

1 JAN I. GOLDSMITH, City Attorney
 California State Bar No. 70988
 2 ANDREW JONES, Executive Assistant City Attorney
 California State Bar No. 188375
 3 JOAN F. DAWSON, Deputy City Attorney
 California State Bar No. 178311
 4 WILLIAM GERSTEN, Deputy City Attorney
 California State Bar No. 150951
 5 SANNA SINGER, Deputy City Attorney
 California State Bar No. 228627
 6 Office of the City Attorney
 1200 Third Avenue, Suite 1620
 7 San Diego, California 92101-4178
 Telephone: (619) 236-6220
 8 Facsimile: (619) 236-7215
 Attorneys for Defendant/Respondent
 9 CITY OF SAN DIEGO

Exempt from fees from Cal. Gov't Code § 6103.
 To the benefit of the City of San Diego.

10 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**

11	PUBLIC EMPLOYMENT RELATIONS)	SDSC Case No. 37-2012-00092205-CU-MC-CTL
12	BOARD,)	
13	Plaintiff/Petitioner,)	DECLARATION OF JAN I. GOLDSMITH
14	v.)	IN SUPPORT OF RESPONDENT CITY OF
15	CITY OF SAN DIEGO,)	SAN DIEGO'S OPPOSITION TO
16	Defendant/Respondent.)	PETITIONER'S APPLICATION FOR
		TEMPORARY RESTRAINING ORDER AND
		FOR ORDER TO SHOW CAUSE RE:
		PRELIMINARY INJUNCTION
		<u>Ex Parte Hearing:</u>
		Date: February 21, 2012
17	SAN DIEGO MUNICIPAL EMPLOYEES)	Time: 8:30 a.m.
18	ASSOCIATION,)	Dept.: C-67
19	Real Party in Interest.)	Judge: Hon. William S. Dato
		Date Filed: February 13, 2012

20 I, Jan I. Goldsmith, declare, as follows:

21 1. I am an attorney duly authorized to practice before all the courts of the State of
 22 California.

23 2. As the City Attorney for the City of San Diego (City), under San Diego Charter
 24 (Charter) section 40, I serve as the chief legal adviser of, and attorney for, the City and all
 25 Departments, including the San Diego City Council (City Council). As such, it is my
 26 responsibility to interpret and enforce the terms of our Charter and other laws.

27 ////

1 3. Our system of government is set forth in the Charter. We are a “Mayor/Council”
2 form of government under which the Mayor has an executive and administrative function and the
3 Council has a legislative and policy function.

4 4. Under our form of government, only the Council has the power to propose Charter
5 amendments for voter consideration and the Mayor has no vote or veto authority. Attached
6 hereto as Exhibit A¹ is a Memorandum of Law rendered March 22, 2006, by the City Attorney’s
7 office that sets forth the legal authority for the Council’s sole authority. This Memorandum of
8 Law is public and remains the law followed by the City of San Diego.

9 5. In the past, the Council has initiated City-sponsored ballot propositions, the most
10 recent being Proposition D in 2010, having to do with a sales tax increase. Before voting to
11 initiate those ballot propositions, the City met and conferred with its labor unions as required by
12 law.

13 6. The Comprehensive Pension Reform (CPR) Initiative is not City-sponsored. The
14 Council has never voted on it, and had no role in initiating or proposing it. In fact, it is my
15 opinion that the CPR Initiative would not have received a majority vote of the City Council had
16 it been brought to the City Council for a vote.

17 7. Whatever acts of support were undertaken by the Mayor were not authorized by the
18 Council.

19 8. The CPR Initiative was placed on the ballot only because the necessary number of
20 signatures from registered voters was obtained, in this case nearly 116,000 signatures. Once
21 those signatures were obtained and certified by the City Clerk, we advised the Council that they
22 had a ministerial duty to place the initiative on the ballot. That is consistent with the law. Once
23 the signatures are obtained, the initiative MUST be placed on the ballot.

24 9. The City has consistently recognized and discharged its duty to meet and confer with
25 its recognized labor organizations on issues affecting wages, hours and working conditions,
26 when legally required, including issues related to pension benefits and other employment
27

28 ¹ All exhibits cited herein are attached to this declaration.

