EXHIBITS TO

INTERIM REPORT NO. 5

REGARDING THE LEGAL

STATUS OF THE ELECTED

OFFICERS RETIREMENT PROGRAM

REPORT OF THE

SAN DIEGO CITY ATTORNEY

MICHAEL J. AGUIRRE

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

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

18 MAY 2005

EXHIBIT NO. 1

ARTICLE IX

THE RETIREMENT OF EMPLOYEES

Section 141: City Employees' Retirement System

The Council of the City is hereby authorized and empowered by ordinance to establish a retirement system and to provide for death benefits for compensated public officers and employees, other than those policemen and firemen who were members of a pension system on June 30, 1946. No employee shall be retired before reaching the age of sixty-two years and before completing ten years of service for which payment has been made, except such employees may be given the option to retire at the age of fifty-five years after twenty years of service for which payment has been made with a proportionately reduced allowance. Policemen, firemen and full time lifeguards, however, who have had ten years of service for which payment has been made may be retired at the age of fifty-five years, except such policemen, firemen and full time lifeguards may be given the option to retire at the age of fifty years after twenty years of service for which payment has been made with a proportionately reduced allowance.

The Council may also in said ordinance provide:

(a) For the retirement with benefits of an employee who has become physically or mentally disabled by reason of bodily injuries received in or by reason of sickness caused by the discharge of duty or as a result thereof to such an extent as to render necessary retirement from active service.

(b) Death benefits for dependents of employees who are killed in the line of duty or who die as a result of injuries suffered in the performance of duty.

(c) Retirement with benefits of an employee who, after ten years of service for which payment has been made, has become disabled to the extent of not being capable of performing assigned duties, or who is separated from City service without fault or delinquency.

(d) For health insurance benefits for retired employees.

(Editor's note: Supplement No. 655)
(Amendment voted 03-13-1945; effective 04-09-1945.)
(Amendment voted 04-19-1949; effective 05-20-1949.)
(Amendment voted 03-13-1951; effective 03-26-1951.)
(Amendment voted 06-08-1954; effective 01-10-1955.)

(Amendment voted 11-06-1990; effective 02-19-1991.)
(Amendment voted 11-08-1994; effective 01-30-1995.)
(Amendment voted 11-05-1996; effective 02-10-1997.)

Section 142: Employment of Actuary

The Board of Administration hereinafter provided, shall secure from a competent actuary a report of the cost of establishing a general retirement system for all employees of The City of San Diego. Said actuary shall be one who has had actual experience in the establishing of retirement systems for public employees, and his position shall be considered one requiring expert or technical training within the meaning of subdivision (k) of Section 118 of Article VIII of this Charter.

Section 143: Contributions

The retirement system herein provided for shall be conducted on the contributory plan, the City contributing jointly with the employees affected thereunder. Employees shall contribute according to the actuarial tables adopted by the Board of Administration for normal retirement allowances, except that employees shall, with the approval of the Board, have the option to contribute more than required for normal allowances, and thereby be entitled to receive the proportionate amount of increased allowances paid for by such additional contributions. The City shall contribute annually an amount substantially equal to that required of the employees for normal retirement allowances, as certified by the actuary, but shall not be required to contribute in excess of that amount, except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of the employees. The mortality, service, experience or other table calculated by the actuary and the valuation determined by him and approved by the board shall be conclusive and final, and any retirement system established under this article shall be based thereon. Funding obligations of the City shall be determined by the Board on an annual basis and in no circumstances, except for court approved settlement agreements, shall the City and the Board enter into multi-year contracts or agreements delaying full funding of City obligations to the system. When setting and establishing amortization schedules for the funding of the unfunded accrued actuarial liability, the Board shall place the cost of the past service liability associated with a new retirement benefit increase on no greater than a fixed, straight-line, five year amortization schedule. Effective July 1, 2008, the Board shall place the cost associated with net accumulated actuarial losses on no greater than a fifteen year amortization schedule and the Board shall place the benefit associated with net accumulated actuarial gains on no less than a five year amortization schedule. Notwithstanding the above, the Board shall retain plenary authority and fiduciary responsibility for investment of moneys and administration of the system as provided for in article XVI, section 17 of the California Constitution. The setting and establishing of amortization schedules by the

EXHIBIT NO. 2

MEMORANDUM OF LAW

DATE: October 12, 1992

TO: Larry B. Grissom, Retirement Administrator

FROM: City Attorney

SUBJECT: Legislative Officers' Retirement Plan Vesting Requirements - San Diego Municipal Code Sections 24.0541 et seq.

Recently you asked for clarification of the vesting requirements for the Legislative Officers' Retirement Plan ("LORP") set forth in San Diego Municipal Code ("SDMC") sections 24.0541 et seq. Specifically, you have asked whether there is any conflict with these requirements as they relate to the vesting provisions set forth in Section 141 of the Charter for the City of San Diego ("Charter section 141"). After reviewing the City's Charter, the LORP and other relevant authority, we conclude that there is no conflict with the vesting provisions set forth in either the Charter or the LORP. Our analysis follows.

BACKGROUND

The LORP was established pursuant to Ordinance No. O-10479 N.S., effective January 12, 1971, to provide, on an optional basis for the Mayor and City Council members who wished to become members of the Retirement System, a separate plan for service and disability retirement. The age and service requirements for the LORP were set forth in SDMC section 24.0545. Substantively, this section has not been amended since its enactment. It provides:

> Upon his written application to the Board of Administration, a legislative officer who is a member of this system shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.0546 if the member a) is 60 or more years of age and has 4 or more years of creditable service at retirement, or b) has 20 or more years of creditable service at

> retirement, regardless of his age, or
> c) has 15 or more years of creditable
> service at an age less than 60 with
> the retirement allowance reduced by
> 2% for each year and fractional year
> under 60. (Emphasis added.)

As currently drafted, Charter section 141 provides in pertinent part:

> The Council of the City is
> hereby authorized and empowered by
> ordinance to establish a retirement
> system and to provide for death
> benefits for compensated public
> officers and employees, other than
> those policemen and firemen who were
> members of a pension system on June
> 30, 1946. No employee shall be
> retired before reaching the age of
> sixty-two years and before completing
> ten years of continuous service,
> except such employees may be given
> the option to retire at the age of
> fifty-five years after twenty years
> of continuous service with a
> proportionately reduced allowance.
> Policemen, firemen and full time
> lifeguards, however, who have had ten
> years of continuous service may be
> retired at the age of fifty-five
> years, except such policemen, firemen
> and full time lifeguards may be given
> the option to retire at the age of
> fifty years after twenty years of
> continuous service with a
> proportionately reduced allowance.
> (Emphasis added.)

The alleged conflict arises in the age and service requirements set forth in Charter section 141 (age 62, 10 years of continuous service) and SDMC section 24.0545 (age 60, 4 years of continuous service). Although at first glance these provisions appear to suggest a conflict, further review compels a contrary result.

DISCUSSION

As originally enacted, Charter section 141 empowered the Council to establish a retirement system for "public employees

other than policeman and fireman (who are now members of a pension system) and elective officers, and members of commissions who serve without pay; . . ." Charter section 141, adopted at General Election on April 8, 1931, approved by the Legislature on April 15, 1931. As can be seen from the foregoing, elective officers and non-compensated commission members were expressly excluded from coverage.

In addition, Charter section 141, as originally enacted, provided further "that in no retirement system, so established shall an employee be retired - except in case of disability, incapacitating the employee for the performance of his duties - before he reaches the age of sixty-two and before ten years of continuous service; . . ." (Emphasis added.) A similar 10-year limitation was placed on safety members who were age fifty-five. Separate age restrictions (general members - age 50, safety members - age 55) were imposed for twenty years of service.

Charter section 141 was subsequently amended on June 8, 1954, effective January 10, 1955. According to this amendment, the previously used term "public employee" was changed to "compensated public officers and employees, ..." In addition, the previous exclusion from coverage in the Retirement System for elective officers and non-compensated commission members was removed. The age and service requirements for general and safety member employees set forth above remained. Significantly, however, neither age nor service requirements were introduced for the newly included "compensated public officers."

Since the Charter is silent on the terms and conditions for service retirements for "compensated public officers," the real issue is whether the Council had the authority in 1971 when enacting Ordinance No. O-10479, N.S., establishing the LORP, to set age and service requirements different than those set for City "employees" in Charter section 141. We conclude that the Council did have such authority. The age and service requirements set forth in SDMC section 24.0545 are lawful. Longstanding rules of statutory construction support our conclusion.

Generally speaking, "the city charter represents the supreme law of the city, subject only to conflicting provisions in the state and federal constitutions, or to preemptive state or federal law. The charter supersedes all municipal laws, ordinances, rules or regulations that are inconsistent with its provisions." 2 McQuillin, The Law of Municipal Corporations 841 (3d ed. 1988).

Specifically, Article XI, section 5, subdivision (b) of the state constitution gives full power to charter cities to provide

for the compensation of their employees. In this context, " ┌iσt is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." (Citation omitted.) Grimm v. City of San Diego, 94 Cal. App. 3d 33, 37 (1979).

With respect to well-settled rules of statutory construction involving our City's Charter, the Court of Appeal has held:

> 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.σ . . . All rules of statutory construction as applied to charter provisions ┌citationsσ 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. ┌Citations.σ

Id. at 38.

In approaching our task of construing Charter section 141, we are further guided by additional principles of statutory construction. They include:

> ┌Eσffect 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 age and service requirements for "employees" set forth in Charter section 141 and the age and service requirements for legislative members (compensated public officers) in SDMC section 24.0545, we find no conflict between these provisions. The statutory scheme under scrutiny provides for the establishment of a retirement system for "compensated public officers" and "employees" by the city council through ordinance. Charter section 141. Importantly, Charter section 141 expressly identifies two separate classifications of public employment.

In this regard, we note " ┌aσ distinction is commonly drawn between a public officer and a public employee. A person is not a public officer unless he holds a 'public office' created by the Constitution or some legislative body, the office existing independently of the person in it." Witkin, Summary of California Law Agency and Employment Section 8 pp. 25-26. Specifically,

> 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.

Sharpe v. City of Los Angeles, 136 Cal. App. 732, 737 (1934).

In light of the real and substantial differences between public officer and public employee, the City Charter's express use of both terms, and the principles of statutory construction outlined above, we conclude that the express limitations imposed on service retirements for employees do not apply equally to compensated public officers. Our inquiry does not stop here, however. Charter section 146 further empowers 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; . . ." Moreover, "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." Charter section 146.

Although age and service limitations were placed on service retirements for "employees," no such limitations were placed on service retirements for "compensated public officers." Not faced with any such limitations or restrictions and pursuant to the authority set forth in Charter section 146, the Council had the power to establish different age and service requirements for service retirements for its elected members who elect to join the Retirement System.

CONCLUSION

The LORP, established by Ordinance No. O-10479, N.S., effective on January 12, 1971, was validly enacted pursuant to the Council's authority under Charter sections 141 and 146. Absent any Charter-imposed restrictions based on age or service for compensated public officers, the Council was free to establish the criteria for service retirements for its members who subsequently elected to join the Retirement System.

JOHN W. WITT, City Attorney
By
Loraine L. Etherington
Deputy City Attorney

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EXHIBIT NO. 4

Item 515
1/8/02

THE CITY OF SAN DIEGO

MANAGER'S REPORT

DATE: November 20, 2001 REPORT NO. 01-258

ATTENTION: Rules, Finance and Intergovernmental Relations Committee
Agenda of November 21, 2001

SUBJECT: Modification of the Retirement Program for Former Elected Officers

DISCUSSION

The Legislative Officers Retirement Plan (LORP) was created by Ordinance in 1971 as a distinct plan administered by the San Diego City Employees Retirement System (SDCERS). The Plan was re-titled Elected Officers Retirement Plan (EORP) in October of 2001, when the elected City Attorney was added to the Plan. While the retirement benefits for general members and safety members of SDCERS have increased over time to stay competitive with other public agency jurisdictions, the formula for calculating retirement benefits for EORP members had not changed since inception in 1971 (nineteen years). In September of 2000, the City Council adopted modifications to the Elected Officers Retirement Plan (EORP) that (1) changed the formula for calculating benefits from "5% of the first $500/month compensation plus 3% of any additional monthly compensation" to "3.5% of total monthly compensation"; and (2) changed the age at which an elected member could draw retirement benefits from age 60 to age 55.

There are presently three categories of EORP Members:

1. *Active Members* are the current Mayor, Councilmembers and City Attorney.

2. *Deferred Members* are former Mayors and Councilmembers who have left contributions on deposit with SDCERS and will be eligible to receive benefits as soon as they reach the age requirements and are eligible for a benefit as specified in the Municipal Code.

3. *Retired Members* are former Mayors and Councilmembers who have met both service and age eligibility requirements and are actually receiving retirement benefits.

When benefit modifications were implemented on September 12, 2000, based on the current provisions of the Municipal Code, the new benefits only apply to EORP members who were in office on or after September 12, 2000.

Deferred Members

There are presently six (6) Deferred EORP Members who left office *before* the September 12, 2000 modifications were effected, and who will receive benefits under the old formula once they reach age eligibility, unless the Council amends the Municipal Code.

Retired Members

There are twelve (12) Retired EORP Members who are currently receiving benefits under the old formula. There are five (5) Retired Members who left office after September 12, 2001 and are receiving benefits under the new formula.

It is recommended that the City Council express its intent regarding application of the new benefit modifications to all EORP Members, including Deferred and Retired Members.

Attachment 1 is a Draft Ordinance which would make these benefit modifications applicable to Deferred and Retired Members should the Council so desire. The Draft Resolution also changes the reference to the name of the Plan from "LORP" to "EORP" where applicable. Given the small number of Deferred and Retired EORP Members under the old formula (Attachment 2), the cost associated with the change would be diminimus.

Respectfully submitted,

Cathy Lexin
Human Resources Director

Attachments: 1. Draft Resolution
2. Comparison of EORP Benefits for Retired and Deferred

NEW LANGUAGE - REDLINED
OLD LANGUAGE - STRIKEOUT

(O-2002-62)

STRIKEOUT ORDINANCE NUMBER O-_____ (NEW SERIES)
ADOPTED ON _____

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 4, DIVISION 1, BY AMENDING SECTION 24.0103; AND BY AMENDING CHAPTER 2, ARTICLE 4, DIVISION 12, BY AMENDING SECTION 24.1201; AND BY AMENDING CHARTER 2, ARTICLE 4, DIVISION 17, SECTION 24.1706, ALL RELATING TO ELECTED OFFICERS RETIREMENT PLAN

Amending Chapter 2, Article 4, Division 1, by amending section 24.0103, to read as follows:

§24.0103 Definitions

Unless otherwise stated, for purposes of this Article:

"Accumulated Additional Contributions" through "Elected Officers" - No changes made in definitions.

"Final Compensation" for General Members and ~~Legislative~~ Elected Officers means the Base Compensation based on the highest one year period during membership in the Retirement System for those Members and Officers who are on the active payroll of ~~T~~the City of San Diego on or after June 30, 1989, and who retire on or after July 1, 1989.

"Final Compensation" for Safety Members - No changes made in definition.

"General Member" is any Member not otherwise classified as a Safety Member of ~~Legislative~~ Elected Officer.

"Health Eligible Retire" means any retired General Member, Safety Member, or ~~Legislative~~ Elected Officer who: (1)was on the active payroll of ~~T~~the City of San Diego on or after October 5, 1980, and (2)retires on or after October 6, 1980, and (3)is eligible for and is receiving a retirement allowance from the Retirement System.

"Investment Earnings Received" - No changes made in definition.

~~"Legislative Officers" means the Mayor and/or members of the City Council.~~

"Members" means any person who actively participates in and contributes to the Retirement System, and who is thereafter entitled, when eligible, to receive benefits therefrom. There are four classes of Members: General, Safety, ~~Legislative~~ Elected Officer and Deferred.

"Normal Contributions" through "Unmodified Service Retirement Allowance" - No changes made in definitions.

By amending Chapter 2, Article 4, Division 12, by amending section 24.1201, to read as follows:

§24.1201 Eligible Retirees

(a) Effective August 1, 1997, two separate post retirement health benefits shall be offered, one to Health Retirees as set forth in this Division. A Health Eligible Retiree is any General Member, Safety Member or ~~Legislative~~ Elected Officer who: (1) was on the active payroll of ~~T~~the City of San Diego on or after October 5, 1980, and (2)retires on or after October 6, 1980, and (3) is eligible for and is receiving a retirement allowance from the Retirement System. A Non Health Eligible Retiree is any retiree who: (1) retired or terminated employment as a vested member from ~~T~~the City of San Diego prior to October 6, 1980; and (2) is eligible for and is receiving a retirement allowance from the Retirement System.

Subsections (b) through (c) - No changes made.

By amending Charter 2, Article 4, Division 17, section 24.1706, to read as follows:

§24.1706 Elected Officer Services Retirement - Computation of Benefits

The service retirement allowance payable to eligible Members shall be an amount sufficient, when added to the annuity that is derived from the accumulated normal contributions of the Member, to equal 3.5% of his or her final monthly compensation for each year of creditable service. Notwithstanding Sections 24.0102 and 24.0103, all Elected Officers and former Elected Officers who are Members of the System shall receive the service retirement allowance provided for in this Section.

ELH:smf
11/16/01
Or.Dept:Human Resources
O-2002-62

Attachment 2

Comparison of Old and New EORP Benefits for Retired and Deferred Members

Retired Member	Pre-2000 Annual Benefit	Post-2000 Annual Benefit	Annual Difference
John T. Hartley	6,228.36	6,975.76	747.40
Lucy L. Killea	4,398.72	4,926.57	527.85
Robert T. Martinet	3,404.16	3,812.66	408.50
Gloria D. McColl	12,319.92	13,798.31	1,478.39
William J. Mitchell	5,365.20	6,009.02	643.82
Floyd L. Morrow	7,575.84	8,484.94	909.10
Maureen O'Connor	25,169.88	28,190.27	3,020.39
Michael J. Schaefer	1,554.12	1,740.61	186.49
Edward J. Struiksma	19,359.84	21,683.02	2,323.18
Leon L. Williams	15,201.84	17,026.06	1,824.22
Barbara G. Warden	15,673.56	17,554.39	1,880.83
Judith H. McCarty*	39,628.44	44,383.85	4,755.41
Bob Filner	6,408.84	7,600.68	1,191.84
Mike Gotch	9,982.20	14,829.24	4,847.04
Bruce Henderson	6,247.80	7,401.96	1,154.16
William Jones	5,776.08	6,684.12	908.04
Wes Pratt	6,247.80	7,401.96	1,154.16
Ron Roberts	11,247.60	13,345.20	2,097.60
			30,058.42

* Although Councilmember McCarty was still in office on September 12, 2000, she exercised the Deferred Retirement Option Plan (DROP) feature of SDCERS prior to September 12, 2000 under the old formula and consequently is receiving benefits under the old formula.

SD RET OFFICE
2001 NOV -9 AM 10: 38

Office of
The City Attorney
City of San Diego

MEMORANDUM

533-5800

DATE: November 6, 2001

TO: William Baber, Rules Committee Consultant
Office of the Mayor

FROM: Theresa C. McAteer, Deputy City Attorney

SUBJECT: Retroactive Application of Changes to the Elected Officers Retirement Program; Query re: Mayor's Retirement Benefits Status

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In September of 2000, the City Council amended the Legislative Officers' Retirement Program [the Program],[1] to lower the eligible retirement age and to change the percentage factor used to calculate a Program member's benefits. This was done to update the Program's benefits, since no such change had been made since the Program was adopted in 1971. Recently, the suggestion has been made to apply those update changes retroactively, to former council members who left the City before the changes were made. Before this suggestion is considered by the Council or any committee of the Council, you would like to confirm whether a retroactive application of these new criteria would change the benefit calculation applicable to the Mayor, given his prior City service as a council member. The Mayor would like to avoid any appearance of a conflict that might be suggested if a retroactive application would change the benefits he would be entitled to receive.

Based on the established manner in which retirement benefits are ascertained, and after consultation with the staff and general counsel to the San Diego City Employees' Retirement System [CERS], I have concluded the Mayor would not have a conflict in considering a proposal to retroactively apply the September, 2000 amendments, because the new criteria would already apply to the entirety of the Mayor's past and present service to the City.

According to CERS, when the Mayor left the City after serving as a council member, he did not "retire" or elect to exercise any other right with respect to the funds on deposit on his behalf. Rather, he simply left the funds in place. Accordingly, when he returned to City service as Mayor, he effectively picks up where he left off, continuing to accrue years of City service in

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[1]In 2001, the Council added the elected position of City Attorney to this Program and re-named it the Elected Officers Retirement Program. Those changes are not the subject of, nor are they relevant to, the issue addressed in this memorandum.

the Program. When he retires, the age and calculation factors in effect when he leaves service will apply to all of his accrued City years. This means that the amendments enacted in September 2000 will apply to both the years he accrued while serving on the City Council, and the years he will accrue serving as Mayor. He accordingly would reap no additional benefit from making the September 2000 amendments apply to other former council members who -- unlike the Mayor -- have not re-joined the City and "reactivated" their participation in CERS under the new criteria.

