside counsel were used. It proved to be a very costly process both in terms of money and time.

Importantly, I highlighted the substantial differences between the Retirement Board and City departments, boards and commissions. Unlike any of these entities, the Retirement Board enjoys considerable charter-created autonomy and independence. It is not a City department. It is an independent entity with the power to sue and be sued. This fact alone sets it apart. This fact also has special significance in light of an interim ethics opinion.

Finally, the Retirement Board's request for separate and independent legal counsel finds additional support under the California Pension Protection Act ("Proposition 162"), a ballot initiative approved by the voters in 1992. Under Proposition

162, the Retirement Board has the "plenary authority and fiduciary responsibility" over the investment and administration of the Retirement System. The creation of a legal services division certainly fits within the Retirement Board's administrative authority and responsibility.

In short, the City Attorney can, under Charter § 40, allow the Retirement Board to have independent counsel. The creation of a Legal Services Division for the Retirement Board under these circumstances is permissible and desirable. For your review, I have attached copies of the Memoranda discussed above. The information contained in these Memoranda could be used in a Memorandum of Law on the subject. I have not prepared the Memorandum of Law because I believe it would be inappropriate for me to do so.

In light of the foregoing and in order to address the concerns that will most likely be raised concerning the creation of these new positions, I strongly recommend, under your direction, a Memorandum of Law be prepared addressing the above issues. It is my understanding that all materials must be submitted to the Civil Service Commission two weeks in advance of the April 3, 1997 meeting (i.e., by March 20). That is the date the Retirement Board is aiming for to submit the job descriptions and other materials. I have also been informed, however, the Commission has allowed materials to be submitted as late as one week prior to the meeting at which they are to be considered.

Finally, I wanted to let you know I have scheduled a meeting with Stu Swett for Wednesday, March 12, to discuss the procedures for creating new positions. I asked for this meeting because I was informed he is usually involved in these matters. Please let me know if this proposed course of action meets with your approval. Thank you for your assistance.

Lou Chapin

LEC:mrh
Attachments

Exhibit 37

GOVERNMENT CODE SECTION 1090-1099

1090. Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

1090.1. No officer or employee of the State nor any Member of the Legislature shall accept any commission for the placement of insurance on behalf of the State.

1091. (a) An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

(b) As used in this article, "remote interest" means any of the following:

(1) That of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

(2) That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

For purposes of this paragraph, time of employment with the contracting party by the officer shall be counted in computing the three-year period specified in this paragraph even though the contracting party has been converted from one form of business organization to a different form of business organization within three years of the initial taking of office by the officer. Time of employment in that case shall be counted only if, after the transfer or change in organization, the real or ultimate ownership of the contracting party is the same or substantially similar to that which

Exhibit 38

C

Court of Appeal, Second District, Division 4, California.
The PEOPLE Plaintiff and Respondent,
v.
Stewart Mortimer SOBEL, Defendant and Appellant.
Cr. 24534, 25504.

July 31, 1974.
As Modified Aug. 6, 1974.
Rehearing Denied Aug. 20, 1974.
Hearing Denied Oct. 10, 1974.

County employee, who was a deputy purchasing aent in book-buying section, who increased business with book company from nothing in 1969 to $361,249 in 1971-- 72, who awarded book company a contract when another vendor's bid was lower, who married one of two persons authorized to draw on accounts of book company, who was paid money from that account, and who allegedly was the other person authorized to draw on the account, but in another name, was convicted before the Superior Court, Los Angeles County, Harold J. Ackerman, J., of violating provisions of statutes prohibiting conflict of interest by public officials and employees. County employee's motion for a new trial was denied and the trial court suspended criminal proceedings and granted defendant probation for a period of three years, on condition that he pay fine of $1,000, and county employee appealed from the order granting probation and petitioned for habeas corpus concurrently with the appeal. The Court of Appeal, Jefferson, Acting P.J., held that evidence supported conclusion that defendant had the opportunity, whatever his job classification, to direct a steady flow of county business and money to book company in which he was interested, personally, and that he did so, that failure of prosecutor to introduce administrative regulations showing employee's actual civil service classification was not suppression of evidence in that it was immaterial, that failure of employee's counsel to emphasize with more vigor the alleged lack of contractual capacity was not incompetence, and that there was no unfairness in the trial nor inadequacy of counsel.

Judgment affirmed; petition for writ of habeas corpus denied.

West Headnotes

[1] Public Contracts ⚷4
316Ak4 Most Cited Cases
Actual execution of a contract is not the only criteria for application of statute which prohibits an interest by officials or employees in any contract made by them in their official capacity. West's Ann.Gov.Code, §§ 1090, 1097.

[2] Officers and Public Employees ⚷121
283k121 Most Cited Cases
An official or public employee may be convicted of violation of statute which prohibits an interest by officials or employees in any contract made by them in their official capacity no matter whether they actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests. West's Ann.Gov.Code, §§ 1090, 1097.

[3] Public Contracts ⚷4
316Ak4 Most Cited Cases
Under statute prohibiting an interest by officials or employees in any contract made by them in their official capacity, existence of opportunity to exercise prohibited influence regarding any particular employee is a factual issue to be resolved on a case-by-case basis. West's Ann.Gov.Code, § 1090.

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[4] Counties ⚷102
104k102 Most Cited Cases
Evidence, in prosecution of county employee who was a deputy purchasing agent for violating statute prohibiting an interest by officials or employees in any contract made by them in their official capacity, supported conclusion that employee had opportunity, whatever his job classification, to direct a steady flow of county business and money to a book company in which he was interested, personally, and that he did so. West's Ann.Gov.Code, § 1090.

[5] Counties ⚷102
104k102 Most Cited Cases
Activities of county employee, who was a deputy purchasing agent in book-buying section, who increased business with book company from nothing in 1969 to $361,249 in 1971-72, who awarded book company a contract when another vendor's bid was lower, who married one of two persons authorized to draw on accounts of book company, who was paid money from that account, and who allegedly was the other person authorized to draw on the account, but in another name, constituted the type of conduct the legislature desired to discourage by statute prohibiting any interest by officials or employees in any contract made by them in their official capacity, and thus it was immaterial whether he did not actually have legal authority to execute contracts for county. West's Ann.Gov.Code, § 1090.

[6] Criminal Law ⚷700(3)
110k700(3) Most Cited Cases
(Formerly 110k700)
Failure of prosecutor, in prosecution of county employee under statutes prohibiting conflict of interest by public officials and employees, to present evidence of employee's status as deputy purchasing agent without authority to execute contracts binding on county was not suppression of evidence; such issue was immaterial in that statute prohibiting an interest by officials or employees in any contract made by them in their official capacity applied to employee who had opportunity, whatever his job classification, to direct a steady flow of county business and money to a book company in which he was interested, personally, and did so. West's Ann.Gov.Code, § 1090.

[7] Criminal Law ⚷641.13(2.1)
110k641.13(2.1) Most Cited Cases
(Formerly 110k641.13(2))
Failure of defense counsel, in prosecution of county employee who was a deputy purchasing agent in book buying section for violating statute prohibiting an interest by officials or employees in any contract made by them in their official capacity, to emphasize with more vigor alleged lack of contractual capacity was not incompetence of counsel. West's Ann.Gov.Code, §§ 1090, 1097.

[8] Criminal Law ⚷641.13(6)
110k641.13(6) Most Cited Cases

[8] Criminal Law ⚷661
110k661 Most Cited Cases
Failure of either the People or defense counsel, in prosecution of county employee who was a deputy purchasing agent in book-buying section for violating statute prohibiting an interest by officials or employees in any contract made by them in their official capacity, to introduce administrative regulations defining his authority as deputy purchasing agent did not constitute unfairness in the trial nor inadequacy of counsel in that the regulations and the departmental action thereunder did not remove county employee from the proscription of the statute. West's Ann.Gov.Code, § 1090.
**533 *1047 Cy H. Lemaire, Los Angeles, for defendant and appellant.

Evelle J. Younger, Atty. Gen., Jack R. Winkler, Chief Asst. Atty. Gen., S. Clark Moore, Asst. Atty. Gen., Norman H. Sokolow and Lawrence P. Scherb II, Deputy Attys. Gen., for plaintiff and respondent.

*1048 JEFFERSON, Acting Presiding Justice.

Defendant Stewart Mortimer Sobel was charged by information in one count with violating Government Code section 1090 and section 1097, provisions prohibiting conflict of interest by public officials and employees. [FN1] It was charged that

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defendant, '**534 being at all times, during the period alleged, a County employee, to wit, a deputy purchasing agent, on or about and between July 13, 1970 and April 18, 1972 at and in the County of Los Angeles, State of California, did wilfully, unlawfully and feloniously have a financial interest in contracts made by the said (defendant) in the official capacity of the said (defendant) and because a vendor at purchases made by the said (defendant) in his official capacity.

FN1. Section 1090: 'Members of the Legislature, state, county, district, judicial district and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
'As used in this article, 'district' means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.'
Section 1097: 'Every officer or person prohibited by the laws of this State from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip, or other evidences of indebtedness, including any member of the governing board of a school district, who wilfully violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the state prison for not more than five years, and is forever disqualified from holding any office in this State.'

Defendant pleaded not guilty. Trial by jury was waived. Pursuant to stipulation, the case was submitted on the testimony contained in the peliminary hearing transcript, each side reserving the right to offer additional evidence. Such evidence was received, and defendant was found guilty as charged. His motion for a new trial was denied. The trial court suspended criminal proceedings and granted defendant probation for a period of three years, on condition that he pay a fine of $1,000. Defendant appeals the judgment (order granting probation) which we affirm.

Waldo A. Perez, Head Deputy Purchasing Agent for the Los Angeles County Department of Purchasing and Stores, testified that defendant was assigned to the department on January 30, 1969, as a trainee. His duty was to assist more experienced personnel in performing the departmental function, that of negotiating on behalf of Los Angeles County the purchase of all necessary supplies at the lowest possible price. Shortly after defendant *1049 commenced this assignment, the department underwent reorganization in an attempt to streamline the purchasing operation and cope more effectively with the ever-increasing volume of purchasing required. One aspect of the new plan was the delineation of particular areas of purchasing by subject matter, and the assignment of particular personnel exclusively to those areas with the hope that the concentrated, specialized experience gained thereby would produce a better long range competitive bidding situation for Los Angeles County.

In August or September 1969, Perez testified defendant was assigned to the book buying section as a purchasing agent, and he remained there until his departure from county employment in April 1972.

Perez provided the trial court with a general description of how books are purchased. Large volume purchases are made subject to a formal bid procedure. Solicitation for bids is made to a compiled list of vendors bythe purchasing agent, as the person responsible for actual negotiation. An important responsibility of the agent is to maintain and expand the vendor list to include as many sources as possible, in order to encourage. Competitive bidding. Sealed bids are received from the vendors, and the low bid is ascertained. This step is also within the province of the purchasing

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agent. While it is standard operating procedure to accept the low bid, it is impossible for the agent to substitute another vendor if he decides the circumstances warrant it. In addition to formal bids, other methods are used. Sometimes it is deemed more expedient to solicit bids from only two or three vendors who are known to have available the particular merchandise needed. Small or unusual purchases are often made by contacting a prticular vendor by telephone. All of the resulting purchase orders, which are submitted to supervisory personnel by the agent for final approval, unless he has authority to act without such approval, show the method used by the agent to obtain the quoted price, I.e., by telephone or letter, and such orders are further identified by a numbered sequence which shows whether formal or informal bid procedure has been used.

Perez explained that the purchasing agent has considerable discretion in selecting vendors and in arranging financial terms. Standard operating procedure in the department, however, requires that deviations ****535** from ordinary practice, such as the selection of other than the low bid or acceptance of a discount arrangement, are expected to be submitted for approval by the agent to his supervisor but, again, in practice such submission results from the exercise of discretion by the agent. When an agent completes a transaction, it may be submitted as a purchase order for approval by a supervisor; however, the review of the transaction, particularly when negotiated ***1050** by an experienced buyer, is largely perfunctory. Because of the tremendous volume of business done by the department every year, it is virtually impossible to employ supervisory staff to scrutinize every individual transaction as it occurs. In short, it is necessary for the department to rely on individual agents' skill, honesty and loyalty.

Perez testified that defendant performed the functions of an agent described above from the time he was assigned to the book buying section, at first under supervision and later with increasing autonomy. Defendant expanded the vendor list used in his section considerably. He and another employee devised a prepayment plan, whereby the vendor was to be paid at the time the order was placed and in return for advance payment the county was to be given a two percent discount on the order. The intended objective was to obtain a price advantage for the county but, as will be seen, the prepayment plan was also of direct benefit to one particular vendor, the Eola Book Service, Inc.

The prosecution introduced into evidence numerous purchase orders, negotiated by defendant as a purchasing agent, with the Eola Book Service, Inc. from July 1970 to December 1971. Some had been approved by superior, and some had not. Gerald Costa, head of management service for the purchasing department, testified that he had found nothing in his fiscal records showing that Eola had done business with Los Angeles County in 1969, but that Eola had done a dollar volume of business with the county totalling $269,977 in 1970--71, and had increased the volume to $361,249 in 1971--72. Perez testified that Eola's substantial volume of business was unusual for a concern that did not have a long history of transacting with the county. He also testified that Eola was the only vendor who had received prepayment in return for giving the two percent discount, the procedure formulated by the defendant. In addition, subsequent audit on some of the formal bidding contacts defendant had negotiated with Eola established that Eola had been awarded the contract when another vendor had actually turned in a lower bid.

The People introduced into evidence two signature authorization cards for bank accounts established by Eola, one in Nevada and another in California. The cards showed that the persons authorized to draw on the accounts were Lois Eola, who subsequently married defendant, and a certain 'M. Stewart.' Other evidence established that county warrants for payment of book purchases were deposited by Eola in the California account; certain checks were introduced showing payment to defendant from that account either by Lois Eola or 'M. Stewart.' One such check was used by defendant to pay off a balance owed to his stock broker.

***1051** Stock broker Chronis testified that while he was employed by a brokerage firm in 1971,

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defendant had dealt with him, opening a joint account in his own name with Eola Book Service, Inc.

Laurence W. Sloan, a handwriting expert in the office of the District Attorney, gave his expert opinion that defendant's signature and that of 'M. Stewart' were written by the same person.

Defendant denied that he had signed the bank account authorization cards, but did say that he had used the name 'M. Stewart' 'in '48 and '49 when I was writing.' It is not clear from the record when defendant first became friendly with Lois Eola. Defendant testified, however, that during his years of employment as a purchasing agent, he had spent substantial ****536** periods of time with Lois in Las Vegas and admitted that he had accompanied her on one occasion when she consulted an attorney about incorporating the book business. She also consulted with defendant about stock market investments.

In April 1972 defendant informed his department head of his impending marriage to Lois Eola, a vendor doing business with the department. The investigation which led to this prosecution commenced.

In connection with this appeal, defendant requested this court to take judicial notice of the Administrative Code of Los Angeles County (Ordinance 4099), material relating to the classification of employees by the county civil service commission, and of a handbook of the Los Angeles County Department of Purchasing and Stores. The handbook sets forth policies and procedures of the department, designating which personnel have authority to execute contracts on behalf of Los Angeles County.

On February 27, 1974, we made an order deferring the decision to take judicial notice of the material submitted by defendant, but we did allow counsel to refer to the material in their appelalte briefs, to explain its relevance to this appeal and the basis upon which judicial notice should be taken.

Defendant contends that Government Code section 1090, if correctly interpreted, is not applicable to him, and thus he was improperly convicted of violating the statute. He claims that at all times during the period he negotiated with Eola he was performing ministerial functions under supervision. He further contends that during his employment he was classified, first, as an assistant deputy purchasing agent and then as a deputy purchasing agent with probationary status, and that in these classifications he was without legal authority to execute contracts with vendors ***1052** on behalf of Los Angeles County. He argues that section 1090, which prohibits an interest by an official or employee in 'any contract Made by them in their Official capacity . . .' (italics added) only applies to those persons who actually have the legal authority to execute contracts, and do so, for the governmental entity they represent, and that he was not a member of that group.

Defendant misconceives the meaning and purpose of the conflict of interest statute. In People v. Darby, 114 Cal.App.2d 412, 425, 250 P.2d 743, 753 it was said that the statute is based upon 'the ancient truism that one cannot faithfully serve two masters at one and the same time . . . The act denounced is 'the possession of an interest" adverse to the governmental body for whom the actor performs. (Emphasis added.)

[1] Actual execution of a contract is not the only criteria for application of the statute. 'The instant statutes (section 1090 included) are concerned with any interest, . . . which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the city . . . (citations). . . . (T)he object . . . is to remove or limit the Possibility of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct (citations). . . . (W)e are persuaded, if not compelled, to reject . . . the narrow and technical interpretation of the word 'made' and construe its statutory meaning to encompass the planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids . . . which here were, in the broad sense,

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embodied in the making of the contract.' (Stigall v. City of Taft, 58 Cal.2d 565, 569--571, 25 Cal.Rptr. 441, 444, 375 P.2d 289, 292; see also, Millbrae Assn. for Residential Survival v. City of Millbrae, 262 Cal.App.2d 222, 237, 69 Cal.Rptr. 251.)

[2][3] The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually **537 participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests. (See People v. Watson, 15 Cal.App.3d 28, 92 Cal.Rptr. 860.) By amendment to Government Code section 1090 in 1963, the Legislature recognized that it was necessary to include 'employees' within the statute because, under present governmental conditions, many public employees do have the opportunity to exercise the prohibited influence. The existence of such opportunity for any particular employee is a factual issue to be resolved on a case by case basis.

*1053 [4][5] In the instant case, the evidence was ample to support the conclusion that the defendant had the opportunity, whatever his job classification, to direct a steady flow of Los Angeles County business and money to a concern in which he was interested, personally, and that he did so. His activities in this regard constituted the type of conduct the Legislature desired to discourage.

[6][7] In view of our discussion of section 1090, it is unnecessary for us to take judicial notice of the submitted material on this appeal, for it would not, even if supportive of defendant's position, affect the result herein. It is also unnecessary to do more than comment briefly and negatively on defendant's other contentions, I.e., that the prosecution 'suppressed evidence' (the documentary items sought to be judicially noticed on this appeal) and that defendant was deprived of a fair trial by the ineffective assistance of his trial counsel. Since we have determined as a matter of law that defendant's actual civil service classification during the period from 1969 to 1972 was immaterial under the circumstances presented here, it follows tht failure to present evidence of that status was not suppression by the People, nor was failure of counsel to emphasize with more vigor the alleged lack of contractual capacity a sign of incompetence.

[8] By a petition for habeas corpus, which was argued and submitted concurrently with the appeal, defendant, in addition to re-arguing the issues on appeal which we have discussed above, contends that he was deprive of a fair trial by the failure of either the People or the defense counsel to introduce the administrative regulations above considered. Since we hold that those regulations, and the departmental action thereunder, did not remove defendant from the proscription of section 1090, it follows that there was no unfairness in the trial nor inadequacy of counsel.

The judgment is affirmed; the petition for a writ of habeas corpus is denied.

KINGSLEY and DUNN, JJ., concur.

40 Cal.App.3d 1046, 115 Cal.Rptr. 532

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Exhibit 39

C

CHARLES GRIMM et al., Plaintiffs and Appellants,
v.
CITY OF SAN DIEGO et al., Defendants and Respondents.
Civ. No. 16974.

Court of Appeal, Fourth District, Division 1, California.

