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August 21, 2007

Christopher W. Waddell
General Counsel
San Diego City Employees' Retirement System
401 West A Street, Suite 400
San Diego, CA 92101

Re: Termination of Illegal DROP Program

Dear Mr. Waddell:

This is in response to your letter dated August 3, 2007, regarding the "Effective Date of July 1, 2005 Negotiated Retirement Benefit Changes." Your letter and the enclosed "legal opinion" grossly misconstrue the law, as enacted by the City Council, and as set forth by the California courts. I strongly urge you to reconsider the position stated by you on behalf of SDCERS. If, as you assert, SDCERS "will continue to advise City employees hired before February 17, 2007 that they are eligible for retirement benefits in place prior to the 2006 MOU changes," be advised that SDCERS will be continuing to violate City law and subjecting itself to increasing liability for breach of fiduciary and other duties. The City Attorney's Office will pursue legal action to halt this unlawful practice.

In brief, SDCERS's position that it is not bound by the 2005 Memoranda of Understanding (MOUs)[1] between the City of San Diego and its employee representatives is absurd—SDCERS is part of the City and the City is a signatory to those contracts. Those MOUs bind the City ***and*** SDCERS to their terms, which expressly provide that new hires (those hired on or after July 1, 2005) are not eligible for the Deferred Retirement Option Program (DROP). More fundamentally, it is the City Council, not SDCERS, that creates retirement benefits. The City (in contractual agreements with its employees) expressly terminated the illegal DROP

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[1] I assume your reference quoted above to "the 2006 MOU changes," erroneously refers to the ***2005*** contracts, discussed in this letter and in the May 4, 2007, letter from Reed Smith LLP, which you enclosed.

program[2] in the 2005 MOUs, which became binding and effective upon ratification by the employees and upon City Council approval. Such ratification and approval unquestionably occurred. Subsequent conforming changes to the Municipal Code were not conditions to the effectiveness of the MOUs which, by their express terms, are unqualified. In all events, the subsequent revisions to the Municipal Code merely repeat and confirm the MOUs' unequivocal provisions—that the illegal DROP program will not be extended to new hires. The notion that new hires have a "vested right" to a program that was terminated through legislatively-approved contracts that became effective prior to those persons being hired blatantly misstates the law. These points are detailed below.

A. The MOUs Expressly Provide that the DROP Benefits Are Not Available for Employees Hired On or After July 1, 2005

The City entered into MOUs in 2005 terminating the illegal DROP program. For example, the MOU with the Municipal Employees' Association (MEA) provides in Article 2, regarding Implementation, that the MOU shall be binding upon City Council approval, and upon ratification by the MEA (which shall occur no later than June 28, 2005). In comparison to this provision, which specified a mandatory date of approval, in Article 2, Section 2, the MOU provides: "The City shall, in a timely manner, complete the changes in ordinances, resolutions, rules . . . to conform to this agreement, using September 30, 2005, as a target date for such completion." In other words, no mandatory date of City enactment of conforming ordinances was provided—there is a non-binding "target date." There is also no express condition of the happening of a future event—such as the enactment of the ordinance—delaying or qualifying the effectiveness of the MOU. *Compare Firemen's Benevolent Ass'n v. City Council of the City of Santa Ana*, 168 Cal. App. 2d 765, 766 (1959) (statute provided that it did not apply "unless and until agency elects . . . by amendment to its contract"). Rather, in Article 3, the MEA MOU explicitly provides: "The term of this modified Memorandum of Understanding ***shall begin on July 1, 2005 . . . .***" (Emphasis added).

In Article 22 of the MEA MOU, addressing Retirement, the intent could not be more clear. In Section 1, the agreement explains that Section 2 is new and "reflects the parties' agreement regarding retirement contribution and benefit changes resulting from meet and confer in 2005." The agreement states that ***Section 2 shall control*** and supersedes Sections 3 through 6 (DROP provisions) in the event of any inconsistency between Section 2 and Sections 3 through 6. Then, in Section 2, the agreement expressly provides: "Employees hired on or after July 1, 2005, are not eligible for the Deferred Retirement Option Plan ('DROP'). Article 4, Division 14 of the Municipal Code will be revised to reflect this change." Thus, the controlling section of the