I have conferred with CERS general counsel and she concurs in this opinion. Please feel free to contact me or my colleague in this Office, Mike Rivo, if you would like further attention to this matter.

cc: Loraine Chapin, CERS General Counsel
Michael Rivo, Deputy City Attorney

EXHIBIT NO. 6

Section 38: City Clerk

The City Clerk shall be elected by the Council for an indefinite term and shall serve until his successor has been elected and qualified. He shall maintain all official records of the City, the custody of which is not provided for in this Charter or by ordinances of the City, including the journal of all proceedings of the Council and all its ordinances and resolutions.
(Amendment voted 09-17-1963; effective 02-11-1964.)

Section 38.1: Microfilming of Records.
(Addition voted 04-19-1949; effective 05-20-1949.)
(Repeal voted 11-04-1958; effective 02-19-1959.)

Section 39: City Auditor and Comptroller

The City Auditor and Comptroller shall be elected by the Council for an indefinite term and shall serve until his successor is elected and qualified. The City Auditor and Comptroller shall be the chief fiscal officer of the City. He shall exercise supervision over all accounts, and accounts shall be kept showing the financial transactions of all Departments of the City upon forms prescribed by him and approved by the City Manager and the Council. He shall submit to the City Manager and to the Council at least monthly a summary statement of revenues and expenses for the preceding accounting period, detailed as to appropriations and funds in such manner as to show the exact financial condition of the City and of each Department, Division and office thereof. No contract, agreement, or other obligation for the expenditure of public funds shall be entered into by any officer of the City and no such contract shall be valid unless the Auditor and Comptroller shall certify in writing that there has been made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof. He shall perform the duties imposed upon City Auditors and Comptrollers by the laws of the State of California, and such other duties as may be imposed upon him by ordinances of the Council, but nothing shall prevent the Council from transferring to other officers matters in charge of the City Auditor and Comptroller which do not relate directly to the finances of the City. He shall prepare and submit to the City Manager such information as shall be required by the City Manager for the preparation of an annual budget. He shall appoint his subordinates subject to the Civil Service provisions of this Charter.
(Amendment voted 06-04-1974; effective 08-13-1974.)

Section 97: Collusion in Bidding

If at any time it shall be found that any party or parties to whom a contract has been awarded has, in presenting any bid or bids, been guilty of collusion with any party or parties in the submission of any bid or for the purpose of preventing any other bid being made, then the contracts so awarded may be declared null and void by the Council and the Council shall thereupon re-advertise for new bids for said work or the incomplete portion thereof. The Council shall debar from future bidding all persons or firms found to be in violation of this Section, or any future firm in which such person is financially interested.

Section 98: Alteration in Contracts

Whenever it becomes necessary in the opinion of the City Manager to make alterations in any contract entered into by the City, such alterations shall be made only when authorized by the Council upon written recommendation of the Manager, whenever the cost of such alterations increases the amount of the contract by more than the amount authorized by ordinance passed by the Council. No such alterations, the cost which exceeds the amount authorized by ordinance, shall be valid unless the new price to be paid for any supplies, materials, or work under the altered contract shall have been agreed upon in writing and signed by the contractor and the Manager prior to such authorization by the Council. All other alterations shall be made by agreement in writing between the contractor and the Manager.
(Amendment voted 06-07-1966; effective 06-29-1966.)
(Amendment voted 11-04-1975; effective 12-01-1975.)

Section 99: Continuing Contracts

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, 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 also provision to constitute 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 same; provided, however, anything to the contrary herein notwithstanding, 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 the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds'

majority vote of the members elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.
(Amendment voted 04-22-1941; effective 05-08-1941.)
(Amendment voted 06-04-1968; effective 07-22-1968.)

Section 99.1: Sports Stadium

For the purpose of acquiring, constructing and completing on a site in Mission Valley not to exceed 200 acres and lying westerly of Murphy Canyon Road, northerly of Highway 80 and southerly of Friars Road, and maintaining and operating thereon a coliseum, stadium, sports arena, sports pavilion or other building, or combination thereof, and facilities and appurtenances necessary or convenient therefor, for holding sports events, athletic contests, contests of skill, exhibitions and spectacles and other public meetings, the City may, in addition to other legal methods, enter into contracts, leases or other agreements not to exceed fifty years with any other public agency or agencies, and the provisions of Sections 80 and 99 of this Charter shall not be applicable thereto.
(Addition voted 11-02-1965; effective 02-10-1966.)

Section 100: No Favoritism in Public Contracts

No officer or employee of the City shall aid or assist a bidder in securing a contract to furnish labor, or material, or supplies at a higher price or rate than that proposed by any other bidder, or shall favor one bidder over another, by giving or withholding information, or shall wilfully mislead any bidder in regard to the character of the material or supplies called for, or shall knowingly accept materials or supplies of a quality inferior to that called for by the contract, or shall knowingly certify to a greater amount of labor performed than has actually been performed, or to the receipt of a greater amount of material or supplies than has actually been received. Any officer or employee found guilty of violation of this Section shall forfeit his position immediately.

Section 101: When Contracts and Agreements Are Invalid

All contracts, agreements or other obligations entered into, all ordinances and resolutions passed, and orders adopted, contrary to the provisions of Sections 97 and 100 of this Article may be declared null and void by the Council and thereupon no contractor whatever shall have any claim or demand against the City thereunder, nor shall the Council or any officer of the City waive or qualify the limitations fixed by such section or fasten upon the municipality any liability whatever; provided that all persons who have heretofore furnished material for and/or performed labor on the job shall be protected by the contractor's surety bonds. Any wilful violation of these Sections on contracts shall constitute malfeasance in office, and any officer or employee of the City found guilty thereof shall thereby forfeit his office or position. Any violation of these Sections, with

EXHIBIT NO. 7

THE CITY OF SAN DIEGO, CALIFORNIA
MINUTES FOR REGULAR COUNCIL MEETING
OF
MONDAY, OCTOBER 8, 2001
AT 2:00 P.M.
IN THE COUNCIL CHAMBERS - 12TH FLOOR

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FILE LOCATION: MINUTES

COUNCIL ACTION: (Tape location: A496-522.)

CITY MANAGER COMMENT:

Comment by the City Manager regarding security measures in the City. The City Manager stated that as the Mayor cautioned, he could not go into detail on the security measures, but that he did produce Friday afternoon a report to the Mayor and City Council plus all of the City employees some security measures that the City is undertaking. The City Manager stated that right now under the leadership of the Assistant City Manager, they have a working group that is looking at all City facilities, and upgrading the security in those facilities. The City Manager also stated that they asked him whether the City had enhanced security at major public events such as the baseball game. The City Manager noted that there were additional private security people at the baseball game with additional Police Officers, and that checks were being done that were not done in the past. The City Manager announced that there will be metal detectors installed on the first floor of the City Administration Building, and that should be implemented by next Monday. Additionally, other city facilities are being looked at to enhance security. The City Manager also announced that the City was working with the American Water Works Association, the National Association, and that they have a network of interactions with County, State, and Federal authorities to ensure security in City Facilities.

FILE LOCATION: MINUTES

COUNCIL ACTION: (Tape location: A527-570.)

* ITEM-50: Amending the Legislative Officers Retirement Program.

CITY COUNCIL'S RECOMMENDATION:

Adopt the following ordinance which was introduced on 9/24/2001. (Council voted 8-0. Councilmember Inzunza not present.):

(O-2001-149) ADOPTED AS ORDINANCE O-18994 (New Series)

Amending Chapter II, Article 4, of the San Diego Municipal Code by amending Division 1, Section 24.0103, and by amending Division 17, Sections 24.1701-24.1707, pertaining to the Legislative Officers Retirement System to include the elected City Attorney as a member of the program. The amendment also changes the name of the program to the "Elected Officers Retirement Program."

FILE LOCATION: MEET

COUNCIL ACTION: (Tape location: A183-257.)

CONSENT MOTION BY WEAR TO DISPENSE WITH THE READING AND ADOPT THE ORDINANCE. Second by Stevens. Passed by the following vote: Peters-yea, Wear-yea, Atkins-yea, Stevens-yea, Maienschein-yea, Frye-yea, Madaffer-yea, Inzunza-yea, Mayor Murphy-yea.

* ITEM-51: Removal of Painted Utility Markings in Public Rights-of-Way.

CITY COUNCIL'S RECOMMENDATION:

Adopt the following ordinance which was introduced on 9/24/2001. (Council voted 8-0. Councilmember Inzunza not present.):

(O-2002-170) ADOPTED AS ORDINANCE O-18995 (New Series)

Amending Chapter VI, Article 2, of the San Diego Municipal Code, by amending Section 62.1105, adding a new Section 62.1106, and renumbering Sections 62.1106 and 62.1107, all relating to the Placement and Removal of Utility Installation Markouts in the Public Right-of-Way.

FILE LOCATION: MEET

COUNCIL ACTION: (Tape location: A183-257.)

CONSENT MOTION BY WEAR TO DISPENSE WITH THE READING AND ADOPT THE ORDINANCE. Second by Stevens. Passed by the following vote: Peters-yea, Wear-yea, Atkins-yea, Stevens-yea, Maienschein-yea, Frye-yea, Madaffer-yea, Inzunza-yea, Mayor Murphy-yea.

EXHIBIT NO. 9

CALIFORNIA CONSTITUTION
ARTICLE 11 LOCAL GOVERNMENT

SEC. 3. (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.

EXHIBIT NO. 11

(O-2002-62)

ORDINANCE NUMBER O-19022 (NEW SERIES)

ADOPTED ON JANUARY 8, 2002

AN ORDINANCE AMENDING CHAPTER 2, ARTICLE 4, DIVISION 1, BY AMENDING SECTION 24.0103; AND BY AMENDING CHAPTER 2, ARTICLE 4, DIVISION 12, BY AMENDING SECTION 24.1201; AND BY AMENDING CHARTER 2, ARTICLE 4, DIVISION 17, SECTION 24.1706, ALL RELATING TO ELECTED OFFICERS RETIREMENT PLAN

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

Section 1. That Chapter 2, Article 4, Division 1, of the San Diego Municipal Code is hereby amended, by amending section 24.0103, to read as follows:

§24.0103 Definitions

Unless otherwise stated, for purposes of this Article:

"Accumulated Additional Contributions" through "Elected Officers" - No changes made in definitions.

"Final Compensation" for General Members and Elected Officers means the Base Compensation based on the highest one year period during membership in the Retirement System for those Members and Officers who are on the active payroll of the City of San Diego on or after June 30, 1989, and who retire on or after July 1, 1989.

"Final Compensation" for Safety Members - No changes made in definition.

"General Member" is any Member not otherwise classified as a Safety Member of Elected Officer.

"Health Eligible Retire" means any retired General Member, Safety Member, or Elected Officer who: (1) was on the active payroll of the City of San Diego on or after October 5, 1980, and (2) retires on or

after October 6, 1980, and (3) is eligible for and is receiving a retirement allowance from the Retirement System.

"Investment Earnings Received" - No changes made in definition.

"Members" means any person who actively participates in and contributes to the Retirement System, and who is thereafter entitled, when eligible, to receive benefits therefrom. There are three classes of Members: General, Safety, and Elected Officer.

"Normal Contributions" through "Unmodified Service Retirement Allowance" - No changes made in definitions.

Section 2. That Chapter 2, Article 4, Division 12, of the San Diego Municipal Code is hereby amended, by amending section 24.1201, to read as follows:

§24.1201 Eligible Retirees

(a) Effective August 1, 1997, two separate post retirement health benefits shall be offered, one to Health Retirees as set forth in this Division. A Health Eligible Retiree is any General Member, Safety Member or Elected Officer who: (1) was on the active payroll of the City of San Diego on or after October 5, 1980, and (2) retires on or after October 6, 1980, and (3) is eligible for and is receiving a retirement allowance from the Retirement System. A Non Health Eligible Retiree is any retiree who: (1) retired or terminated employment as a vested member from the City of San Diego prior to October 6, 1980; and (2) is eligible for and is receiving a retirement allowance from the Retirement System.

Subsections (b) through (c) - No changes made.

Section 3. That Chapter 2, Article 4, Division 17, of the San Diego Municipal Code is hereby amended, by amending section 24.1706, to read as follows:

§24.1706 Elected Officer Services Retirement - Computation of Benefits

The service retirement allowance payable to eligible Members shall be an amount sufficient, when added to the annuity that is derived from the Accumulated Normal Contributions of the Member, to equal 3.5% of his or her final monthly compensation for each year of creditable service. Notwithstanding Section 24.0102 and 24.0103, all Elected Officers and former Elected Officers who are either Members or Deferred Members of the System shall receive the service retirement allowance provided for in this Section.

Section 4. That a full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 5. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: CASEY GWINN, City Attorney

By _____

Elmer L. Heap, Jr.
Head Deputy City Attorney

ELH:smf
11/21/01
Or.Dept:Human Resources
O-2002-62
Form=codeo.frm

THE CITY OF SAN DIEGO, CALIFORNIA
MINUTES FOR REGULAR COUNCIL MEETING
OF
TUESDAY, JANUARY 8, 2002
AT 9:00 A.M.
IN THE COUNCIL CHAMBERS - 12TH FLOOR

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CHRONOLOGY OF THE MEETING:

The meeting was called to order by Mayor Murphy at 10:12 a.m. The meeting was recessed by Mayor Murphy at 12:11 p.m. to convene the Redevelopment Agency. Mayor Murphy reconvened the meeting at 12:15 p.m. with Council Members Wear, Maienschein, and Inzunza not present. Mayor Murphy adjourned the meeting at 12:17 p.m.

ATTENDANCE DURING THE MEETING:

(M) Mayor Murphy-present

(1) Council Member Peters-present

(2) Council Member Wear-present

(3) Council Member Atkins-present

(4) Council Member Stevens-present

(5) Council Member Maienschein-present

(6) Council Member Frye-present

(7) Council Member Madaffer-present

(8) Council Member Inzunza-present

Clerk-Fishkin (er)

FILE LOCATION: MINUTES

ITEM-300: ROLL CALL

Clerk Fishkin called the roll:

(M) Mayor Murphy-present
(1) Council Member Peters-present
(2) Council Member Wear-present
(3) Council Member Atkins-present
(4) Council Member Stevens-present
(5) Council Member Maienschein-present
(6) Council Member Frye-present
(7) Council Member Madaffer-present
(8) Council Member Inzunza-present

ITEM-10: INVOCATION

Invocation was given by Father Russell E. J. Martin of St. Dunstans' Episcopal Church.

ITEM-20: PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was led by Council Member Peters.

ITEM-30: Approval of Council Minutes.

TODAY'S ACTION IS: APPROVED

Approval of Council Minutes for the meetings of:

11-05-2001
11-06-2001
11-12-2001 Adjourned
11-13-2001
11-13-2001 Workshop
11-19-2001
11-20-2001
11-20-2001 Special Joint Meeting
11-26-2001

11-27-2001
12-03-2001
12-04-2001

FILE LOCATION: MINUTES

COUNCIL ACTION: (Tape location: A023-026.)

MOTION BY WEAR TO APPROVE. Second by Peters. Passed by the following vote: Peters-yea, Wear-yea, Atkins-yea, Stevens-yea, Maienschein-yea, Frye-yea, Madaffer-yea, Inzunza-yea, Mayor Murphy-yea.

ITEM-31: Rhonda Henton Day.

COUNCILMEMBER PETERS' RECOMMENDATION:

Adopt the following resolution:

(R-2002-823) CONTINUED TO MONDAY, JANUARY 28, 2002

Commending Rhonda Henton for her courageous and selfless volunteer efforts following the attacks of September 11, 2001;

Proclaiming January 28, 2002 to be "Rhonda Henton Day" in the City of San Diego.

FILE LOCATION: NONE

COUNCIL ACTION: (Tape location: A028-033.)

MOTION BY PETERS TO CONTINUE TO MONDAY, JANUARY 28, 2002 TO ALLOW MS. HENTON TO BE PRESENT. Second by Atkins. Passed by the following vote: Peters-yea, Wear-yea, Atkins-yea, Stevens-yea, Maienschein-yea, Frye-yea, Madaffer-yea, Inzunza-yea, Mayor Murphy-yea.

NON-AGENDA COMMENT:

PUBLIC COMMENT-1:

Don Stillwell commented regarding the rush to change city laws to restrict Non-Agenda Comment during Council Meetings and urged the City to investigate other methods for financing city projects other than bonds.

FILE LOCATION: AGENDA

COUNCIL ACTION: (Tape location: A042-071.)

PUBLIC COMMENT-2:

Mel Shapiro commented that Non-Agenda Comment during committee meetings should follow the same order as it is during Council meetings. It should be heard at the beginning of the meeting. One committee hears Non-Agenda Comment last. Mr. Shapiro requested that they be instructed to allow Non-Agenda Comment first.

FILE LOCATION: AGENDA

COUNCIL ACTION: (Tape location: A072-090.)

PUBLIC COMMENT-3:

Ken Loch commented regarding the athletic renaissance.

FILE LOCATION: AGENDA

COUNCIL ACTION: (Tape location: A091-129.)

COUNCIL COMMENT:

COUNCIL COMMENT-1: **Referred to the City Manager**

Council Member Atkins commented regarding the withdrawal by the Governor of appropriations for projects in local jurisdictions in which the funds that have not been expended are pulled down from the State Treasury because the City didn't need the money right at that time. In light of that action and the current State budget deficit, Ms. Atkins requested that the City begin the process of looking at what projects still have money being held at the state for CIP projects, park projects, etc., and figure out a way to access those funds so that the City doesn't loose them.

FILE LOCATION: MINUTES

COUNCIL ACTION: (Tape location: A132-156.)

CITY ATTORNEY COMMENT:

City Attorney Gwinn updated Council on two cases regarding lawsuits that have had significant rulings; the first is Mercury Books v. the City of San Diego. On December 26th the judge denied the plaintiffs' motion for preliminary injunction. The second is a lawsuit from the opponents of the San Diego Naval Training Center Development Project who claim that the City is violating the 30 foot height limit from Proposition D. The judge ruled that there was no merit to any of the arguments by the opponents of the San Diego Naval Training Center Redevelopment Projects and that case is now over.

FILE LOCATION: MINUTES

COUNCIL ACTION: (Tape location: A157-189.)

CITY MANAGER COMMENT:

NONE.

ITEM-50: Proposed Changes to the Permanent Rules of Council (San Diego Municipal Code Section 22.0101) re Scheduling Evening Meetings and Adding Tuesday Consent Items.

CITY COUNCIL'S RECOMMENDATION:

Adopt the following ordinance which was introduced as amended on 12/10/2001. (Council voted 9-0):

(O-2002-70 Rev. 12/10/2001) ADOPTED AS ORDINANCE O-19021 (New Series)

Amending Chapter 2, Article 2, Division 1, of the San Diego Municipal Code by amending Section 22.0101, relating to the Permanent Rules of the Council, to schedule evening meetings at least four times a year instead of once quarterly and to add consent items on Tuesday.

FILE LOCATION: MEET

COUNCIL ACTION: (Tape location: A296-390.)

MOTION BY WEAR TO DISPENSE WITH THE READING AND ADOPT THE ORDINANCE. Second by Peters. Passed by the following vote: Peters-yea, Wear-yea, Atkins-yea, Stevens-yea, Maienschein-yea, Frye-yea, Madaffer-yea, Inzunza-yea, Mayor Murphy-yea.

* ITEM-51: Modification of the Retirement Program for Former Legislative Officers.

CITY COUNCIL'S RECOMMENDATION:

Adopt the following ordinance which was introduced on 12/10/2001 (Council voted 9-0):

(O-2002-62) ADOPTED AS ORDINANCE O-19022 (New Series)

Amending Chapter 2, Article 4, Division 1, by amending Section 24.0103; and by amending Chapter 2, Article 4, Division 12, by amending Section 24.1201; and by amending Chapter 2, Article 4, Division 17, Section 24.1706, all relating to Elected Officers Retirement Plan.

FILE LOCATION: MEET

COUNCIL ACTION: (Tape location: A203-290.)

CONSENT MOTION BY WEAR TO DISPENSE WITH THE READING AND ADOPT THE ORDINANCE. Second by Peters. Passed by the following vote: Peters-yea, Wear-yea, Atkins-yea, Stevens-yea, Maienschein-yea, Frye-yea, Madaffer-yea, Inzunza-yea, Mayor Murphy-yea.

* ITEM-52: Fenton-Carroll Canyon Technology Center Rezoning.

(RZ-98-1199. Mira Mesa Community Plan Area. District-5.)