June 13, 1979

SUMMARY

Members of the board of administration of a city retirement system brought an action challenging the authority of the city to pass an ordinance establishing nine members of the thirteen-member board as a quorum and requiring a majority vote of the entire board for final action on any board decision except a vote to adjourn. A rule of the board provided for quorum of a majority, or seven, of its members and an affirmative vote of a majority of those present as necessary for the passage of any business. The trial court found the ordinance to be a lawful enactment and entered an order denying plaintiffs their requested preliminary injunctive relief. (Superior Court of San Diego County, No. 405606, Alfred Lord, Judge.)

The Court of Appeal affirmed. The court held that, while it was the function of the board to act on individual cases, the city council, by charter was given the authority to control the board's activities by "general ordinances," and the quorum requirement could not be characterized as a mere procedural housekeeping provision without disregarding the substantive impact of a quorum requirement and without violating the intent of charter provisions relating to the makeup of the board. The court held the quorum requirement not only insured the participation of more than a majority of the board, but also guaranteed that board decisions would be representative of the majority of the entire board regardless of the number of members present considering and voting on a particular matter. (Opinion by Wiener, J., with Brown (Gerald), P. J., and Staniforth, J., concurring.) ***34**

HEADNOTES

Classified to California Digest of Official Reports

(1) Municipalities § 15--Legislative Control--Control of Municipal Affairs--Home Rule Cities.
A charter city can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive law. Consequently, within its scope, a charter is to a city what the state Constitution is to the state.

(2) Municipalities § 18--Legislative Control--What Are "Municipal Affairs"--Compensation of Officers and Employees--Pensions.
Under Cal. Const. art. XI, § 5, subd. (b), giving full power to charter cities to provide for the compensation of their employees, provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution. A city council's decision regarding a pension system must be upheld unless expressly prohibited by the city charter.

[See **Cal.Jur.3d**, Municipalities, § 103; **Am.Jur.2d** , Municipal Corporations, Counties, and Other Political Subdivisions. § 138.]

(3) Municipalities § 11--Charters--Contents and Interpretation.
A city charter operates not as a grant of power, but as an instrument of limitation and restriction on the

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exercise of power over all municipal affairs which the city is assumed to possess; the enumeration of powers does not constitute an exclusion or limitation. All rules of statutory construction as applied to charter provisions are subordinate to this controlling principle. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. Thus, in construing a city's charter a restriction on the exercise of municipal power may not be implied.

(4) Pensions and Retirement Systems § 1--Statutory Construction.
Although the legislative intent, as evidenced by the provisions of the law, and judicial construction thereof, is controlling, municipal pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby. However, a strained and unreasonable construction should not be adopted, and it should be remembered that the construction should ***35** protect both the municipality and the employee. Ambiguity and uncertainty in pension legislation requires a construction that will, if reasonably possible, accomplish the purpose of the legislation.

(5) Municipalities § 18--Legislative Control--What Are "Municipal Affairs"--Compensation of Officers and Employees--Pensions--Authority of City.
Under charter provisions giving a city the authority to control the activities of the board of administration of the city retirement system by "general ordinances," while the board was authorized to manage the system, the city had authority to pass an ordinance establishing nine members of the thirteen-member board as a quorum and requiring a majority vote of the entire board for final action on any board decision except the decision to adjourn. A quorum requirement was not a mere procedural housekeeping provision, but a protection against totally unrepresentative action in the name of the board by an unduly small number of persons. The quorum requirement not only insured the participation of more than the majority of the board, but guaranteed that board decisions would be representative of the majority of the entire board, regardless of the number of members present considering and voting on a particular matter.

COUNSEL

Lewis & Marenstein and Richard A. Shinee for Plaintiffs and Appellants.

John W. Witt, City Attorney, Jack Katz, Chief Deputy City Attorney, and Thomas F. Calverley, Deputy City Attorney, for Defendants and Respondents.

WIENER, J.

Article IX of the San Diego City Charter provides for the creation of a retirement system (System) for city employees to be managed by a board of administration (Board). (San Diego City Charter, art. IX, §§ 141-148.1.) The city council, pursuant to its power under section 146 of the charter, has enacted through the years a series of ***36** ordinances affecting the System which are now contained in the San Diego City Municipal Code. (San Diego Mun. Code, § 24.0100 et seq.)

The sole issue in this appeal is whether the city was authorized to pass Ordinance No. 12132 (new series) establishing nine members of the thirteen-member Board as a quorum and requiring a majority vote of the entire Board for final action on any Board decision except a vote to adjourn. [FN1] We conclude the trial court properly found the ordinance to be a lawful enactment and affirm the order denying plaintiffs, as members of the Board, their requested preliminary injunctive relief.

FN1 The city council enacted Ordinance No. 12132 (new series) which was codified as section 24.0109.1 of the San Diego Municipal Code and became effective on September 23, 1977. It provides: "Nine (9) of the members elected and appointed to the Board pursuant to Section 144 of the Charter shall constitute a quorum to do business or conduct a hearing but a lesser number may take action to adjourn a meeting or hearing from time to time. The

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affirmative vote of a majority of the members elected and appointed to the Board shall be necessary to pass any vote and take final action on any decision before the Board except that a vote to adjourn may be adopted by a majority of the members present."

The cause of this litigation is the direct conflict between the ordinance passed by the city and the quorum requirement established by the Board itself. Rule 10 of the Board provides for a quorum of a majority, or seven, of its members and an affirmative vote of a majority of those present as necessary for the passage of any business. Plaintiffs contend the city council is not authorized by the charter to enact an ordinance establishing quorum requirements for the Board and, consequently, their action resulted in an amendment to the city charter in violation of article XI, section 3 of the California Constitution. [FN2] The resolution of this issue turns on the proper construction of the relevant charter provisions. ***37**

FN2 Article XI, section 3 of the California Constitution provides:

"(a) For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. The provisions of a charter are the law of the State and have the force and effect of legislative enactments.

"(b) The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.

"(c) An election to determine whether to draft or revise a charter and elect a charter commission may be required by initiative or by the governing body.

"(d) If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail."

Section 141, the enabling clause of article IX, authorizes the city council to establish a retirement system by ordinance. Section 144 mandates the creation of a managerial body for the System and enumerates its authority, composition and function. The section provides in pertinent part:

"The system shall be managed by a Board of Administration which is hereby created, consisting of the City Manager, City Auditor and Comptroller, the City Treasurer, three members of the Retirement System to be elected by the active membership, one retired member of the retirement system to be elected by the retired membership, an officer of a local bank, and three other citizens of the City, the latter four to be appointed by the Council ...

"The Board of Administration may establish such rules and regulations as it may deem proper ...

"The Board of Administration shall be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system; and shall have exclusive control of the administration and investment of such fund or funds as may be established; ... Section 146 of the charter authorizes the city council: "... to enact any and all ordinances necessary, in addition to the ordinance authorized in Section 141 of this Article, to carry into effect the provisions of this Article; and any and all ordinances so enacted shall have equal force and effect with this Article and shall be construed to be a part hereof as fully as if drawn herein."

(1)San Diego is a charter city. It can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law.

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Consequently, "'[w]ithin its scope, such a charter is to a city what the state Constitution is to the state.'" (*San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 898-899 [137 Cal.Rptr. 607].) (2)"Article XI, section 5, subdivision (b) of the California Constitution [gives] full power to charter cities to provide for the compensation of their employees. It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." (*City of Downey v. Board of Administration* (1975) 47 Cal.App.3d 621, 629 [121 Cal.Rptr. 295].) ***38**

(3)A city council's decision regarding a pension system must be upheld unless expressly prohibited by the city charter. (*Estes v. City of Richmond* (1967) 249 Cal.App.2d 538, 545 [57 Cal.Rptr. 536].) "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. [Citations.] ... All rules of statutory construction as applied to charter provisions [citations] are subordinate to this controlling principle. ... A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. ... Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied. " (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598-599 [212 P.2d 894].)

(4)In approaching our task of interpretation, we are further guided by the following principles of statutory construction specifically relating to charter pension provisions: "Although the legislative intent, as evidenced by the provisions of the law, and judicial construction thereof, is controlling, pension laws, being remedial in nature, should be liberally construed in favor of the persons intended to be benefited thereby. However, a strained and unreasonable construction should not be adopted, and it should be remembered that the construction should protect both the municipality and the employee. " [Fns. omitted.] (McQuillin, Municipal Corporations (3d ed. 1973) § 12.143, p. 600.) Ambiguity and uncertainty in pension legislation requires a construction that will, if reasonably possible, accomplish the purpose of the legislation. (*Terry v. City of Berkeley* (1953) 41 Cal.2d 698, 701-702 [263 P.2d 833]; *Newhouser v. Board of Trustees* (1971) 15 Cal.App.3d 322, 327 [93 Cal.Rptr. 166].)

(5)The statutory scheme under scrutiny provides for the establishment of a retirement system for compensated city officers and employees by the city council through ordinance. However, the charter directs that a Board of Administration shall be created to manage the system. The Board, as the managing entity, is authorized by section 144 to "establish such rules and regulations as it may deem proper ..." and to "be the sole authority and judge under such general ordinances as may be adopted by the Council as to the conditions under which persons may be admitted to benefits of any sort under the retirement system ..." In other words, the Board, vested with the management of the retirement system, is authorized by the charter to make such rules and regulations as ***39** it deems proper for the administration of the system. (See also San Diego Mun. Code, § 24.0901.) The charter further provides that the Board shall be the sole authority and judge, under such general ordinances as may be adopted by the council, to determine when members may be admitted to and continue to receive benefits of any sort under the System. (See *Lyons v. Hoover* (1953) 41 Cal.2d 145, 148 [258 P.2d 4]; San Diego Mun. Code, § 24.0901; 38 Cal.Jur.2d, Pensions, § 32, p. 353.) Thus, while it is the function of the Board to act upon individual cases, the city council has been conferred the authority to control the Board's activities by "general ordinances." (See *Lyons v. Hoover, supra.*, at p. 148; 38 Cal.Jur.2d, *op cit supra.*, at p. 353.)

This latter determination of the city council's role is supported by the presence of section 146 within the charter empowering the council "to enact any and all ordinances necessary, in addition to the ordinance authorized in section 141 of this Article, to carry into effect the provisions of this Article ..." In *Montgomery v. Board of Admin., etc.* (1939) 34

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Cal.App.2d 514, 521 [93 P.2d 1046, 94 P.2d 610], this court held section 146 to be constitutional, explaining that "the section gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority [however] to pass any enactment that conflicts with the charter provisions."

Although the quorum requirement in controversy could be easily branded as a mere procedural housekeeping provision and hence an administrative rule which could be enacted only by the Board under its rule-making authority in section 144, it cannot be so characterized without disregarding the substantive impact of a quorum requirement and without violating the intent of the charter provisions, especially relating to the make-up of the Board. "The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons." (Robert's Rules of Order (rev. ed. 1970) p. 16.) The charter mandates not only the creation of the Board, but more importantly, its composition (see § 144, *supra.*). The evident purpose of this latter provision is to secure a board as objective, fair and competent as possible through the representation of all those interests necessarily involved within a public service retirement system. Accordingly, a quorum requirement like rule 10 enacted by the Board providing for a quorum of a majority, or seven, of its members and an affirmative vote of a majority of those present (possibly four within a minimum quorum) as necessary for the passage of any business matter would be contrary to the charter. For, accompanying the cited purpose of the ***40** composition provision is the necessarily implied intent to have this "representative" Board benefited by the perspectives, opinions and values of its varied membership and thus their vote representative of such diverse interests. Hypothetically, the possibility exists that the whim of four members of the thirteen-member Board could be determinative of any business matter and, taken to its extreme, plaintiffs' argument would permit the Board to establish a one-member quorum. Clearly, such possibilities are in conflict with the intent and purpose of section 144 of the charter and, indeed, present us with a denial of true majority representation.

On the other hand, the city council's enactment of the quorum of nine members and an affirmative vote of a majority of the entire Board (seven members) as necessary to pass any vote and take final action on any decision except an adjournment vote, is fully consistent with the charter pension provisions. This quorum requirement not only insures the participation of more than the majority of the Board, but, of greater significance, guarantees that Board decisions shall be representative of the majority of the entire Board regardless of the number of members present considering and voting on a particular matter. It is further representative of the other quorum requirements contained in the charter. (See §§ 15, [FN3] 146, *supra.*.) Finally, in light of the nature of the city council's more stringent quorum requirement which effectuates the intent behind charter section 144, the city council's enactment of the ordinance is authorized by the express language of charter section 146.

> FN3 Charter section 15 provides: "A majority of the members elected to the Council shall constitute a quorum to do business, but a less number may adjourn from time to time and compel the attendance of absent members in such manner and under such penalties as may be prescribed by ordinance. Except as otherwise provided herein the affirmative vote of a majority of the members elected to the Council shall be necessary to adopt any ordinance, resolution, order or vote; except that a vote to adjourn, or regarding the attendance of absent members, may be adopted by a majority of the members present. No member shall be excused from voting except on matters involving the consideration of his own official conduct or in which his own personal interests are involved."

Plaintiffs further assert "that once the benefits are established by the City Council in accordance with

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Section 141, their legislative role, as it pertains to the pension system, ceases." This assertion is without merit in light of the presence of section 146 empowering the council "to enact any and all ordinances necessary, *in addition to the ordinance authorized in Section 141 of this Article*, to carry into effect the provisions of this Article ..." (Italics added.) Section 146 does not contain the asserted ***41** limitation as there is no basis to imply a time limit on the city council's role as overseer to assure performance of the charter pension provisions. [FN4]

FN4 Plaintiffs also urge charter section 143.1 is in direct conflict with Ordinance No. 12132 rendering the latter null and void. Section 143.1 provides: "No ordinance amending the retirement system which affects the benefits of any employee under such retirement system shall be adopted without the approval of a majority vote of the members of said system." We reject this contention as the ordinance in question does not affect in any manner either the substantive benefits or the vested rights of any member of the retirement system.

The order is affirmed.

Brown (Gerald), P. J., and Staniforth, J., concurred.

Appellants' petition for a hearing by the Supreme Court was denied August 15, 1979. ***42**

Cal.App.4.Dist.,1979.

Grimm v. City of San Diego

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Exhibit 40

C

CITY OF GRASS VALLEY, Petitioner,
v.
J. L. WALKINSHAW, as City Auditor, etc., Respondent.
S. F. No. 18028.

Supreme Court of California

Dec. 28, 1949.

HEADNOTES

(1) Municipal Corporations § 83(6)--Legislative Control--Municipal Affairs.
A city which has accepted the privilege of autonomous rule offered by Const., art. XI, §§ 6, 8, as amended in 1914, has all powers over municipal affairs, otherwise lawfully exercised, subject only to clear and explicit limitations and restrictions contained in the charter.

See 18 **Cal.Jur.** 783.

(2) Municipal Corporations § 75--Charter.
A city charter adopted under the home rule provisions of the Constitution operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation.

(3) Municipal Corporations § 83(6)--Legislative Control--Municipal Affairs.
In respect to municipal affairs, a city operating under a home rule charter is not subject to general law except as the charter may provide.

(4) Municipal Corporations § 86(1)--Legislative Control--Municipal Affairs.
The levy of taxes for city purposes is a municipal affair.

(5) Municipal Corporations § 78--Charter--Construction.
All rules of statutory construction as applied to charter provisions are subordinate to the controlling principle that a city, by accepting the privilege of autonomous rule, has full control over its municipal affairs except as clearly and explicitly curtailed by the charter. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied.

(6) Municipal Corporations § 185--Fiscal Matters--Debt Limitation--Charter Limitations.
Provisions of a city home rule charter which deal with the taxing power for general purposes may not impose by implication a limitation on the separately treated power to contract an indebtedness in excess of a specified amount, which amount the framers deemed was the maximum which could be covered by the general tax rate.

(7) Municipal Corporations § 187--Fiscal Matters--Bonds.
A provision of a city home rule charter adopting the procedure of the general law in creating and issuing bonds does not preclude a holding that the method ***596** of payment required by the bond act in force at the time was adopted, since a direct reference to the general law is sufficient to include the complete scheme.

(8) Municipal Corporations § 187--Fiscal Matters--Bonds--Power to Levy Tax to Discharge Indebtedness.
Where a city has authority under its home rule charter to create and issue bonds for the construction of sanitary improvements, the power to levy taxes sufficient to discharge the bonded indebtedness is conclusively presumed to exist unless the charter clearly manifests a contrary intention.

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(9) Municipal Corporations § 187--Fiscal Matters--Bonds--Power to Levy Tax to Discharge Indebtedness.
The power of a city to tax specially to discharge a bonded indebtedness authorized by its charter is necessarily an ingredient of the power to contract, and such power is not implied but is express since it is a duty growing out of the authority to contract. The power to do the thing carries with it the authority to use the necessary means to accomplish it, and is not affected by a charter tax limitation.

(10) Municipal Corporations § 187--Fiscal Matters--Bonds--Construction of Charter Provisions.
Assuming that an ambiguity exists in the provisions of a city charter with respect to the power of the city to issue bonds for necessary public improvements, where the city has adopted a construction favorable to the exercise of the power by the issuance of bonds, and its interpretation was proper one, the fact that the city has acted in conformity with this construction for some 25 years is entitled to due weight.

(11) Mandamus § 25--To Public Officers--City Auditor.
Mandamus is an appropriate remedy to compel a city auditor to extend on the city's property tax rolls a special levy to discharge payments on an authorized bonded indebtedness where the taxing power sought to be exercised exists, and there is no express limitation on its exercise under the city charter except that the bonded indebtedness must be duly authorized.

SUMMARY

PROCEEDING in mandamus to compel a city auditor to extend on city's property tax rolls a special levy to discharge payments of interest and principal on bonded indebtedness. Writ granted.

COUNSEL

Kirkbride, Wilson, Harzfeld & Wallace for Petitioner.

William J. Cassettari for Respondent.

SHENK, J.

In this proceeding the petitioner, city of Grass Valley, seeks the writ of mandate to compel the respondent, its auditor, to extend on the city's property tax rolls, in addition to the tax for general municipal purposes, a special levy ***597** of 63 cents to discharge the 1950 payments of interest and principal on bonded indebtedness. The controversy is submitted on an agreed statement of the case pursuant to sections 1138-1140 of the Code of Civil Procedure.

In 1921 the petitioner, then a city of the sixth class, adopted a freeholders' charter (Stats. 1921, p. 1889) and thereby accepted the privilege of autonomous rule offered by sections 6 and 8 of article XI of the state Constitution as amended in 1914.

Section 2(i) of the charter refers to the city's power to levy and collect ad valorem taxes "subject to the limitations hereinafter imposed."

Section 2(j) prohibits the contracting of indebtedness in excess of $5,000 except with the consent of two-thirds of the qualified electors voting thereon and requires bonds to be issued therefor. The following proviso appears: "Provided, that in the procedure for the creation and issuance of such bonded indebtedness the general law of the State of California in force at the time such proceedings are taken shall be observed and followed."

Section 4 of the charter provides the limitation (referred to in section 2(i)) on the "property tax, to be levied by the City Council upon all property real and personal, within said City at 12 o'clock of the first Monday in March of each year, which may equal but shall never exceed seventy- five (75) cents on every one hundred dollars, assessed valuation of such property."

The present assessed valuation of property in the city of Grass Valley is $3,437,790. The 75-cent rate, levied thereon, will raise $25,783.42. The

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whole of this amount is required for general municipal purposes.