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[2] The DROP program was void from its inception for a number of reasons, not the least of which is that it was adopted by those with a disqualifying conflict of interest and it did not conform to the City Council's intent that the program be cost neutral. Those issues are not the subject of this letter, and the limited discussion here of the unequivocal termination of the DROP program in 2005 should not be construed to suggest that the program had any validity from its inception, which it did not.

agreement, Section 2, eliminates the illegal DROP program as to new hires, and merely provides for a change to occur in the Municipal Code, at an unspecified time in the future without restriction, "to reflect ***this change***." (Emphasis added). Leaving no doubt, Section 3 also provides that "Notwithstanding any provision below, employees hired on or after July 1, 2005, . . . are not eligible for . . . participation in the DROP program. . . ." Thus, under the 2005 MOUs, it is agreed that as to new hires, their DROP participation will never arise—***they are not eligible to participate in the program***.[3]

B. The MOUs Were Adopted by the City Council and the Employee Representatives and Are Binding on the Parties to that Contract (Including the City) and Effective as of the Date of Approval

The assumption upon which your letter and your counsel's opinion are based is that SDCERS acts autonomously on City employee benefit issues. That obviously is incorrect: The City Council ***creates*** retirement benefits; SDCERS ***administers*** those benefits. You need look no farther than SDCERS's own binding judicial admissions on this point:

- The Council of the City ("City Council") is authorized and empowered by the Charter, Article IX, section 141, to establish a retirement system for compensated public officers and employees . . . .[4]

- Pursuant to Charter, Article IX, sections 144 and 146, ***the City Council has the sole authority to establish the retirement benefits available under the System*** . . . .[5]

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

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[3] The MOUs with the other employee representatives contain similar or identical provisions. For example, the MOU with Local 127 provides in Article 2 that the "term of this Memorandum of Understanding shall begin commenced at 12:01 a.m. on July 1, 2005 . . . ." The agreement provides that "Employees hired on or after July 1, 2005, are not eligible for the Deferred Retirement Option Plan ("DROP"). Article 4, Division 14 of the Municipal Code will be revised to reflect this change."

[4] Complaint for Declaratory Relief, filed by SDCERS in San Diego Superior Court Case No. 851286 on July 26, 2005, at 2, ¶ 6.

[5] Complaint for Declaratory Relief, filed by SDCERS in San Diego Superior Court Case No. 851286 on July 26, 2005, at 3, ¶ 14 (emphasis added). That Complaint also recognizes that SDCERS has a fiduciary duty to "minimize[] employer contributions" to the pension system. *Id.* at 3, ¶ 12.

As SDCERS recognizes, Section 141 of Article IX of the Charter makes the City Council the sole authority over the creation of retirement benefits. ("The Council of the City is hereby authorized and empowered by ordinance to establish a retirement system . . . "). By Charter, "all legislative powers of the City" are vested in the Council. S.D. Charter, Art. III, § 11. That legislative power is non-delegable. *Id.* § 11.1. Under the Charter, the Council is also expressly authorized to enter into binding MOUs with City employees:

> Notwithstanding any provisions of this Charter to the contrary, nothing in the Charter shall be construed to preclude the Council from entering into a multiple year memorandum of understanding with any recognized City employee organization concerning wages, hours and other terms and conditions of employment if, in the prudent exercise of legislative discretion as provided in this Charter, the Council determines it is in the best interests of the City to do so . . . .

Id. § 11.2

As the legal opinion you enclosed recognizes, the 2005 MOUs were duly ratified by the employees and approved by the City Council. Accordingly, they are contractual obligations of the City, of which SDCERS is a part. S.D. Muni. Code § 22.1801(b) (SDCERS was established by the City of San Diego, and is defined under the Municipal Code as a department of the City). As part of the City—a party to these labor contracts—SDCERS is bound by their terms. *Cf. Lerner v. Los Angeles City Board of Education*, 59 Cal. 2d 382, 398 (1963) ("the courts have held that the agents of the same government are in privity with each other, since they represent not their own rights but the right of the government").