CITY COUNCIL'S RECOMMENDATION:

Adopt the following ordinance which was introduced on 12/11/2001. (Council voted 7-2. Councilmembers Peters and Frye voted nay.):

(O-2002-67) ADOPTED AS ORDINANCE O-19023 (New Series)

Rezoning a 130.9-acre site located east of I-805, south of Mira Mesa Boulevard, and north of Miramar Road, in the Mira Mesa Community Plan area, from the AR-1-1 (Agricultural) zone (previously referred to as A-1-5) to the IL-2-1 (Industrial) and OR-2-1 (Open Space) zones (previously referred to as M-1B and OS-OSP, respectively.)

FILE LOCATION: PERM-98-1199 (65)

COUNCIL ACTION: (Tape location: A203-290.)

CONSENT MOTION BY WEAR TO DISPENSE WITH THE READING AND ADOPT THE ORDINANCE. Second by Peters. Passed by the following vote: Peters-nay, Wear-yea, Atkins-yea, Stevens-yea, Maienschein-yea, Frye-nay, Madaffer-yea, Inzunza-yea, Mayor Murphy-yea.

EXHIBIT NO. 15

Council Chamber

CHARTER

OF THE

CITY OF SAN DIEGO

CALIFORNIA

ADOPTED

AT THE

GENERAL ELECTION

Tuesday, April 7th, 1931

Approved by the Legislature, April 15th, 1931

PRINTED IN SAN DIEGO DOUGHERTY THE PRINTER

Section 137. POWER OF TAXPAYERS TO ENFORCE RULES. Any taxpayer in the City may maintain an action to recover for the City any sum of money paid in violation of the Civil Service provisions, or to enjoin the Personnel Director from attaching his certificate to a payroll on account for services rendered in violation of this Article or the rules made thereunder; and the rules made under the foregoing provisions shall for this and all other purposes have the force of law.

Section 138. CERTAIN CANDIDATES FOR ELECTIVE OFFICE AND APPOINTMENTS PROHIBITED. No person holding an elective office of the City shall, during the term for which elected, be appointed to any office or position in the service of the City except as otherwise provided by this Charter.

Section 139. FURTHER POWERS. The City Council, whenever requested by the Commission, may by ordinance confer upon the Commission such other or further rights, duties and privileges as may be necessary adequately to enforce and carry out the principles of Civil Service not in conflict with this Charter.

Section 140. PRESENT EMPLOYEES RETAINED. All officers and employees in the classified or unclassified service of the City at the time this charter becomes effective as provided in Section 212 of Article XIV hereof, shall automatically retain their positions and shall thereafter be superseded, replaced, discharged, reduced in rank, promoted, transferred, or retired, only in accordance with the provisions of this Charter. Employees of any public utility taken over by the City, who are in the service of such utility at the time of its acquisition, shall be deemed to hold their positions as though appointed under the Civil Service provisions of this Charter; but vacancies thereafter occurring in such service shall be filled from eligible lists in the manner herein provided.

ARTICLE IX.
THE RETIREMENT OF EMPLOYEES

Section 141. CITY EMPLOYEES' RETIREMENT SYSTEM. The Council of The City of San Diego, State of California, is hereby authorized and empowered by ordinance to establish a retirement system and to provide for death benefits for public employees other than policemen and firemen (who are now members of a pension system) and elective officers, and members of Commissions who serve without pay; provided, however, that in no retirement system, so established shall an employee be retired—except in case of disability, incapacitating the employee for the performance of his duties—before he reaches the age of sixty-two and before ten years of continuous service; except that the Board of Administration hereinafter created may, by rule, provide for retirement of employees after thirty years of continuous service who elect, within one year after their entrance into a retirement system, to receive a retirement allowance payable after thirty years of continuous service at rates of contribution established by the Board of Administration. Retirement shall be compulsory at the age of seventy-two.

Section 142. EMPLOYMENT OF ACTUARY. The Board of Administration hereinafter provided, shall secure from a competent actuary a report of the cost of establishing a general retirement system for all employees of The City of San Diego. Said actuary shall be one who has had actual experience in the establishing of retirement systems for public employees, and his position shall

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EXHIBIT NO. 16

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Michael J. Aguirre

CITY ATTORNEY

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

MEMORANDUM OF LAW

DATE: April 27, 2005

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Rescission of Ordinance O-19126, Re: Five Year Vesting Requirement

---

INTRODUCTION

During the course of the investigations into the fiscal crisis currently facing the City, the City Attorney's Office has had an opportunity to examine the pension system and evaluate the root causes of the current deficit. As the investigations progressed, a clear picture began to emerge. As early as 1996, the Mayor, the City Council and the City Manager began to see the pension fund as a resource from which they could grant special benefits and enhancements to City employees,[1] union presidents,[2] and at times, senior city staff.[3] One such benefit was the waiver of the ten years of service required for vesting pursuant to San Diego City Charter Section 141.[4]

As outlined below, Charter section 141, as originally adopted in 1931, required that an employee work ten years before becoming eligible to receive a pension from the City.[5] A failed attempt to amend this section, Proposition C, which attempted to establish a five year vesting period, was initiated in November 2001.[6] According to the ballot statement, Proposition C was needed in order to provide the City "more opportunity to hire qualified senior employees from the private sector." In March 2002, the voters rejected Proposition C. Even though this measure failed, the City Council unilaterally adopted a five year vesting requirement by amending the Municipal Code via Ordinance O-19126, adopted in December 2002.

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[1] *See, e.g.*, San Diego Ordinance O-18835, which established a 3.0% Retirement Factor for all members of the public safety retirement system.
[2] *See, e.g.*, San Diego Resolution R-297212.
[3] *See, e.g.*, San Diego Ordinance O-19126, which waived the ten-year service requirement for vesting, established in San Diego City Charter §141.
[4] San Diego City Charter Article IX, §141.
[5] Original Charter §141, as adopted in 1931.
[6] San Diego Proposition C (2002).

In the *Gleason*[7] case, members of the retirement system challenged the City's ability to under fund the pension system by simply amending the Municipal Code that defined the Charter mandated funding requirement. In settling this litigation, the City acknowledged that it cannot circumvent the intent of the Charter by amending the Municipal Code. The intent of the Charter on this matter is clear: a City employee must actually work ten years in order to receive a City pension. Further, an attempt to remove the Charter-mandated ten-year vesting provision was rejected by the voters. Any subsequent attempt to circumvent the express intent of the voters by amending the Municipal Code leaves the City open to the same type of liability it faced in *Gleason*. Therefore, the City Attorney's Office recommends that the City Council rescind Ordinance O-19126; and instead, adhere to both the intent of the Charter and the will of the voters by re-establishing the ten year service requirement of the Charter.

II

DISCUSSION

A. The History of Charter §141—The Ten Year Vesting Requirement Has Been Present in the City Charter Since its Adoption in 1931

Article IX of the San Diego Charter was adopted in 1931 and governs the retirement of City employees. Originally, Article IX, section 141 set forth the vesting requirements for the pension system, stating the following: "[I]n no retirement system, so established shall an employee be retired...before he reaches the age of sixty-two and before ten years of *continuous service*...."[8] The section made it clear that to become a vested member of the retirement system, an employee was required to work ten uninterrupted years.

In 1994, City officials decided to make a change in Charter section 141 for the benefit of certain City workers who had not served at least ten years in a row. Some employees, for example, had performed a year or more of military service during their vesting period, or had taken a leave of absence for personal reasons. As originally set forth in the Charter, the term "continuous service" acted to disqualify employees in those types of situations from the retirement system. Under this rule, even if a City employee worked nine years in a row, took a year off to perform, for example, National Guard duty, and then served another nine continuous years with the City, for a total of 18 actual years served, he or she would not yet be vested in the retirement system. The City desired to correct this inequitable result.

The City submitted Proposition D to the voters in a special municipal election on November 8, 1994. Proposition D sought to amend Charter section 141 and to delete the portion of the original Charter section 141 which spoke of "continuous service" and in its place substitute the following language for general members (with a similar provision for fire and safety members): "No employee shall be retired before reaching the age of sixty-two years and

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[7] *Gleason v. City of San Diego,* San Diego Superior Court Case No. GIC 803779.

[8] San Diego City Charter Art. IX, section 141 (as adopted in 1931) (emphasis added). (*See* fn 5)

before completing ten years of service for which payment has been made...."[9] The voters overwhelmingly passed Proposition D, with 181,901 votes for and 69,935 against.[10]

The amended version of the Charter, as set forth in Proposition D, accomplished its purpose—allowing workers to vest once they have worked ten actual years even if their services was interrupted by time off. However, this amendment can not allow "bought years" (under the purchase of service provisions of the Municipal Code, discussed more fully in Part B, below) to count toward the ten years of service required. The ballot argument in favor states::

> This proposition would ensure that City employees would not lose their pensions if their employment were interrupted by reasons such as other employment, family leave or military service. This proposition also ensures that a City employee would have to work the required minimum number of years and make the required contributions in order to qualify for a pension at retirement age.[11]

No argument against Proposition D was filed and none appeared in the ballot pamphlet. The argument in favor also specified that no substantive changes were to be made to the pension system, and that no pensions would be increased: "This proposition is a housekeeping amendment....It does not change current practice. It does not increase pensions for City employees. It does not cost you, the taxpayer, one cent."[12]

Recently, in the case of *Robert L. v. Superior Court*, 30 Cal. 4th 894 (2003), the California Supreme Court has given clear guidance on the interpretation of propositions:

> In interpreting a voter initiative, [the court] applies the same principles that govern statutory construction. [The court] turn[s] first to the statute, giving the words their ordinary meaning. The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme in light of the electorate's intent. When the language is ambiguous, [the court] refer[s] to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.[13]

Id. at 900-01 (citations omitted).

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[9] San Diego Proposition D (1994).
[10] San Diego Resolution R-285240, p. 7.
[11] San Diego Proposition D, "Argument in Favor of Proposition D" (1994).
[12] *Id.*
[13] *Robert L. v. Superior Court*, 30 Cal. 4th 894, 900-01 (2003).

Thus, the plain language of Proposition D and of its supporting argument in the ballot pamphlet lead simply and directly to the conclusion that Proposition D was intended to assist workers who had broken up their years of service, but not allow a worker to vest who had not actually worked the ten required years.

In 2002, City officials attempted to shorten the ten year vesting requirement by amending the City Charter through a new proposition, Proposition C. Proposition C would have (if passed) amended the ten year vesting requirement originally built into Charter section 141 so that only five years of actual service would be required. The voters rejected Proposition C, and the Charter was not amended.[14] Thus, the ten year vesting requirement remains.

B. The History of "Purchase of Service Credit" Sections of the Municipal Code: In 2002, the City Attempted to Evade the Requirements of the City Charter

1. Various Purchase of Service Provisions Consolidated in 1993

In 1993, ordinance O-17938 reorganized the purchase of service credit available to members of the Retirement System.[15] Before 1993, purchase of service was discussed in scattered portions of the Municipal Code. The 1993 ordinance does not include a limit on the number of years that may be purchased, and is silent as to vesting requirements. The relevant section of the ordinance reads: "SEC. 24.1310....To purchase service credit, a Member must elect to pay and thereafter pay, in accordance with such election and prior to retirement, into the retirement fund an amount, including interest, determined by the Board." Notably, the purchase of service options available in 1993 did not include the so-called "air time," which are years bought without any underlying work period or authorized leave. Years could be purchased for an employee's probationary period (during which they could not join the retirement system), military service, or part-time work, among others.

2. In 1997 and Again in 1998, the Municipal Code Was Amended Allowing "Air Time," But Limiting Those Purchases of Service to Five Years, and Specifying That Those Years Would Not Count Toward Vesting

In 1997, O-18383 was passed, which specified that a member could purchase five years of unspecified "air time" credit, but that those purchased years could not count toward vesting. The relevant portion of O-18383 read:

> SEC. 24.1312....Any person employed by the City of San Diego on the date of December 31, 1996, may purchase up to a maximum of five (5) years of service credit....However, in no event shall the

[14] Resolution R-296287.
[15] San Diego Ordinance O-17938 (July 12, 1993)

> years purchased pursuant to this provision qualify to satisfy the vesting requirement set forth in Section 141 of the San Diego City Charter.[16]

In 1998, O-18600 was passed, which stated in its "recitals" clauses that it was still necessary to specify in the purchase of service provisions that purchased years could not be used to satisfy the ten year vesting requirements.[17] However, the resolution portion of ordinance O-18600 made no actual changes to the existing language in the Municipal Code regarding vesting. Thus, the language put in place by O-18383 remained.

3. <u>In 2002, The Municipal Code Was Amended to Allow Purchased Years to Count Towards Vesting, Even Though This Conflicted With the City Charter</u>

In 2002, O-19126 was enacted by the City Council, which stated in its "recitals" clauses that it was to do the following:

> [Remove] the current prohibition against counting a purchase of Creditable Service set forth in San Diego Municipal Code section 24.1312 towards the ten-year vesting requirement set forth in section 141 of the San Diego City Charter....[18]

The ordinance then proceeded to remove the portions of Municipal Code section 24.1312 which prohibited using the purchased years towards the vesting requirement. As set forth in the strike-out version of the new Municipal Code section 24.1312, the changes (in strikeout type) appeared as follows:

> §24.1312....Any Member may purchase a maximum of five years of Creditable Service, in addition to any other Creditable Service the member is eligible to purchase under this Division. The cost of Creditable Service purchased under section 24.1212 is the amount the Board determines to be the employee and employer cost of that Creditable Service. ~~Any Member employed by the City of San Diego on the date of December 31, 1996, may purchase up to a maximum of five (5) years of Creditable Service in addition to any other purchase of Creditable Service benefit for which that Member was eligible as of December 31, 1996. However, in no event shall the years purchased pursuant to this provision qualify to~~

[16] San Diego Ordinance O-18383 (February 25, 1997), p. 36.
[17] San Diego Ordinance O-18600 (November 10, 1998).
[18] San Diego Ordinance O-19126 (December 3, 2002), p.4. (*See* fn 3)

> ~~satisfy the ten year vesting requirements set forth in Section 141 of the San Diego City Charter.~~[19]

The final version of Municipal Code section 24.1312 reads accordingly, leaving out the portion in strikeout text. [20]

In making the above revision, the Mayor, City Council, and the City Attorney's Office attempted to accomplish a reduction in the ten year vesting requirement set forth in Charter section 141 through Proposition C (discussed in Part II.A, above), they attempted to modify the Municipal Code instead. This attempted modification was contrary to the clear intent of the Charter and the intent of the voters in rejecting Proposition C.

C. Ordinance No. O-19126 Should Be Rescinded

Charter section 146 empowers the San Diego City Council to "enact any and all ordinances necessary, in addition to the ordinance authorized in section 141 of this Article [establishing a retirement system], to carry into effect the provisions of that Article."[21] It further provides that "any and all ordinances so enacted shall have equal force and effect with th[at] Article and shall be construed to be a part thereof as fully as if drawn herein."[22] However, while the City Council is empowered to enact retirement ordinances, it is not empowered to enact retirement ordinances that conflict with the Charter.

In *Montgomery v. Board of Admin., et al.,* 34 Cal. App. 2d 514 (1939)[23], the plaintiffs sued the San Diego City Employee's Retirement System Board of Administration to compel it to pay retirement benefits which they claimed they were entitled to under the provisions of the City's Charter and ordinances. To resolve their claims, which were based upon retirement ordinances which conflicted with the City Charter (*Id.* at 520), the Court of Appeal for the Fourth Appellate District was required to construe the provisions of Charter section 146. The court reasoned and held:

> The section grants to the city council power to pass ordinances proper "to carry into effect the provisions of this article." This quoted portion of the section gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority to pass any enactment that conflicts with the charter provisions. In view of that provision of the section, we

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[19] Draft of San Diego Ordinance O-19126.
[20] San Diego Municipal Code §24.1312. (Current)
[21] San Diego City Charter Article IX, §146.
[22] *Id.*
[23] *Montgomery v. Board of Administration, et al.*, 34 Cal. App. 2d 514, 520 (1939).

> must hold that it is only an ordinance that puts into effect charter provisions that is to have the same force and effect as though a part
>
> of and included in the charter; that *the section does not empower the city council to pass any ordinance conflicting with the charter or that may have the effect of amending it.*

Montgomery, 34 Cal. App. 2d at 521 (emphasis added).

Thus, the language in Charter section 146 that "any and all ordinances so enacted shall have equal force and effect" with the Charter does not authorize the City Council to enact ordinances that conflict, modify, or amend the Charter. Otherwise, it would violate section 3, subdivision (a) of article XI of the California Constitution, which requires that Charter amendments be approved by a majority of voters.[24] (*Id.* at 520.) More recently, in *Grimm v. City of San Diego,* 94 Cal. App. 3d 33 (1979), the court reaffirmed that Charter section 146 only "gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority to pass any enactments that conflict with the charter provisions."[25]

In 1992, the voters of California amended the California Constitution to prevent politicians from tampering with the state and local pension funds. Under the California Pension Protection Act of 1992 (enacted by the passage of Proposition 162), Article XVI, section 17 of the California Constitution was amended to grant retirement boards "plenary authority and fiduciary responsibility for the investment of moneys and the administration of the system." The express "purpose and intent" of the amendment was "give the sole and exclusive power over the management and investment of public pension funds to the retirement boards selected or appointed for that purpose, . . . and to prohibit the Governor or any executive or legislative body of any political subdivision of this State from tampering with public pension funds." *Westly v. CALPERS,* 105 Cal. App. 4th 1095, 1110 -11 (2003).[26] The measure was intended to protect pension funds from the tax increases which result if "state and local politicians are permitted to divert public pension funds." *Id.* at 1111.

By enacting O-19126, the City Council "tampered with public pension funds" for the benefit of a select class of employees. The "independent" Board of Administration, ostensibly set up to protect the fund from the politicians, allowed this amendment to the Municipal Code. However, neither the City Council nor the SDCERS Board may enact ordinances or adopt rules circumventing the San Diego City Charter. Because O-19126 contradicts the ten year vesting requirement contained in Charter section 141, it must be rescinded.

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[24]California Constitution, Article XI, subdivision (a), section 3.
[25] *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 39 (1979).
[26] *Westly v. CALPERS,* 105 Cal.App.4th 1095, (2003).

III

CONCLUSION

In circumventing the ten year vesting requirement in Charter section 141, the Mayor, City Council, City Attorney, and City Manager "tampered" with public pension funds in direct contravention of the City Charter and the California Pension Protection Act of 1992. As outlined, the enactment of O-19126 contradicted a long standing tenet of the San Diego City Retirement System; namely, that a City employee must work for the City for ten years before becoming eligible for a City pension. The Council recognized the Charter required a ten year vesting element when it originally enacted the purchase of service credit program. Municipal Code section 24.1312, before it was amended, clearly stated that the purchase of "air time" could not be used as part of the ten year vesting requirement. The amendment, which simply deleted this language from section 24.1312, cannot override the clear mandate of the charter. In order to protect the City from further liability associated with pension ordinances and resolutions, Ordinance O-19126 should be rescinded and the ten year vesting requirement of the Charter should be re-instituted.

MICHAEL J. AGUIRRE, City Attorney

By

Christopher S. Morris
Chief Deputy City Attorney

CSM:jb
ML-2005-9

EXHIBIT NO. 17

credited in the Retirement System will be the amount the Board determines to be the employer and employee cost of that Creditable Service. Represented Members in the Local 145 bargaining unit are not eligible to exercise any cash-out feature of Annual Leave that they accrue after July 1, 2002, including Annual Leave accrued after July 1, 2002, while in DROP.
(Amended 12–3–2002 by O–19126 N.S.)

§24.1312 General Provision for Five-Year Purchase of Creditable Service

Any Member may purchase a maximum of five years of Creditable Service, in addition to any other Creditable Service the Member is eligible to purchase under this Division. The cost of Creditable Service purchased under section 24.1312 is the amount the Board determines to be the employee and employer cost of that Creditable Service.
("Amended 12-3-2002 by O-19126 N.S.)

any officer or employee chooses to come within the field of membership, such officer or employee shall have the right to purchase service credit for that period of service not previously included within the field of membership of the Retirement System as provided in this Division.
("Purchase of Service Credit for Officer or Employee not Previously Included within Field of Membership" added and amended 7–12–1993 by O–17938 N.S.)

§24.1309 Purchase of Military Service for Service Credit

The Board is hereby authorized and vested with power to enact rules and regulations which shall govern the status of Members of the Retirement System who either voluntarily or involuntarily enter into the service of the United States Military forces, which rules and regulations shall safeguard the interest of such Members to the extent that they shall not be deprived in any way of any benefit secured by General law of the State because of such absence. These rules and regulations shall provide that the member shall be eligible to purchase service credit for such absence on Military service.
("Purchase of Military Service for Service Credit" added 7–12–1993 by O–17938 N.S.)

§24.1310 Purchase of Service Credit Payment Options

To purchase Service credit, a Member must elect to pay and thereafter pay, in accordance with such election and prior to retirement, into the retirement fund an amount, including interest, determined by the Board. No Member shall receive service credit under this Division for any service for which payment has not been completed pursuant to this Division before the effective date of the Member's retirement.