The Bond Act of 1901 (Stats. 1901, p. 27 as amended; 2 Deering's Gen. Laws, Act 5178) authorizes a municipal corporation to incur bonded indebtedness to pay the cost of a municipal improvement where the expenditure would be too great to be paid out of its ordinary annual income and revenue. The act provides the procedure for the creation and issuance of bonds to meet the cost of such improvements. Section 7 empowers the city, at the time of fixing the general tax rate, to levy and collect a sufficient tax to meet the current payments of bond interest and principal. The section states that the "taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes. ..." ***598**

In 1923, pursuant to section 2(j) of the charter and the authority of the electors, the city followed the provisions of the 1901 Bond Act in creating and issuing a bonded indebtedness of $100,000 to meet the cost of street improvements. In conformity with the statutory provisions periodic interest and principal payments on the bonds were made by the levy in the years 1924- 1948 of a special tax of 55 cents in addition to the 75-cent charter rate.

In June, 1949, the electors of the city duly authorized a bonded indebtedness of $398,000 to meet the cost of necessary sanitary improvements, including the acquisition of lands and easements, and the construction of a sewage collection, outfall and treatment works system. On July 1, 1949, the city issued 398 bonds of $1,000 denomination bearing interest of not over 2 3/4 per cent, and maturing in annual amounts varying from $10,000 to $18,000 through the year 1980. The city council has levied the 63-cent special tax to meet the interest and principal payments to fall due the first year, but the respondent auditor has refused to extend the special levy on the tax rolls. Contracts have been let for the construction of the improvements. The bonds have been sold but remain undelivered pending the outcome of the present controversy.

The respondent contends that the 75-cent charter rate is a limitation for all requirements, including the discharge of the bonded indebtedness created pursuant to section 2(j) of the charter and the 1901 Bond Act. He seeks support for his position in the language of sections 2(i) and 4 of the charter providing the 75-cent rate limitation and of section 2(j) incorporating the Bond Act procedure for the creation and issuance of the bonds. He argues that since the language of section 2(j) makes no specific reference to a requirement for the levy of a special tax to meet payments on the bonds, the charter limitation controls and restricts the rate which may be levied for both general and special purposes.

(1) Established law governing the exercise of municipal powers under a home rule charter and principles of construction applicable to charter provisions require the rejection of the respondent's contentions. He has overlooked the controlling principle that by accepting the privilege of autonomous rule the city has all powers over municipal affairs, otherwise lawfully exercised, subject only to the clear and explicit limitations and restrictions contained in the charter. (2) The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal ***599** affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation. (*West Coast Advertising Co. v. San Francisco,* 14 Cal.2d 516, 521-522, 525 [95 P.2d 138] and cases cited; *City of Oakland v. Williams,* 15 Cal.2d 542, 550 [103 P.2d 168]; *San Francisco v. Boyd,* 17 Cal.2d 606, 617-618 [110 P.2d 1036]; *Kennedy v. Ross,* 28 Cal.2d 569, 575 [170 P.2d 904]; *Ayres v. City Council of Los Angeles, ante,* pp. 31, 37 [207 P.2d 1]. (3) Thus in respect to municipal affairs the city is not subject to general law except as the charter may provide. (*Heilbron v. Sumner,* 186 Cal. 648, 650 [200 P. 409] ; *Muehleisen v. Forward,* 4 Cal.2d 17, 19 [46 P.2d 969].) (4) As recognized in the West Coast Advertising case, the levy of taxes for city purposes is a municipal affair; the collection, treatment and disposal of city sewage and the making of contracts therefor are likewise municipal affairs (*Loop Lumber Co. v. Van Loben Sels,* 173 Cal. 228, 232 [

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159 P. 600]), and neither may be held to be circumscribed except as expressly limited by the charter provisions. (5) All rules of statutory construction as applied to charter provisions (*Braun, Bryant & Austin v. McGuire,* 201 Cal. 134, 143 [255 P. 808]; *Hartford Acc. etc. Co. v. City of Tulare,* 30 Cal.2d 832, 835 [186 P.2d 121]) are subordinate to this controlling principle. The former guide-that municipalities have only the powers conferred and those necessarily incident thereto (*San Francisco v. Boyle,* 195 Cal. 426 [233 P. 965]) -is inapplicable. A construction in favor of the exercise of the power and against the existence of any limitation or restriction thereon which is not expressly stated in the charter is clearly indicated. So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied.

The question then is whether the exercise of the power which is the subject matter of section 2(j) of the charter is to be deemed limited or controlled by the provisions of sections 2(i) and 4.

Section 2(i) deals with the general taxing power of the city, which is "subject to the limitations hereinafter imposed." Section 4 states the limitation, namely, that such tax "may equal but shall never exceed" a 75- cent rate.

Section 2(j) treats of the power to borrow money, and limits contracts of indebtedness to $5,000 except with the ***600** consent of two-thirds of the electors of the city. Bonds are required to meet the cost of the duly authorized greater indebtedness, the procedure for the creation and issuance thereof to be according to general law. There is in this section no language expressly withholding any existing power to levy taxes to discharge the bonded indebtedness. Nor is there in the tax limitation of section 4 a specific inclusion of an existing power to levy such special tax. As will be seen the power to tax for the purpose of discharging authorized bonded indebtedness is a necessary accompaniment of the power to contract the indebtedness. (6) In the absence of specific allusion to that subject matter elsewhere in the charter, all the restrictions or limitations upon the exercise of the power to contract a bonded indebtedness including the requirement to tax to discharge it must be found in section 2(j). Thus sections 2(i) and 4 on the one hand, and section 2(j) on the other, treat of two distinct powers. The first must be deemed to have reference to the taxing power for general purposes; and the second to the power to tax for the municipal improvements as well as the authority to contract therefor. Sections 2(i) and 4 may not impose by implication a limitation on the separately treated power to contract an indebtedness in excess of $5,000, which specified amount the framers deemed was the maximum which could be covered by the general tax rate.

(7) Nevertheless the respondent purports to find in the language of section 2(j), adopting the procedure of the general law in creating and issuing the bonds, a limitation on any existing power to levy taxes to discharge an authorized bonded indebtedness. He says that the reference to procedure in the creation and issuance of the bonds precludes a holding that the method of payment required by section 7 of the Bond Act was adopted. The effect claimed would leave incomplete the provision for the bonded indebtedness. In such case the direct reference to the general law is deemed sufficient to include the complete scheme. (*Muehleisen v. Forward, supra,* 4 Cal.2d at p. 20.) However, since the power to tax specially to discharge the bonded indebtedness exists independently of the provision in the general law, that power may be exercised unless the language of section 2(j) expressly prohibits it.

(8) The duly conferred authority to create and issue bonds for the construction of the authorized sanitary improvements not only bestowed the power to levy a special tax to discharge ***601** the bonded indebtedness but made it the duty of the city to exercise the taxing power to that end. It has been recognized that when the municipality has authority to contract an extraordinary debt by the issuance of negotiable securities, the power to levy taxes sufficient to meet the obligation is conclusively deemed to exist unless the law (here the charter) clearly manifests a contrary intention. (9) The

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power to tax is necessarily an ingredient of the power to contract, since the obligation can be met only through the instrumentality of taxation. The power so to tax is not implied but is express since it is a duty growing out of the authority to contract. The power to do the thing carries with it the authority to use the necessary means to accomplish it, and is not affected by a charter tax limitation. (*United States v. New Orleans,* 98 U.S. 381, 393-394 [25 L.Ed. 225]; *Ralls County Court v. United States,* 105 U.S. 733, 735-736 [26 L.Ed. 1220] and cases cited; *Quincy v. Jackson,* 113 U.S. 332, 337-338 [5 S.Ct. 544, 28 L.Ed. 1001] and cases cited; *Dutton v. City of Aurora,* 114 Ill. 138 [28 N.E. 461, 462]; *City of Austin v. Nalle,* 85 Tex. 520 [22 S.W. 668, 673, 960].) No case presented or discovered denies this result in the absence of restriction expressly designed to withhold the power or place a limitation on its exercise. On the contrary, it has been indicated in this state that the discharge of that duty may not indirectly be repudiated by provision in the charter for a limitation of the tax rate which would render performance of the duty impossible. (*Wilkinson v. Lund,* 102 Cal.App. 767, 773 [283 P. 385].) The provisions of the charter do not expressly withhold or limit the exercise of the power, and in the absence of a limiting provision the authority to contract the bonded indebtedness includes authority to exercise the taxing power by levying a special tax to discharge it.

(10) If it may be said that the charter provisions seem to be conflicting, it does not follow that they are irreconcilable. Full force and effect may be given to both provisions when each is seen to have a different and distinct purpose. Assuming ambiguity, a construction which would prevent the city from issuing bonds for necessary public improvements authorized by the electorate would be unreasonable. The city adopted a construction favorable to the exercise of the power by the issuance of the 1923 bonds, and its interpretation was a proper one. The fact that the city has acted in conformity with this construction for a period of some 25 years ***602** is entitled to due weight. (*Reuter v. Board of Supervisors,* 220 Cal. 314, 323 [30 P.2d 417].) The effect of the contemporaneous construction is that the 75- cent tax limitation of section 4 of the charter was intended to curb extravagance in the exercise of the discretionary power to tax for general municipal purposes but was not intended to prevent the exercise of the taxing power for the purpose of discharging a bonded indebtedness duly authorized by the electorate pursuant to section 2(j) of the charter.

(11) The taxing power sought to be exercised exists. There is no express limitation upon its exercise except that the bonded indebtedness must be duly authorized. The electorate, legislative body, and taxpayers of the city have governed themselves in accord with the existence of the power and without the tax limitation invoked by the respondent. The writ of mandate is appropriate to compel performance of the respondent's official duty (Code Civ. Proc., § 1085); and the petitioner is entitled to the relief sought.

Let the peremptory writ issue.

Gibson, C. J., Carter, J., Traynor, J., and Spence, J., concurred.

SCHAUER, J.

I dissent.

The charter of Grass Valley squarely and explicitly provides that the "property tax ... may equal but shall never exceed seventy-five (75) cents on every one hundred dollars, assessed valuation of ... property." That charter has not been amended by any lawful means but now this court sustains the city council in imposing on the people of Grass Valley a property tax rate of $1.38 on every one hundred dollars of assessed valuation.

The language of the charter is clear and unequivocal; such charter is the basic governing law of the city; the residents of that city are entitled to have the law upheld and to expect and demand that this court shall enforce it. None of the arguments for the majority decision, nor all of them together, can escape the fact that the effect of that decision-indeed, its sole object-is to uphold a

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property tax which *does exceed* "seventy-five (75) cents on every one hundred dollars." However desirable that result may appear to the majority justices it is not sound law; and the indulgence in so straining law to reach an end does not in my view constitute desirable judicial practice. ***603**

By the terms of the charter and by prior decisions of this court, hereinafter cited, it is unescapable that the 63-cent tax levied by the city council for the purpose of meeting principal and interest payments on the sanitary improvement bonds issued by the city was and is invalid because it was levied over and above, and in addition to, the maximum property tax rate set forth in the charter (Stats. 1921, p. 1889). If we are to respect and uphold established law the peremptory writ sought by petitioner should be denied.

The provisions of the city charter which are pertinent to this controversy are found in sections 2 and 4 of article I. [FN1]

> FN1 Such provisions are as follows: "Sec. 2. The City shall have power: ...
> "(i) To levy and collect taxes upon any or all objects of taxation upon which a city may levy a tax in accordance with the Constitution and laws of this State, subject to the limitations hereinafter imposed.
> "(j) To borrow money for any of the purposes for which the City is authorized to provide, and for the purpose of carrying out any of the powers granted to the City by this Charter, but shall not contract indebtedness on behalf of the City in excess of the sum of five thousand (5,000) dollars, without the consent of two-thirds of the qualified electors voting thereon, and to issue bonds therefor; Provided, that in the procedure for the creation and issuance of such bonded indebtedness the general law of the State of California in force at the time such proceedings are taken, shall be observed and followed.
> "(k) To do and perform any and all other acts and things appropriate to a municipal corporation which are not specifically forbidden by the Constitution or laws of this State, or which may be for the general welfare and good of the people of said City of Grass Valley, and no enumeration of powers in this Charter shall be taken to imply any limitation of the foregoing general grant of power. ...
> "Sec. 4. A property tax, to be levied by the City Council upon all property, real and personal, within said City at 12 o'clock, of the first Monday in March of each year, which may equal but shall never exceed seventy- five (75) cents on every one hundred dollars, assessed valuation of such property."

At a special election called by the council and held in June, 1949, the city electors approved the incurring by the city of a bonded indebtedness of some $398,000 for the acquisition, construction, and completion of a city sewer system. The bond proceedings "were undertaken for the purpose of financing the cost of improvements for treating and disposing of the sanitary sewage of said City." The bonds were issued, in the denomination of $1,000 each, with maturity dates commencing on July 1, 1950, and extending through July 1, 1980. In September, 1949, the council fixed the "general tax rate for all City purposes for the year 1949-50," at the rate of 75 cents on each one hundred dollars of assessed valuation of property in the city and also levied on such property "a special tax at the rate of sixty- three" cents to meet the principal ***604** and interest payments falling due on the bonds in January and July, 1950.

As claimed plausible "authority" for the additional 63-cent rate the city relies upon subsection (j) of section 2, article I, of the charter, and also upon section 7 [FN2] of an act of the Legislature which took effect on February 25, 1901 (Stats. 1901, p. 27, as amended; 2 Deering's Gen. Laws, Act 5178), and which has to do with the incurring of bonded indebtedness by cities, towns and municipal corporations for municipal improvements and regulating the acquisition, construction or completion thereof. The parties state that "the whole of said seventy-five (75) cent rate is necessary for

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general city purposes, and that City would be unable to finance the cost of any general City improvements unless section 7 of said 1901 Act is applicable to said City as a qualification of section 4 of Article I of said Charter."

> FN2 Section 7 reads as follows: "The legislative branch of said city ... shall at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect annually each year until said bonds are paid, or until there shall be a sum in the treasury of said city ... set apart for that purpose to meet all sums coming due for principal and interest on such bonds, a tax sufficient to pay the annual interest on such bonds as the same becomes due, and also such part of the principal thereof as shall become due before the proceeds of a tax levied at the time for making the next general tax levy can be made available for the payment of such principal. ... *The taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes,* and shall be collected at the time and in the same manner as other municipal taxes are collected, and be used for no other purpose than the payment of said bonds and accruing interest." (Italics added.)

The sale of the bonds has been "awarded" to "the highest responsible bidder therefor" and contracts have been let for the construction of the contemplated improvements but "the consideration for the sale of said bonds will not be received until and unless the City receives a favorable decision herein." It is shown that on a prior occasion, "pursuant to the authority granted at an election ... in the year 1923, under the provisions of said 1901 Bond Act, the City issued ... general obligation bonds ... in the amount of $100,000.00 for street improvements." Such bonds matured in the years 1924 through 1948, and "a special tax separate and distinct from and in excess of the general City tax was levied in each of said years for the payment of the principal and interest of said bonds, and ... in the fiscal year 1923-1924 the amount of the special levy therefore was" 55 cents.

As declared in ***605***West Coast Advertising Co. v. San Francisco* (1939), 14 Cal.2d 516, 521-522 [95 P.2d 138], "It is now established by a line of decisions of the courts of this state that a city which has availed itself of the provisions of the Constitution as amended in 1914 has full control over its municipal affairs unaffected by general laws on the same subject-matters, and that it has such control whether or not its charter specifically provides for the particular power sought to be exercised, so long as the power is exercised within the limitations or restrictions placed in the charter. (*Stege v. City of Richmond,* 194 Cal. 305 [228 P. 461]; *Brougher v. Board of Public Works,* 205 Cal. 426 [271 P. 487]; *Butterworth v. Boyd,* 12 Cal.2d 140 [82 P.2d 434]; *Bank v. Bell, supra* [62 Cal.App. (1923) 320 (217 P. 538).] As stated in *In re Galusha,* 184 Cal. 697, at page 700 [195 P. 406], 'The question, then, is not whether the charter grants the power to impose the tax, but whether it prohibits the tax, ...' Also in *In re Nowak,* 184 Cal. 701, 704 [195 P. 402], it was said: 'The net result ... is that, as to municipal affairs, the charter, instead of being a grant of power, is, in effect, a limitation of powers, and, the imposition of the tax for revenue purposes being strictly a municipal affair, the city has the power to impose that tax unless the power was taken from it by the charter itself. [Citing cases.]'

"The foregoing cited cases leave no doubt that such a charter is no longer a grant of powers, but is rather an instrument which accepts the privilege granted by the Constitution of complete autonomous rule with respect to municipal affairs, and which otherwise serves merely to specify the limitations and restrictions upon the exercise of the powers so granted and accepted. Therefore any such power not expressly forbidden may be exercised by the municipality, and any limitations upon its exercise are those only which have been specified in the charter." (See, also, *Adams v. Wolff* (1948), 84 Cal.App.2d 435, 440-441 [190 P.2d 665].)

The "city is not subject to general laws in matters concerning municipal affairs except as the charter

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itself may provide." (*Heilbron v. Sumner* (1921), 186 Cal. 648, 650 [200 P. 409].) "That street and sewer work in a municipality ... are 'municipal affairs' within the meaning of the constitutional provision cannot be doubted." (*Loop Lumber Co. v. Van Loben Sels* (1916), 173 Cal. 228, 232 [159 P. 600].) The "levy of taxes by a municipality for revenue purposes ... is strictly a municipal affair ... [and] included within the special grant and privilege tendered by the constitutional amendment ***606** in 1914." (*West Coast Advertising Co. v. San Francisco* (1939), *supra,* p. 524.)

A charter provision is "subject to the same rules of interpretation as a statute. If it be free from ambiguity no construction or interpretation is required or permissible and it must be given no meaning other than its words import. 'It is a cardinal rule applicable to the interpretation of statutes that in order to ascertain the intent of the legislature in enacting the same, recourse must first be had to the language of the statute itself; and that if the words of enactment given their ordinary and proper signification are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning.' (*People v. Stanley,* 193 Cal. 428, 431 [225 P. 1, 2].) In the construction of the instrument the office of the court 'is simply to ascertain what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted' (Code of Civ. Proc., sec. 1858, 23 Cal.Jur. 729)." (*Braun, Bryant & Austin v. McGuire* (1927), 201 Cal. 134, 143 [255 P. 808].) "Where there is a conflict between two provisions in a statute a specific or special provision controls over a general one [citations]." (*Hartford Acc. etc. Co. v. City of Tulare* (1947), 30 Cal.2d 832, 835 [186 P.2d 121].)

The problem here is to determine, in conformity with the foregoing rules, whether the property tax limitation of 75 cents expressed in section 4 of article I of the city charter was intended by the electors who adopted the charter (Const., art. XI, § 8, subd. (g)) to include taxes levied for the payment of principal and interest on bonded indebtedness contracted by the city and discussed in subsection (j) of section 2 of article I of the charter. The city urges that the provision of subsection (j) "that in the *procedure* for the *creation* and *issuance* of such bonded indebtedness the general law of the State of California in force at the time such proceedings are taken, shall be observed and followed" (italics added) authorizes and requires the city council, under section 7 of the act of February 25, 1901 (quoted hereinabove), not only to levy and collect to meet the bond payments a property tax "in addition to all other taxes levied for municipal purposes" but to add such tax to the 75-cent maximum if the council finds it expedient so to do.