1 benefits.

2 10. In addition to the formal meet and confer obligation, the City has sought to negotiate
3 changes to the pension system.

4 11. In January 2011, the City, with unanimous approval of the City Council, invited the
5 City's recognized labor organizations to engage in mediation for a "global" resolution of pension
6 issues, including issues having to do with pension reform that were later addressed in the CPR
7 Initiative. On January 13, 2011, I sent a letter to all labor unions offering to negotiate such
8 pension reform. Exh. B. (Letter of January 13, 2011)

9 12. The response from labor unions varied from some conditional agreement to talk, to an
10 agreement to "attend" but not "participate", to an accusation that I was being "Aguirre-like" [the
11 former City Attorney] for wanting to negotiate changes. I ignored the personal attacks and
12 attempted to have meaningful discussions.

13 13. After several months of "discussions" over procedure, on March 17, 2011, on behalf
14 of the City, I personally met with the representatives of the recognized labor organizations to
15 discuss the possibility of an agreement to mediate. In attendance was Tony Butka, the California
16 Presiding Mediator for the State of California, Department of Industrial Relations, Mediation &
17 Conciliation Service.

18 14. After collective discussions regarding ground rules and substantive discussions with
19 the recognized labor organizations, unfortunately the parties did not reach an agreement to
20 mediate. Exh. C. (Letter of March 17, 2011.)

21 15. Despite the refusal of the labor organizations to agree to a mediation process, I
22 communicated my openness to making an attempt in the future. I never received any response to
23 my offer. Exh. D. (Letter of March 21, 2011.)

24 16. The foregoing effort to negotiate pension reform occurred months before the CPR
25 Initiative was proposed.

26 17. I have personal knowledge of the facts set forth in this Declaration, and declare them
27 to be so. If called as a witness, I could and would testify competently thereto, except as to those
28 matters stated upon information and belief, and as to those matters, I believe them to be true.

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I declare under penalty of perjury under the laws of the State of California that the foregoing Declaration is true and correct to the best of my knowledge and belief.

This Declaration was executed on February 16, 2012, at San Diego, California.



JAN I. GOLDSMITH

320386.docx

EXHIBIT A

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Michael J. Aguirre
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: March 22, 2006

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: The Mayor's Authority to Approve or Veto Council Ordinances Proposing Ballot Measures to Amend the City Charter

INTRODUCTION

The Mayor and City Council are discussing various ballot measures to amend the City Charter related to employee pension increases and managed competition. Under the City's new form of Mayor-Council governance, the Mayor has the right to veto resolutions and ordinances passed by the City Council, unless one of the exceptions outlined in the City Charter or the law apply. The question has arisen whether the Mayor may veto an ordinance passed by the City Council to place a measure on the ballot.

QUESTIONS PRESENTED

May the Mayor approve or veto City Council actions proposing ballot measures to amend the City Charter?

SHORT ANSWER

No. Controlling state law vests sole authority in the City Council to propose charter amendments for voter approval and the Mayor may not approve or veto such Council actions.

ANALYSIS

Effective January 1, 2006, the City's Council-Manager form of governance changed to a Mayor-Council form of governance on a five-year trial basis. San Diego Charter art. XV. The implementation of article XV divided City government into two parts: an executive-administrative branch headed by the elected Mayor and a legislative branch headed by the City Council. The City Charter vests all legislative power in the City Council, which must act by

The pertinent constitutional and statutory provisions now include the following. article XI, section 3(b) of the California Constitution provides in pertinent part: "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." California Government Code section 34458 provides: "[T]he governing body of any city or city and county, on its own motion may propose or cause to be proposed, amend or cause to be amended, or repeal or cause to be repealed, a charter and may submit the proposal for the adoption, or the amendments or repeal thereof, to the voters" ² California Elections Code section 9255 (a)(2) also provides: "The following city . . . charter proposals shall be submitted to the voters . . . (2) An amendment or repeal of a charter proposed by the governing body of a city or a city and county on its own motion." Each of these controlling provisions vest the authority to propose City charter amendments in a City's governing body. ³

II. The City Council has the Authority to Propose Charter Amendments.

Since the mid 1800's, the charter City of San Francisco has been governed in similar fashion to San Diego's new form of government. San Francisco's Mayor is head of the City's executive branch, and must also approve or veto certain legislative actions of that City's governing body, the Board of Supervisors. See, *Jacobs v. Board of Supervisors*, 100 Cal. 121 (1893); *Affordable Housing Alliance v. Feinstein*, 179 Cal.App.3d 484, 490 (1986).