Subject to any limitations imposed by the Internal Revenue Code, such payment may be made by a lump sum, installment payments, a direct transfer to the Retirement System from any defined contribution plan maintained by The City of San Diego or in such manner and at such time as the Board may by rule prescribe. Any sums paid by a Member pursuant to this section shall be considered to be and administered as Member contributions.
("Purchase of Service Credit Payment Options" added 7–12–1993 by O–17938 N.S.)

§24.1312 General Provision for Five Year Purchase of Creditable Service

Any Member employed by the City of San Diego on the date of December 31, 1996, may purchase up to a maximum of five (5) years of service credit in addition to any other purchase of service credit benefit for which that Member was eligible as of

December 31, 1996. However, in no event shall the years purchased pursuant to this provision qualify to satisfy the ten year vesting requirements set forth in Section 141 of the San Diego City Charter.

Any Member hired by The City of San Diego on or after January 1, 1997, may purchase up to a maximum of five (5) years of service credit in addition to any other purchase of service credit benefit set forth in Chapter II, Article 4, Division 13, for which that Member was eligible on January 1, 1997.

The cost of service credit purchased pursuant to this section shall be the amount determined by the Board to be the equivalent of the employee and employer cost of that service credit.
("General Provision for Five Year Purchase of Creditable Service" amended 11-10-1998 by O-18600 N.S.)

EXHIBIT NO. 20

shall be entitled to all of the privileges and benefits of other members of this system except as specifically provided to the contrary in this Division 5-C.
(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-10964 N.S.)

SEC. 24.0542 Membership by Legislative Officers Permissive

Every legislative officer in office at the time this section becomes effective, or elected after the effective date of this section, may become a member of this System if he files with the Board a written election to become a member.
(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Amended 3-5-74 by O-11263 N.S.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0543 Provision Authorizing Retroactive Membership

Every legislative officer who elects to become a member may also elect within one year of becoming a member to receive credit for the service rendered as a legislative officer prior to his becoming a member if he makes contributions to the System equal to the contributions he would have made had he been a member during the period of prior service for which he is electing to receive credit.
(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Amended 3-5-74 by O-11263 N.S.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0544 Contribution Rate

The City Auditor and Comptroller shall withhold from the wages or salary of a legislative officer who becomes a member of this system 8% of his earnable compensation for deposit in the Retirement Fund and placed to the credit of the individual member's account. The contribution rate shall also be 8% of earnable compensation for the period of time for which a member is electing to receive prior service credits. Notwithstanding the above, all participating legislative members shall contribute an additional four-tenths (4/10) of one percent (1%) in connection with the high one-year basis for final compensation, said additional contribution to commence from and after December 30, 1988.
(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)
(Amended 5-15-89 by O-17295 N.S.)

SEC. 24.0545 Legislative Officer Age and Service Requirements for Retirement

Upon his written application to the Board of Administration, a legislative officer who is a member of this system shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.0546 if the member a) is 60 or more years of age and has 4 or more years of creditable service at retirement, or b) has 20 or more years of creditable service at retirement, regardless of his age, or c) has 15 or more years of creditable service at an age less than 60 with the retirement allowance reduced by 2% for each year and fractional year under 60.
(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0546 Legislative Officer Service Retirement—Computation of Benefits

The service retirement allowance payable to eligible members shall be an amount sufficient, when added to the annuity that is derived from the accumulated normal contributions of the member, to equal 5% of his final compensation not in excess of $500.00 per month for each year of creditable service and 3% of his final compensation in excess of $500.00 per month for each year of creditable service.
(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0547 Legislative Officer Disability Benefits

Any legislative officer who is a member of this system and who becomes permanently incapacitated from the performance of duty shall be retired for disability with a retirement allowance determined in accordance with the provisions of Section 24.0546.
(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)

DIVISION 6
Optional Settlements for Members and Safety Members

(Old Division 6 — Administration, incorp. 1-22-52 by O-5046 N.S. contained in O-10792 O.S. adopted 11-29-26)
(Repealed 10-25-62 by O-8744 N.S.)
(New Division 6 — Optional Settlements for Members and Safety Members, added 10-25-62 by O-8744 N.S.)

EXHIBIT NO. 21

retirement plan for those present and future legislative officers who become members of this system and who are not otherwise entitled to benefits from this system for the period of service under consideration. Legislative officers who become members of this system shall be entitled to all of the privileges and benefits of other members of this system except as specifically provided to the contrary in this Division 5–C.

(Title added 12–8–76 by O–11964 N.S.)

§ 24.0542 Membership by Legislative Officers Permissive

Every legislative officer in office at the time this section becomes effective, or elected after the effective date of this section, may become a member of this System if he files with the Board a written election to become a member.

(Title added 12–8–76 by O–11964 N.S.)

§ 24.0543 Provision Authorizing Retroactive Membership

Every legislative officer who elects to become a member may also elect within one year of becoming a member to receive credit for the service rendered as a legislative officer prior to his becoming a member if he makes contributions to the System equal to the contributions he would have made had he been a member during the period of prior service for which he is electing to receive credit.

(Title added 12–8–76 by O–11964 N.S.)

§ 24.0544 Contribution Rate

The City Auditor and Comptroller shall withhold from the wages or salary of a legislative officer who becomes a member of this system 8% of his earnable compensation for deposit in the Retirement Fund and placed to the credit of the individual member's account. The contribution rate shall also be 8% of earnable compensation for the period of time for which a member is electing to receive prior service credits. Notwithstanding the above, all participating legislative members shall contribute an additional four–tenths (4/10) of one percent (1%) in connection with the high one–year basis for final compensation, said additional contribution to commence from and after December 30, 1988.

(Amended 5–15–89 by O–17295 N.S.)

§ 24.0545 Legislative Officer Age and Service Requirements for Retirement

(a) Upon written application to the Board of Administration, a legislative officer who is a member of this system shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.0546 if the member:

(1) is 60 or more years of age and has 4 or more years of creditable service at retirement, or

(2) has 8 or more years of creditable service at an age less than 60 with the retirement allowance reduced by 2% for each year and fractional year under 60.

(b) Notwithstanding the vesting requirements set forth in Section 24.0545(a), upon written application to the Board of Administration, a legislative officer who is a member of this system and who was elected for Districts 1,3,5 and 7 in 1993 or Districts 2,4,6 and 8 in 1995, and who serves a three year term, shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.0546 if the member:

(1) is 60 or more years of age and has 3 or more years of creditable service at retirement, or

(2) has 7 or more years of creditable service at an age less than 60 with the retirement allowance reduced by 2% for each year and fractional year under age 60.

(Amended 10–30–95 by O–18225 N.S.)

EXHIBIT NO. 22

shall be entitled to all of the privileges and benefits of other members of this system except as specifically provided to the contrary in this Division 5-C.

(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-10964 N.S.)

SEC. 24.0542 Membership by Legislative Officers Permissive

Every legislative officer in office at the time this section becomes effective, or elected after the effective date of this section, may become a member of this System if he files with the Board a written election to become a member.

(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Amended 3-5-74 by O-11263 N.S.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0543 Provision Authorizing Retroactive Membership

Every legislative officer who elects to become a member may also elect within one year of becoming a member to receive credit for the service rendered as a legislative officer prior to his becoming a member if he makes contributions to the System equal to the contributions he would have made had he been a member during the period of prior service for which he is electing to receive credit.

(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Amended 3-5-74 by O-11263 N.S.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0544 Contribution Rate

The City Auditor and Comptroller shall withhold from the wages or salary of a legislative officer who becomes a member of this system 8% of his earnable compensation for deposit in the Retirement Fund and placed to the credit of the individual member's account. The contribution rate shall also be 8% of earnable compensation for the period of time for which a member is electing to receive prior service credits. Notwithstanding the above, all participating legislative members shall contribute an additional four-tenths (4/10) of one percent (1%) in connection with the high one-year basis for final compensation, said additional contribution to commence from and after December 30, 1988.

(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)
(Amended 5-15-89 by O-17295 N.S.)

SEC. 24.0545 Legislative Officer Age and Service Requirements for Retirement

Upon his written application to the Board of Administration, a legislative officer who is a member of this system shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.0546 if the member a) is 60 or more years of age and has 4 or more years of creditable service at retirement, or b) has 20 or more years of creditable service at retirement, regardless of his age, or c) has 15 or more years of creditable service at an age less than 60 with the retirement allowance reduced by 2% for each year and fractional year under 60.

(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0546 Legislative Officer Service Retirement—Computation of Benefits

The service retirement allowance payable to eligible members shall be an amount sufficient, when added to the annuity that is derived from the accumulated normal contributions of the member, to equal 5% of his final compensation not in excess of $500.00 per month for each year of creditable service and 3% of his final compensation in excess of $500.00 per month for each year of creditable service.

(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)

SEC. 24.0547 Legislative Officer Disability Benefits

Any legislative officer who is a member of this system and who becomes permanently incapacitated from the performance of duty shall be retired for disability with a retirement allowance determined in accordance with the provisions of Section 24.0546.

(Added 1-12-71 by O-10479 N.S.; effective 7-1-71.)
(Title added 12-8-76 by O-11964 N.S.)

DIVISION 6
Optional Settlements for Members and Safety Members

(Old Division 6 — Administration, incorp. 1-22-52 by O-5046 N.S. contained in O-10792 O.S. adopted 11-29-26)
(Repealed 10-25-62 by O-8744 N.S.)
(New Division 6 — Optional Settlements for Members and Safety Members, added 10-25-62 by O-8744 N.S.)

EXHIBIT NO. 25

§24.1706 Elected Officer Service Retirement - Computation of Benefits

The service retirement allowance payable to eligible Members shall be an amount sufficient, when added to the annuity that is derived from the Accumulated Normal Contributions of the Member, to equal 3.5% of his or her final monthly compensation for each year of creditable service. Notwithstanding Section 24.0102 and 24.0103, all Elected Officers and former Elected Officers who are either Members or Deferred Members of the System shall receive the service retirement allowance provided for in this Section.
(Amended 1-8-2002 by O-19022 N.S.)

§24.1707 Elected Officer Disability Benefits

Any Elected Officer who is a Member of this System and who becomes permanently incapacitated from the performance of duty shall be retired for disability with a retirement allowance determined in accordance with the provisions of Section 24.1706.
(Retitled from "Legislative Officer Disability Benefit" and amended 10-8-2001 by O-18994 N.S.)

EXHIBIT NO. 26

(O-2001-149)

ORDINANCE NUMBER O-18994 (NEW SERIES)

ADOPTED ON OCTOBER 8, 2001

AN ORDINANCE AMENDING CHAPTER II, ARTICLE 4, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING DIVISION 1 BY AMENDING SECTION 24.0103, AND BY AMENDING DIVISION 17, SECTIONS 24.1701-24.1707, PERTAINING TO THE RETIREMENT SYSTEM

WHEREAS, pursuant to Division 17 of Article 4 of Chapter II of the Municipal Code, the City provides certain retirement benefits for legislative officers of the City; and

WHEREAS, the City Council finds that the Legislative Officers Retirement Program [LORP] is intended to provide retirement benefits for elected officials who, because of term limits, otherwise would not be able to enjoy the full benefits of the retirement system available to all other employees of the City; and

WHEREAS, the LORP currently includes only the Mayor and City Council Members; and

WHEREAS, the City Attorney is also an elected official, subject to the same term limits as are the Mayor and Council Members; and

WHEREAS, the Council finds that the same considerations underlying the creating of the LORP also apply to the position of elected City Attorney;

WHEREAS, a vote of the affected Members will be conducted as required to make this benefit effective; NOW, THEREFORE,

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

Section 1. That Chapter II, Article 4, Division 1, of the San Diego Municipal Code be and the same is hereby amended by deleting the definition of "Legislative Officers" in Section 24.0103, and by otherwise amending Section 24.0103, to read as follows:

SEC. 24.0103 Definitions

Unless otherwise stated, for purposes of this Article:

[No change in text of other definitions].

"Elected Officers" means the Mayor, members of the City Council, and/or the City Attorney.

Section 2. That Chapter II, Article 4, Division 17, of the San Diego Municipal Code be and the same is hereby amended by deleting all references therein to "Legislative Officers," and replacing all such references with the term "Elected Officers," to read as follows:

Division 17: Elected Officers Retirement Plan

SEC. 24.1701 Elected Officers' Retirement Plan Established

From and after the effective date of this section, there is established within this Retirement System a separate retirement plan for those present and future Elected Officers who become Members of this System and who are not otherwise entitled to benefits from this System for the period of service under consideration. Elected Officers who become Members of this System shall be entitled to all of the privileges and benefits of other Members of this System except as specifically provided in the section of the Municipal Code describing the benefit.

SEC. 24.1702 Membership by Elected Officers Permissive

Every Elected Officer in office at the time this section becomes effective, or elected after the effective date of this section, may become a Member of this System if he files with the Board a written election to become a Member.

SEC. 24.1703 Provision Authorizing Retroactive Membership

Every Elected Officer who elects to become a Member may also elect within one year of becoming a Member to receive credit for the service rendered as an Elected Officer prior to his or her becoming a Member if he or she makes contributions to the System equal to the contributions he or she would have made had he or she been a Member during the period of prior service for which he or she is electing to receive credit.

SEC. 24.1704 Contribution Rate

The City Auditor and Comptroller shall withhold from the wages ro salary of an Elected Officer who becomes a Member of this System 8% of his or her Base Compensation for deposit in the Retirement Fund and placed to the credit of the individual Member's account. The contribution rate shall also be 8% of Base Compensation for the period of time for which a Member is electing to receive prior service credits. Notwithstanding the above, all participating Elected Officers shall contribute an additional four-tenths (4/10) of one percent (1%) in connection with the high one-year basis for Final Compensation, said additional contribution to commence from and after December 30, 1988.

SEC. 24.1705 Elected Officer Age and Service Requirements for Retirement

(a) Upon written application to the Board of Administration, an elected officer who is a Member of this System shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.0546 if the Member:

(1) Is 55 or more years of age and has 4 or more years of creditable service at retirement, or

(2) Has 8 or more years of creditable service at an age less than 55 with the retirement allowance reduced by 2% for each year and fractional year under 55.

(b) Notwithstanding the vesting requirements set forth in Section 24.0545(a), upon written application to the Board of Administration, an Elected Officer who is a Member of this System and who was elected for Districts 1,3,5 and 7 in 1993 or Districts 2,4,6 and 8 in 1995, and who serves a three-year term, shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.1706 if the Member:

(1) Is 55 or more years of age and has 3 or more years of creditable service at retirement, or

(2) Has 7 or more years of creditable service at an age less than 55 with the retirement allowance reduced by 2% for each year and fractional year under age 55.

SEC. 24.1706 Elected Officer Service Retirement — Computation of Benefits

[No change in text].

SEC. 24.1707 Elected Officer Disability Benefit

Any Elected Officer who is a Member of this System and who becomes permanently incapacitated from the performance of duty shall be retired for disability with a retirement allowance determined in accordance with the provisions of Section 24.1706.

Section 3. A full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 4. This Ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: CASEY GWINN, City Attorney

By:_____
Theresa C. McAteer
Deputy City Attorney

TCM:lb
05/17/01
Or. Dept:Retirement
O-2001-149

EXHIBIT NO. 27

Article 4: City Employees' Retirement System

Division 17: Elected Officers' Retirement Plan

(Retitled from "Legislative Officers Retirement Plan" on 10-8-2001 by O-18994 N.S.)
(Retitled from "Elected Officers Retirement Plan on 4-2-2002 by O-19043 N.S.)

§24.1701 Elected Officers' Retirement Plan Established

From and after the effective date of this section, there is established within this Retirement System a separate retirement plan for those present and future Elected Officers who become Members of this System and who are not otherwise entitled to benefits from this System for the period of service under consideration. Elected Officers who become Members of this System shall be entitled to all of the privileges and benefits of other Members of this System except as specifically provided in the section of the Municipal Code describing the benefit.
(Retitled from "Legislative Officers' Retirement Plan Established" and amended 10-8-2001 by O-18994 N.S.)

§24.1702 Membership by Elected Officers Permissive

Every Elected Officer in office at the time this section becomes effective, or elected after the effective date of this section, may become a Member of this System if he files with the Board a written election to become a Member.
(Retitled from "Membership by Legislative Officers Permissive" and amended 10-8-2001 by O-18994 N.S.)

§24.1703 Provision Authorizing Retroactive Membership

Every Elected Officer who elects to become a Member may also elect within one year of becoming a Member to receive credit for the service rendered as a Elected Officer prior to his or her becoming a Member if he or she makes contributions to the System equal to the contributions he or she would have made had he been a Member during the period of prior service for which he or she is electing to receive credit.
(Amended 10-8-2001 by O-18994 N.S.)

§24.1704 Contribution Rate

The City Auditor and Comptroller will withhold from the wages or salary of a Elected Officer who becomes a Member of this System 8% of his or her Base Compensation,

which will be deposited in the Retirement Fund and credited to the individual Member's account. The employee contribution rate will also be 8% of Base Compensation for any purchase of prior service as an Elected Officer Member. Beginning on December 30, 1988, each Elected Officer Member will contribute an additional 0.40% of his or her Base Compensation to pay for the high one–year basis for Final Compensation. Beginning on July 1, 2001, each Elected Officer Member will contribute an additional 0.49% of his or her Base Compensation as a result of the Corbett Settlement.
(Amended 4-2-2002 by O-19043 N.S.)

§24.1705 Elected Officer Age and Service Requirements for Retirement

(a) Upon written application to the Board of Administration, a Elected Officer who is a Member of this System shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.1706 if the Member:

(1) Is 55 or more years of age and has 4 or more years of creditable service at retirement, or

(2) Has 8 or more years of creditable service at an age less than 55 with the retirement allowance reduced by 2% for each year and fractional year under 55.

(b) Notwithstanding the vesting requirements set forth in Section 24.1705(a), upon written application to the Board of Administration, a Elected Officer who is a Member of this System and who was elected for Districts 1,3,5 and 7 in 1993 or Districts 2,4,6 and 8 in 1995, and who serves a three-year term, shall be retired and thereafter shall receive for life the service retirement allowance provided in Section 24.1706 if the Member:

(1) Is 55 or more years of age and has 3 or more years of creditable service at retirement, or

(2) Has 7 or more years of creditable service at an age less than 55 with the retirement allowance reduced by 2% for each year and fractional year under age 55.

(Retitled from "Legislative Officer Age and Service Requirements for Retirement" and amended 10-8-2001 by O-18994 N.S.)

§24.1706 Elected Officer Service Retirement - Computation of Benefits

The service retirement allowance payable to eligible Members shall be an amount sufficient, when added to the annuity that is derived from the Accumulated Normal Contributions of the Member, to equal 3.5% of his or her final monthly compensation for each year of creditable service. Notwithstanding Section 24.0102 and 24.0103, all Elected Officers and former Elected Officers who are either Members or Deferred Members of the System shall receive the service retirement allowance provided for in this Section.
(Amended 1-8-2002 by O-19022 N.S.)

§24.1707 Elected Officer Disability Benefits

Any Elected Officer who is a Member of this System and who becomes permanently incapacitated from the performance of duty shall be retired for disability with a retirement allowance determined in accordance with the provisions of Section 24.1706.
(Retitled from "Legislative Officer Disability Benefit" and amended 10-8-2001 by O-18994 N.S.)

EXHIBIT NO. 29

CALIFORNIA CONSTITUTION
ARTICLE 16 PUBLIC FINANCE

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.

EXHIBIT NO. 30

INTERIM REPORT NO. 3

REGARDING VIOLATIONS

OF STATE AND LOCAL LAWS AS

RELATED TO THE SDCERS PENSION FUND

REPORT OF THE

SAN DIEGO CITY ATTORNEY

MICHAEL J. AGUIRRE

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

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

8 APRIL 2005

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8 APRIL 2005

In *Wilson,* the California legislature attempted to modify the funding of the California Public Employees' Retirement Fund [PERS]. In an effort to balance the state's budget by shortchanging the PERS fund, between 1991 and 1993 the California legislature changed the payment schedule for funding PERS to an "in arrears" financing system and in doing so moved away from a "level contribution" system that paid for pension liabilities as they accrued. *Wilson,* 52 Cal.App.4th at 1117-1122. The court in *Wilson* held that such a financing scheme, which delayed funding of the retirement system to balance the state's budget, was in effect an impairment of the employees' vested contract rights. *Id.* at 1144.

The court in *Wilson* also determined that the California Constitution protects the public employees' right to an actuarially sound retirement system. *Wilson,* 52 Cal.App.4th at 1135. Whether or not a pension fund is "actuarially sound" is a question of fact. *Id.* at 1139. Here, MPI and MPII depart from the principles of level cost financing because current liabilities are shifted to later years. Under their non-actuarial contribution methods, SDCERS funding ratio had plummeted to 65.8% percent by June 30, 2004. Only two years earlier, on June 30, 2002, the system had a funded ratio of 77.3%. This precipitous drop represented a severe threat to the fiscal health of the Retirement Fund. As this decline in the funded ratio was a result of deliberate underfunding as part of a scheme between the City and the Board, it therefore violates the constitutional rights of the employees of the City of San Diego.