At the outset, the city relies upon *Ex parte Lemon* (1904), 143 Cal. 558 [77 P. 455, 65 L.R.A. 946]; *Ransome-Crummey Co. v. Bennett* (1918), 177 Cal. 560, 563 [171 P. 304]; and ***607** *Richards v. Wheeler* (1935), 10 Cal.App.2d 108 [51 P.2d 436], as supporting the proposition that a "provision of the general law incorporated into a charter has all of the force and effect of any other charter section." It appears, however, that in the Lemon and the Ransome-Crummey Company cases the statutes in question had been made, in their entirety, a part of the city's organic law, and, as pointed out in *West Coast Advertising Co. v. San Francisco* (1939), *supra,* 14 Cal.2d 516, 522, *Richards v. Wheeler* was apparently concerned with a charter framed as a specific grant of power "rather than with limitations upon recognized existing powers ..." Where the charter adopts only a portion of a general law, or adopts a general law subject to reservations or provisos expressed in the charter, the general law controls only to the extent that it does not conflict with other charter provisions. (See *Muehleisen v. Forward* (1935), 4 Cal.2d 17, 19-20 [46 P.2d 969].)

Here it appears that the city of Grass Valley in its charter has in express language adopted only a portion of the general law relating to the incurring of bonded indebtedness for municipal improvements (2 Deering's Gen. Laws, Act 5178), to wit, the *procedure* to be followed in the *creation* and the *issuance* of such bonds, and has neither expressly nor by any legally permissible implication adopted the provisions embodied in section 7 of the act, treating of the levying of a tax "in addition to all other taxes levied for municipal purposes" for

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the purpose of meeting bond principal and interest payments. Much less does the charter state that the express property tax limitation of 75 cents may be ignored, or does not apply to and include, property taxes which may be levied to pay the bonds. As declared in the Muehleisen case, *supra,* "It is impossible to hold that the proceedings under review were valid. The question is not of strict or liberal construction, nor is the case one of immaterial or unsubstantial departure from formal requirements. The charter provision is clear and requires no interpretation; and the requirements [concerning the recall of elective city officials] which were not followed are among the most important elements of the ... system ..."

The city urges that the tax limitation specified in section 4 of the charter applies only to "general" taxes levied for "general" municipal expenses, and that the meeting of bond payments for municipal improvements constitutes a "special" purpose warranting a "special" tax over and above the charter limitation. In support of such position the city relies upon ***608** a number of cases arising both in California, and in other jurisdictions. Review of such cases reveals, however, that they were decided under charter provisions and statutes differing in both language and effect from those now before us.

Wilkinson v. Lund (1929), 102 Cal.App. 767, 774 [283 P. 385], concerned the validity of a tax limitation provision in a *county,* rather that a *city,* charter, and it was held that under the Constitution (art. XI, § 7 1/2, subd. 4) the taxation power of a county board of supervisors is controlled by general law rather than by the charter limitation; by contrast, the city charter now before us is controlling over general law. *Myers v. Placerville* (1870), 1 Cal. Unrep. 565, concerns the interpretation of acts of the state Legislature, rather than charter limitations which control over such acts. In *People v. Rigney* (1883), 63 Cal. 296, the question was whether taxes beyond a charter limitation were "authorized" by subsequent acts of the Legislature, which at that time controlled over charter provisions (see *Bank v. Bell* (1923), 62 Cal.App. 320, 324-325 [217 P. 538]). *American Co. v. City of Lakeport* (1934), 220 Cal. 548 [32 P.2d 622]; *Los Angeles etc. Corp. v. City Council* (1936), 18 Cal.App.2d 97, 100-102 [63 P.2d 326]; and *Federal Construction Co. v. Wold* (1916), 30 Cal.App. 360, 361 [158 P. 340], had to do with constitutional (art. XI, § 18) and statutory (Stats. 1935, p. 1254) debt and expenditure limitations placed on cities, and held that such limitations did not apply to the mandatory, contingent, liability imposed upon cities by the Improvement Bond Act of 1915 (Stats. 1915, p. 1441; 3 Deering's Gen. Laws, Act 8209) to pay into a tax redemption fund the amount of the delinquent assessment and interest against lands sold for default in payment thereof and purchased by the city. By contrast, there is no mandatory liability upon the city under the charter here involved to levy a property tax at a rate in excess of the charter limitation. In *Gualco v. City of Bakersfield* (1927), 86 Cal.App. 167, 171 [260 P. 308], it was determined that the city charter had not directly provided for street improvement by assessment proceedings, but instead had adopted the procedural provisions of general state law with respect thereto, and that therefore the period specified by state law for publishing notice for bids should be observed.

Thatcher v. Chicago & N. W. Ry. Co. (1887), 120 Ill. 560 [11 N.E. 853]; *Dutton v. Aurora* (1885), 114 Ill. 138 [28 N.E. 461]; and ***609***Werner v. Galveston* (1888), 72 Tex. 22, 29 [7 S.W. 726, 728, 12 S.W. 159], also relied upon by the city, relate to the construction of state statutes which governed the cities involved, and are of little assistance here. *Quincy v. Jackson* (1885), 113 U.S. 332, 335 [5 S.Ct. 544, 28 L.Ed. 1001]; *Columbus Water Co. v. Columbus* (1892), 48 Kan. 99 [28 P. 1097, 1104, 15 L.R.A. 354]; and *Dawson County v. Clark* (1899), 58 Neb. 756, 764 [79 N.W. 822], construed statutes or charter provisions expressly limiting the tax rate for "general purposes" or "general expenses," but (in the Dawson case) permitting "other taxes" authorized by law. In *City of Austin v. Nalle* (1893), 85 Tex. 520 [22 S.W. 668, 960], the charter limited the tax to 1 per cent which was to be used "for the current expense and general improvement of the city," and it was held that the 1 per cent was not intended to cover the

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interest and sinking fund of a bonded indebtedness for construction and operation of a city water and light system, also expressly authorized by the charter. In *LaMar Water & Electric Light Co. v. LaMar* (1895), 128 Mo. 188 [26 S.W. 1025, 31 S.W. 756, 32 L.R.A. 157], the constitutional tax limitation at issue was held not to include a tax which a subsequent section of the same constitution expressly directed to be levied to meet interest payments and create a sinking fund for city indebtedness before such indebtedness could be incurred. The levy upheld in *Pleasant Grove City v. Holman* (1921), 59 Utah 242 [202 P. 1096, 1098], was a special assessment for the benefit to land from the use of water, and not a property tax as that term is used here and is commonly understood. In *Butz v. City of Muscatine* (1869), 75 U.S. (8 Wall.) 575, 580 [19 L.Ed. 490], the tax levy involved (to pay a judgment against an Iowa city) was held to be mandatory under a state statute which controlled over the city's charter tax limitation; however, it may be noted that the Iowa Supreme Court reached a contrary conclusion as to the same state statute (*Clark, Dodge & Co. v. City of Davenport* (1863), 14 Iowa 494) and the Supreme Court of the United States, in *Supervisors v. United States* (1873), 85 U.S. (18 Wall.) 71, 80-83 [21 L.Ed. 771], declared itself bound by the state court decision, and followed it.

In contrast to the statutes and charter provisions and the control by state Legislatures over many of the municipalities involved in the aforementioned decisions, the city of Grass Valley, a municipal corporation independent of general state ***610** legislation, whose charter is its organic law or local constitution (see *Brougher v. Board of Public Works* (1928), 205 Cal. 426, 438 [271 P. 487]; *Dalton v. Lelande* (1913), 22 Cal.App. 481 [135 P. 54]; *Adams v. Wolff* (1948), *supra,* 84 Cal.App.2d 435, 440-441), has by section 4 of article I of its charter expressly and without exception limited the property tax rate to be levied upon property within the city to "seventy-five (75) cents on every one hundred dollars, assessed valuation of such property." Such limited rate is not stated to be for "general expenses" or "general purposes" only, but is a clearly declared maximum property tax rate, which is not subject to general state law except as the charter may provide. [FN3] And it seems unequivocally clear that by providing, in subsection (j), section 2, article I, of the charter, that "in the *procedure for the creation and issuance* of ... bonded indebtedness the general law of the State ... shall be observed and followed" the city adopted at most only the rather detailed provisions as to procedure embodied in the Act of 1901 (see, e.g., §§ 2, 3, 5) to be followed in "the creation and issuance of such ... indebtedness" and did not adopt section 7 of the act concerning the method of providing funds to pay the indebtedness *after* its creation and issuance, nor, more to the point at issue here, did the city authorize a tax levy for that purpose over and above the maximum rate expressly limited by its charter.

FN3 See *Rothschild v. Bantel* (1907), 152 Cal. 5 [91 P. 803], to the effect that charter provisions control manner and place of safekeeping municipal funds, rather than a state statute adopted by the Legislature under the provisions of section 16 1/2 of article XI of the California Constitution.

In support of my view that the tax limitation expressly declared in the charter must be observed, are *San Christina etc. Co. v. San Francisco* (1914), 167 Cal. 762 [141 P. 384, 52 L.R.A.N.S. 676]; *Burr v. San Francisco* (1921), 186 Cal. 508 [199 P. 1034, 17 A.L.R. 581]; and *Spreckels v. San Francisco* (1926), 76 Cal.App. 267, 276 [244 P. 919], which treated of the "great necessity or emergency" which, under certain terms of the charter of the city and county of San Francisco, would warrant the supervisors in temporarily suspending the otherwise controlling "dollar limit" of taxation specified in the charter. In the San Christina case the court declared (p. 774 of 167 Cal.) that "no argument of hardship or inconvenience will justify a court in setting at naught the written terms of a city's charter, even at the instance of the city's officials. As was said by this court in ***611***Connelly v. City of San Francisco* [1912], 164 Cal. 101, [127 P. 834], 'an inconvenience to the city does not justify the despoiling of its taxpayers.' If these large revenues

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sought to be raised by the city do not fairly come within the purview of the emergency tax measure it is for the city to meet the desired end either by the issuance of bonds or by an amendment of its charter. It is not for the courts themselves to amend this charter by striking therefrom any of its salutary and protective provisions." (See, also, *Corbett v. City of Portland* (1897), 31 Ore. 407 [48 P. 428, 430].) In the Burr case it was held that an increase in city expenses, also urged by the city of Grass Valley in the instant case as a reason for ignoring the charter tax limitation, was not such an emergency as to authorize levy of a tax beyond the dollar limit. In so holding the court declared (pp. 515-516 of 186 Cal.) that a contrary holding would "practically destroy" the dollar limit, and that "If the growth of the city, or changes in the charter, or in the state law, or the entering upon new activities by the city government, or other changes which are always to be expected in a growing community, require the creation of new offices, bureaus, or commissions and the hiring of more employees and result in large additions to the regular yearly running expenses of the city, and there is no corresponding increase in the tax valuation, and these things are sufficient to create the 'great necessity' in mind when the charter was adopted in 1899, then, of course, they will continue to operate every year and the dollar limit ceases to exist. It reduces the meaning of the charter provisions on the subject to a mere statement that such tax shall not exceed the dollar rate, except in cases where that rate will not raise the expenses of the city, in which event the rate will be unlimited. The charter may as well have provided that such taxes should not exceed the dollar limit, unless a higher rate was necessary to raise the money required to pay the regular annual expenses of the city. The *temporary* suspension authorized to 'enable the supervisors to provide for such necessity or emergency' would immediately become regular and permanent. The restriction to the dollar limit, which was intended to compel reasonable economy, would have no effect of that kind whatever. All that the supervisors need do to circumvent the provision would be to create a necessity by their own extravagance or by engaging in new municipal activities and enterprises, benevolent or otherwise, and the power to levy the increased rate would automatically follow. ***612**

"We think the charter-makers did not intend that the dollar limit should be so ineffectual and useless."

In the Spreckels case (1926), *supra,* 76 Cal.App. 267, 276, the continuance of sanitary measures to prevent recurrence of bubonic plague in San Francisco was held not such an emergency as would authorize suspension of the dollar limit and the court reiterated that "no argument of hardship or inconvenience will justify a court in ignoring ... [the charter's] protective provisions."

Courts of other jurisdictions have also expressed views in conformity with those I here declare. In *Webber v. Traubel* (1880), 95 Ill. 427, 431, it was held that a charter provision expressly limiting the annual tax to "one percentum per annum," controlled over another charter provision which "enjoins the duty of providing, by taxation, to meet certain registered indebtedness, limiting the taxation in that regard to three mills on the dollar," and that the aggregate tax for "all purposes," including such three mills, could be only 1 per cent. In *Gould v. City of Paris* (1887), 68 Tex. 511 [4 S.W. 650], it was held that under a provision of the state constitution limiting the city to an annual tax of one-fourth of 1 per cent "to defray the current expenses of ... local government," the city could not levy an additional tax of one-tenth of 1 per cent to provide for the interest and sinking fund on bonds issued for the purchase of fire-fighting equipment. In so holding the court declared (p. 652 of 4 S.W.), "It is a principle of law, sustained by the highest authority, that when a municipal corporation contracts a debt to be paid by taxation, if it has not the power to levy the tax, the debt cannot be enforced against it. 'The right to contract must be limited by the right to tax; and if, in the given case, no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it ... The validity of a contract which can only be enforced by a resort to taxation depends on the power to levy the tax for that purpose.' [Citation.]" (See, also, *Corbett v. City of Portland* (Ore., 1897), *supra,* 48 P. 428; *State v. L'Engle* (1898), 40 Fla. 392 [24 So. 539]; *Brown v. Town of Patrick* (1943),

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202 S.C. 236 [24 S.E.2d 365].)

Petitioner city also seeks to find support in the rule of contemporaneous and practical construction of the charter provisions and points to the fact that a "special tax separate and distinct from and in excess of the general City tax" was levied in the years 1924 through 1948 to meet the street improvement bonds authorized by the election of 1923. As repeatedly emphasized ***613** by the courts of this state, however, contemporaneous and practical construction of a statute can "only be resorted to in order to clear up uncertainties and ambiguities. [Citations.] The construction of a statute by [those administering it] ... cannot change its clear language or alter its plain meaning. [Citations.] The provisions of the charter in question not being uncertain, there is no opportunity for practical construction here." (*Montgomery v. Board of Administration* (1929), 34 Cal.App.2d 514, 521-522 [93 P.2d 1046, 94 P.2d 610]; see, also, *Johnston v. Board of Supervisors* (1947), 31 Cal.2d 66, 75 [187 P.2d 686]; *California Drive-In Restaurant Assn. v. Clark* (1943), 22 Cal.2d 287, 294 [140 P.2d 657, 147 A.L.R. 1028].) An "erroneous administrative construction does not become decisive no matter how long continued." (*Trabue Pittman Corp. v. County of Los Angeles* (1946), 29 Cal.2d 385, 399 [175 P.2d 512].)

It is apparent that, as urged by respondent auditor, section 4 of article I of the charter of the city declares in plain and unequivocal language the intent to limit the city's property tax rate for all purposes to 75 cents, and that it is not the function of the courts to declare exceptions which are neither expressly nor even impliedly permitted by the charter. As already noted, if the people wish to increase the limit or provide exceptions, they may do so by expressly amending their charter by their own vote; there is nothing so iniquitous in the charter provision limiting the tax rate on property as to justify this court in effecting such amendment by what is known as "judicial legislation." (See *Montgomery v. Board of Administration* (1939), *supra.*) It may also be added that it is a matter of public knowledge that municipalities may secure their revenues from sources other than property taxes and may, for instance, levy sales taxes and license taxes, among others, for such purpose (see *West Coast Advertising Co. v. San Francisco* (1939), *supra,* 14 Cal.2d 516, 524), especially where, as here, such taxes are expressly authorized in the city charter (art. I, § 2, subd. (i)).

For the reasons above stated, the writ sought should be denied.

EDMONDS, J.

I read the provisions of the city charter with the same meaning as that stated by Justice Schauer. I would also deny the city any relief in this proceeding for the additional reason that, by the judgment in an action to which ***614** only the city and its auditor are parties, the property owners of Grass Valley have a tax burden placed upon them. In my opinion, litigation in that form is against the public interest and should not be entertained by this court. (See my dissenting opinions in *City of Whittier v. Dixon,* 24 Cal.2d 664 [151 P.2d 5, 153 A.L.R. 956], and cases cited.)

Cal.,1949.

City of Grass Valley v. Walkinshaw

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Exhibit 41

STEVE WESTLY, as Controller, etc., Plaintiff and Appellant,
v.
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM BOARD OF ADMINISTRATION et al.,
Defendants and Appellants.
No. C039686.

Court of Appeal, Third District, California.

Jan. 30, 2003.

SUMMARY

The state Controller brought an action for declaratory and injunctive relief against the chief executive officer and members of the Board of Administration of the California Public Employees' Retirement System (CalPERS). The Controller challenged defendants' assertion of plenary authority to exempt its employees from civil service, to issue its own employee pay warrants, and to issue stipends, salaries, and other payments in excess of the amounts permitted by the Government Code. The trial court granted the Controller's motion for judgment on the pleadings on all causes of action, except that the trial court sustained defendants' demurrer to the Controller's challenge to defendants' authority to exempt its portfolio managers from civil service provisions. The trial court entered a judgment of dismissal of that one cause of action, and entered judgment in favor of the Controller on the remaining causes of action. (Superior Court of Sacramento County, No. 01AS00633, Charles C. Kobayashi, Judge.)

The Court of Appeal overruled the order sustaining the demurrer and directed the trial court to enter judgment in favor of the Controller on the cause of action that challenged the board's exemption of its portfolio managers from civil service, modified the judgment in certain particulars, and, in all other respects, affirmed the judgment. The court held that the Controller had standing to challenge the board's exemption of its portfolio managers from civil service, since the Controller has the right to issue warrants and to audit payments to ensure that state expenditures are authorized by law. The court also held that defendants did not have plenary authority to evade state laws governing civil service (Cal. Const., art. VII, § 1) and authorizing the Controller to issue warrants and audit their legality, since CalPERS money is state money (Gov. Code, § 12320) that is governed by state law. Further, the plenary administrative authority that is granted the board by Cal. Const., art. XVI, § 17, encompasses the management of CalPERS assets and their delivery, not the remuneration of those who administer those assets. While Cal. Const., art. XVI, § 17, imposes fiduciary ***1096** duties upon the board, these duties must be performed within the limits of applicable state law. (Opinion by Blease, Acting P. J., with Sims and Robie, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) State of California § 4--Officers--Controller--Authority to Litigate Disputes:Pensions and Retirement Systems § 3--Board of Administration.
The state Controller had standing to bring an action for declaratory and injunctive relief against the chief executive officer and members of the Board of Administration of the California Public Employees' Retirement System (CalPERS), challenging defendants' authority to exempt its portfolio managers from civil service provisions. The Controller has authority as the head of a state department to pursue litigation that concerns activities of the department and violations of departmental law (Gov. Code, § 11180). Further, this action arose when defendants developed their

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own payroll system to directly pay the portfolio managers from the retirement fund in amounts that exceeded civil service classifications, in response to the Controller's refusal to issue warrants in those amounts. The Controller has authority to prevent the payment of persons employed by state agencies in violation of the civil service system. The issue was whether the board could, by setting up its own payroll system, bypass the Controller's authority to issue warrants and pay employees through a uniform payroll system. Hence, this action was fundamentally about the Controller's right to determine whether defendants' actions complied with the law. A declaratory relief action properly may be sought as a prophylactic measure to resolve a dispute.