Considering the 1970 constitutional revisions and statutes, the First District Court of Appeal addressed the question posed here – whether a governing body's action regarding a proposed charter amendment required the approval or potential veto of San Francisco's Mayor. *Clark*, 68 Cal.App.3d at 334-336. ⁴ The Court held in part that a City charter could *not* require proposed charter amendments be sent to the Mayor for approval or veto. *Id.* at 335. The Court found the constitutional revisions and implementing statutes to be "unequivocal," "exclusive and controlling" in their language. *Id.* at 335 & n. 6. This controlling language made "no mention of executive officer approval or veto," vesting the governing body of the City with the power "on its own motion" to submit proposed charter amendments to the voters. *Id.* at 335, 336 & n. 6. The California Supreme Court came to the same conclusion on the same issue when

² In 1988, the legislature repealed and recodified California Government Code section 34459 into new section 34458.

³ Article XI, section 8 originally vested authority in the "legislative body" of a City. See note 1. The phrase was changed to "governing body" in the constitution and implementing statutes of 1970. Because no substantive change was intended by the constitutional revisions, we assume for purposes of this memorandum that the governing body of a City remains the City's legislative body.

⁴ Specifically, the Court considered whether a resolution withdrawing a charter amendment from the electorate required Mayoral approval. *Ibid.*

Honorable Mayor and
City Councilmembers

-5-

March 22, 2006

these preemptive state laws and procedures, we conclude ordinances by which the City Council proposes City Charter Amendments for voter consideration are not subject to Mayoral approval or veto.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

MJA:JK:CB:jb
ML-2006-8

EXHIBIT B



JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

January 13, 2011

Via Facsimile Transmission, Electronic Mail
and U.S. Mail

Ann M. Smith, Esq.
Tosdal, Smith, Steiner & Wax
401 West A Street, Suite 320
San Diego, CA 92101-7911
(619) 239-6048
asmith@tosdalsmith.com

Elaine W. Reagan, Esq.
General Counsel, SDCERS
401 West A Street, Ste 400
San Diego, CA 92101
(619) 595-0357
EReagan@sdcers.org

Local 127 AFL CIO
Ellen Greenstone, Esq.
Rothner, Segall, Greenstone & Leheny
510 South Marengo Avenue
Pasadena, CA 91101-3115
(626) 577-0124
jshin@rsgllabor.com

IAFF Local 145
Joel N. Klevens, Esq.
Glaser, Weil, Fink, Jacobs & Shapiro, LLP
10250 Constellation Boulevard, 19th floor
Los Angeles, CA 90067
(310) 556-2920
jklevens@glaserweil.com

SDPOA
Michael Conger, Esq.
P.O. Box 9374
16236 San Dieguito Road, Suite No. 4-14
Rancho Santa Fe, CA 92067-4374
(858) 759-1906
congermike@aol.com

DCAA
Shirley Lee, Esq.
Schwartz, Steinsapir, Dohrmann & Sommers LLP
6300 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90048-5268
(323) 655-4488
sal@ssdslaw.com

Teamsters 911
Gregorio Daniel, Esq.
9900 Flower Street
Bellflower, CA 90706
(562) 427-7298
gdaniel@teamsters911.com

Dear Madams and Messrs:

This letter is sent with unanimous support of the San Diego City Council and Mayor. It is an offer to engage in mediated settlement negotiations regarding pending lawsuits and disputed legal issues. This should not be confused with annual labor negotiations under the Meyers-Milias-Brown Act.