A final *Wilson* violation can be found in the use of so-called "surplus earnings" to pay benefits outside of the SDCERS retirement plan violates the principles of actuarial science. This technique is codified in the "waterfall" provision of section 24.1502 of the SDMC. Through the waterfall, funds earmarked for retirement are diverted into uses unrelated to retirement such as health care benefits. As discussed above, public retirement system beneficiaries are entitled to an actuarially-sound system. Thus, the waterfall provision, SDMC section 24.1502, violates the constitutional requirements of *Wilson* and is also void.

4. <u>San Diego City Charter Violated</u>

The San Diego City Charter provides the City with clear guidelines as to the creation and funding of future City debt and the manner in which the City is obligated to contribute to the retirement system. It has been firmly established by California case law that a City Charter represents the "supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and preemptive state law." *Domar Electric, Inc. v. City of Los Angeles,* 9 Cal. 4th 161, 170 (1994). The charter operates as an "instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess." *Id.* The California Supreme Court held in the *Domar* case that a charter city may not act in conflict with its charter and that *any act* that is not in compliance with the city charter is void. *Id.* at 171 (emphasis added).

Below, three violations of the Charter are discussed: (1) the creation of long-term indebtedness for the City that exceeded the income and revenue necessary to sustain the

debt on a yearly basis (Charter Section 99); (2) the City's intentional deviation from actuarially computed retirement system contribution rates in favor of "negotiated" rates--an action that the City attempted to legitimize by formally manipulating the Municipal Code and which violated Charter Section 143; and (3) the creation of benefits without a corresponding funding source (Charter Section 39). Similar to the violations of the California Constitution outlined above, these Charter violations render the underfunding scheme and its associated side benefits void and without further force or effect.

San Diego City Charter section 99 mirrors the language of California Constitution article XVI, section 18, discussed above, regarding public finance. City Charter Section 99 provides:

> The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, 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 also provision to constitute 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 same...

City Charter Section 99 further states:

> No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds' majority vote of the members elected to Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.

As stated above, the adoption of MPI and MPII in 1996 and 2002 by the City Council which allowed for the under-funded status of the City's Retirement system created a long-term indebtedness for the City that exceeded the income and revenue necessary to sustain that debt. Without the requisite vote, by incurring a real debt that the City did not have sufficient funds to support the City violated Charter Section 99. As such, the ordinances that allowed for such underfunding and the related side benefits were in violation of the City Charter. By doing that which the Charter expressly prohibits, the City took action which exceeded its power such that the action is void as a matter of law.

Beyond the vote requirement of Charter section 99, San Diego Charter section 143 imposes a duty to use actuarially-based contribution rates. Charter section 143 states, in relevant part:

> The mortality, service, experience or other table *calculated by the actuary and the valuation determined by him* and approved by the board shall be conclusive and final, and any retirement system established under this article shall be based thereon... (emphasis added.)

This Charter section mandates that the City's contributions to the system must be based on rates computed by the system's actuary and not based on rates otherwise negotiated between the City and the Board. The clear text of the Charter evidences the fundamental need to maintain an actuarially sound system. Notwithstanding this, the City, by way of MPI and MPII, created an unlawful funding strategy based on negotiation with the Board, and not based on actuarial science. Furthermore, prior to November 18, 2002, SDMC section 24.0801, which was consistent with Charter section 143, prohibited the City from deviating from the Board's actuaries computed contribution rate.

As such, on November 18, 2002, the City simply went beyond its power by amending SDMC section 24.0801 so that it permitted their funding scheme but conflicted with the Charter. The amended section stated that the City's contribution would be "amounts agreed to in the governing Memorandum of Understanding between the City and the Board." While this change may have allowed the City to adopt funding mechanisms not based on actuarial science, those funding mechanisms continued to violate the Charter. Further, this illegal SDMC change evidences an attempt by the City to legitimize the underfunding mechanisms created by MP I and MPII.

In addition to the violations of Charter sections 99 and 144 described above, Charter section 39 was also violated by the City's failure to provide funding sources for the aforementioned benefits. In relevant part, City Charter section 39 provides: "No contract, agreement, or other obligation for the expenditure of public funds shall be entered into by any officer of the City and no such contract shall be valid unless the Auditor and Comptroller shall certify in writing that there has been made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof." By approving the MPI and MPII ordinances and associated side deals, the City acted in violation of the requirements provided in Section 39 in that no written certification was made regarding the appropriations for the real costs to the City of MPI, MPII and the related side deals.

5. <u>San Diego Municipal Code Disobeyed</u>

Beyond the violations of California conflict of interest laws, the Constitution, and the City Charter, the SDMC itself was also not followed. First, as discussed above, before the City Council modified SDMC section 24.0801, it required the City to contribute to the Retirement Fund and amount "as determined by the System's actuary pursuant to the annual actuarial evaluation." Former SDMC section 24.0801 (prior to Nov. 18, 2002). Thus, the City's actions were not in compliance with this provision from the 1996 inception of MPI to the change in the SDMC in 2002.

Second, San Diego's local conflict-of-interest rules were violated as well. SDMC section 27.3560 prohibits City officials from participating in any contract made by them

EXHIBIT NO. 31

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

EXHIBIT NO. 33

H

W. S. MONTGOMERY et al., Plaintiffs and Appellants,
v.
BOARD OF ADMINISTRATION OF THE "CITY EMPLOYEES' RETIREMENT SYSTEM OF SAN DIEGO"
et al., Respondents; ANNA MAUDE KENNEDY, Intervener and Appellant.
Civ. No. 2330.

District Court of Appeal, Fourth District, California.

September 11, 1939.

HEADNOTES

(1) Municipal Corporations--Pensions--Action to Compel Payment--Duration of Service--Burden of Proof.
In this action to compel the payment of pensions or retirement benefits to city employees, where the city charter provided for ten years' continuous service as a prerequisite to payment, which provision meant ten years' continuous service without break or interruptions except such as were caused by legally authorized vacations or leaves of absence, and certificates for the total of intermittent periods of employment were issued to the employees which were authorized by ***515** ordinance to be credited on the total of ten years' continuous employment required by the charter, and plaintiffs had the affirmative of the issue as to whether or not they were entitled to pensions, the burden of proof did not rest on the retirement board to prove lack of ten years' continuous service, but rested on plaintiffs to prove ten years' continuous service or lawful excuse for intermissions in that service.

(2) Municipal Corporations--City Charters--Amendments--Procedure.
A city charter can only be amended by the amendment being proposed by the legislative body of the city or by fifteen per cent of its electors or by both and being submitted to and approved by a majority of the electors and also being submitted to and approved by the legislature at its next regular session following the election, and any attempt to amend a city charter in any other way is void.

See 18 **Cal. Jur.** 772; 19 **R. C. L.** 748 (7 **Perm. Supp.**, p. 4705).

(3) Municipal Corporations--Charters--Ordinances--Statutory Construction-- Constitutional Law.
In said action, although an ordinance attempting to substitute intermittent service for continuous service as a basis for retirement was void as contrary to the charter and as an attempt to amend the charter in an unauthorized manner, a charter provision empowering the city council to enact ordinances to carry the retirement plan into effect and providing that the ordinances were to have the same legal effect as if they were incorporated in the charter was not rendered unconstitutional, where the charter provision in question was to be construed as giving no authority to pass any ordinance that conflicted with the charter provisions, and as giving authority to pass only ordinances that put the charter provisions into effect.

(4) Municipal Corporations--Statutes--Liberal Construction.
The liberal construction of a statute does not include an amendment to or enlargement of its clear provisions by judicial decision.

(5) Municipal Corporations--Practical Construction.
Practical construction of a statute can only be resorted to in order to clear up uncertainties and ambiguities, and the construction of a statute by an administrative board cannot change its clear language or alter its plain meaning; and in said

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action, where the charter provisions in question were not uncertain, there was no opportunity for practical construction.

(6) Municipal Corporations--Pensions--Charters--Construction.
In said action, although a city employee worked intermittently after having rendered ten years' continuous service, he was eligible for retirement, that is, he was entitled to something in the form of retirement, where there was nothing in the charter nor in the retirement ordinances that required ten years of continuous service to immediately precede the retirement. ***516**

(7) Municipal Corporations--Age--Pension s--Charters--Construction.
In said action, although a city employee was compelled to retire because of age at which the charter provision made retirement compulsory, he was not entitled to a pension, where he had not rendered ten years of continuous service as required by the charter, and such requirement was not waived except in case of disability.

SUMMARY

APPEAL from a judgment of the Superior Court of San Diego County. L. N. Turrentine, Judge. Affirmed as to plaintiffs and appellants; reversed as to intervener and appellant.

The facts are stated in the opinion of the court.

COUNSEL

Ray D. Johnson and John H. Langston for Appellants.

Dayton L. Ault, City Attorney, and James J. Breckenridge, Deputy City Attorney, for Respondents.

Marks, J.

This is an action to compel respondents to pay appellants certain employees' pension or retirement benefits claimed to have accrued under the provisions of the charter and ordinances of the city of San Diego. The trial court held that none of the appellants were entitled to receive pensions and this appeal followed.

A. R. Kennedy was retired on November 1, 1935, and received his pension up to the date of his death. His widow, Anna Maude Kennedy, succeeded to his pension rights. Except where clarity requires, we will make no distinction between deceased and his widow, the intervener.

The first charter of the city of San Diego (Stats. 1889, p. 643, amended Stats. 1925, p. 1351) provided for a retirement plan for certain employees of the city. These provisions were reenacted in the present charter (Stats. 1931, p. 2838) without any substantial change affecting the rights of the parties before us. We will, therefore, not concern ourselves with the older charter provisions and all references will be to the present charter.

Article nine of the present charter contains the following provisions:

"Section 141. City Employees' Retirement System. The Council of The City of San Diego, State of California, is hereby authorized and empowered by ordinance to establish ***517** a retirement system and to provide for death benefits for public employees other than policemen and firemen (who are now members of a pension system) and elective officers, and members of Commissions who serve without pay; provided, however, that in no retirement system so established shall an employee be retired-except in case of disability, incapacitating the employee for the performance of his duties-before he reaches the age of sixty-two and before ten years of continuous service; ... Retirement shall be compulsory at the age of seventy-two."

"Section 144. Board of Administration. The system shall be managed by a Board of Administration which is hereby created, ...

"The Board of Administration may establish such

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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, ... Provided, however, that the Auditor and Comptroller shall refuse to allow any warrant drawn for payment of a retirement allowance if, in the opinion of the Auditor and Comptroller such retirement allowance has been granted in contravention of this Article or any ordinance passed under the authority granted herein."

"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."

In 1927, the city council of San Diego adopted ordinances setting up its retirement system. These ordinances attempted to provide for credits to employees for employment that had been intermittent and not continuous. It provided for the issuance of certificates to employees for the total of such intermittent periods of employment which should be ***518** credited on the total of ten years' continuous employment required in the charter as a prerequisite to retirement.

For a number of years the retirement system was administered under the terms of the ordinances. Those employees who had ten years' service, even though part of it was intermittent, were retired and received their pensions. In 1938, this procedure was questioned and the Board of Administration of the City Employees' Retirement System suspended payments to those pensioners who did not have ten years' continuous service to their credit.

An action in declaratory relief was brought by a pensioner, presumably on behalf of all other pensioners, setting forth the controversy that had arisen and asking the Superior Court of San Diego County to determine and declare the rights of the pensioners under the charter and the ordinances. The superior court declared those provisions of the ordinances void that attempted to give employees credit for intermittent service and held that only those who had ten years' continuous service to their credit could receive pensions. No appeal was taken from this judgment. Appellants have set forth portions of this judgment in their brief. It contains the following:

"That the words .continuous service' in the Charter of the City of San Diego, in its relation to the retirement of members of the City Employees' Retirement System of the City of San Diego, means ten consecutive years of service without break, cessation or intervening period of time, save and except such breaks or interruptions as may be caused by legally authorized vacations or leaves of absence within the power of the City to grant."

(1) Appellants in their reply brief state that the quoted portion of the judgment in the declaratory relief action defining continuous service is a reasonable definition of the term. We agree with that admission. Appellants admit that their records of service to San Diego do not show ten years' continuous service as defined by the judgment in the declaratory relief case, except in one instance. To escape the natural result of this admission, they urge: that each one of them holds a certificate of service and retirement issued by respondents; that the burden of proof rests on respondents to prove lack of ten years' continuous service on the part of ***519** each appellant; that respondents failed to prove that the many breaks in the service of each appellant were not caused by legally authorized vacations or other lawful causes that would not break the continuity of the service.

This is an ingenious if not a convincing argument. It overlooks the elementary rule "that the burden of producing a preponderance of evidence is upon the party who has the affirmative of the issue, and

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remains upon him throughout the trial". (10 Cal. Jur., p. 785, sec. 91, and cases cited.)

The appellants are the plaintiffs in the action. They have been removed from the retirement system and their pensions have been stopped. They are seeking to avoid the effect of the order of respondents depriving them of their pensions. They have alleged and must prove, before they can prevail, that they are entitled to their pensions. This includes proof of ten years' continuous service or lawful excuse for intermissions in that service. This they failed to do, except in one instance. Our study of the record fails to disclose any evidence of ten years' continuous service on the part of any appellant except A. R. Kennedy.

We have been cited to and have found no provision in the city charter or ordinances giving any particular significance to the certificates of service and retirement issued to appellants. As there is undisputed evidence in the record that none of appellants, except Kennedy, had rendered continuous service for ten years, the mistaken recitals in the certificates cannot be held to have overcome the positive evidence that no appellant, except Kennedy, had rendered continuous service for ten years.

Appellants urge that under the broad provisions of section 146 of the charter which we have quoted, the city council had power to pass and adopt ordinances setting up the retirement system and to establish requirements of and qualifications for retirements and pensions; that under the section such provisions of the ordinances had the same force and effect as the provisions of the charter and became portions of the charter; that such ordinances, when adopted, must be given the same force and effect as though their provisions had been incorporated in the charter. From this they argue that since the retirement ordinances provided that the total time of intermittent and interrupted service be computed and ***520** considered as continuous service and as each appellant, except Brand, had more than ten years' intermittent and interrupted service, each of them was entitled to retirement and a pension. It is true that the provisions of section 146 of the charter, if legal and if liberally construed, might be held to support the foregoing contentions.

(2) Section 8 of article XI of the Constitution provides for the framing, ratification and adoption of city charters. An amendment to a charter can only be proposed by the legislative body of the city or by fifteen per cent of its electors or by both. Such amendment must be submitted to and approved by a majority of the electors and must also be submitted to and approved by the legislature at its next regular session following the election. There is no other way in which a city charter may be amended and any attempt to do so in any other manner is void. (*Blanchard v. Hartwell,* 131 Cal. 263 [63 Pac. 349]; *Garver v. Council of the City of Oakland,* 96 Cal. App. 560 [274 Pac. 375]; *Garver v. Williams,* 96 Cal. App. 118 [273 Pac. 604].)

(3) If section 146 of the charter must be construed as giving authority to the city council of San Diego by ordinance to add to or subtract from the charter provisions or make regulations for the administration of the retirement system inconsistent with the clear provisions of that document, it must be held to be unconstitutional as attempting to permit the amendment of the charter in an unauthorized manner.

It is clear that certain provisions of the retirement ordinances, as construed and applied prior to 1938, conflict with the provisions of the charter. Certainly, intermittent service is not continuous service and in so far as the ordinances attempt to substitute intermittent service for continuous service as a basis for retirement, their provisions are void as contrary to the charter and as an attempt to amend the charter in an unauthorized manner.

It does not follow that section 146 of the charter is unconstitutional.

"It is a well-recognized canon of interpretation that, where a legislative enactment is susceptible of two constructions, one consistent and the other inconsistent with the provisions of the constitution, such enactment should be so construed as to make it harmonious with the constitution and comport ***521**

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with the legitimate powers of the legislature." (5 Cal. Jur., p. 615, sec. 46.)

It is our duty to construe the provisions of section 146 of the charter so that they may be held constitutional if that can be done without doing violence to the language of the section and the well-established rules of statutory construction. The section grants to the city council power to pass ordinances proper "to carry into effect the provisions of this article". (Art. IX, Charter.) This quoted portion of the section gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority to pass any enactment that conflicts with the charter provisions. In view of that provision of the section, we must hold that it is only an ordinance that puts into effect charter provisions that is to have the same force and effect as though a part of and included in the charter; that the section does not empower the city council to pass any ordinance conflicting with the charter or that may have the effect of amending it. With such a construction placed upon it, we believe section 146 of the charter to be constitutional.

It is urged that we are required to put a liberal interpretation on the charter and that the interpretation put upon it by practical construction for a period of years by the administrative officers of the retirement system is persuasive and requires us to include within the term "continuous service" as used in the charter, the intermittent service that was recognized and credited for retirement for several years.

(4) The liberal construction of a statute does not include an amendment to or enlargement of its clear provisions by judicial decision. (*In re Jessup,* 81 Cal. 408 [21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594]; *Mulville v. City of San Diego,* 183 Cal. 734 [192 Pac. 702].) The word "continuous" is in common use and has a clear and unambiguous meaning. Continuous service, as used in the charter, means consecutive service and does not include intermittent and interrupted service, as appellants would have us conclude.

(5) Practical construction of a statute can only be resorted to in order to clear up uncertainties and ambiguities. (*Hodge v. McCall,* 185 Cal. 330 [197 Pac. 86]; *People v. Sinicrope,* 109 Cal. App. (Supp.) 757 [288 Pac. 61].) The construction of a statute by an administrative board cannot change its clear language or alter its plain meaning. (*Hodge* ***522** *v. McCall,* supra; *People v. Kerber,* 152 Cal. 731 [93 Pac. 878, 125 Am. St. Rep. 93]; *People v. Sinicrope,* supra, at p. 767.) The provisions of the charter in question not being uncertain, there is no opportunity for practical construction here.

(6) Respondents introduced in evidence the records of service of appellants. That of A. R. Kennedy shows that he worked intermittently during 1919 and until June 30, 1920; that he was transferred to the operating department on July 1, 1920, and worked continuously until June 30, 1931, for more than ten years; that after one year's leave of absence his employment was terminated; that he worked intermittently during 1934 and 1935; that he was retired on November 1, 1935.

We can find nothing in the city charter nor in the retirement ordinances that require the ten years of continuous service to immediately precede the retirement. As, on the record before us, it appears that Kennedy was eligible for retirement and that intervener as his successor in interest is entitled to his retirement pay, the judgment against intervener must be reversed.

(7) The service record of B. D. Brand shows that he worked eighteen days in July, 1923; that he was reemployed by the city on July 1, 1925, and served continuously until August 31, 1932, on which day he was retired at the age of 72 years.

Brand argues that as his retirement was involuntary because of age, he is entitled to his pension. This contention is based on the last sentence of section 141 of the charter which provides that "Retirement shall be compulsory at the age of seventy-two." This sentence does not contain any waiver of the prior positive provision in the earlier part of the section denying to the city council the power to provide by ordinance for the retirement and pension

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of any employee not having served the city continuously for ten years. In view of the positive provisions of that portion of the charter, an employee lacking ten years' continuous service could not be retired and pensioned except in case of disability. There is no showing that Brand was disabled at the time of his retirement. Therefore he did not possess the necessary qualifications for retirement and a pension. ***523**

The judgment against plaintiffs is affirmed. The judgment against intervener is reversed.

Barnard, P. J., concurred.

Griffin, J., being disqualified, did not participate herein.

A petition for a rehearing of this cause was denied by the District Court of Appeal on October 7, 1939, and the following opinion then rendered thereon:

Marks, J.

Respondents have filed a petition for rehearing and present two questions that require further notice. They first urge that the judgment in the declaratory relief action has become final, is binding on intervener and precludes her from recovering anything in this action. They next urge that our statement in the opinion that intervener, as successor in interest of A. R. Kennedy, "is entitled to his retirement pay" has the effect of awarding her $32.50 a month for life, when, under an optional selection made by Kennedy during his lifetime, she was only entitled to receive a smaller monthly payment until a reserve fund is exhausted. We will consider the two questions in the order stated.

Mrs. Kennedy was not a party to the declaratory relief action. There is nothing in the record before us indicating that she either actively or tacitly participated in its prosecution or actually knew that it was filed or prosecuted. Our order merely reverses the judgment against her and has the effect of remanding her action for new trial. The effect of the judgment in the declaratory relief action may be inquired into and determined at such time. Under the very unsatisfactory condition of the record before us, we expressly refrain from passing upon the question of the effect, if any, of that judgment on the suit of intervener.

When we said in the opinion that: "We can find nothing in the city charter nor in the retirement ordinances that require the ten years of continuous service to immediately precede the retirement. As, on the record before us, it appears that Kennedy was eligible for retirement and that intervener as his successor in interest is entitled to his retirement ***524** pay, the judgment against intervener must be reversed" we spoke rather loosely.