(2a, 2b, 2c, 2d) Pensions and Retirement Systems § 3--CalPERS-- Board of Administration--Extent of Authority--To Exempt Employees from Civil Service and Issue Its Own Pay Warrants to Employees.
In an action for declaratory and injunctive relief by the state Controller against the chief executive officer and members of the Board of Administration of the California Public Employees' Retirement System (CalPERS), the trial court properly granted the Controller's motion for judgment on the pleadings. Defendants did not have plenary authority to exempt board employees from civil service, to issue its own employee pay warrants, or to issue stipends, salaries, and other ***1097** payments in excess of the amounts permitted by the Government Code. Defendants did not have plenary authority to evade state laws governing civil service (Cal. Const., art. VII, § 1) and authorizing the Controller to issue warrants and audit their legality, since CalPERS money is state money (Gov. Code, § 12320) that is governed by state law. Further, the plenary administrative authority that is granted the board by Cal. Const., art. XVI, § 17, encompasses the management of CalPERS assets and their delivery, not the remuneration of those who administer those assets. While Cal. Const., art. XVI, § 17, imposes fiduciary duties upon the board, these duties must be performed within the limits of applicable state law.

[See 9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 149; West's Key Number Digest, Officers and Public Employees⚷ 101.]

(3a, 3b) Initiative and Referendum § 1 --Construction of Initiative Measures.
The rules of construction are the same for initiative enactments as for legislative enactments. A court, in construing either, looks first to the language of the enactment, giving the words their usual and ordinary meaning. The court resorts to extrinsic evidence to determine the intent of the voters only if the statutory language is susceptible of more than one reasonable interpretation.

(4a, 4b, 4c) Pleading § 92--Motions and Objections--Motion for Judgment on Pleadings.
In an action for declaratory and injunctive relief by the state Controller against the chief executive officer and members of the Board of Administration of the California Public Employees' Retirement System, the trial court properly resolved the matter on the Controller's motion for judgment on the pleadings, since this dispute involved a pure question of law. The Controller challenged defendants' assertion of plenary authority to exempt its employees from civil service, to issue its own employee pay warrants, and to issue stipends, salaries, and other payments in excess of the amounts permitted by the Government Code. In resolving this dispute, the trial court was called upon to interpret the plenary administrative authority that is granted the board by Cal. Const., art. XVI, § 17, which is a purely legal question.

(5a, 5b) Appellate Review § 128--Scope of Review--Rulings on Demurrers-- Motion for Judgment on Pleadings.
A motion for judgment on the pleadings is analogous to a general demurrer. In reviewing a trial court's grant of a plaintiff's motion for judgment on the pleadings, the appellate court assumes that the defendant could have proven ***1098** all of the allegations in its answer. The issue is whether the complaint raised an issue that could be resolved as a matter of law.

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(6) Estoppel and Waiver § 13.4--Estoppel Against Public Entities.
In an action for declaratory and injunctive relief by the state Controller against the chief executive officer and members of the Board of Administration of the California Public Employees' Retirement System, the affirmative defenses of laches and waiver were not available to defendants. The Controller challenged defendants' assertion of plenary authority to exempt its employees from civil service, to issue its own employee pay warrants, and to issue stipends, salaries, and other payments in excess of the amounts permitted by the Government Code. Defendants could not assert that the Controller's failure to raise legal objections to past violations of the law precluded the Controller from bringing an action to prevent further violations of the law. Further, neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public. Both the civil service laws and the Public Employees' Retirement Law (Gov. Code, § 20000 et seq.) are intended to protect the public fisc, thereby protecting the interests of state's taxpaying citizens. A court will not recognize equitable defenses where the plaintiff in an official capacity seeks equitable relief on behalf of the citizens of this state.

COUNSEL

Remcho, Johansen & Purcell, Joseph Remcho, Robin B. Johansen, James C. Harrison, Miguel Marquez; Strumwasser & Woocher, Fredric D. Woocher and Michael J. Strumwasser for Plaintiff and Appellant.

Jones, Day, Reavis & Pogue, Elwood Lui, Jeffrey A. LeVee, Peter G. McAllen, Emma Killick; Jones, Day, Reavis & Pogue, Stephen J. Goodman; and Peter Mixon for Defendants and Appellants.

Kathy M. Katano-Lee for Alameda County Employees' Retirement Association as Amici Curiae on behalf of Defendants and Appellants.

Steefel Levitt & Weiss, Harvey L. Leiderman, Ashley K. Dunning for Board of Retirement of Orange County Employees' Retirement System as Amici Curiae on behalf of Defendants and Appellants. ***1099**

Christopher W. Waddell for California State Teachers' Retirement System as Amici Curiae on behalf of Defendants and Appellants.

BLEASE, Acting P. J.

At issue is the meaning of the provision of article XVI, section 17 of the California Constitution (Article XVI, section 17), that grants the Board of Administration (the Board) of the California Public Employees' Retirement System (CalPERS) "plenary authority ... for ... administration of the system ...."

Article XVI, section 17 provides in pertinent part: "Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following: ...."

The state Controller, [FN1] challenges the Board's [FN2] assertion of plenary authority to exempt its employees from civil service, to bypass the Controller's duty to issue warrants for the pay of employees, and to issue stipends, salaries, and other payments in excess of the amounts permitted by the Government Code. [FN3]

FN1 By reason of an election held in November 2002, as of January 1, 2003, Kathleen Connell was replaced as Controller by Steve Westly.

FN2 Also named as defendants were James E. Burton, the chief executive officer of CalPERS, and three members of the Board, Robert F. Carlson, Mike Quevedo, Jr., and William B. Rosenberg. We shall refer to them collectively as the Board.

FN3 A reference to a section is to the Government Code unless otherwise

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designated or apparent from the context.

The trial court granted the Controller's motion for judgment on the pleadings on all but the sixth cause of action, which challenges the Board's authority to exempt its portfolio managers from the civil service provisions of the California Constitution.

We will affirm the judgment with the exception that, unlike the trial court, we find the Controller has standing to raise the sixth cause of action because the Controller has the right to issue warrants and audit payments to ensure an expenditure is authorized by law.

The primary purposes of Article XVI, section 17 are to grant retirement boards the sole and exclusive power over the management and investment ***1100** of public pension funds and to ensure that the assets of public pension systems are used to provide benefits and services to participants efficiently and promptly. The authority claimed by the Board is not within these purposes. [FN4]

FN4 We have no occasion to consider the application of Article XVI, section 17 to any other issue.

We conclude the Board does not have plenary authority to evade the law that limits the pay of the Board and its employees, that specifies the employees exempt from civil service, and that authorizes the Controller to issue warrants and audit their legality.

Factual and Procedural Background

The voters enacted the challenged provision as an amendment to Article XVI, section 17, in 1992. The backdrop against which the amendment was enacted involved actions by the Governor and Legislature to balance the state budget by limiting or delaying the state's employer contributions to CalPERS.

For example, in 1982 legislation was enacted to bar the state from making a contribution for a portion of that year and to require the shortfall to be made up from the CalPERS reserve against deficiencies. (*Claypool v. Wilson* (1992) 4 Cal.App.4th 646, 655 [6 Cal.Rptr.2d 77].) Until 1990, the state paid employer contributions on a monthly basis. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1119 [61 Cal.Rptr.2d 207].) In 1990, the Legislature changed the payment schedule from monthly to quarterly. In 1991, the Legislature temporarily changed the payment schedule from quarterly to semiannually. In 1992 legislation "changed the schedule to 'semiannually, six months in arrears.' Legislation in 1993 changed the schedule to 'annually, 12 months in arrears.' " (*Id.* at p. 1117.) In 1991, legislation was passed to repeal statutes providing for cost of living benefits to retirees, and to use these funds to meet the state's employer contribution requirement. (*Claypool v. Wilson*, *supra*, at pp. 657-658.) Also in 1991, legislation was passed transferring the actuarial function to the Governor. (*Id.* at p. 658.)

Under the California Pension Protection Act of 1992 (enacted by passage of Proposition 162), Article XVI, section 17 was amended to grant retirement boards [FN5] "plenary authority and fiduciary responsibility for ***1101** investment of moneys and administration of the system...." [FN6] The amendment is subject to the subdivisions which follow and the law, as ***1102** enacted, to a statement of "Purpose and Intent" [FN7] and to "Findings and Declarations." [FN8]

FN5 Article XVI, section 17 applies not only to the Board but also to other retirement boards in the state.

FN6 The amendment adds in pertinent part, in italics, as follows:
"Notwithstanding *any other* provisions *of law or this Constitution* to the contrary, the *retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for* investment of moneys *and administration* of *the* system, subject to all of the following:
"(a) *The retirement board of a public pension or retirement system shall have the sole and exclusive fiduciary responsibility over the assets of the public*

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pension or retirement system. The retirement board shall also have sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries. The assets of a public pension or retirement system are trust funds and shall be held for the exclusive purposes of providing benefits to participants in the pension or retirement system and their beneficiaries and defraying reasonable expenses of administering the system.

"(b) The *members of the retirement board* of *a* public pension or retirement system shall discharge *their* duties with respect to the system solely in the interest of, and for the exclusive purposes of providing benefits to, participants and their beneficiaries, minimizing employer contributions thereto, and defraying reasonable expenses of administering the system. *A retirement board's duty to its participants and their beneficiaries shall take precedence over any other duty.*

"(c) The *members of the retirement board* of a public pension or retirement system shall discharge *their* duties with respect to the system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims.

"(d) The *members of the retirement board* of *a* public pension or retirement system shall diversify the investments of the system so as to minimize the risk of loss and to maximize the rate of return, unless under the circumstances it is clearly not *prudent* to do so.

"(*e*) *The retirement board of a public pension or retirement system, consistent with the exclusive fiduciary responsibilities vested in it, shall have the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system.*

"(*f*) *With regard to the retirement board of a public pension or retirement system which includes in its composition elected employee members, the number, terms, and method of selection or removal of members of the retirement board which were required by law or otherwise in effect on July 1, 1991, shall not be changed, amended, or modified by the Legislature unless the change, amendment, or modification enacted by the Legislature is ratified by a majority vote of the electors of the jurisdiction in which the participants of the system are or were, prior to retirement, employed.*

"(*g*) *The Legislature may by statute continue to prohibit certain investments by a retirement board where it is in the public interest to do so, and provided that the prohibition satisfies the standards of fiduciary care and loyalty required of a retirement board pursuant to this section.*

"(*h*) *As used in this section, the term 'retirement board' shall mean the board of administration, board of trustees, board of directors, or other governing body or board of a public employees' pension or retirement system; provided, however, that the term 'retirement board' shall not be interpreted to mean or include a governing body or board created after July 1, 1991 which does not administer pension or retirement benefits, or the elected legislative body of a jurisdiction which employs participants in a public employees' pension or retirement system.*" (Cal. Const., art. XVI, § 17; see also Ballot Pamp., Gen. Elec. (Nov. 3, 1992) text of Prop. 162, pp. 70-71 (Ballot Pamphlet).)

FN7 In pertinent part, the declaration of purpose is as follows:

" 'Section Three. Purpose and Intent. The People of the State of California hereby declare that their purpose and intent in

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enacting this measure is as follows:
" '(a) To protect pension funds so that retirees and employees will continue to be able to enjoy a basic level of dignity and security in their retirement years.
" '(b) To give voters the right to approve changes in the composition of retirement boards containing elected retirees or employee members.
" '(c) To protect the taxpayers of this state against future tax increases which will be required if state and local politicians are permitted to divert public pension funds to other uses.
" '(d) To ensure that the assets of public pension systems are used exclusively for the purpose of efficiently and promptly providing benefits and services to participants of these systems, and not for other purposes.
" '(e) To give the sole and exclusive power over the management and investment of public pension funds to the retirement boards elected or appointed for that purpose, to strictly limit the Legislature's power over such funds, and to prohibit the Governor or any executive or legislative body of any political subdivision of this state from tampering with public pension funds.
" '(f) To ensure that all actuarial determinations necessary to safeguard the competency of public pension funds are made under the sole and exclusive direction of the responsible retirement boards.
" '(g) To affirm the legal principle that a retirement board's duty to its participants and their beneficiaries takes precedence over any other duty.' " (See Historical Notes, 3 West's Ann. Const. (1996 ed.) foll. Art. XVI, § 17, p. 114.)

FN8 In pertinent part, the findings provide:
" 'Section Two. Findings and Declarations. The People of the State of California hereby find and declare as follows: [¶] ... [¶]
" '(c) Politicians have undermined the dignity and security of all citizens who depend on pension benefits for their retirement by repeatedly raiding their pension funds.
" '(d) Political meddling has driven the federal Social Security system to the brink of bankruptcy. To protect the financial security of retired Californians, politicians must be prevented from meddling in or looting pension funds.
" '(e) Raids by politicians on public pension funds will burden taxpayers with massive tax increases in the future.
" '(f) To protect pension systems, retirement board trustees must be free from political meddling and intimidation.
" '(g) The integrity of our public pension systems demands that safeguards be instituted to prevent political "packing" of retirement boards, and encroachment upon the sole and exclusive fiduciary powers or infringement upon the actuarial duties of those retirement boards.
" '(h) In order to protect pension benefits and to avoid the prospect of higher taxes, the People must act now to shield the pension funds of this state from abuse, plunder and political corruption.' " (See Historical Notes, 3 West's Ann. Const., *supra*, foll. Art. XVI, § 17, p. 114.)

Claiming plenary authority under Article XVI, section 17, the Board engaged in a series of administrative actions that conflict with constitutional and statutory authority. ***1103**

Contrary to article VII, section 4 of the California Constitution, which limits the employees exempt from civil service to one deputy or employee selected by the Board, and contrary to section 20208, which classifies personnel with investment expertise as civil service employees, the Board exempted at least 10 portfolio managers from civil service. Contrary to California Constitution, article XVI, section 7, and the uniform payroll provisions of section 12470, the Board issued its own warrants for the pay of its portfolio managers. Contrary to

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section 20091, which limits the compensation of Board members for attendance at Board meetings to $100, the Board increased the compensation to $400 per meeting. Contrary to section 19820, subdivision (a), which limits travel reimbursements for Board members and employees, as determined by the Department of Personnel Administration (DPA), the Board adopted an expense reimbursement policy that exceeded its amounts. Contrary to section 20092, which limits the amount the Board may reimburse a member's employing agency (known as "release time" reimbursements) to 25 percent of the member's annual compensation, the Board increased the reimbursement rates beyond 25 percent.

Article VII, section 1 of the California Constitution provides that every employee of the state is a civil service employee, unless exempted. Section 4 exempts one deputy or employee selected by each board or commission. Contrary to these provisions, and section 20208, the Board classified at least 10 portfolio managers as exempt from the civil service system. Contrary to section 19826, which directs the DPA to establish salary ranges for civil service classifications, the Board set the salaries for its portfolio managers at an amount in excess of that approved by the DPA.

Finally, in order to pay its portfolio managers increased salaries in the face of the DPA's and the Controller's refusals to process the increases, the Board developed its own payroll system by which it paid the managers directly from the retirement system trust funds. This action was contrary to article XVI, section 7 of the California Constitution, which provides the Controller must issue all warrants for money drawn from the state treasury, and section 12470, which directs the Controller to operate a uniform payroll system for all state agencies.

The Controller filed this declaratory and injunctive relief action. The Board demurred to the sixth cause of action which challenged the Board's exemption of its portfolio managers from civil service on the ground the Controller has no standing to raise the issue. The trial court sustained the Board's demurrer to the sixth cause of action without leave to amend. The Controller cross-appeals from the judgment of the trial court that dismisses this cause of action. ***1104**

The Controller moved for judgment on the pleadings on the remaining causes of action. The trial court granted the motion and entered judgment in the Controller's favor. The trial court's ruling states in part that "the existing case law and the background materials, particularly the ballot arguments, clearly indicate that the voters had intended to stop the raiding of the pension funds, not to grant the defendants unlimited authority to ignore state laws governing state employees."

This appeal followed. [FN9]

FN9 Appellants filed a petition for writ of supersedeas which we treated as a motion for stay pending appeal, and on that basis granted the motion.

Discussion

I. *Standing to Raise the Sixth Cause of Action*

(1) We first consider the Controller's standing to raise the issues tendered in the sixth cause of action.

A. *The Issues*

In the sixth cause of action the Controller alleges the Board's classification of 10 portfolio managers as employees exempt from civil service, violates article VII, section 4 of the California Constitution and the state civil service laws (§ 18500 et seq).

The complaint requests a declaration of the Controller's rights and duties without being subject to liability. The Controller asserts liability could attach for failing to superintend the fiscal concerns of the state, failing to audit disbursements from the treasury for correctness and legality (§ 12410), failing to ensure warrants for payment are authorized by law (Cal. Const., art. XVI, § 7; § 12470), failing to audit all claims before drawing a warrant (§ 925.6, subd. (a)), failing to abolish vacant civil service positions (§ 12439), and failing to verify that payments of salary to civil servants are proper (§ 19764).

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The trial court ruled the Controller had no standing to assert the sixth cause of action because the Controller's authority is limited to the fiscal governance of the state and no facts were alleged sufficient to establish authority over the civil service classification of the Board's employees. We disagree. ***1105**

B. *Allegations of Fact*

The Controller alleged the Board voted to reclassify its portfolio managers as employees exempt from civil service, increase their salaries in excess of the salary range set by the DPA, and pay them directly from the retirement fund in the state treasury without approval by the DPA or the Controller. [FN10]

> FN10 DPA establishes salary ranges for each class of civil service positions and administers salaries of exempt employees. (Respectively, §§ 19826, 19816.) In *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1146 [2 Cal.Rptr.2d 558] (*Lowe*), this court said the DPA has "exclusive jurisdiction to classify positions in the state civil service." CalPERS argues this prevents the Controller from challenging its expenditures because the Controller has no authority to classify employees as civil service. We disagree. *Lowe* concerns the classification of positions within the civil service, not the right to a determination whether positions *are* civil service positions. (See *Stockton v. Department of Employment* (1944) 25 Cal.2d 264, 272 [153 P.2d 741], upon which *Lowe* relies.)

The Board's action arose in the following way. The DPA refused to approve the Board's increase in salaries and refused to issue a pay letter to the Controller. In response CalPERS delivered its own pay letter to the Controller, requesting an increase in the salary range for the portfolio managers on the basis it had plenary authority under Article XVI, section 17 to take this action. The Controller refused to honor the pay letter because it was not approved by the DPA. CalPERS then informed the Controller it had developed its own payroll system and would directly pay the salaries of portfolio managers from the retirement fund in excess of those authorized by their civil service classification.

C. *The Controller's Litigation Authority*

Section 11180 provides: "The head of each department may ... prosecute actions concerning: [¶] (a) All matters relating to the business activities and subjects under the jurisdiction of the department [and] [¶] (b) Violations of any law or rule or order of the department."

The Office of State Controller is a state department and the Controller is the head of the department. (§ 12405.) The thrust of the present action, including the sixth cause of action, concerns the Controller's authority to issue warrants for the pay of state employees, to audit and determine the legality of any claim regarding such pay, including exemption from the civil service laws, and to oversee the uniform payroll system established pursuant to section 12470.

The Constitution provides: "Money may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn ***1106** warrant." (Cal. Const., art. XVI, § 7.) The state Treasury contains the Public Employees' Retirement Fund to which state public retirement money must be credited. (§ 20170.) Accordingly, money may be drawn on the retirement fund only by a warrant issued by the Controller.