Ann M. Smith, Esq.
Elaine Reagan, Esq.
Michael Conger, Esq.
Shirley Lee, Esq.
Ellen Greenstone, Esq.
Joel N. Klevens, Esq.
Gregorio Daniel, Esq.

January 13, 2011

As you know, we have consistently stated a goal to end most, if not all, pension-related litigation through a "global settlement."

The benefits of a global settlement are obvious. The era of pension litigation has been inordinately expensive to both the City and your clients. Pending litigation creates uncertainty and animosity that is not healthy for employer-employee relationships. And, upon final judgments, there are fairness issues that cannot be resolved after the fact, but which could have been resolved well before judgment.

The current litigation seeking to enforce the "substantially equal" provision of Charter section 143 is an example of something that should be resolved by negotiation. The City's position is legally correct and this lawsuit is likely to result in an order to recalculate employee contributions. Once that determination is made, employees will face significant increases in contributions.

It doesn't have to be that way.

Our office has been searching for ways to approach "global settlement" negotiations. Such a settlement would need to resolve the legal issues by restructuring the pension system to reduce costs and preserve vested benefits and should reduce both the City's and employees' contributions from what they are today while providing opportunities to attract and retain quality City employees.

I believe we have found concepts that could achieve a global settlement within the above parameters. We propose to open settlement negotiations of pending litigation using an experienced mediator (sharing the cost) and with the assistance of an actuary and pension experts, to include negotiation of the following elements:

1. An agreement to freeze (for a period to be negotiated) base compensation for purposes of calculating defined benefit pensions without affecting vested benefits, thereby reducing the unfunded liability. This would reduce the City's and employees' annual pension contributions; in essence, capping the pension. This could involve a process for additional performance based compensation that does not count toward pensions;
2. An agreement regarding "substantially equal";
3. An agreement to end all major litigation except for retiree health (which is on a separate negotiating schedule) and presidential leave cases;
4. Creation of a tier 3 optional retirement plan subject to IRS approval.

Creation of a tier 3 option has already been discussed publicly in connection with Proposition D. The first two elements need to be flushed out during negotiations.

Ann M. Smith, Esq.
Elaine Reagan, Esq.
Michael Conger, Esq.
Shirley Lee, Esq.
Ellen Greenstone, Esq.
Joel N. Klevens, Esq.
Gregorio Daniel, Esq.

January 13, 2011

1. **An agreement to cap base compensation for purposes of calculating defined benefit pensions.**

As you know, a qualifying retired employee's retirement allowance is calculated by multiplying the employee's years of service credit by the calculation factor applicable to his or her retirement classification and age at retirement. The resulting number is the percentage of the employee's "final compensation" that equals his or her annual unmodified service retirement allowance.

For general members hired before July 1, 2009 and safety members, our pension plans ordinances define "final compensation" as the highest one-year period of the employee's "base compensation" during membership in the Retirement System. SDMC § 24.0103. "Final compensation" for general members hired on or after July 1, 2009 is defined as an average of the member's highest three years of "base compensation" while a member of the Retirement System. *Id.*

"Base compensation" is defined as "the base salary or wages paid (standard hours multiplied by the hourly rate) on a regular bi-weekly basis to an employee for his or her services in any given pay period . . ." Expressly excluded from "base compensation" is "any item of compensation or remuneration which is identified in the Earning Codes Document as excluded from Base Compensation." Among those items listed as excluded is compensation paid under a pay for performance plan. SDMC § 24.0103.

The City can cap base compensation by freezing base salaries and wages. But, that does not mean that employees' compensation must be frozen. Additional compensation could be provided through a legitimate performance-based plan that is expressly excluded under the Earnings Code Document from base compensation.

Obviously, there are some limitations. Any limit on base compensation must be prospective. The City may not take away an employee's current highest base compensation. In addition, it is likely that the performance pay portion would not be an automatic level of compensation, but would be based upon available funds and performance criteria. Of course, some employees could exceed their current compensation levels by performing well. Any such plan would be subject to good faith negotiation and current MOU's.

Done properly, the City can benefit from a cap on future pensions without having to amend the pension plan. An actuary would no longer assume increases in base compensation. As a result, the City's annual required contribution and the unfunded liability would be reduced.