We did not and do not now intend to intimate that Kennedy or intervener as his successor in interest was or is entitled to any particular amount or kind of retirement benefits. All we intended to state was that at the time of his retirement Kennedy was entitled to something in the form of retirement and that intervener succeeded to his rights. The amount and character of those payments cannot be determined from the record. Nor can we determine whether the fund from which those payments have been made has been exhausted if the source of such payments be limited to any particular fund or amount.

All that we intend to hold is that, on the record before us, it appears that intervener might be entitled to some payments from the retirement fund. As this portion of the case must be retried, the character, amount, duration, and other necessary facts concerning such payments and the fund from which they may be drawn, if any, may be determined at that time, if the evidence discloses that she is entitled to receive anything in addition to the payments already made.

The petition for rehearing is denied.

Barnard, P. J., concurred.

Griffin, J., being disqualified, did not participate herein.

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Montgomery v. Board of Administration of City Emp. Retirement System of San Diego

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EXHIBIT NO. 34

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**

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Grimm v. City of San Diego

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EXHIBIT NO. 35

▷

DOMAR ELECTRIC, INC., Plaintiff and Appellant,
v.
CITY OF LOS ANGELES, Defendant and Respondent; BAILEY CONTROLS COMPANY, Intervener and Respondent.
No. S036526.

Supreme Court of California

Dec 28, 1994.

SUMMARY

A charter city enacted a requirement that bidders on public works projects undertake good faith efforts in compliance with the city's subcontractor outreach program as part of the competitive bid process. The program's aim was to ensure that minority, women, and all other business enterprises have an equal opportunity to participate in the performance of all city contracts. The lowest bid on a sewage treatment plant was declared nonresponsive due to the bidder's failure to timely provide the good faith effort documentation required by the bid package so as to demonstrate compliance with the outreach program. The bidder filed a petition for a writ of mandate or prohibition seeking to prevent the city from entering into a contract on the sewage project with any contractor other than plaintiff. The trial court denied the petition, finding that the requirement of the outreach program attachment was not illegal or unconstitutional. (Superior Court of Los Angeles County, No. BS020805, Robert H. O'Brien, Judge.) The Court of Appeal, Second Dist., Div. One, No. B073387, reversed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded to that court to allow it to address whether plaintiff might be entitled to relief based on the alternative grounds identified in its notice of appeal. The court held that the city's requirement that bidders on public works projects undertake good faith efforts in compliance with the city's subcontractor outreach program as part of the competitive bid process was not rendered void by the failure of the city's charter to expressly grant the power to require bidders to conduct subcontractor outreach. It was also not void, the court held, even though the charter also required that contracts subject to competitive bidding be awarded to the "lowest and best regular responsible bidder." The outreach program's objectives were consistent with the goals of competitive bidding, and the program sought to advance those goals by stimulating advantageous market place competition. The court further held that the requirement was not void, even though the outreach ***162** program was not one of the specifically enumerated exceptions to the "lowest and best regular responsible bidder" requirement. Unlike the outreach program, virtually all the listed exceptions were anticompetitive in nature. That the charter expressly authorized the city and its contracting agencies to consider these anticompetitive factors during the bid process (pursuant to lawfully enacted ordinances) did not logically lead to the conclusion that bid requirements intended to stimulate and promote competition could not be considered. (Opinion by Baxter, J., with Lucas, C. J., Mosk, Kennard, George and Werdegar, JJ., concurring. Separate dissenting opinion by Arabian, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Municipalities § 15--Legislative Control--Control of Municipal Affairs--Home Rule Cities--Subcontractor Outreach Program--Implied Restrictions on Charter City's Powers.
Under the principle that restrictions on a charter city's power may not be implied, a chartered city's requirement that bidders on public works projects, as part of the competitive bidding process,

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undertake good faith efforts in compliance with the city's subcontractor outreach program (which had as its aim ensuring that minority, women, and all other business enterprises have an equal opportunity to participate in the performance of all city contracts) was not rendered void by the failure of the city's charter to expressly grant the power to require bidders to conduct subcontractor outreach.

(2) Municipalities § 15--Legislative Control--Control of Municipal Affairs--Home Rule Cities--Charter as Supreme Law.
A city charter represents the supreme law of the city, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. In this regard, 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 that the city is assumed to possess, and the enumeration of powers does not constitute an exclusion or limitation. The expenditure of city funds on a city's public works project is a municipal affair. Charter provisions are construed in favor of the exercise of the power over municipal affairs and against the existence of any limitation or restriction thereon that is not expressly stated in the charter. Thus, restrictions on a charter city's power may not be implied. ***163**

(3) Municipalities § 55--Ordinances, Bylaws, and Resolutions--Validity-- Conflict With Charter.
A charter city may not act in conflict with its charter. Any act that is violative of or not in compliance with the charter is void.

(4a, 4b) Public Works and Contracts § 3--Contracts--Bidding Requirements--Compliance With Subcontractor Outreach Program.
A charter city's requirement that bidders on public works projects undertake good faith efforts in compliance with the city's subcontractor outreach program as part of the competitive bid process (the program had as its aim ensuring that minorityand women-owned businesses, and all other business enterprises had an equal opportunity to participate in the performance of all city contracts) was not void, even though the charter also required that contracts subject to competitive bidding be awarded to the "lowest and best regular responsible bidder." The outreach program's objectives were consistent with the goals of competitive bidding, and the program sought to advance those goals by stimulating advantageous market place competition. Further, although the program provided an estimated participation level by minorityand women-owned businesses if good faith efforts were made, a bidder got no advantage or disadvantage from meeting or not meeting the specified level. Since the city could validly enforce the specified outreach, the city public works board could validly reject a bid based on the bidder's failure to demonstrate compliance.

[See 1 **Witkin,** Summary of Cal. Law (9th ed. 1987) Contracts, § 79.]

(5) Public Works and Contracts § 3--Contracts--Bidding Requirements-- Purposes of Competitive Bidding.
The purposes of competitive bidding are to guard against favoritism, improvidence, extravagance, fraud, and corruption; to prevent the waste of public funds; to obtain the best economic result for the public; and to stimulate advantageous market place competition. Competitive bidding provisions are strictly construed by the courts, and will not be extended beyond their reasonable purpose. They must be read in light of the reason for their enactment, or they will be applied where they were not intended to operate and thus deny municipalities authority to deal with problems in a sensible, practical way. Thus, charters requiring competitive bidding are not to be given such a construction as to defeat the object of ensuring economy and excluding favoritism and corruption. ***164**

(6) Public Works and Contracts § 3--Contracts--Bidding Requirements-- Adherence to Competitive Bidding Requirements.
Competitive bidding requirements must be strictly adhered to in order to avoid the potential for abuse in the competitive bidding process.

(7) Public Works and Contracts § 3--Contracts--Bidding Requirements-- Compliance With Subcontractor Outreach Program--Effect of

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City Charter's Enumerated Exceptions.
A charter city's requirement that bidders on public works projects, as part of the bidding process, undertake good faith efforts in compliance with the city's subcontractor outreach program (which had as its aim ensuring that minority, women, and all other business enterprises had an equal opportunity to participate in the performance of all city contracts) was not void, even though the outreach program was not one of the specifically enumerated exceptions to the charter's requirement that the "lowest and best regular responsible bidder" be chosen. Unlike the outreach program, virtually all the listed exceptions were anticompetitive in nature. That the charter expressly authorized the city and its contracting agencies to consider these anticompetitive factors during the bid process (pursuant to lawfully enacted ordinances) did not logically lead to the conclusion that bid requirements intended to stimulate and promote competition could not be considered.

(8) Public Works and Contracts § 3--Contracts--Bidding Requirements-- Competitive and Anticompetitive Requirements.
Perhaps the most important goal of competitive bidding is to protect against insufficient competition to assure that the government gets the most work for the least money. Mandatory set-asides and bid preferences work against this goal by narrowing the range of acceptable bidders solely on the basis of their particular class. By contrast, requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition.

COUNSEL

Kamine, Steiner & Ungerer, Bernard S. Kamine and Phyllis M. Ungerer for Plaintiff and Appellant.

James K. Hahn, City Attorney, Pedro B. Echeverria, John F. Haggerty and Christopher M. Westhoff, Assistant City Attorneys, for Defendant and Respondent. ***165**

Louise H. Renne, City Attorney (San Francisco), Mara E. Rosales, Joseph S. Avila, Bill Lann Lee, Constance L. Rice and Kevin S. Reed as Amici Curiae on behalf of Defendant and Respondent.

Jones, Day, Reavis & Pogue, Gerald W. Palmer and Patricia W. Davies for Intervener and Respondent.

BAXTER, J.

We granted review in this case to determine whether a city charter requirement that contracts subject to competitive bidding be awarded to the "lowest and best regular responsible bidder" prevents the charter city and its agencies from requiring potential contractors to comply with a subcontractor outreach program that involves no bid preferences, set-asides or quotas. Our examination of the relevant charter provisions and the purposes underlying the goals of competitive bidding leads us to conclude that the outreach program does not violate the charter. Accordingly, we reverse the judgment of the Court of Appeal and remand the matter to allow that court to address other issues not previously reached.

I. Factual and Procedural Background
The City of Los Angeles (hereafter the City) is governed by a charter which ordinarily requires competitive bidding on contracts involving the expenditure of more than $25,000. (L.A. City Charter, § 386(b).) [FN1] With exceptions not applicable here, the charter provides that such contracts "shall be let to the lowest and best regular responsible bidder." (§ 386(f).)

FN1 Unless otherwise indicated, all further section references are to the Los Angeles City Charter.

On March 29, 1983, the City's mayor issued Executive Directive No. 1-B, which declared it was the policy of the City "to utilize Minority and Women-Owned Business Enterprise[s] [MBE's and WBE's] in all aspects of contracting relating to procurement, construction, and personal services." [FN2] The directive explicitly declared that the City, "through the City Council and ***166** it's [*sic*]

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respective Boards and Commissions, will ensure that Minority Business Enterprises have the maximum opportunity to participate in the performance of contracts and subcontracts. In this regard, the City will take all responsible steps to ensure that Minority and Women-Owned Business Enterprises have the maximum opportunity to compete for and perform contracts and services." The directive also contained general guidelines for implementing this policy.

> FN2 In a footnote, the directive defined minority-owned business enterprises (MBE's) and women-owned enterprises (WBE's) as "any business, bank or financial institution which is owned and operated by a minority group member or woman, or such business, bank or financial institution of whom 50% or more of it's [*sic*] partners or stockholders are minority group members or women. If the business is publicly owned, the minority members or stockholders must have at least 51% interest in the business and possess control over management capital earnings."

Subsequently, the United States Supreme Court decided *Richmond v. J. A. Croson Co.* (1989) 488 U.S. 469 [102 L.Ed.2d 854, 109 S.Ct. 706], which involved a challenge to a municipality's program that required prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to minority firms. In that case, the high court found that the mandatory set-aside for minority subcontractors violated the equal protection clause of the United States Constitution because there was no direct evidence of past discrimination. Thereafter, on March 6, 1989, the Mayor of the City issued Executive Directive No. 1-C, which was "intended to clarify the implementation of Executive Directive 1-B in light of the *Richmond v. Croson* decision...."

Although Executive Directive No. 1-C declared that the previous directive "remains intact and in force," it revised the intended policy of the City, as follows: "It is the policy of the City of Los Angeles to provide Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs) *and all other business enterprises* an equal opportunity to participate in the performance of all city contracts. Bidders and proposers shall assist the city in implementing this policy by taking all reasonable steps to ensure that *all available business enterprises*, including local MBEs and WBEs, have an equal opportunity to compete for and participate in city contracts." (Italics added.) Under Executive Directive No. 1-C, contracting agencies of the City were directed to evaluate the good faith efforts made by bidders and proposers in their outreach to MBE's, WBE's and other business entities according to nine factors. Subsequent guidelines issued by the mayor's office clarified that a tenth factor, which purported to measure a bidder's good faith with reference to certain anticipated levels of MBE and WBE subcontractor participation, should no longer be considered in evaluating bids.

The Los Angeles Board of Public Works (hereafter the Board) established an outreach program patterned after Executive Directive No. 1-C. Under the Board's program, the adequacy of a bidder's good faith in conducting ***167** subcontracting outreach efforts to MBE's, WBE's and other business enterprises (OBE's) [FN3] is to be determined by utilizing the factors listed in the mayor's directive, including evaluations of the bidder's efforts to identify and select specific work items in projects for subcontracting out to MBE's, WBE's and OBE's, to conduct advertising on selected work, and to provide information to and negotiate in good faith with interested subcontractors. [FN4] Although the Board provides estimates of the level of MBE and/or WBE participation which might be achieved in each particular bid situation (1 ***168** percent in the instant project), the program makes clear that the failure to meet the anticipated participation level shall not by itself disqualify any bidder from consideration for a contract award nor result in a determination of lack of reasonable MBE/WBE participation. Thus, a bidder gains no advantage from meeting the anticipated participation level nor a disadvantage from not meeting it.

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FN3 The Board's program defines "OBE" to mean "any subcontractor which does not otherwise qualify as a Minority or Women Business Enterprise."

FN4 The Board's program lists 10 factors in the following order: "[¶] (1) The bidder has made a good faith effort to obtain sub-bid participation by MBEs, WBEs and OBEs [other business enterprises] which could be expected by the Board to produce a reasonable level of participation by interested business enterprises, including the MBE and WBE percentages set forth by paragraph B herein. [In this case, paragraph B states: 'The subcontracting outreach policy requires the bidder to make a "Good Faith Effort" to obtain sub-bid participation by MBEs, WBEs and OBEs which can be expected by the Board of Public Works to produce a level of participation by interested business, including *1* percent MBE and/or WBE.'] [¶] (2) The bidder has attended the pre-bid meeting scheduled by the Board to inform all bidders of the requirements for the project for which the contract will be awarded. The Board may waive this requirement only if the bidder certifies in writing it was already informed as to those project requirements prior to the pre-bid meeting. [¶] (3) The bidder has identified and selected specific work items in the project to be performed by sub-bidder/subcontractors in order to provide an opportunity for participation by MBEs, WBEs and OBEs. Upon making this determination, the bidder subdivided the total contract work requirements into smaller portions or quantities to permit maximum active participation of MBEs, WBEs and OBEs. [¶] (4) Not less than ten (10) calendar days prior to the submission of bids, the bidder advertised for sub-bids from interested business enterprises in one or more daily or weekly newspapers, trade association publications, minority or trade oriented publications, trade journals, or other media specified by the Board. [¶] (5) The bidder has provided written notice of its interest in receiving sub-bids on the contract to those business enterprises, including MBEs and WBEs having an interest in participation in the selected work items. All notices of interest shall be provided not less than ten (10) calendar days prior to the date the bids are required to be submitted. In all instances, bidder can document that invitations for sub-bid/subcontracting was sent to available MBEs, WBEs and OBEs for each item of work to be performed. [¶] (6) The bidder has documented efforts to follow-up initial solicitations of sub-bid interest by contacting the affected business enterprises to determine with certainty whether said enterprises were interested in performing specific portions of the project work. [¶] (7) The bidder has provided interested sub-bid enterprises with information about the plans, specifications and requirements for the selected sub-bid/subcontracting work. [¶] (8) The bidder requested assistance from organizations that provide assistance in the recruitment and placement of MBEs, WBEs and OBEs not less than 15 calendar days prior to the submission of bids. It should be noted that any legitimate association concerning MBE/WBE/OBE activities not on the following list may also be contacted for this purpose. [¶] (9) The bidder has negotiated in good faith with interested MBEs, WBEs and OBEs and did not unjustifiably reject as unsatisfactory the sub-bids prepared by any enterprise. As documentation, the bidder can submit a list of all sub-bidders for each item of work for which bids were solicited, including dollar amounts of potential work for MBEs, WBEs and OBEs. [¶] (10) The bidder has documented efforts to advise and assist interested MBEs, WBEs and OBEs in obtaining bonds, lines of credit, and insurance required by the Board or

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contractor."

In October 1991, the Board issued a request for bids on a contract to provide a computer control system for the Hyperion Secondary Sewage Treatment Plant. The bid package specified that bidders would be required to submit documentation of their compliance with the outreach program. In particular, the package contained a document called a "bidder's checklist" which detailed all pages of the bid required to be submitted for the bid to be considered responsive. This checklist included the statement: " 'Good Faith Effort Documentation Checklist': I have used this checklist, initialed each step and have signed the form. I will submit this checklist along with required documentation no later than three (3) City working days following the close of Board business the day bids are received." Additionally, at the bottom of the bidder's checklist was the following statement: "I have carefully read and completed each and every applicable page of the Proposal. I am aware that the failure to submit the appropriate pages of the Proposal, properly completed and signed, may render my bid non-responsive and subject to rejection by the Board of Public Works." This statement was followed by a line for the bidder's signature.

Three companies submitted bids for the project. Of these, Domar Electric, Inc. (hereafter Domar) submitted the apparent lowest monetary bid of $3,335,450. However, the bid was declared nonresponsive due to Domar's failure to timely provide the required good faith effort documentation within the three-day deadline. The Board awarded the contract to Bailey Controls Company, which had submitted the next lowest monetary bid of $3,987,622.

Domar filed a petition for a writ of mandate and/or prohibition in the superior court seeking, among other things, to prevent the City from entering a contract on the subject project with any contractor other than itself. After an alternative writ was issued, the superior court denied Domar's petition, finding that "the requirement of the MBE/WBE outreach program attachment is not illegal and/or unconstitutional or precluded by case authorities. The requirement serves an important and significant public policy which does not set any quotas or improper goals." Domar's petition for a writ of mandate in the Court of Appeal was denied, as was its petition for review.

After a final judgment was entered, Domar appealed on the grounds that: (1) the outreach program violates the City's charter; (2) the program violates ***169** Public Contract Code section 2000, which permits compliance with an outreach program to be predicated on *either* demonstrating good faith in seeking MBE and WBE participation *or* meeting specific goals and requirements for such participation; and (3) the program is unconstitutionally race-conscious in violation of the federal equal protection clause and the holding in *Richmond v. J. A. Croson Co.*, *supra*, 488 U.S. 469. The Court of Appeal, in a split decision, reversed the superior court judgment. After finding that authorization for the outreach program was not expressly set forth in the charter, the appellate court determined that the Board's rejection of Domar's bid based on the failure to submit outreach documentation violated charter section 386(f), which requires that contracts be awarded to the "lowest and best regular responsible bidder." Because it found a charter violation, the court did not reach the other two contentions. We granted the City's petition for review.

II. Discussion

The procedures and requirements relating to the competitive bidding of municipal contracts are set forth in large part at section 386 of the City's charter. Those relevant to this case are described below.

With certain exceptions not pertinent here, section 386(b) provides that the City "shall not be, and is not bound by any contract involving the expenditure of more than twenty-five thousand dollars ($25,000) unless the ... board ... authorized to contract shall first have complied with the procedure for competitive bidding established by this section." Notices of requests for bids must be published at least once in a daily newspaper printed and published in the City, and such notices must specify

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the amount of the bond to be given for the faithful performance of the contract. (§ 386(c).) "Bidders may be required to submit with their proposals detailed specifications of any item to be furnished, together with guarantees as to efficiency, performance, characteristics[,] operating cost, useful life, time of delivery, and other appropriate factors. Such notice shall specify the time and place such bids will be received." (*Ibid.*) Bids must be accompanied by a cashier's check for an amount not less than 10 percent of the aggregate sum of the bid, or, in lieu thereof, a satisfactory surety bond in like amount, guaranteeing that the bidder will enter into the proposed contract if the contract is awarded to the bidder. (§ 386(d).) The bid must also be supported by an affidavit of noncollusion. (*Ibid.*)

Section 386(f) pertains to the award of contracts, and provides in pertinent part: "At the time specified for opening of said bids, ... the contract *shall* ***170** *be let to the lowest and best regular responsible bidder furnishing satisfactory security for its performance*. This determination may be made on the basis of the lowest ultimate cost of the items in place and use; and where the same are to constitute a part of a larger project or undertaking, consideration may be given to the effect on the aggregate ultimate cost of such project or undertaking. Notwithstanding any other provision of this Charter to the contrary and to the extent permitted by law, the City and its various awarding authorities, including those City departments which exercise independent control over their expenditure of funds, shall not enter into or renew any contract, ... unless the bidder is in compliance with, or the contract has been excluded or exempted from any anti-apartheid policy adopted by the City by ordinance .... In addition, irrespective of the provision of this subsection requiring award to the lowest and best regular responsible bidder, a bid preference can be allowed in the letting of contracts for California or Los Angeles County firms and, in addition, the bid specifications can provide for a domestic content requirement; the extent and nature of such bid preference, domestic content requirement and any standards, definitions and policies for their implementation shall be provided for by ordinance adopted by the Council .... The bid of any bidder previously delinquent or unfaithful in the performance of any former contract with the City may be rejected." (Italics added.)