The statutory jurisdiction of the Controller is set forth in articles 2 through 5 of title 2, division 3, part 2, chapter 5 of the Government Code (§ 12410 et seq.). These articles vest the Controller with the responsibility to audit and make payments from the state treasury and to operate a uniform state payroll system for all state agencies.

The Controller is required to audit all claims against the state and all claims for the disbursement of any state money for their correctness, and to determine whether the law supports payment. (§ 12410.) [FN11] The Controller must abolish civil service positions that are vacant for six consecutive

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months. (§ 12439.) The Controller must operate a uniform state payroll system for all state agencies, except the University of California and the California State Fair. (§ 12470.) [FN12] The Public Retirement System is an agency of the state and subject to section 12470 because it is a unit of the State and Consumer Services Agency. (§§ 20002, 12800, 12804.)

FN11 Section 12410 provides in pertinent part: "The Controller shall superintend the fiscal concerns of the state. The Controller shall audit all claims against the state, and may audit the disbursement of any state money, for correctness, legality, and for sufficient provisions of law for payment." In part V of the Discussion we consider the Board's claim the retirement fund is not "state money."

FN12 Section 12470 provides in pertinent part that "the Controller shall install and operate a uniform state payroll system for all state agencies except the California Exposition and State Fair and the University of California."

"That the Controller has the power, indeed the duty, to ensure that the decisions of an agency that affect expenditures are within the fundamental jurisdiction of the agency is clear." (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1335 [26 Cal.Rptr.2d 666].) "[W]ith respect to the Controller's duties the Legislature has specifically provided that 'a warrant shall not be drawn unless authorized by law ....' (§ 12440.) An attempt by an administrative agency to exercise control over matters which the Legislature has not seen fit to delegate to it is not authorized by law and in such case the agency's actions can have no force or effect." (*Ibid.*)

There is no question the Controller has authority to prevent the payment of persons employed by state agencies in violation of the civil service system. In both *Stockburger v. Riley* (1937) 21 Cal.App.2d 165 ***1107**[68 P.2d 741], [FN13] and *State Compensation Insurance Fund v. Riley* (1937) 9 Cal.2d 126 [69 P.2d 985, 111 A.L.R. 1503], the courts upheld the Controller's refusal to pay independent contractors because they were not within the civil service. In *Treu v. Kirkwood* (1954) 42 Cal.2d 602 [268 P.2d 482], the court upheld the Controller's refusal to pay overtime to an employee exempt from civil service.

FN13 Overruled on other grounds in *California State Employees' Assn. v. State of California* (1988) 199 Cal.App.3d 840, 851 [245 Cal.Rptr. 232].

Normally, the Controller asserts authority over the civil service system by refusing to authorize payment to the person employed in violation of the civil service laws. The Controller's authority to enforce these laws is no less, however, when a state agency attempts to do indirectly what it cannot do directly.

The issue tendered is whether a state agency may bypass the Controller's authority to issue warrants and audit and pay the employees of the state through a uniform payroll system by claiming the employees are not civil service employees and by setting up its own payroll system. The Controller asks the courts to determine the responsibilities intrinsic to his authority to issue and audit employee payments.

By bringing this action in declaratory relief, the Controller seeks not to infringe on the jurisdiction of the DPA to enforce the civil service statutes, but to enforce the Controller's authority to audit the disbursement of any state money for its legality and correctness.

The Board cites *Tirapelle v. Davis, supra*, 20 Cal.App.4th 1317, as authority for the argument the Controller has no standing to challenge the classification of a state employee as a civil service employee. The Board misreads *Tirapelle*.

Tirapelle concerned a mandate proceeding to review the Controller's refusal to implement salary reductions established by the DPA for employees exempt from civil service. As appropriate to a

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mandate proceeding, the court held the Controller has both ministerial and discretionary authority. The Controller has ministerial authority when the amount of an expenditure is set by law or entrusted to the discretion of another agency. (*Tirapelle v. Davis, supra*, 20 Cal.App.4th at p. 1329.) The Controller has discretionary authority when the facts must be determined as necessary to establish the validity of a claim. (*Ibid.*)

Tirapelle held the Controller had ministerial authority over an award of salary because the "power of approval and the administration of salaries of ***1108** exempt employees" was vested in the DPA. (*Tirapelle v. Davis, supra*, 20 Cal.App.4th at p. 1339.) Since the Controller could point to no law authorizing the payment of higher salaries, it was not authorized to fix those salaries at a higher level. (*Id.* at p. 1332.)

However, *Tirapelle* also said, "Our decision is without prejudice to the right of the Controller, in the exercise of his statutory duties ... to determine whether the DPA lacked fundamental authority with respect to any specific salary claim." (*Tirapelle v. Davis, supra*, 20 Cal.App.4th at p. 1341.) The court thus recognized the Controller's right to determine whether the DPA has authority to set the salary ranges for civil service employees and, incident to that determination, the right to determine whether the Board may exempt its employees from the civil service provisions of the state Constitution. (§ 19826.)

In the present case, there is no law that grants the Board the right to set the salaries of its portfolio managers except for its interpretation of Article XVI, section 17, the very provision at issue in this case. Rather, the Board is directed by statute to classify its employees who possess investment expertise as civil service employees. It may contract outside of state service only for "necessary investment expertise" upon the approval of the DPA, if the expertise "is not available within existing civil service classifications ...." (§ 20208.) The portfolio managers are employees who possess investment expertise and for that reason are within the civil service.

This action, including the sixth cause of action, is fundamentally about the Controller's right to determine whether the Board's actions comply with the law. Just as there was no question the Controller would have had standing to litigate the Controller's authority and the DPA's authority in *Tirapelle*, had it initiated the action, there is no question the Controller has standing to litigate the authority of the Board to exempt its employees from civil service, to bypass the Controller's authority to issue warrants and otherwise to exempt its actions from the Controller's review of the legality of any payment from the Treasury.

The complaint sought declaratory relief to resolve the disputed issue whether the CalPERS employees are within the civil service. A declaratory judgment properly may be sought as a prophylactic measure to resolve a dispute. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 898 [123 Cal.Rptr.2d 432, 51 P.3d 297].) That includes the civil service status of the Board's portfolio managers.

The trial court erred in sustaining the Board's demurrer to the Controller's sixth cause of action. ***1109**

II. *The Plenary Authority of the Board*

(2a) The Board claims the "plenary authority" that Article XVI, section 17 grants it over the "administration of the system" includes the exclusive power to set the salaries of its employees, to determine their civil service status, to determine the amount to reimburse its members and its members' employers, and to pay its employees without a warrant from or the review of the Controller. We disagree.

A. *Conflict with Statutes*

The Board claims Article XVI, section 17 conflicts with and, as the paramount law, supersedes statutes that inter alia authorize the DPA to adopt classes and salary ranges for each position within state civil service (§ 18800), that limit the pay of the Board's members for attending meetings (§ 20091), and that limit the amount a Board member's employing agency may be reimbursed for the time each member spends carrying out his or her duties as a

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Board member (§ 20092). The claim presents a question of constitutional law involving the construction of Article XVI, section 17.

(3a) The rules of statutory construction are the same for initiative enactments as for legislative enactments. (*Williams v. Superior Court* (2001) 92 Cal.App.4th 612, 622 [111 Cal.Rptr.2d 918].) The goal is to determine and effectuate voter intent. (*Ibid.*) (2b) To do this we interpret the phrase "administration of the system" in Article XVI, section 17, within the context of the subsequent conditions and the statement of purposes and intent and findings which are a part of its enactment.

(3b) We are directed to look to the language of the enactment first, giving the words their usual and ordinary meaning. (*Williams v. Superior Court, supra,* 92 Cal.App.4th at p. 623.) Only if the statutory language is susceptible of more than one reasonable interpretation do we resort to extrinsic evidence to determine the intent of the voters. (*Ibid.*) (2c) We start with the language of Article XVI, section 17. The Board is granted "plenary authority" over the "administration of the system" in the initial paragraph of the amendments to Article XVI, section 17. (See fn. 6, *ante.*) The paragraph is made "subject to all" of the subdivisions that follow. The subdivisions serve to limit and define the authority and responsibility granted in the initial paragraph. ***1110**

In Article XVI, section 17, subdivision (a), the analogous phrase "administer the system" appears. It provides the board "shall ... have sole and exclusive responsibility to *administer the system* in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries." (Italics added.) It is preceded by a provision granting to the Board "the sole and exclusive fiduciary responsibility over the assets of the public pension or retirement system...." In this context, the "plenary authority" that is granted over the "administration of the system" goes to the management of the assets and their delivery to members and beneficiaries of the system, not the remuneration of those who administer it.

By contrast, Article XVI, section 17, subdivision (f) concerns the powers of the Board. It provides the Legislature may not modify the "number, terms, and method of selection or removal of members of the retirement board ...." It says nothing about the remuneration of the Board or its employees. The retirement board also is given exclusive power over actuarial services in subdivision (e). "The retirement board of a public pension or retirement system ... shall have the sole and exclusive power to provide for actuarial services ...." The remaining subdivisions concern the Board's discharge of its duty to efficiently manage its assets and to provide benefits to its members.

Thus, with regard to administration of the system, the Board's authority is limited to actuarial services and to the protection and delivery of the assets, benefits, and services for which the Board has a fiduciary responsibility. No such power is given over the administration of the matters at issue here.

The initiative by which the amendments to Article XVI, section 17 were enacted contains a statement of purpose and intent and declarations and findings. (See fns. 6, 7 & 8, *ante.*)

The express "purpose and intent" of the amendments to Article XVI, section 17, as set forth in Section Three of the initiative (fn. 7, *ante*), is to " 'give the sole and exclusive power over the management and investment of public pension *funds* to the retirement board's selected or appointed for that purpose, to strictly limit the Legislature's power over such *funds*, and to prohibit the Governor or any executive or legislative body of any political subdivision of this state from tampering with public pension *funds*.' " (See fn. 7, *ante*, italics added.)

The remaining declarations of purpose reinforce the intent of the measure to protect pension *funds* by giving pension boards the authority to administer the funds without interference. Thus, the measure expresses the intent to "protect pension funds," to protect against tax increases that would result ***1111** "if state and local politicians are permitted to divert public pension funds" and to "ensure that the assets of public pension systems are used exclusively for

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the purpose of ... providing benefits and services to the participants of these systems ...." (See fn. 7, *ante* .)

Similarly, five of the eight "[f]indings and [d]eclarations," set forth in Section Two of the initiative (fn. 8, *ante*), are concerned with the specter of the political looting of pension funds. (See fn. 8, *ante*.) The three remaining findings concern the selection of a retirement board encroachment on the fiduciary powers, and infringement on the actuarial function. Article XVI, section 17 specifically addresses two of the these matters. (Art. XVI, § 17, subds. (e) and (f).)

In keeping with the foregoing, the thrust of the ballot arguments in favor of Article XVI, section 17 is to prevent the Legislature from "raiding" pension funds. The ballot pamphlet summary states the measure grants the "boards of public employee retirement systems sole authority over investments and administration, including actuarial services." (Ballot Pamp., Gen. Elec., *supra*, summary of Prop. 162, p. 6.) The summary argument in favor states that Article XVI, section 17 would "stop politicians from raiding the pensions of ... public employees." (Ballot Pamp., *supra*, argument in favor of Prop. 162, p. 38.) The claims address the means by which the Legislature on previous occasions had altered its contributions to the retirement system.

The full argument in favor of the initiative warns that politicians would continue to raid the pension funds of retirees unless Article XVI, section 17 was passed. It complains it was "not right" to allow politicians to "balance their budgets on the backs of seniors and retirees." (Ballot Pamp., Gen. Elec., *supra*, argument in favor of Prop. 162, p. 6.) The argument makes no mention of the scope of a retirement board's administrative authority.

The ballot argument against Article XVI, section 17 claims the Controller has blocked the pay increase of a "bureaucrat," but would not have the authority to "stop other outrageous salary hikes if Proposition 162 [became] law." (Ballot Pamp., Gen. Elec., *supra* , argument against Prop. 162, p. 39.) The rebuttal argument states the proposition's opponents are "trying to mislead the voters." "The central purpose of this measure is to STOP POLITICIANS FROM USING PUBLIC PENSION FUNDS TO BAIL THEM OUT WHEN THEY FAIL TO KEEP GOVERNMENT SPENDING UNDER CONTROL." (*Id.*, rebuttal to argument against Prop. 162, p. 39, original capitalization.)

The Legislative Analyst gives slightly more attention to the issue of a retirement board's administrative authority under Article XVI, section 17. It ***1112** recognizes that prior to Article XVI, section 17, the Constitution specified the general authority of the Board over public pension systems and that within these limits the Legislature could change the administrative functions of public pension systems. Two examples which are given are legislation removing the actuarial function from the Board and placing it under a state actuary appointed by the Governor and confirmed by the Legislature, and legislation allowing the use of CalPERS assets to offset employer contribution costs. Both of these examples relate to administration of the CalPERS assets, not to the administration of personnel matters.

The analyst also states that Article XVI, section 17 would give "the board of each public pension system complete authority for administration of the system's *assets* and for the actuarial function." (Ballot Pamp., Gen. Elec., *supra*, Analysis by the Legislative Analyst, p. 37, italics added.) The analysis also states Article XVI, section 17 could have some fiscal impact because it would reduce oversight of the administration of assets. The analysis makes no mention of the administration of anything else.

Thus, the voter intent, evidenced by the published ballot materials, is that Article XVI, section 17 would give the Board the authority to administer the investments, payments, and other services of CalPERS, but not the compensation of the Board or the Board's employees.

Corcoran v. Contra Costa County Employees Retirement Bd. (1997) 60 Cal.App.4th 89 [70 Cal.Rptr.2d 385] (*Corcoran*), cited by the Board, is

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inapposite. At issue was whether the Contra Costa County Employees Retirement Board was an agency governed by the county board of supervisors. It arose because the board of supervisors adopted a resolution applying a multiple-tier retirement scheme to " 'all officers and employees of all agencies of which this Board [the county board of supervisors] is the governing body.' " (*Id.* at p. 91.) The court held the county board of supervisors was not the "governing body" of the retirement board, but expressly recognized the employees of the retirement board were part of the civil service system. (*Id.* at p. 94.) The court found the employees' civil service status was immaterial to the resolution of the issue before it because the retirement board appointed, promoted, and discharged its employees and officers. (*Id.* at pp. 94-95.)

The issue here is not whether some other entity is the governing body of the Board but whether the Board's authority over the administration of the system is in conflict with the laws governing state civil service and payment of expenses. *Corcoran* did not address this issue. (See *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2 [39 Cal.Rptr. 377, 393 P.2d 689] ["an opinion is not authority for a proposition not therein considered"].) ***1113**

Nor are we persuaded by the Board's argument that Article XVI, section 17's prefatory phrase "[n]otwithstanding any other provisions of law or this Constitution to the contrary" expresses the voters' intent to have Article XVI, section 17 control over the other provisions of law at issue in this case. The phrase applies only to laws that are "to the contrary." We have concluded the powers the voters intended to give the Board do not include the exclusive and unfettered authority over payments made to and on behalf of its members and employees.

B. *Civil Service*

As noted, article VII, section 1 of the California Constitution provides that every officer and employee of the state is included in the civil service system, unless exempted. Section 4 exempts one deputy or employee for each board or commission.

The Board claims it has plenary authority under Article XVI, section 17 to classify its portfolio managers as exempt from civil service. If we accept the Board's position that the civil service law does not apply to it, there is no logical reason why the Board would not have plenary authority over the classification and salary of all of its employees who are not otherwise exempt. It does not.

As discussed above, the purpose of the amendments to Article XVI, section 17 is to protect pension funds from interference by the Governor or the Legislature and there is nothing in it from which it could be inferred that it reaches civil service classifications. [FN14] ***1114**

FN14 In a petition for rehearing, the Board argues that we improperly decided the merits of the Controller's sixth cause of action because we decided an issue that had not been addressed by the trial court and had not been proposed or briefed by any party to the appeal in violation of Government Code section 68081. We disagree.

As to the Board's first argument, this court has the power pursuant to Code of Civil Procedure section 43 to "determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case." Pursuant to this section we may direct the trial court to enter judgment where the facts are undisputed, as here, and the proper judgment is apparent from the record as a matter of law. (*Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1459, fn. 7 [66 Cal.Rptr.2d 578]; *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 440 [296 P.2d 801].)

As to the second argument, Government Code section 68081 directs that before we may render a decision "based upon an issue which was not proposed or briefed by any party to the proceeding" we must afford the parties an opportunity for supplemental briefing. There is no need to

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do so in this case because the sixth cause of action is based upon an issue thoroughly briefed by both parties, the nature and scope of the "plenary authority" over the "administration of the system" granted the Board by Article XVI, section 17. Implicit in our determination that such authority is limited to the investments, payments to beneficiaries, and similar services of CalPERS, is the determination that Article XVI, section 17 does not overrule the state's civil service laws, including article VII, section 1.

III. *Judgment on the Pleadings*

(4a) The Board argues it was entitled to make a factual showing in the trial court that it was impossible to comply with its fiduciary duties under Article XVI, section 17, if it followed the constitutional and statutory provisions and regulations at issue.

As noted, Proposition 162, subdivision (a), provides the assets of the retirement system are trust funds that shall be used for providing benefits to participants and for defraying the reasonable expenses of administering the system. This provision predated and is not a part of the amendments to Article XVI, section 17. Prior to this case it had not been thought thatthis provision limited the powers of the Legislature to set the terms of reasonableness.

Notwithstanding, the Board claims the provision as a limitation upon the Legislature's authority to adopt rules which limit the pay of the Board and its employees. Accordingly, the Board reasons the trial court should have considered evidence in order to evaluate the reasonableness of the Board's administrative expenditures for itself and its employees.

The Board claims that "as a factual matter, limiting the expenditures at issue to the levels prescribed by statute or regulation would have made it *impossible* for the Board to comply with its fiduciary duties under Section 17." It presents its challenge as an "as applied" challenge requiring the trial court to consider the specific factual circumstances involved.

The Board's analysis is incorrect. It has confused the measure of its power with the reasonableness of its exercise of the power. The rule is first, the application of the rule is second. While Article XVI, section 17 imposes fiduciary duties upon the Board to provide benefits to participants and their beneficiaries and to minimize the risk of loss and maximize the rate of return, it is obvious these duties must be performed by the Board and its employees within the applicable law. There was no need for the Board to present evidence of the reasonableness of its decisions with respect to the exercise of a power it does not have.

(5a) A motion for judgment on the pleadings is analogous to a general demurrer. (***1115***Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198 [51 Cal.Rptr.2d 622].) To this end we assume the Board could have proven all of the allegations in its answer. (*Ibid.*; *Pacific Club v. Commercial etc. Co.* (1910) 12 Cal.App. 503, 506 [107 P. 728].) (4b) The trial court assumed the Board concluded it was obligated to make the decisions it made in order to comply with its constitutional mandate, just as we assume these facts for purposes of appeal.

The issue here is not whether the Board makes a facial or as applied challenge to those statutes it claims are in conflict with Article XVI, section 17. (5b) The issue is whether the complaint raises an issue that can be resolved as a matter of law. (*In re Guardianship of Olivia J.* (2000) 84 Cal.App.4th 1146, 1155 [101 Cal.Rptr.2d 364]; *Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 234 [39 Cal.Rptr. 284]; *Estate of Marler* (1957) 148 Cal.App.2d 30, 33-34 [306 P.2d 105].)