From employees' viewpoint, any increase in compensation over the base would not be used to calculate their retirement allowance, but that would also reduce their contributions, thus putting more money in their pockets. Current employees whose compensation exceeds any maximum base compensation would be grandfathered in.

Ann M. Smith, Esq.
Elaine Reagan, Esq.
Michael Conger, Esq.
Shirley Lee, Esq.
Ellen Greenstone, Esq.
Joel N. Klevens, Esq.
Gregorio Daniel, Esq.

January 13, 2011

What's more, current employees face a shrinking City budget that has left little room for salary increases. It is certainly possible that compensation paid under a performance-based plan with a pension cap may be higher as the pressures on the general fund subside. Since performance-based compensation does not increase base compensation, long term implementation of this policy might allow employees to benefit when the economy is doing well and the City's revenues are healthy without increasing the long-term pension unfunded liability.

2. An agreement regarding "substantially equal" provision of Section 143.

As part of such a global settlement that reduces the City's contributions, we should also explore ways to end the "substantially equal" lawsuit (I'd add efforts to settle DROP and the "main" pension case). Of course, the parameters of such a settlement would be subject to negotiation.

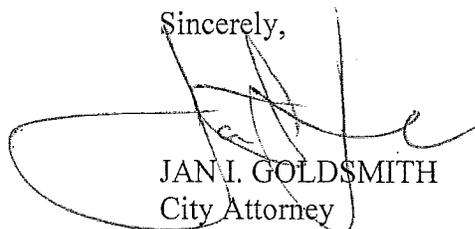
Absent a change in the litigation mentality, the City, SDCERS and our labor unions will continue to litigate over and over again. Our office will not back down as we have a client facing a huge alleged unfunded liability and some past practices have been at odds with our Charter. You will not back down as you have clients whose members cannot afford the increases in contributions we are seeking.

Going forward, we will win some and lose some. But, there will not be real winners and losers. After we win, we will hear of inequities (as we already have) and will be asked for a "do over". When we lose, members of the public will further lash out at our public employees, something we do not subscribe to. In the meantime, taxpayers and our employees will spend millions of dollars on legal fees. This cycle needs to end.

Let's move forward to retain a mediator and work on a global resolution within the frame-work outlined above. In that regard, at my request, Dean Steven Smith of California Western School of Law has offered his assistance in seeking a highly qualified mediator acceptable to all parties. I am open to others who may also assist. Our community will want us all to give this a good faith try.

Please let me know by the end of this month of your decision on whether to participate. For obvious reasons, we feel we need uniform participation to move forward.

Sincerely,



JAN I. GOLDSMITH
City Attorney

JG:cbs

cc: Honorable Mayor
Honorable City Councilmembers

EXHIBIT C



JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

March 17, 2011

Mr. Tony Butka
Mediation & Conciliation Service Director
State of California, Department of Industrial Relations
4286 Verdugo View Drive
Los Angeles, CA 90065

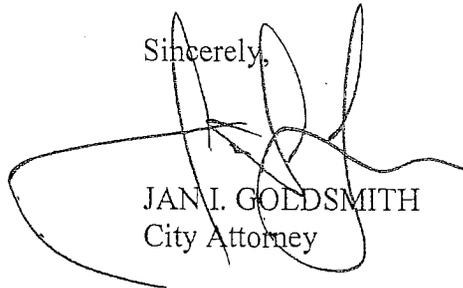
Dear Tony:

Thank you for taking time from your busy schedule to travel from Los Angeles and meet with us today. All of our labor organizations were present and you were able to meet with all parties. We appreciate your efforts and your insight.

It is unfortunate that we have not moved forward, but it just wasn't to be at this point in time.

Thank you, again, for your efforts.