The issue in this case is whether the charter precludes the Board from requiring bidders on public works projects to undertake good faith efforts in compliance with its subcontractor outreach program as part of the competitive bid process. At the outset, we observe that the charter contains no provision expressly allowing the City or its contracting agencies to adopt a subcontractor outreach program. (1a) Accordingly, we shall first consider whether the program is void in the absence of explicit charter authorization.

(2) We begin with the cardinal principle that the charter represents the supreme law of the City, subject only to conflicting provisions in the federal and state Constitutions and to preemptive state law. (See *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 161 [101 Cal.Rptr. 880, 496 P.2d 1248].) In this regard, "[t]he 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.]" (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 598- 599 [212 P.2d 894] (*City of Grass Valley*); see also *Johnson v. Bradley* (1992) 4 Cal.4th 389, 396-397 [14 Cal.Rptr.2d 470, 841 P.2d 990].) The expenditure ***171** of city funds on a city's public works project is a municipal affair. (*Loop Lumber Co. v. Van Loben Sels* (1916) 173 Cal. 228, 232 [159 P. 600] [street and sewer work]; see *Vial v. City of San Diego* (1981) 122 Cal.App.3d 346, 348 [175 Cal.Rptr. 647]; *Smith v. City of Riverside* (1973) 34 Cal.App.3d 529, 534-537 [110 Cal.Rptr. 67].)

"[B]y 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." (*City of Grass Valley*, *supra*, 34 Cal.2d at p. 598; see *Johnson v. Bradley*, *supra*, 4 Cal.4th at pp. 396-397.) Charter provisions

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are construed in favor of the exercise of the power over municipal affairs and "against the existence of any limitation or restriction thereon which is not expressly stated in the charter ...." (*City of Grass Valley*, *supra*, 34 Cal.2d at p. 599; *Taylor v. Crane* (1979) 24 Cal.3d 442, 450-451 [155 Cal.Rptr. 695, 595 P.2d 129].) Thus, "[r]estrictions on a charter city's power may not be implied." (*Taylor v. Crane*, *supra*, 24 Cal.3d at p. 451)

(1b) Applying these principles, we conclude that the mere failure of the City's charter to expressly grant the power to require bidders to conduct subcontractor outreach does not render the outreach program void. However, our analysis does not stop here. (3) Even though the absence of express authorization is not fatal to the program, it is well settled that a charter city may not act in conflict with its charter. (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 [120 Cal.Rptr. 707, 534 P.2d 403]; *Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [84 Cal.Rptr. 615]; *Brown v. City of Berkeley* (1976) 57 Cal.App.3d 223, 230-233 [129 Cal.Rptr. 1].) Any act that is violative of or not in compliance with the charter is void. (*Ibid.*)

(4a) In holding that the outreach program is invalid, the Court of Appeal found that the program "unquestionably purports to establish a noncharter exception to the competitive bidding requirements and exceptions set forth in section 386(f). As such, it does not conform to, is not subordinate to, conflicts with, and exceeds the charter." Domar essentially agrees with this reasoning, arguing that the requirements and exceptions enumerated in the charter are intended to be exclusive.

In determining whether the implementation of the outreach program conflicts with the charter, we employ the following rules of charter construction. First, we construe the charter in the same manner as we would a statute. (*C.J. Kubach Co. v. McGuire* (1926) 199 Cal. 215, 217 [248 P. 676]; ***172** *Currieri* v. *City of Roseville*, *supra*, 4 Cal.App.3d at p. 1001.) Our sole objective is to ascertain and effectuate legislative intent. (*City of Huntington Beach v. Board of Administration* (1992) 4 Cal.4th 462, 468 [14 Cal.Rptr.2d 514, 841 P.2d 1034].) We look first to the language of the charter, giving effect to its plain meaning. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [7 Cal.Rptr.2d 531, 828 P.2d 672].) Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history. (*Ibid.*)

Section 386 contains two subsections that specifically authorize the City to impose certain requirements upon bidders as part of the competitive bid process. Section 386(c) expressly states that "[b]idders may be required to submit with their proposals detailed specifications of any item to be furnished, together with guarantees as to efficiency, performance, characteristics[,] operating cost, useful life, time of delivery, and other appropriate factors." Section 386(f) requires that bids shall be let to the "lowest and best regular responsible bidder," [FN5] but explicitly states that irrespective of this requirement, a local bidder preference may be allowed and a domestic content requirement may be included in bid specifications if provided for by ordinance adopted by the city council. Similarly, section 386(f) provides that notwithstanding any other provision of the charter to the contrary and to the extent permitted by law, the City shall not enter into any contract unless the bidder is in compliance with, or the contract has been excluded or exempted from, any anti-apartheid policy adopted by the City by ordinance. [FN6]

FN5 " 'The term "lowest responsible bidder" has been held to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work.' " (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867-868, fn. 5 [103 Cal.Rptr. 689, 500 P.2d 601] (*City of Inglewood*), citing *West v. Oakland* (1916) 30 Cal.App. 556, 560-561 [159 P. 202], italics omitted.) The parties have not suggested that there is any significance in the difference between the charter's phrase

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"lowest and best regular responsible bidder" and the above term or other similar terms.

FN6 In addition to those contained in section 386(f), Domar contends that other charter exceptions to the lowest bidder requirement include: (1) when the contract involves an expenditure of less than $25,000 (§ 386(b)); (2) when the contract is for patented products (§ 386(a)(2)); (3) when a declaration of "urgent necessity" authorizing the contract is approved by the city council and the mayor (§ 386(a)(4)); (4) when, during war or national emergency, the city council by a two-thirds vote suspends all or part of the competitive bidding system (§ 386.1); (5) when the bid is not accompanied by a certified check or bid bond of 10 percent of the bid (§ 386(d)); and (6) when the bid is not accompanied by a noncollusion affidavit (*ibid.*). We conclude that these other so-called charter exceptions are irrelevant to the issue of whether the City may validly impose a particular bidding requirement not explicitly authorized by the charter. The first, second, third and fourth identified items merely represent situations or types of contracts for which competitive bidding is not required at all. The fifth and sixth items lack relevance because their purpose is to deprive the City of any authority to contract with bidders who have not supplied the charter-mandated check, bid bond or noncollusion affidavit.

(5) Since neither section 386(c) nor section 386(f) expressly authorizes or forbids the City to adopt a requirement relating to subcontractor outreach, ***173** the validity of such a requirement must be ascertained with reference to the purposes of competitive bidding, which are "to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public" (*Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 636 [164 Cal.Rptr. 56], citing 10 McQuillin, Municipal Corporations (3d ed.) § 29.29), and to stimulate advantageous market place competition (*Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 456 [253 Cal.Rptr. 591] [interpreting statutory competitive bid requirements]).

As one leading treatise explains: "The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. These provisions are strictly construed by the courts, and will not be extended beyond their reasonable purpose. Competitive bidding provisions must be read in the light of the reason for their enactment, or they will be applied where they were not intended to operate and thus deny municipalities authority to deal with problems in a sensible, practical way." (10 McQuillin, Municipal Corporations (3d rev. ed. 1990) § 29.29, p. 375, fns. omitted.) Thus, charters requiring competitive bidding are not to be given such a construction as to defeat the object of insuring economy and excluding favoritism and corruption. (*Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 354 [291 P. 839, 71 A.L.R. 161], citing *Harlem Gaslight Co. v. Mayor etc. of New York* (1865) 33 N.Y. 309, 329.)

(4b) We perceive no conflict between the outreach program and the purposes of competitive bidding. It has been generally recognized that competitive bidding requirements "necessarily imply equal opportunities to all whose interests or inclinations may impel them to compete at the bidding." (64 Am.Jur.2d (1972) Public Works and Contracts, § 37, p. 889, fn. omitted.) This is precisely what the outreach program aims to do in requiring prime

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contractors to provide MBE's, WBE's and OBE's an equal opportunity to compete for and participate in the performance of all city ***174** contracts. Moreover, in mandating reasonable good faith outreach to all types of subcontractor enterprises, the program in effect seeks to guard against favoritism and improvidence by prime contractors, and to increase opportunity and participation within the competitive bidding process. Consequently, not only are the program's objectives consistent with the goals of competitive bidding, but the program seeks to advance those goals by stimulating advantageous marketplace competition. In implementing its outreach program, the Board could reasonably have concluded that the program will assist the City in securing the best work at the lowest price practicable.

Domar disagrees with this assessment, arguing that the instant record contains no evidence to support the conclusion that the outreach program will actually promote competition or reduce prices. Moreover, while Domar does not assert that the outreach program increases contract prices or that it requires efforts that are unreasonable or costly, [FN7] Domar suggests that MBE and WBE programs generally do not lead to lower prices for public projects because they encourage bidders to use less competitive but more costly MBE and WBE firms. Domar contends that such programs do not expand the public contracts market; rather, they simply cause the market to shift from non-MBE and non-WBE firms to MBE and WBE firms and drive the former out of their existing market share.

FN7 Notwithstanding Domar's failure to make such assertions, the dissent argues that "both the good faith efforts and the documentation involve considerable time, effort, and expense, all of which represents a considerable monetary loss for the unsuccessful bidders" and which may be added to bids as part of the bidder's overhead. (Dis. opn. of Arabian, J., *post*, at p. 187.) Not surprisingly, the dissent cites no evidence in the record to support these arguments. It is important to keep in mind that, although Domar's bid was approximately $650,000 lower than the next lowest bid, the differential was not due to the fact that Domar made no attempt to conduct the required good faith outreach, while the other bidders did. Indeed, at oral argument Domar contended that it did comply with the outreach program, but simply failed to submit the required documentation in a timely manner.

We are not persuaded by these arguments. Despite the lack of empirical evidence, it is not unreasonable for the Board to conclude that, in the absence of mandated outreach, prime contractors will tend to seek out familiar subcontractors when bidding for projects, and that therefore their bids may or may not reflect as low a price had reasonable outreach efforts been made. Indeed, Domar is unable to cite to anything in the record that might detract from such a conclusion. Under these circumstances, the Board's action is entitled to deference. (See *Social Services Union v. City and County of San Francisco* (1991) 234 Cal.App.3d 1093, 1101 [285 Cal.Rptr. 905]; see also *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 856 [191 Cal.Rptr. 800, 663 P.2d 523].) ***175**

Moreover, the outreach program here poses none of the particular evils identified by Domar. The program does not require bidders to contract with any particular subcontractor enterprise, nor does it compel them to set aside any percentage of a contract award to MBE's or WBE's in order to qualify for a municipal contract. And even though the Board's outreach program provides an estimate that a participation level of 1 percent by MBE's and WBE's may be anticipated by the exercise of good faith efforts, a bidder gets no advantage or disadvantage from meeting or not meeting the specified participation level. Thus, the program provides no incentive to a bidder to use MBE's or WBE's if they are inferior in cost or ability, and the market for public contracts among subcontractors remains a level playing field. [FN8]

FN8 In asserting that the Board's program is invalid, the dissent at times appears to

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> assume that the program requires bidders to achieve a minimum participation level of MBE's and WBE's and that it mandates solicitation efforts that focus exclusively on a narrow field of contractors. (See dis. opn. of Arabian, J., *post*, at pp. 181, fn. 1, 184-186.) However, as the record makes clear, the program has a broad focus, requiring outreach to all types of subcontracting enterprises-MBE's, WBE's *and OBE's*.

Hence, mindful as we must be of the principle that a charter must not be given such a construction as to defeat the objectives of competitive bidding (*Los Angeles Dredging Co. v. Long Beach*, *supra*, 210 Cal. at p. 354; see 10 McQuillin, *supra*, § 29.29, p. 375), we conclude that the outreach program is not void under the charter. By working to ensure that bids for municipal projects reflect the lowest prices practicable, the program is fully compatible with the charter requirement that contracts be awarded to the lowest and best regular responsible bidders.

Since the City and its agencies may validly require bidders to conduct the specified outreach without violating the charter, it follows that the Board may validly reject a bid based on the bidder's failure to demonstrate compliance with this requirement. If bidders had the option to disregard the outreach requirement because the Board was without power to enforce it, the program itself would be undermined. Moreover, even though awarding the instant contract to Bailey Controls Company may not save the City money on this particular project, the Board could reasonably have concluded that consistent enforcement of the outreach requirement will lead, in the long term, to lower contract prices. (6) Finally, the Board's action in rejecting Domar's bid due to the absence of the required good faith effort documentation is consistent with the general rule that bidding requirements must be strictly adhered to in order to avoid the potential for abuse in the competitive ***176** bidding process. [FN9] (*Konica Business Machines U.S.A., Inc. v. Regents of University of California*, *supra*, 206 Cal.App.3d at p. 456 [strict adherence with bidding requirements is applied "even where it is certain there was in fact no corruption or adverse effect upon the bidding process, and the deviations would save the [public] entity money"].)

> FN9 Domar makes no contention that it was not afforded due process on the matter of its late submission of documentation. (See *Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1343 [241 Cal.Rptr. 379].) Consequently, it is not an issue in the case.

(7) Contrary to Domar's assertions, the charter's enumeration of various exceptions to the lowest and best regular responsible bidder restriction in section 386(f) does not compel a different result. Unlike the outreach program, virtually all of the exceptions listed in section 386(f) tend to be anticompetitive in nature. [FN10] For instance, antiapartheid restrictions suppress competition by disqualifying potential contractors on the basis of their connections with South Africa without regard to their potential for offering the lowest price practicable. Similarly, local bidder preferences generally inhibit competition in that they prohibit potential contractors from competing on an equal basis. Finally, domestic content requirements discriminate against the use of foreign products and may thereby substantially increase the cost of a project, thus undermining the goal of securing the best bargain for the public. That the charter expressly authorizes the City and its contracting agencies to consider these anticompetitive factors during the bid process (pursuant to lawfully enacted ordinances) does not logically lead to the conclusion that bid requirements intended to stimulate and promote competition may not be considered.

> FN10 The sole exception is the provision that allows rejection of a bidder previously delinquent or unfaithful in the performance of any former contract.

Additionally, Domar's reliance on *Associated General Contractors of California, Inc. v. City and County of San Francisco* (9th Cir. 1987) 813 F.2d 922 (*Associated General Contractors*) and *Neal*

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Publishing Co. v. Rolph (1915) 169 Cal. 190 [146 P. 659] is misplaced. Those cases are factually distinguishable and do not support Domar's position.

Associated General Contractors, *supra*, 813 F.2d 922, dealt with an ordinance of the City and County of San Francisco that: (1) required each city department to set aside 10 percent of its purchasing dollars for MBE's and 2 percent for WBE's; (2) gave a 5 percent bidding preference to MBE's, WBE's and locally owned business enterprises (LBE's); (3) required each city department to establish a yearly goal for the percentage of contracting dollars to go to MBE's, WBE's and LBE's and required prospective prime ***177** contractors to submit bids that met or exceeded such goals; and (4) established as an overall goal that 30 percent of the city's contracting dollars shall go to MBE's and 10 percent to WBE's. (813 F.2d at p. 924.) In that case, the Ninth Circuit concluded that the ordinance violated a city charter provision requiring that all contracts worth more than $50,000 be awarded to the "lowest reliable and responsible bidder." (*Id.*, at pp. 924-928.)

Even if the competitive bidding scheme contained in the San Francisco charter is the same or similar to the one here, there are significant differences between the set-asides, bid preferences and contracting goals enacted in San Francisco and the good faith outreach required here. (8) As the United States Court of Appeals for the Ninth Circuit recognized, perhaps the most important goal of competitive bidding is to protect against "insufficient competition to assure that the government gets the most work for the least money." (*Associated General Contractors*, *supra*, 813 F.2d at p. 926.) Mandatory set-asides and bid preferences work against this goal by narrowing the range of acceptable bidders solely on the basis of their particular class. In stark contrast, requiring prime contractors to reach out to all types of subcontracting enterprises broadens the pool of participants in the bid process, thereby guarding against the possibility of insufficient competition. In light of these differences, *Associated General Contractors*, *supra*, 813 F.2d 922, does not persuade us to find the outreach program violative of the City's charter. [FN11]

FN11 Of course, if a bidder were to demonstrate that the Board in fact considered MBE or WBE participation levels in awarding a bid, the legal reasoning of *Associated General Contractors*, *supra*, 813 F.2d 922, might have more force.

Neal Publishing Co. v. Rolph, *supra*, 169 Cal. 190, is likewise unhelpful to Domar. That case involved a contract for the furnishing of printed forms which the mayor refused to sign after the board of supervisors had awarded the contract to the plaintiff as the successful bidder. The mayor contended, inter alia, that awarding the contract to the plaintiff would have violated a board resolution requiring that all printing jobs be awarded to unionized printers. (169 Cal. at p. 196.) The mayor's arguments did not prevail. After noting that the resolution preceded the enactment of charter provisions requiring competitive bidding, this court held that the resolution was merely directive in nature and that it was not binding on the board itself in awarding contacts. (*Id.*, at pp. 196-197.) Although there is language in the case to the effect that, in any event, the board of supervisors could not impose additional conditions to those imposed by the charter for competitive bidding without violating the provision requiring contracts to be awarded to the lowest bidder (*id.*, at p. 197), such dicta must be understood in light of the ***178** union requirement claimed there. That requirement was clearly anticompetitive in that contractors were rendered ineligible for a bid award based solely on their nonunion status. The case does not aid Domar under the instant facts.

Finally, the parties and various amici curiae dispute whether our decision in *City of Inglewood*, *supra*, 7 Cal.3d 861, supports Domar's position. In that case, a civic center authority awarded a contract to a contractor who was not the lowest monetary bidder, even though former Government Code section 25454 (now Pub. Contract Code, § 20128) required that contracts be awarded to the "lowest responsible bidder." The authority had based the award, not on

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a finding that the lowest bidder was not responsible, but on a determination that the higher bidder was relatively superior in ability to perform the work. In ruling to set aside the award, we reasoned that the statute provided no basis for applying a relative superiority concept. (7 Cal.3d at p. 867.) Rather, it required the authority to award the contract to the lowest bidder unless the bidder was found not responsible, i.e., not qualified to do the particular work under consideration. (*Ibid.*)

Although our decision in *City of Inglewood*, *supra*, 7 Cal.3d 861, makes clear that a competitive bidding scheme with a lowest responsible bidder restriction ordinarily requires a contract to be awarded to the bidder who submits the lowest monetary bid and is responsible, the case does not concern the issue presented here, i.e., whether a public entity may, consistently with its charter, impose certain requirements upon bidders as part of the bid specifications for a project. Unlike the instant case, *City of Inglewood*, *supra*, did not involve a challenge to the validity of a particular bid requirement, nor did it concern a situation where the lowest monetary bidder had failed to comply with all advertised bid requirements. [FN12]

FN12 Consistent with the holding of *City of Inglewood*, *supra*, 7 Cal.3d 861, the City concedes that the lowest responsible monetary bidder that meets the Board's minimum standards for demonstrating good faith outreach efforts must be awarded a bid over the next lowest responsible monetary bidder that exceeds the minimum standards.

Accordingly, we hold that the Board's outreach program does not violate the competitive bidding provisions set forth in the City's charter. [FN13] ***179**

FN13 In its answer brief on the merits, Domar argues that the outreach program is void for the additional reason that the mayor of the City acted in excess of his mayoral authority under the charter in issuing Executive Directive Nos. 1-B and 1-C. We need not consider this argument since it was not raised below. In any event, the point is not well taken. As the relevant charter provisions make clear, the Board "shall have and exercise all the powers and duties possessed by the City under this Charter ... relating to: [¶] (a) The advertising for and inviting of proposals or bids for doing any work or making any improvement ... ; [¶] (b) The examining, considering and preparing of such proposals or bids; [¶] (c) The awarding, letting, reletting, entering into and signing of contracts on behalf of the City for doing any said work or making of any said improvements ...." (§ 233.) Thus, even though the outreach program at issue was adopted by the Board in response to the mayor's directives, the validity of the program does not depend on whether the charter allows the mayor to issue directives of the sort involved here.

III. Disposition

The judgment of the Court of Appeal is reversed and the matter is remanded to allow that court to address whether Domar may otherwise be entitled to relief based on the alternative grounds identified in its notice of appeal.

Lucas, C. J., Mosk, J., Kennard, J., George, J. and Werdegar, J., concurred.

ARABIAN, J.

I respectfully dissent. Accepting the proposition that a home rule charter city has broad powers to conduct its municipal affairs free of outside interference, city agencies nonetheless are without authority to act in any manner that conflicts with express charter provisions. While I certainly have no quarrel with the laudatory and undoubtedly long overdue goals of the minorityand women-owned business enterprise outreach program, the unvarnished fact is that it is intended to promote social policy, not competition. More importantly and to the point, conditioning acceptance of otherwise qualified prime contractor bids on

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documentation of good faith outreach efforts is incompatible with the mandate of Los Angeles City Charter section 386(f) that contracts for city work "shall be let to the lowest and best regular responsible bidder." Neither the record before this court nor intuitive logic supports the majority's conclusion that the outreach program is necessary to or does in fact "eliminate favoritism, fraud and corruption; avoid misuse of public funds; [or] stimulate advantageous market place competition." (*Konica Business Machines U.S.A., Inc. v. Regents of University of California* (1988) 206 Cal.App.3d 449, 456 [253 Cal.Rptr. 591].) Indeed, as this case empirically documents, it runs directly counter to the purpose and goals of the competitive bidding process.