(4c) The trial court was called upon to interpret Article XVI, section 17. This is purely a question of law. (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 619 [113 Cal.Rptr.2d 309]; *Clemente v. Amundson* (1998) 60 Cal.App.4th 1094, 1102 [70 Cal.Rptr.2d 645].) For reasons stated above, the trial court properly resolved the matter on the Controller's motion for

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judgment on the pleadings.

Citing *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 343 [178 Cal.Rptr. 801, 636 P.2d 1139], [FN15] the Board argues that application of the statutes and other provisions at issue would make it impossible to realize the objectives of Article XVI, section 17; thus Article XVI, section 17 repealed those provisions insofar as necessary. The board does not state precisely what objectives could not be realized if it followed the constitutional and statutory law, only that it could not then meet its "fiduciary obligations."

> FN15 *Hustedt* held the objectives of California Constitution, article XIV, section 4 (to enact a complete package of workers' compensation, to provide for the resolution of any disputes arising under such legislation by an administrative agency which exercised all "requisite" governmental functions, and to resolve disputes arising under such legislation "expeditiously, inexpensively, and without incumbrance") did not require the Workers' Compensation Appeals Board to have the power to suspend or remove attorneys from practice before the board. Therefore, article XIV, section 4 did not effect an implied repeal of the separation of powers doctrine embodied in article III, section 3. (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d at p. 344.)

(2d) As we read Article XVI, section 17, its objectives are to protect the pension fund and to ensure it is used for providing benefits and services to participants. The payment of Board staff according to existing civil service laws, the payment of members under existing reimbursement limits, and ***1116** payment of release time reimbursements under existing allowable amounts do not prohibit the realization of these objectives.

IV. *CalPERS Funds Are State Funds*

The Board claims that even without Article XVI, section 17, it has the statutory authority to pay its portfolio managers whatever salaries it deems appropriate. It relies upon section 19825, which states in part: "Notwithstanding any other provision of law, whenever any state agency is authorized by special or general statute to fix the salary or compensation of an employee or officer, which salary is payable in whole or in part out of state funds, the salary is subject only to the approval of the department [the DPA] before it becomes effective and payable, except as provided in subdivision (b). The Legislature may expressly provide that approval of the department is not required."

The Board claims its portfolio managers are not paid from state funds, but from CalPERS assets. Citing *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 782 [189 Cal.Rptr. 212], the Board argues these assets are trust funds, not state funds. It claims that once the state makes contributions to the CalPERS fund, it gives up any ownership or power of disposition over the fund for purposes of section 19825.

Whatever else the CalPERS fund may be, section 12320 makes clear it is also state money. It provides that "[b]onds, and other securities or investments belonging to the state, except those of the Public Employees' Retirement System and the State Teachers' Retirement System, shall be received by the Treasurer and kept in the vaults of the State Treasury ...." If the CalPERS investments are not investments belonging to the state, there would be no need to except them from the operation of section 12320.

Moreover, as the Controller points out, retirement benefits are contractual obligations of the state and if the CalPERS fund is insufficient to pay the benefits owed to state employees, the state is obligated to pay the money to pensioners from other sources. (*Valdes v. Cory, supra*, 139 Cal.App.3d at pp. 783-784.) Therefore, the state has a valid reason to ensure that payments from the fund to employees meet the requirements of state law.

The trial court ruled that CalPERS is a part of the state, and because section 16305.2 provides that "[a]ll money in the possession of or collected by

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any state agency or department ... is ... state money," the CalPERS ***1117** fund is a state fund. The Board argues the "state funds" exception in section 19825 would become meaningless if it included all "money in the possession of or collected by" a state agency or department as provided by section 16305.2. We disagree.

The phrase in section 19825, "which salary is payable in whole or in part out of state funds," is not an exception at all, but simply a recognition the state has no control over salaries it does not fund. We can conceive, and the Legislature could no doubt as well, that an employee could be paid directly from federal or county funds, and that such an employee's salary would not depend on the approval of the DPA.

However, in this case we have money originating from the state's general fund and being held as money "belonging to the state." Notwithstanding the fact the Board has been given plenary authority over the investment and management of the money, it is state money that is at issue, and DPA's approval and the Controller's warrant are necessary before it can be paid out as salaries.

The Board claims the provision of section 20098 that provides in pertinent part that "[t]he board shall appoint and *fix* the compensation of ... other necessary employees" gives the Board the ability to fix the compensation of the portfolio managers. (Italics added.) This argument fails to recognize the operation of section 19825, which applies in cases where an employee's compensation is fixed by an agency of the state. It provides that "whenever any state agency is authorized by special or general statute to fix the salary or compensation of an employee or officer," the salary or compensation is subject to the approval of the DPA.

V. *Affirmative Defenses*

(6) The Board argues we should reverse the judgment as to the issues of reimbursement for "release time" and travel expenses because it raised affirmative defenses of laches and waiver that could not properly be disposed of on the pleadings.

The facts it claims support these affirmative defenses are: (1) the Controller authorized "release time" payments between 1995 and the initiation of this suit; and (2) the Controller authorized reimbursement of travel expenses in excess of the amounts allowed by statute from 1999 to the initiation of this suit. ***1118**

The Board's answer alleged merely: "Plaintiff's claims are barred in whole or in part by the doctrine of waiver," and "Plaintiff's causes of action, or some of them, are barred by the doctrine of laches because plaintiff unreasonably delayed bringing suit, causing defendants to reasonably rely on the status quo."

These affirmative defenses consist of legal conclusions that could survive neither a demurrer nor a motion for judgment on the pleadings. (*Mack v. State Bar of California* (2001) 92 Cal.App.4th 957, 961 [112 Cal.Rptr.2d 341]; *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 384 [282 Cal.Rptr. 508]; *Wienke v. Smith* (1918) 179 Cal. 220, 225 [176 P. 42].)

There could be no laches or waiver from the facts the Board asserts in support of its defenses. Just because the Controller has paid reimbursements in the past is not a waiver of the right to refuse to do so in the future if the action is in violation of the law. There can be no laches as to plaintiff's suit for declaratory and injunctive relief over the claims for which payment has been refused. The acts complained of here are in the nature of ongoing wrongs. (See *California Trout, Inc., v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 631 [255 Cal.Rptr. 184].) The Board cannot assert that because the Controller raised no legal objection to past violations of the law, the office is forever precluded from bringing an action to prevent future violations of those laws. There can be no laches or waiver where the claim is that future payments would be unlawful.

Finally, "neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to

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protect the public." (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 826 [186 P.2d 124, 175 A.L.R. 747].) The Controller has brought this action in the official capacity as controller of the State of California, representing the interests of the citizens of the state. The Controller seeks to enforce provisions of the civil service laws and the Public Employees Retirement Law.

The civil service laws were passed to limit corruption and to promote efficiency and economy in state government. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 182 [172 Cal.Rptr. 487, 624 P.2d 1215].) The purpose of the Public Employees Retirement Law is to promote economy and efficiency in government service. (§ 20001.) Both of these schemes are intended to protect the public fisc, thereby protecting the interests of the state's taxpaying citizens.

We will not recognize equitable defenses where the plaintiff in an official capacity seeks equitable relief on behalf of the citizens of this state. ***1119**

VI. *Modification of Judgment*

The Board claims the judgment of the trial court is overbroad and should be modified by striking paragraphs 2 and 3(f). We shall strike paragraph 3(f) and part of paragraph 2 as unnecessary to the judgment.

The Controller's complaint requested injunctive and declaratory relief. The trial court declared in paragraph 2 of the judgment that defendants were subject to sections 1153, 12470, 19816, 19820, subdivision (a), 19825, 19826, 20091, and 20092, as well as the restrictions of article III, section 3.5 of the California Constitution. The trial court also permanently enjoined defendants from acting in such a manner as to violate these statutory and constitutional provisions in paragraph 3 of the judgment.

Paragraph 2 of the judgment provides: "The Court FURTHER DECLARES that defendants are subject to Government Code sections 1153, 12470, 19816, 19820(a), 19825, 19826, 20091 and 20092; and defendants are subject to the restrictions of article III, section 3.5 of the California Constitution." The Board claims paragraph 2 is unnecessary because paragraph 3 relies on the same statutes and provisions to enjoin the Board from acting in the complained-of manner.

Paragraph 2, with one exception, to be addressed *post*, is not unnecessary to the opinion. Paragraph 2 is a direct response to the Controller's seventh cause of action that requested "a judicial determination and declaration that defendant's actions to disregard applicable state law and regulations are not authorized by article XVI, section 17 of the California Constitution. Such a declaration is necessary and appropriate at this time so that [the Controller] may ascertain [his] rights and duties without being subjected to liability for violations of article VII, section 1, and article XVI, section 6 of the California Constitution, Government Code sections 1153, 12470, 19820(a), 20091, 20092, and title 2, section 599.619 of the California Code of Regulations."

Paragraph 2 is thus a specific determination of the allegations in the Controller's seventh cause of action. It also provides the reasoning for the injunction that follows. It is not unnecessary to the judgment.

However, we shall grant the Board's request to strike paragraph 3(f) of the judgment and that portion of paragraph 2 that states, "and defendants are subject to the restrictions of article III, section 3.5 of the California Constitution." Article III, section 3.5 provides that an administrative agency has no ***1120** power "[t]o declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [or] [¶] ... [t]o declare a statute unconstitutional[.]"

We strike this part of the judgment not because it was unnecessary to the trial court's judgment. It was in fact a separate and independent ground for the judgment. However, because we hold the statutes at issue are not made unconstitutional by Article XVI, section 17, we need not decide whether the Board

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must obtain an appellate court ruling on the constitutionality of the statutes at issue. These portions of the judgment are therefore no longer necessary, as the issue is moot.

Disposition

The order sustaining the demurrer is overruled and the trial court is directed to enter judgment in favor of the Controller on the sixth cause of action.

The judgment is modified by striking paragraph 3(f) and by deleting the following language from paragraph 2: "; and defendants are subject to the restrictions of article III, section 3.5 of the California Constitution."

In all other respects the judgment is affirmed and our previously issued stay is vacated.

Sims, J., and Robie, J., concurred.

A petition for a rehearing was denied February 25, 2003, and the opinion was modified to read as printed above. The petition of defendants and appellants for review by the Supreme Court was denied April 23, 2003. Kennard, J., and Moreno, J., were of the opinion that the petition should be granted. ***1121**

Cal.App.3.Dist.,2003.

STEVE WESTLY, as Controller, etc., Plaintiff and Appellant, v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM BOARD OF ADMINISTRATION et al., Defendants and Appellants.

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Exhibit 42

41 Cal.App.4th 1180, 49 Cal.Rptr.2d 220, 96 Cal. Daily Op. Serv. 363, 96 Cal. Daily Op. Serv. 545
View National Reporter System version

ALFRED SINGH, Plaintiff and Respondent,
v.
BOARD OF RETIREMENT OF THE IMPERIAL COUNTY EMPLOYEES' RETIREMENT SYSTEM,
Defendant and Appellant.
No. D020085.
Court of Appeal, Fourth District, Division 1, California.
Jan 16, 1996.

SUMMARY
In mandamus proceedings by a county employee to review a county retirement board's decision denying him a service-connected disability, the trial court entered judgment for plaintiff, finding that plaintiff's injuries, sustained while he was driving his vehicle to work, occurred in the course of his employment. (Superior Court of Imperial County, No. 77558, William E. Lenhardt, Judge.)
The Court of Appeal affirmed. The court held that the trial court properly found that plaintiff's injuries occurred in the course of his employment. The court further held that Prop. 162, amending Cal. Const., art. XVI, § 17, to state that "[n]otwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system," did not repeal the established rules (e.g., Code Civ. Proc., § 1094.5) by which local agency decisions are reviewed in the superior courts. Rather, the amendment removed the Legislature's authority to make investment decisions, and established that a system's primary obligation is to its members and beneficiaries. Nothing in the history or circumstances surrounding the enactment suggests that it was intended to abrogate established rules of judicial review. Repeals by implication are disfavored and are recognized only when potentially conflicting statutes cannot be harmonized. (Opinion by Nares, J., with Kremer, P. J., and Huffman, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports
(1) Pensions and Retirement Systems § 4.2--Right to Benefits--Disability-- Going-and-coming Rule--Employee Driving Own Vehicle ***1181** to Work--Benefit to Employer.
In mandamus proceedings by a county employee to review a county retirement board's decision denying him a service-connected disability, the trial court properly found that plaintiff's injuries, sustained while he was driving his vehicle to work, occurred in the course of his employment. Plaintiff, with the knowledge and consent of his supervisors, regularly used his private truck in conducting business on behalf of the county. The vehicle was equipped with a county radio permitting plaintiff to communicate with his own and other county departments, and was also equipped with a county-supplied toolbox that contained the tools necessary for plaintiff to perform his duties. As a regular part of plaintiff's duties, he was often required to proceed directly from his home to a work site. Thus, the exception to the going-and-coming rule that arises when the employee's use of his or her own vehicle gives some incidental benefit to the employer was applicable.
(2a, 2b) Pensions and Retirement Systems § 9--Actions and Proceedings-- Judicial Review of Board Decisions--Effect of Board's Plenary Power Over Investment and Administration.
Prop. 162, amending Cal. Const., art. XVI, § 17, to state that "[n]otwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system," did not repeal the established rules (e.g., Code Civ. Proc., § 1094.5) by which local agency decisions are reviewed in the superior courts. Rather, the amendment removed the Legislature's authority to make investment decisions, and established that a system's primary obligation is to its members and beneficiaries. Nothing in the history or surrounding circumstances of the enactment suggests that it was intended to abrogate established rules of judicial review. Repeals by implication are disfavored and are recognized only when potentially conflicting statutes cannot be harmonized.
[See 8 **Witkin,** Cal. Procedure (3d ed. 1985) Extraordinary Writs, § 143.]
(3) Statutes § 16--Repeal--By Implication.

Repeals of statutes by implication are not favored, and are not recognized unless two apparently conflicting laws cannot be harmonized. So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, in order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say it was intended to be a substitute for the first. ***1182**

COUNSEL
Thomas M. Fries, County Counsel, and Walter L. Cress, Assistant County Counsel, for Defendant and Appellant.
Sutherland & Gerber, Lowell F. Sutherland and Neil Gerber for Plaintiff and Respondent.

NARES, J.
Alfred Singh, following a 1986 accident which resulted in his disability, then applied to the Board of Retirement of the Imperial County Employees' Retirement System (Board) for a service-connected disability, which application was denied by Board. Singh thereafter sought review of Board's decision in the Imperial County Superior Court, which overturned the denial of disability retirement benefits to Singh.
Board, represented by Imperial County counsel, argues that a 1992 amendment to the California Constitution requires us to reverse the determination of the lower court and reinstate the determination of Board. For the reasons which follow, however, we reject the arguments advanced by Board, and we affirm the judgment entered in the superior court.

Statement of Facts [FN1]

Singh was employed by Imperial County (County), working as an environmental health specialist III in the health department. Singh's job description required him to perform inspections of swimming pools, food markets, restaurants, water systems, septic tanks, constructions sites, and landfills. Singh also had to possess a valid California driver's license.

FN1 Appellant fails to set forth in the opening brief a concise statement

of facts, with citations to the record, as is required by California Rules of Court, rule 13. While respondent points this out, there is no request that we take any step such as striking the opening brief. In the absence of such a request, and in view of the facts that (1) the factual background of this case is uncontested as to any material matter and (2) the appeal raises a question of law only, we proceed to consider the matter despite appellant's noncompliance with the rules.

Singh regularly, with the knowledge and consent of his supervisors, used his private truck in the conduct of his business on behalf of County. That vehicle was equipped with a County radio permitting Singh to communicate with his own and other County departments. Singh's truck was also equipped with a County-supplied toolbox which contained the tools necessary for Singh to perform his duties. ***1183**
As a regular part of Singh's duties, he would be required to proceed directly from his home to a work site. On some occasions Singh would, for example, often proceed directly from his home to a landfill which opened at 6 or 7 in the morning in order to perform an inspection. Singh would also often be called on the radio and directed to proceed to a work location before reporting to his office at 8 in the morning.
Singh would drive his vehicle between 1,400 and 2,000 miles a month on County business, and was reimbursed by County for the use thereof. Singh was also part of an emergency response team which was on call 24 hours a day, and Singh was permitted to use his private vehicle to respond to emergency calls.
On the morning of January 31, 1986, Singh got into his vehicle, started the engine, and called in to his office before departing therefor. While Singh was en route from his Holtville home to his office in El Centro, about 7:30 that morning he was hit from behind by another vehicle while stopped at a stop sign. The injuries Singh received from this accident aggravated a pre-existing injury, causing him such pain he determined to seek a disability retirement from Board.

Procedural Background

A. *Administrative Board Proceedings*

On October 11, 1991, Singh filed an application with Board for a service-connected disability retirement. On February 24, 1992, Board denied the application without a hearing. Singh thereafter filed a timely appeal from this denial, and a hearing before Board was held on October 7, 1992.

In the election on November 3, 1992, the voters of the state of California enacted Proposition 162, known as "The California Pension Protection Act of 1992." The enactment amended the second paragraph of section 17 of article XVI of the California Constitution to state: "Notwithstanding any other provisions of law or this Constitution to the contrary the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to ... the following: ...."

Previous language, which was superseded by the newly enacted provision, had provided that "Notwithstanding provisions to the contrary ... the Legislature may authorize the investment of moneys of any public pension or retirement system, subject to ... the following: ...." This amendment was an urgency measure, and took effect immediately upon passage. ***1184**

On December 16, 1992, Board found Singh was "permanently disabled to substantially perform the usual duties of his County position" but that Singh's "disability is not Service-Connected in that it arose from said automobile accident ... and that such accident was not in the course of [Singh's] County employment." Board again denied Singh's application for service-connected disability retirement. Singh then requested reconsideration of the denial, which request was itself denied. Singh thus exhausted his administrative remedies.

B. *Superior Court Proceedings*

On April 28, 1993, Singh filed a petition for a writ of mandate in the Imperial County Superior Court, seeking review pursuant to Code of Civil Procedure section 1094.5 of Board's decision as to whether his disability arose out of the course of his employment. Singh argued therein the weight of the evidence did not support Board's determination Singh's disability had not arisen in the course of his employment.

While Singh acknowledged that the "going-and-coming" rule normally would preclude an employee from being considered in the course of his employment while he was proceeding to work from his home or to his home from work, he cited the court to a line of cases holding that where an employee must provide a vehicle to fulfill his job requirements, as did Singh, the going-and-coming rule did not apply, and an employee's operation of a vehicle which provided a benefit to his employer permitted a finding that even the use of the vehicle to go to and from work was in the course of an employee's employment.

In opposition, Board argued primarily that the modifications to article XVI, section 17 of the California Constitution, which were enacted by the voters in November 1992, gave Board the "plenary" power to determine Singh's retirement eligibility, and that the exercise of such "plenary" power could not be overturned by the superior court.

Argument on the petition was held on June 22, 1993, and at the conclusion of the hearing the court ruled that "the weight of the evidence here is that ... this arose out of his employment. [Singh] was in the course of his employment" at the time of the accident ultimately resulting in his disability, and Singh's use of his vehicle to carry County equipment "conveyed a ***1185** substantial benefit to the county." Judgment granting the writ of mandate was filed on September 17, 1993. [FN2] Board now appeals.

FN2 Attorney fees were denied at this hearing, but at a later hearing on December 6, 1993, Singh was awarded attorney fees. See the discussion in footnote 5, *post*.