Sincerely,



JAN I. GOLDSMITH
City Attorney

JG:cbs

cc: Honorable Mayor *(Via Electronic Mail)*
Honorable City Councilmembers *(Via Electronic Mail)*
Jay Goldstone, COO *(Via Electronic Mail)*
Andrea Tevlin, IBA *(Via Electronic Mail)*
Elaine W. Reagan, Esq. *(Via Electronic Mail)*
Mark Hovey, SDCERS *(Via Electronic Mail)*
Ann M. Smith, Esq. *(Via Electronic Mail)*
Ellen Greenstone, Esq. *(Via Electronic Mail)*
Joel N. Klevens, Esq. *(Via Electronic Mail)*
Michael Conger, Esq. *(Via Electronic Mail)*
George Schafer, Esq. *(Via Electronic Mail)*
Chester Mordasini, Pres. *(Via Electronic Mail)*

(cc's continued)

Frank DeClerq, Fire *(Via Electronic Mail)*
Michael McGhee, Fire *(Via Electronic Mail)*
Joan Raymond, Local 127 *(Via Electronic Mail)*
Michael Zucchet, MEA *(Via Electronic Mail)*
Brian Marvel, SDPOA *(Via Electronic Mail)*

EXHIBIT D



JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

March 21, 2011

Via U.S. Mail and
Electronic Mail

Ann M. Smith, Esq.
Tosdal, Smith, Steiner & Wax
401 West A Street, Suite 320
San Diego, CA 92101-7911
asmith@tosdalsmith.com

Chester Mordasini, President
Teamster Local 911
9900 Flower Street
Bellflower, CA 90706
cmordasini@teamsters911.com

Ellen Greenstone, Esq.
Rothner, Segall, Greenstone & Leheny
510 South Marengo Avenue
Pasadena, CA 91101-3115
egreenstone@rsglabor.com

Joel N. Klevens, Esq.
Glaser, Weil, Fink, Jacobs & Shapiro, LLP
10250 Constellation Boulevard, 19th floor
Los Angeles, CA 90067
jklevens@glaserweil.com

Michael Conger, Esq.
P.O. Box 9374
16236 San Dieguito Road, Suite No. 4-14
Rancho Santa Fe, CA 92067-4374
congermike@aol.com

George Schaefer
615 C Street
Box 149
San Diego, CA 92101
gschaefer@sandiego.gov

Dear Madams and Messrs:

Thank you for attending a session with State of California mediator Tony Butka.

Our office, with approval of the Mayor and City Council, is pursuing the "substantially equal" lawsuit in order to enforce the City Charter. This does not sit well with your side. But, it is a legitimate issue raised in 2004 by the Pension Reform Commission and it needs to be resolved either in the courtroom or at the table.

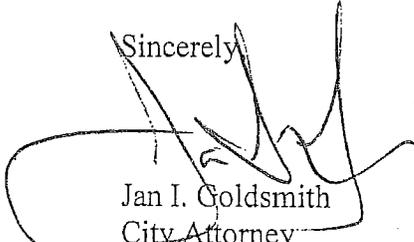
We recognize that negotiation is the best way to address this issue and the overall pension problem. I also recognize that negotiation means give and take on both sides and success requires the willingness to stick one's neck out to support solutions that include things that some folks may not like. We never got to such discussions.

Ann M. Smith, Esq.
Michael Conger, Esq.
George Schaefer, Esq.
Ellen Greenstone, Esq.
Joel N. Klevens, Esq.
Chester Mordasini, Pres.

-2-

March 21, 2011

Although it did not work out at this point, I want you to know that should there be a change of position, my door is open to making such an attempt.

Sincerely

Jan I. Goldsmith
City Attorney

JIG:cbs

cc: Honorable Mayor Sanders (*via electronic mail*)
Honorable City Council Members (*via electronic mail*)
Jay Goldstone, Chief Operating Officer (*via electronic mail*)
Andrea Tevlin, Independent Budget Analyst (*via electronic mail*)
Mark Sullivan, President SDCERS (*via electronic mail*)
Gerry Braun, Director of Special Projects (*via electronic mail*)
Joan Raymond, Local 127 AFL CIO (*via electronic mail*)
Frank DeClercq, IAFF Local 145 (*via electronic mail*)
Michael Zucchet, SD MEA (*via electronic mail*)
Brian Marvel, SDPOA (*via electronic mail*)
Elaine W. Reagan, Esq., SDCERS (*via electronic mail*)