Notwithstanding the breadth of its plenary powers, the City of Los Angeles through its various agencies is restricted in the exercise of municipal authority by any and all express limitations contained in the city charter. (*City of Grass Valley v. Walkinshaw* (1949) 34 Cal.2d 595, 599 [212 P.2d 894].) A necessary corollary to this principle is that " 'an ordinance [or executive equivalent] must conform to, be subordinate to, not conflict with, and not exceed the [city's] charter, and can no more change or limit the ***180** effect of the charter than a legislative act can modify or supersede a provision of the constitution of the state.' [Citations.]" (*Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001 [84 Cal.Rptr. 615], quoting 5 McQuillin, Municipal Corporations (3d ed. 1969 rev.) Nature, Requisites and Operation of Municipal Ordinances, § 15.19, pp. 79-80.)

Subject only to enumerated exceptions, Los Angeles City Charter section 386(f) requires that contracts "shall be let to the lowest and best regular responsible bidder furnishing satisfactory security for its performance" and thus constitutes an specific and categorical restriction on the city's contracting authority. (See *Associated General Contractors of California v. City and County of San Francisco* (9th Cir. 1987) 813 F.2d 922, 927; see also *Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 353 [291 P. 839, 71 A.L.R. 161] ["the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable"].) In this context, "California courts have uniformly construed the term 'low responsible bidder' [and its variants] to mean the bidder who can be expected to successfully complete the contract for the lowest price." (*Associated General Contractors of California v. City and County of San Francisco*, *supra*, 813 F.2d at p. 926, fn. omitted.) The concept is not one of relative superiority but "has reference to the quality, fitness and capacity of the low bidder to satisfactorily perform the proposed work. [Citation.] Thus, a contract must be awarded to the lowest bidder unless it is found that he is not responsible, i.e., not qualified to do the particular work under consideration." (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court* (1972) 7 Cal.3d 861, 867 [103 Cal.Rptr. 689, 500 P.2d 601]; *West v. Oakland* (1916) 30 Cal.App. 556, 560-561 [159 P. 202].)

Any deviation from acceptance of the lowest and most capable bidder operates in derogation of the charter mandate and is therefore void. (*San Francisco Fire Fighters v. City and County of San Francisco* (1977) 68 Cal.App.3d 896, 902-903 [137 Cal.Rptr. 607].) It follows that additional qualifications to the competitive bidding process not contained in the charter itself must relate directly to a bidder's "experience and financial and material resources necessary to" perform the contract. (*Steelgard, Inc. v. Jannsen* (1985) 171 Cal.App.3d 79, 93 [217 Cal.Rptr. 152].) Thus, while a bid must be "responsive," i.e., comply with any specifications contained in the call for ***181** bids, those specifications must be relevant to a determination of whether the bidder is "responsible." [FN1]

FN1 For example, the "General Instructions and Information for Bidders" on the Hyperion project contained numerous specifications in addition to the outreach program. With limited exceptions, they all related to the bidder's qualifications to do the work in a competent and financially sound manner

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> without risk to the city, including bonding and insurance, construction schedules, and liquidated damages. (See also L.A. City Charter, § 386(c) & (d).) Other than the outreach program, the only exceptions were matters governed by superseding state and federal law, such as prevailing wage, apprenticeship utilization, and nondiscrimination obligations. The materials also contain information regarding the city's employment and training policy, which requires bidders to submit a declaration of compliance. This program appears to be an effort to facilitate job placement of disadvantaged youth and adults residing in the city. The only obligation on the part of a bidder is to identify potential openings for these individuals and consider them for employment to the extent they are qualified. Unlike the outreach program, no minimum participation level is set, no outreach is mandated, and no further documentation is required. Accordingly, it does not appear inconsistent with the charter's "lowest and best" limitation.

The majority attempts to bring the requirement of documenting compliance with the minorityand women-owned business enterprise (M/WBE) outreach program within the foregoing framework by finding that it enhances competition and promotes the goals of public sector competitive bidding; therefore, it does not conflict with the charter's "lowest and best regular responsible bidder" mandate. After careful consideration of the analysis, I am unpersuaded outreach compliance was intended to or does accomplish this purpose. The majority's rationalization is essentially created out of whole cloth. In point of fact, with its extensive good faith effort and documentation requirements, the program potentially narrows the field of qualified bidders, undermines meaningful competition, and can only lead to the city's fiscal detriment by contributing to higher contractual costs.

Most critically, the majority conspicuously fails to identify *any* relationship between documentation of good faith outreach efforts and the question of whether a prime contractor has "the quality, fitness and capacity ... to satisfactorily perform the proposed work." (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, *supra*, 7 Cal.3d at p. 867.) Nor would such a demonstration be possible since documentation compliance concerns only whether a bidder is "responsive," not whether it is "responsible." (See *Am. Combustion v. Minority Business Opportunity* (D.C.App. 1982) 441 A.2d 660, 671; *Gilbert Cent. Corp. v. Kemp* (D.Kan. 1986) 637 F.Supp. 843, 848-849; see also, *ante*, fn. 1.) Thus, as a threshold proposition, if the out reach requirement operates to eliminate, as it did here, capable lowest bidders, it conflicts with the charter mandate whether or not it enhances competitiveness. ***182**

Moreover, the "long and well-established rule" is that the public bidding process "must be free of any restrictions tending to stifle competition. [Citations.]" (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 821 [25 Cal.Rptr. 798].) To the extent a mandatory good faith outreach effort, including the extensive documentation requirements, tends to discourage or disqualify prime bidders otherwise "qualified to do the particular work under consideration" (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, *supra*, 7 Cal.3d at p. 867), it narrows the field of acceptable proposals rather than expands it, thus "defeating the real objectives of competitive bidding." (*Baldwin-Lima-Hamilton Corp. v. Superior Court*, *supra*, 208 Cal.App.2d at p. 822; *Konica Business Machines U.S.A., Inc. v. Regents of University of California*, *supra*, 206 Cal.App.3d at p. 456.) This case plainly proves the point: Domar Electric, Inc., was prequalified by the city to bid on the Hyperion project and apparently at all times has been considered "responsible" as mandated by the charter. Of note to the taxpayers, it submitted the lowest bid, which was rejected solely for failure to timely document good faith outreach efforts. (Cf. *R & A Vending Services, Inc. v. City of Los Angeles* (1985) 172 Cal.App.3d 1188, 1193 [218 Cal.Rptr. 667] [Lowest bidder's proposal " 'was unrealistic and contained admitted inaccuracies.' "].) In my view, this anticompetitive result provides a

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strong indication the city has run afoul of the charter's express limitation on the letting of city contracts.

The outreach program is suspect in many other respects as well. To begin with, nothing in the record suggests any aspect of the program, including documentation of good faith efforts, was intended to spur competition in the bidding on city contracts. [FN2] Neither of the mayor's executive directives (Nos. 1-B and 1-C) identifies any perceived deficiency in the level of competition for public works or other city business. In fact, the tenor of both indicates the outreach program was formulated solely as an affirmative action measure to generate wider involvement of M/WBE's in city projects. The original directive announced that the city's policy was "to utilize [M/WBE's] in all aspects of contracting relating to procurement, construction, and personal services" and was "fully committed to substantially increase[d] [M/WBE] utilization and participation in all phases of the City's ... contracting," ***183** with no reference to improving the broader competitive bidding process. In addition, the city's "Affirmative Action Officers," among others, were directed to assist in "developing, managing, and implementing" the policy and program; the 5 percent preference allowed under the city's Small Local Business Program was to be used "to the maximum extent possible" to involve M/WBE's; and city departments were to report monthly the extent of implementation including "dollar amounts of contracts awarded" M/WBE's. [FN3]

FN2 The majority claims that the outreach program has the effect of "stimulating advantageous market place competition" and hypothesizes that therefore "the Board [of Public Works] could reasonably have concluded that the program will assist the City in securing the best work at the lowest price practicable." (Maj. opn., *ante*, at p. 174.) In fact, the record contains no evidence that the board incorporated the outreach program into its bid specifications for reasons independent of the mayor's directives or that it did so for any purpose other than implementation of the city policy as set forth in those documents, which contain no reference to enhancement of competition.

FN3 Information supplied to bidders in this case similarly states: "It is the policy of the City of Los Angeles to provide [M/WBE's] an equal opportunity to participate in the performance of all City contracts. Bidders shall assist the City in implementing this policy by taking all reasonable steps to ensure that any qualified available business enterprise including [M/WBE's] have an equal opportunity to compete for and participate in City contracts."

Most tellingly, in direct response to the decision by the United States Supreme Court in *Richmond v. J. A. Croson* (1989) 488 U.S. 469 [102 L.Ed.2d 854, 109 S.Ct. 706], invalidating a raceand gender-conscious set-aside program on equal protection grounds, the mayor "clarified" his original directive to explain that a bidder's "failure to meet [the expected levels of M/WBE participation set by the awarding authority] shall not itself be the basis for disqualification of the bidder ...." The city also commissioned a study, consistent with the dictates of *Croson*, to determine the incidence, if any, of intentional discrimination against M/WBE's in city contracting. (See generally, *id.*, at pp. 498-506 [102 L.Ed.2d at pp. 884-890]; see also *Concrete Works of Colorado, Inc. v. City & County of Denver* (10th Cir. 1994) 36 F.3d 1513, 1523-1530.) At the same time, the new directive reiterated the earlier policy statements and directed city agencies to continue to condition acceptance of bid proposals from otherwise qualified contractors on documentation of good faith outreach efforts measured by nine specific criteria. This obvious concern that the outreach program not fall prey to an equal protection challenge, coupled with efforts to satisfy the constitutional restrictions imposed on raceand gender-conscious public contracting practices under *Croson*, places an unmistakable social policy stamp on the program, unrelated to any articulated need or

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intent to enhance competitive bidding for the general benefit of the city. (See generally, *Concrete Works of Colorado, Inc. v. City & County of Denver* , *supra*, 36 F.3d at pp. 1520-1522.)

Moreover, the city has essentially admitted its social policy agenda. At this point, an awarding agency's only concern in determining a bidder's responsiveness is *documentation* of good faith outreach efforts; actually securing M/WBE participation is irrelevant if not accompanied by the appropriate paperwork. For example, in this case although Domar has qualified with the California Department of Transportation as a WBE, the city ***184** rejected its low bid for failure to timely provide M/WBE outreach documentation. As explained in *Associated General Contractors of California v. City and County of San Francisco*, *supra*, interjecting considerations into the bidding process that do not implicate a contractor's qualifications to do the work in question is contrary to "the charter's mandate that contracts be awarded to the lowest bidder." (813 F.2d at p. 926, fn. omitted; cf. *Konica Business Machines U.S.A., Inc. v. Regents of University of California*, *supra*, 206 Cal.App.3d at p. 456; *Baldwin-Lima-Hamilton Corp. v. Superior Court*, *supra*, 208 Cal.App.2d at p. 822.)

Notwithstanding the indisputable evidence the city instituted the outreach program for reasons wholly extrinsic to the "lowest and best regular responsible bidder" injunction and its underlying goals and purpose, the majority finds the good faith documentation requirement valid because it promotes market competition. Implicitly, this inaccurate predicate rests on the unexamined, and on this record unsubstantiated, premise that the city could have reasonably determined "more is better," i.e., that increasing the number of subcontractors considered by each prime in submitting its final bid will produce the most economical, highest quality results for the city. For the reasons that follow, I find no empirical or intuitive support for this assumption.

First, nothing in the record suggests the city had any concern that its standard bidding procedures were not adequately serving their intended purpose: "to protect against a variety of ills that might befall the government procurement process: sloth, lack of imagination or carelessness on the part of those who award public contracts; inadequate notice to potential bidders; causing contracting officers to act on the basis of ignorance or misinformation; and, perhaps most important of all, insufficient competition to assure that the government gets the most work for the least money. [Citation.]" (*Associated General Contractors of California v. City and County of San Francisco*, *supra*, 813 F.2d at p. 926.) If the city had in fact identified some inadequacy, an elaborate outreach program replete with documentation requirements seems an ill-suited remedy. The logical expedient would be to set a minimum number of subcontractor bids for designated portions of the work on any given project. (See, *post*, fn. 4.) Moreover, even though prime contractors are not limited to considering M/WBE's, mandating solicitation efforts that tend to focus exclusively on a narrow field of subcontractors cannot reasonably enhance competition and may well have the opposite ***185** effect. [FN4] (Cf. *Baldwin-Lima-Hamilton Corp. v. Superior Court*, *supra*, 208 Cal.App.2d at p. 822.)

FN4 The majority notes that the mayor's second directive expanded the outreach program to include "other business enterprises," (OBE'S), i.e., non-M/WBE's. (Maj. opn., *ante*, at p. 175, fn. 8.) This addition appears as much an effort to distract from the program's potential constitutional weakness following *Croson* as an attempt further to enhance competitiveness. At least with respect to this particular case, the practical effect of including "other business enterprises" appears negligible since the bid material provided by the Los Angeles Board of Public Works still continued to emphasize M/WBE's, in particular in setting the expected level of participation. Moreover, if the city actually sought to increase competition among subcontractors rather than promote social policy, simply requiring a minimum number of sub-bids

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> would accomplish that purpose without the compulsion of specific mandatory outreach efforts that can only encumber the process and add to the prime contractor's overall expense.

The record is equally devoid of any evidence from which rationally to conclude that implementing the M/WBE outreach program as presently formulated would as a practical matter enhance competition. [FN5] Several factors warrant a contrary conclusion. Looking at the structure of the program itself, the authorizing agency is to evaluate good faith efforts by determining if the bidder's efforts "could be expected ... to produce" a specified level of M/WBE participation; the level is set by the agency and varies from contract to contract. Here, the Los Angeles Board of Public Works set the level of M/WBE participation on the Hyperion project at *1 percent*. Even assuming the outreach program would in some manner augment competitiveness, such an insignificant proportion of activity could have no more than negligible impact on the prime contractor's ultimate bid. [FN6] In other words, any financial advantage to the city was likely to be nil.

> FN5 Since the city is still awaiting the results of its commissioned study on the extent, if any, of discrimination against M/WBE's in public contracting, there is no support for another key assumption of the majority's analysis: that these enterprises are not presently participating in the bidding process in adequate numbers. Moreover, even if they had been excluded, the record contains no evidence such exclusion has actually impaired the competitive process or resulted in inflated contractual prices for the city.

> FN6 To put these numbers in concrete terms, 1 percent of Domar's bid was $33,000.

In reality, however, the consequence was even worse: *In this case alone*, the "benefit" of "stimulating" market competition by mandating documentation of good faith outreach efforts was an increased cost to the city and its taxpayers of more than $650,000, the amount by which Bailey Controls Company's bid exceeded Domar's. The majority's attempt to justify this departure from the charter mandate on the somewhat blithe as well as unsustainable supposition that "consistent enforcement of the outreach requirement will lead, in the long term, to lower contract prices" (maj. opn., *ante*, at p. 175) is legally and factually untenable, and reflects quintessential ***186** "pie in the sky" thinking. The record contains no evidence that "over time" M/WBE subcontractors can or will provide less costly goods and services of acceptable quality. More importantly, Los Angeles City Charter section 386(f) commands that the city and its agencies award *each and every contract* to the lowest responsible bidder. This language is clear, precise, and unequivocal. It does not accommodate the kind of "averaging" the majority's analysis superimposes. Any touted competitive value attributable to the outreach program is strictly hypothetical; and documentation compliance in fact reduces competition in direct conflict with the charter's mandate. As this court agreed more than 20 years ago, " 'To permit a local public works contracting agency to expressly or impliedly reject the bid of a qualified and responsible lowest monetary bidder in favor of a higher bidder deemed to be more qualified frustrates the very purpose of competitive bidding laws and violates the interest of the public in having public works projects awarded without favoritism, without excessive cost, and constructed at the lowest price consistent with the reasonable quality and expectation of completion.' " (*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court*, *supra*, 7 Cal.3d at p. 867.)

In addition, the process by which city agencies determine good faith outreach efforts invites the very subjectivity, arbitrariness, and cronyism that competitive bidding is intended to eliminate. (Cf. *Konica Business Machines U.S.A., Inc. v. Regents of University of California*, *supra*, 206 Cal.App.3d at p. 457.) Here, the Los Angeles Board of Public Works informed each prequalified bidder that it required a "positive and adequate demonstration to the satisfaction of the Board" of good faith efforts

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according to 10 enumerated criteria. The only measure of this "positive and adequate demonstration" was the board's apparently ad hoc assessment of whether the bidder's outreach effort was sufficient "to obtain [M/WBE] sub-bid participation ... which can be expected by the Board of Public Works to produce a [1 percent] level of participation by interested businesses ...." While each criterion was assigned a specific number of possible points totaling a maximum of 100, the record reveals no rational basis on which the assignments were made. Moreover, many criteria are themselves less than precise. For example, a bidder must have "negotiated in good faith with interested [M/W/OBE's] and ... not unjustifiably reject[ed] as unsatisfactory the sub-bids prepared by any enterprise"; but none of these provisions is quantified or defined in objective terms. Taken in conjunction with the vague standard by which the overall good faith effort was evaluated, the entire process was rife with the potential for abuse to the detriment of the competitive bidding process, thereby heightening public suspicion of city affairs. (See *Ertle v. Leary* (1896) 114 Cal. 238, 241-242 [46 P. 1].) ***187**

The majority's conclusion that documentation of good faith outreach efforts is consistent with the goals of competitive bidding also ignores some critical economic realities. First, any increase in the bureaucracy associated with submitting bids on city contracts will inevitably increase their cost. (Cf. 44 U.S.C. § 3501 et seq. [citing in part minimizing burden on small businesses and cost as purpose of federal Paperwork Reduction Act].) By their nature, both the good faith efforts and the documentation involve considerable time, effort, and expense, all of which represents a considerable monetary loss for the unsuccessful bidders. (Cf. *Gilbert Cent. Corp. v. Kemp*, *supra*, 637 F.Supp. at p. 850 [14 letters and 5 telephone calls with generic information about city project held insufficient to demonstrate "good faith effort"].) So much for the encouragement of a healthy business climate. Furthermore, those prime contractors not inhibited by this possibility may recoup some or all of the additional overhead expense by increasing their bids, which the city will eventually have to absorb when it awards the final contract.

Satisfying some outreach criteria also tends to discourage cost-effective practices by prime contractors. For example, to demonstrate good faith compliance, a bidder must "subdivide the total contract work requirements into smaller portions or quantities to permit maximum active participation of [M/W/OBE's]." Such subdivision is likely to preclude a prime contractor from taking advantage of economies of scale offered by larger suppliers, relying on its own in-house facilities at a lower cost, or otherwise benefiting from the ability to maintain a consolidated operation. Moreover, a prime contractor must have confidence that any subcontractors it considers possess the technical acumen, efficiency, and financial stability to perform the project in a competent and timely manner, just as the city itself did in this case when it prequalified the bidders. As with documentation, substantiating a subcontractor's qualifications takes time, effort, and expense. [FN7] Whether or not this requirement promotes competition, it is unlikely to reduce the overall price the city pays for goods and services.

FN7 Since a bidder is subject to disqualification for having been "previously delinquent or unfaithful in the performance of any former contract with the City" (L.A. City Charter, § 386(f)), which would include any subcontractor deficiencies, prime contractors cannot take this task too lightly.

Conclusion

While generally courts will not consider the motive of legislative or executive officers in construing their actions (see, e.g., *County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 726-727 [119 Cal.Rptr. ***188** 631, 532 P.2d 495]), on occasion the underlying purpose or goal may be highly relevant to determining the intent of a particular enactment and thus a proper subject for assessing its validity. (Cf. *Village of Arlington Heights v. Metropolitan Housing Corp.* (1977) 429 U.S. 252, 265-266 50 L.Ed.2d 450, 464-465, 97 S.Ct. 555] [recognizing relevance of discriminatory purpose in

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assessing validity of rezoning decision].) The express terms of the mayor's executive directives make it indisputably clear that the City of Los Angeles promulgated the M/WBE outreach program in an effort to remedy perceived discrimination against these enterprises in city contracting, not to enhance the competitive bidding process. While the city is generally at liberty to enact whatever measures it finds appropriate to implement social policy, it is nevertheless bound to do so within the express limitations of its own governing charter. In this case, the requirement that prime contractors bidding on city projects document good faith M/WBE outreach efforts narrows rather than expands the field of bidders capable of performing the work in question, thereby stifling, not increasing, competition. It thus plainly contravenes the mandate that contracts "*shall be let to the lowest and best regular responsible bidder*." (L.A. City Charter, § 386(f), italics added.)

For the reasons stated, I would affirm the judgment of the Court of Appeal.

Appellant's petition for a rehearing was denied February 23, 1995. Arabian, J., was of the opinion that the petition should be granted. ***189**

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