Standard of Review

While the superior court was authorized (as urged by Singh in his petition below in that court) to utilize its independent judgment in determining whether Board's decision was supported by the weight of the evidence (see, e.g., *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 44-45 [112 Cal.Rptr. 805, 520 P.2d 29]), [FN3] we now review the trial court's determination only to determine whether it was supported by substantial evidence (*Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72 [64 Cal.Rptr. 785, 435 P.2d 553]; *Bell v. Department of*

Motor Vehicles (1992) 11 Cal.App.4th 304, 309 [13 Cal.Rptr.2d 830]). [FN4]

FN3 At various points in the opening brief, appellant Board argues that (1) this case involves only matters of procedure rather than Singh's substantive rights, and (2) the question whether Singh is entitled to a disability retirement involves only a "statutory privilege" rather than any issue involving a vested right. The first point is not correct, as the case involves the substantive validity of the decision appealed from, rather than any "procedural" defect. The second point is quite clearly erroneous, in light of the holding of the *Strumsky* case, cited *supra*. We do not further address either of these issues.

FN4 Board argues somewhat confusingly it "conceded below and does concede now that the Trial Court can reweigh the evidence and apply its independent judgment on the probative value of the evidence and thus what the facts of this case are. But if the Board's findings are supported by the weight of evidence there is no abuse of the Board's discretion merely because its decision ... might be inconsistent with other law."

This appears to be an argument that while the trial court could properly exercise its independent judgment, it was somehow not allowed to disagree with Board's conclusions, in which case the exercise of the "independent

judgment" would be an exercise in futility. Further, when counsel argues Board's decision should be upheld if its findings are "supported by the weight of the evidence" it ignores the fact the trial court found that in this case the "weight of the evidence" supported Singh's position rather than that of Board.

Further, as Board did not request a statement of decision from the trial court, we will presume the trial court found every fact necessary to support its decision. (Code Civ. Proc., § 632; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 [275 Cal.Rptr. 797, 800 P.2d 1227]; *Slavin v. Borinstein* (1994) 25 Cal.App.4th 713, 718 [30 Cal.Rptr.2d 745].) Essentially, we thus are determining a question of law alone, as no factual matter is in controversy. With this posture of the case in mind, we proceed to determine the single question presented for review: does the constitutional amendment enacted by Proposition 162 insulate Board's decisions from review in the ***1186** superior court, and does it thus mandate reversal of the judgment entered in the trial court reversing Board's decision? [FN5]

FN5 While in its opening brief Board argued both that the grant of mandate and an award of attorney fees should be reversed, as Singh pointed out in

the respondent's brief, only the grant of mandate, and not the order awarding attorney fees, was ever appealed by Board. Counsel for Board admits in its reply brief that counsel "is chagrined to acknowledge that Singh is quite correct; a separate appeal of [the attorney fees] order is apparently required ...." In light of this concession we do not address the question of the award of attorney fees.

Discussion

A. *Introduction*

In the petition for writ of mandate filed in the superior court, Singh argued that Board's determination Singh was not injured in the course of his employment was erroneous. While Singh did not contest the fact that at the time of the accident Singh was en route to work, rather than proceeding to a remote

jobsite as a part of his work, Singh argued that because he was on call for emergencies, because he carried County equipment and supplies, and because he would sometimes go from his home to a jobsite, the case law exceptions to the going-and-coming rule applied to his situation. In particular, Singh cited the superior court to the case of *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal.App.3d 803, 806 [99 Cal.Rptr. 666], a matter which Singh asserted to be on all fours with his own case.

In response, Board did not argue any factual discrepancy, but rather urged in the superior court, as Board does here, that the enactment of Proposition 162 required the superior court to defer to Board's resolution of the matter.

B. *Case Law* [FN6]

In *Smith v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814, 815 [73 Cal.Rptr. 253, 447 P.2d 365], our Supreme Court reiterated the principle that "[u]nder the well established going and coming rule, an employee does not pursue the course of his employment when he is on his way to or from work." The court noted, however, that "[i]n a number of cases we have established exceptions to this rule ..." (*id.* at p. 816), and went on to ***1187** consider whether "we should recognize another exception to the rule ...: that at the time of the accident [the employee] was engaged in the course of his employment inasmuch as he was bringing his car to work as required by his employer." (*Ibid.*, fn. omitted.)

FN6 Board argues we should not consider workers' compensation cases in determining an employee's retirement matter. Board is incorrect, as "the County Employees Retirement Act ... and the Workers' Compensation Act 'are related in subject and harmonious in purpose.' [Citations.] In fact, courts have looked to workers' compensation law precedent for guidance in

contending with similar issues in pension law. [Citations.]" (*Bowen v. Board of Retirement* (1986) 42 Cal.3d 572, 578, fn. 4 [229 Cal.Rptr. 814, 724 P.2d 500].) There is no reason the going-and-coming rule should be interpreted in one way in one context, and differently in another.

The court went on to affirm the suggested exception to the going-and-coming rule, holding: "In the instant case the employer clearly benefited from [the employee]'s bringing the car to work. Indeed, an employer must be conclusively presumed to benefit from employee action reasonably directed toward the execution of the employer's orders or requirements. An employer cannot request or accept the benefit of an employee's services and concomitantly contend that he is not 'performing service growing out of and incidental to his employment.' " (*Smith v. Workmen's Comp. App. Bd., supra*, 69 Cal.2d at p. 820, fn. omitted.) In summary, the court held that the employee's "obligation reached out beyond the employer's premises, and, in driving his car to and from them, he did no more than fulfill the condition and requirement of his employment." (*Id.* at p. 825.)

In the matter of *State Farm Mut. Auto. Ins. Co. v. Haight* (1988) 205 Cal.App.3d 223 [252 Cal.Rptr. 162], this court also exhaustively reviewed the legal background and the cases interpreting the doctrine known as the going-and-coming rule. In that case, an employee had incurred an accident while returning home from a jobsite. [FN7] We quote extensively from that decision:

FN7 The employee normally drove his own car on company business, but at the time of the accident had borrowed a company vehicle to use, as his own vehicle was being repaired. (*State Farm Mut. Auto. Ins. Co. v. Haight, supra*, 205 Cal.App.3d at p. 228.) For the reasons set out in the cited text, however, this distinction between that case and the present one is not material.

"A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. (See *Huntsinger v. Glass Containers Corp., supra*, 22 Cal.App.3d at p. 811.)

The question is not who owns the vehicle (see *Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660 [186 Cal.Rptr. 520]), or whether the employee receives reimbursement by the employer for the vehicle (see *Richards v. Metropolitan Life Ins. Co.* (1941) 19 Cal.2d 236 [120 P.2d 650]), or whether the employee performs a personal errand while driving home. (See *Lazar v. Thermal Equipment Co.* [1983] 148 Cal.App.3d 458, 464- 466 [195 Cal.Rptr. 890]; *Avila v. Standard Oil of California* (1985) 167 Cal.App.3d 441, 448 [213 Cal.Rptr. 314]; *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 970 [227 Cal.Rptr. 106, 719 P.2d 676]; *Joseph v. Office of Consulate General* (9th Cir. 1987) 830 F.2d 1018, 1025, 1026.) ***1188**
"The evidence is uncontradicted [appellant]'s use of the [] vehicle in his job clearly gave [his employer] an incidental benefit. [The employee] was driving a ... vehicle with company equipment in [it] and returning to his home from engaging in company activity. [The employee] had duties both in the office and in the field. He was required to use his vehicle to travel to work sites. He delivered materials in his vehicle to the work site. He was required to travel throughout the county .... It was an express condition of his employment that [he] use the vehicle in attending to his duties.
"The fact that the accident occurred when [the employee] was on his way home from work is not determinative of the scope of employment. In *Huntsinger v. Glass Containers Corp., supra*, 22 Cal.App.3d 803, 810, the court said: ' " The cases ... indicate that exceptions will be made to the 'going-and-coming' rule where the trip involves an incidental benefit to the employer. " ' *Huntsinger* held the employee 'driving his vehicle to and from the office was, therefore, incidentally beneficial to [the employer] in a manner not common to the commute trips by ordinary members of its work force. In other words, when a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to and from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.' (*Id.* at p. 810.)" (*State Farm Mut. Auto. Ins. Co. v. Haight, supra*, 205 Cal.App.3d at pp. 241-242, italics in original.)
(1) Thus the superior court correctly applied the law in finding that Singh's injury arose out of the course of his employment, notwithstanding the fact he was on his way to work at the time of the accident, because Singh came fully within the above discussed exception to the going-and-coming rule. [FN8] Thus Board misapplied the law, and the superior court corrected that misapplication. The remaining question is whether Board is correct in arguing that the superior court, because of the passage of Proposition 162, should have affirmed Board's decision, notwithstanding its misapplication of the law.

FN8 Board points out that the superior court termed the matter a "close call." The trial court's characterization of its decision is not relevant in determining its validity.

C. *Analytical Background*

This case involves statutory construction, and our Supreme Court has recently set out the rules we follow: " 'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the ***1189** purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But " [i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." ' (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899 [276 Cal.Rptr. 918, 802 P.2d 420].)" (*People v. King* (1993) 5 Cal.4th 59, 69 [19 Cal.Rptr.2d 233, 851 P.2d 27].)
(2a) Stripped of its many nonessential arguments, Board's position may accurately be summed up thusly: Board's decisions, under the November 1992 constitutional amendment, may not be reviewed by the superior court to determine whether under traditional mandamus principles they are supported by the weight of the evidence, but instead must be upheld unless and until some violation of the United States Constitution or other due process violation appears. As County counsel phrases it on behalf of Board in his closing brief, "Proposition 162 gave the Board authority to make the decision it did, so long as it breached no fiduciary duty in doing so, and notwithstanding any other state law to the contrary."
In other words, Board appears to suggest (without directly stating) that the scope of review under

Code of Civil Procedure section 1094.5 was repealed by implication by the passage of Proposition 162. We believe no such repeal, however, occurred.

D. *Analysis*

The language enacted in November 1992 upon which Board relies is this: "Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to ... the following: ...." (Cal. Const., art. XVI, 2d par. of § 17.)

(The "following" provisions deal mainly with stating (1) that a retirement board, rather than the Legislature, shall have fiduciary responsibility for operation of a retirement system, and (2) a retirement board's primary duty is to its members.)

As we have stated, Board's claim herein is essentially that the above cited language from Proposition 162, and in particular the use of the word ***1190** " plenary," [FN9] repeals the established rules by which local agency decisions are reviewed in the superior courts. That is, the use of the word "plenary" with respect to the powers of a retirement board means that, as Board puts it, "the evidence of the case need be considered [by the courts] in these two ways only: to see if the evidence supports the Board's findings of fact; and to see if the decision of the Board offends Federal standards of due process or the Board's fiduciary duty to the Retirement System ...."

FN9 Board states as a definition of "plenary": "Full, entire, complete, absolute, perfect, unqualified," which definition appears in Black's Law Dictionary (6th ed. 1990) page 1038, column 2. Nothing in this definition, however, necessarily implies that "unreviewable" is a meaning which must be accorded "plenary."

Necessarily, this is an assertion that Proposition 162 repealed by implication Code of Civil Procedure section 1094.5, subdivision (c), providing that "in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." That standard was applied by the trial court in its determination of this case.

(3) "However, repeals by implication are not favored, and we do not recognize them unless two apparently conflicting laws cannot be harmonized. [Citation.] As we recently reiterated, ' "[s]o strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision '[i]n order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say it was intended to be a substitute for the first.' " ' (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 43 [283 Cal.Rptr. 584, 812 P.2d 931].) (2b) We see no evidence of such legislative intent in this case. Rather, the two bodies of law are readily harmonized if we adopt the usual meaning of the words [at issue.]" (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 379 [20 Cal.Rptr.2d 330, 853 P.2d 496].)

As our Supreme Court phrased the matter in another case in which it was asserted the jurisdiction of an administrative agency had been altered by a statutory repeal-by-implication, "statutes should be interpreted in such a way as to make them consistent with each other, rather than obviate one another. [Citation.]" (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [285 Cal.Rptr. 86, 814 P.2d 1328].)

Again, "accepting [appellant's] contention would require us to conclude that the [voters] implicitly repealed [other relevant statutes]. Repeals by implication are disfavored and are recognized only when potentially conflicting statutes cannot be harmonized. [Citation.] Disharmony, however, ***1191** between the provisions of [a new enactment] and those of [other relevant statutes] exists only if one takes-as does [appellant]-an overly broad view of [the matter at issue]." (*Nickelsberg v. Workers' Comp. Appeals Bd., supra*, 54 Cal.3d at p. 298.)

In this case Board's reliance upon dictionary definitions of the word "plenary" does not compel us to accept Board's conclusion that the definition of that word indicates the voters' enactment of Proposition 162 was intended by necessary implication to repeal the right of a superior court to review a retirement board's decision for errors, whether of fact or of law.

Simply put, as the ballot arguments advised the voters, the measure before them (a) removed the Legislature's authority to make investment decisions, and (b) established that a system's primary

obligation was to its members and beneficiaries. Nothing whatsoever in the history or surrounding circumstances of this enactment suggests that it was intended to abrogate established rules of judicial review, [FN10] and we will not so hold absent some more compelling rationale than the single word "plenary."

FN10 Indeed, even the rebuttal to the ballot argument in favor of Proposition 162 asserted only that the proposition "takes away nearly all authority of the executive and legislative branches to oversee pension board decisions." (Analysis by the Legislative Analyst, Ballot Pamp., Rebuttal to Argument in Favor of Prop. 162, Gen. Elec. (Nov. 3, 1992) p. 38.) Nowhere is any limitation on judicial review of erroneous decisions implicated.

Finally, we should not ascribe to the voters in November 1992 any such intent as Board necessarily implies. [FN11] In August 1992 the California Senate Office of Research prepared Senate Publication No. 643-S, "Analysis of November 1992 Ballot Propositions" (Analysis). As the seven-page study of Proposition 162 therein makes clear, no alteration in the scope of judicial review of retirement boards was ever at issue in that election.

FN11 Board argues we should not resort to determining the intent of the electorate in enacting Proposition 162, because the enacted language is clear. Board's proposed meaning to be ascribed to the use of the word "plenary" is, however, far from clear, and thus resort to other sources to determine legislative intent is not only proper, but necessary.

Instead, as the ballot arguments cited above also indicate, Proposition 162 was "an outcome of California's recent budget difficulties and the struggle to find the financial resources to meet budget shortfalls.... Proposition 162 was placed on the ballot by those who opposed AB702, which passed the Legislature and was signed by [Governor] Wilson." (Analysis at p. 18.)
Briefly, the proposition in question was in response to a bill which had permitted the Legislature and the Governor to use reserve funds in a retirement system (in this case, the state Public Employees' Retirement ***1192** System, or PERS) "to substitute for normal state payments required to fund the system-thereby freeing state money to help close the budget shortfall." (Analysis at p. 18.) (Assembly Bill No. 702 also transferred PERS actuarial functions to the Governor by giving him the power to appoint the PERS actuary.)
The substitution of reserve account funds for state payments and the transfer of actuarial oversight powers away from PERS were "viewed by opponents as unwise and unfair, and many called it one more 'raid' on the pension system." (Analysis at p. 18.) Proposition 162 was thus intended by its proponents to insulate the administration of retirement systems from oversight and control by legislative and executive authorities, and also return control of the actuarial function to the retirement boards themselves. This "increased level of independence would make the [retirement] systems less of a target for local and state officials looking for a way to balance a budget." (Analysis at p. 20.)
Nowhere in any of the materials either analyzing or arguing in favor of or against Proposition 162 is there the slightest hint that judicial review of the decisions of a retirement board was at issue. Clearly, the word "plenary" was intended to mean that retirement boards would have the sole and complete power to invest their funds and to administer their systems, as opposed to being subject to direction from state and local legislative and executive bodies in these matters.
This reading of the provisions of California Constitution, article XVI, section 17, accords with the "usual meaning of the words" at issue (*Roberts v. City of Palmdale, supra*, 5 Cal.4th at p. 379), rather than the strained and *un*usual interpretation of the words urged by Board. Because Board's argument is unsound and unsupported by applicable authority, we reject it, and hold that the established procedures for judicial review of retirement board decisions were unaffected by the passage of Proposition 162.

E. *Summary*

It is *possible* to read California Constitution, article XVI, section 17 to include a direction to immunize the decision of a retirement board from judicial review, but such a reading of the statute would lead, as we have seen, to absurd results. As noted earlier, the " ' "language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." '..." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113 [145 Cal.Rptr. 674, 577 P.2d 1014], citations omitted.) "The intent prevails over the letter, and the letter will, if ***1193** possible, be so read as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115, 755 P.2d 299].) The "spirit of the act" in this case having nothing whatsoever to do with any alteration of the well-established standards for judicial review of local agency decisions, we reject Board's contrary argument.

Disposition

The judgment is affirmed. Respondent to recover costs on appeal, including reasonable attorney fees to be determined by the trial court.

Kremer, P. J., and Huffman, J., concurred.
A petition for a rehearing was denied February 5, 1996.
Cal.App.4.Dist.,1996.
Singh v. Board of Retirement of Imperial County Employees' Retirement System
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Exhibit 43

Retirement
3/20/98

Further research

Pierce v. Lyman, 1 CA4th 1093, 1104 (1991) — attys for trustees of trust can be liable to beneficiaries for BFD, where attys knew of t'ees breaches and took actions to further the t'ees breaches and engaged in self dealing.
[Pretty egregious stuff]
[see citations to
Morales v. Field, et al, 99 CA3d 307, 314-315 (1979)
Skarbrevik v. Cohen, et al, 231 CA 3d 692 (1991)

Must be financial advantage ~~to~~ or actual misrepresentations, to create liability.
Fact that the interests of shrs are affected by atty's advice do board not suff, standing alone.

Masters v. San Bernardino CERA, 32 CA4th 30 (1995) — fiduciary duty & immunity of retirement board.

Re: Lisa's memo — does "administering" the Trust include providing legal services?

∴ If we are not their atty per Ch §40, then
1) we can't K away (or MOU away) anything, but
2) they have no basis for requiring us to provide any legal services. 24.0910 → aren't they rejecting "the City Atty"? They do not consider Lori to be w/our office ⇒ that should be formalized by MOL, not K!
Fact that MC contemplates hiring outside counsel for investmt purposes, then acknowledgs that the City Atty designates his person to be the Board's advisor, suggests that the interp of independent counsel is for investmt advice.

BUT

Retirement
3/20/98
p. 2

If we are the Board's atty per Ch. §40, then we have a duty and a mandate under the Muni Code. That Muni Code ~~[illegible]~~ allows outside investment counsel, but no other. It does not say "outside counsel for any purpose.

If Prop 162 trumps Ch. §40, then we have no Charter duty and no concurrent Muni Code mandate.

So, they want to hire an "in-house" atty to do the investigative part of the disability retirement → this despite Lori's extensive admonishment that the atty's need to be separate? [They are not talking as if they want to "go outside." They want to "dispense w/ the City Atty."] → they can't be DCAs; we already have that! And if they aren't DCAs, ~~[illegible]~~ makes no sense that Lori/Rex. are DCAs ∴ another grounds for breach?

? Is legal advice part of the administration of the system? It's not the same as the auditor's physical acts of ~~[illegible]~~ issuing checks —

Does providing advice interfere w/ the "full, absolute..." power to administer system?

Can Casey replace Lori/Rex?

If we really think that they aren't covered by Ch. §40, we shld sew ourselves by legal op'n, not K.

See Duvernay's memo of 4/93 —