Upon approval, the MOUs became binding upon the City, and the later passage of the related ordinance has no effect on the binding nature of the MOUs. The California Supreme Court explicitly addressed this issue in *Glendale City Employees' Association, Inc. v. City of Glendale*, 15 Cal. 3d 328 (1975). In that case, the Court held that a duly approved MOU was binding and enforceable against the city, giving rise to claims for breach of contract and violation of the Meyers-Milias-Brown Act, despite the city's assertion that its obligation under the MOU was not effective until the passage of later ordinances implementing the MOU's terms. *Id.* at 332 n.2, 334. Rejecting the City's attempt to rely upon later ordinances to undercut its obligation under the MOU, the Court held that "once the governmental body votes to accept the memorandum, it becomes a binding agreement." *Id.* at 335. As the Court wrote:

> Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing if the terms were of no legal consequence? Why submit the agreement to the governing body for determination if its approval were without significance?

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[6] Verified Complaint, filed by SDCERS in San Diego Superior Court Case No. 841845 on January 27, 2005, at 2, ¶ 6. *See also id.* at 5, ¶ 24 ("all legislative power of the City is vested in the City Council . . .").

Id. at 336. The Court squarely rejected the city's attempt to limit or alter its obligations through the later related ordinance. *Id.* at 338-39. Instead, the Court remanded the case for joinder of the city officers charged with the duty of computing and paying the employment benefits in accordance with the MOU. *Id.* at 620-21. As that case makes clear, here, the City's obligations were established by the MOUs, without regard to the subsequent implementing ordinance. Any contrary assertion is groundless under the law set forth by the California Supreme Court.

Your legal opinion's reliance on the lower appellate court opinion in *United Public Employees v. City and County of San Francisco*, 190 Cal. App. 3d 419, 423 (1987), to evade the Supreme Court's *Glendale* decision is not even facially credible. *United Public* discussed a "nonbinding memorandum of understanding" and involved a situation where prior voter approval was required to amend the employee benefits system—circumstances not even colorably analogous to those here—where the MOU was binding upon City Council approval, the employee representatives did ratify the MOU, and voter approval was not required.

The cases following the long-standing *Glendale* rule are legion, including several recent Supreme Court decisions and several cases decided by the Fourth District Court of Appeal, Division One. *See, e.g., Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Board*, 35 Cal. 4th 1072, 1084 (2005) ("a written agreement (commonly termed a memorandum of understanding) entered into under the MMBA becomes binding and enforceable when the public agency employer ratifies it"); *Voters for Responsible Retirement v. Board of Supervisors of Trinity Co.*, 8 Cal. 4th 765, 824 (1994) ("Once the governing body approves the memorandum of understanding, it then becomes binding on both parties"); *National City Police Officers' Ass'n v. City of National City*, 87 Cal. App. 4th 1274, 1278 (2001) ("MOU's are binding agreements between local agencies and designated employee representatives"); *American Federation of State, County and Municipal Employees, AFL-CIO, Local 330 v. County of San Diego*, 11 Cal. App. 4th 506, 513 (1993) ("if the memorandum is accepted by the governing body, it is enforceable"); *Chula Vista Police Officers' Ass'n v. Cole*, 107 Cal. App. 3d 242, 246 (1980) ("The memorandum once approved by the city council is binding upon the parties").

While the legal opinion you enclose attempts to skirt this established rule by suggesting that it applies only to expand, but not limit employee rights, that is not the case. MOUs are interpreted according to the rules applicable to all contracts, and the plain language controls. *National City Police Officers' Ass'n v. City of National City*, 87 Cal. App. 4th at 1278. The language of the 2005 MOUs could not be plainer: new hires are not eligible for DROP. The law will enforce that agreement to restrict, as well as to create employee benefits. *E.g., In re Work Uniform Cases*, 133 Cal. App. 4th 328, 336 (2005) (employees bound by MOU negotiation of work uniform allowances); *accord San Bernardino Employees Ass'n v. City of Fontana*, 67 Cal. App. 4th 1215, 1220 (1998) (a MOU is binding on both parties for its duration).

Because the City and SDCERS are bound to the 2005 MOUs, any action by SDCERS in contravention of the MOUs is *ultra vires*. The Board fulfills its mandate to properly administer the pension system only when it pays benefits to those members actually eligible for them.

McIntyre v. Santa Barbara County Employees' Retirement System, 91 Cal. App. 4th 730, 734-35 (2001). Thus, the Board fulfills its fiduciary duty by denying legally baseless claims for benefits, as well as providing benefits where proper. *Id.* SDCERS cannot use its authority to administer the pension system to override provisions of law adopted by the appropriate legislative authority. *E.g.*, *Westly v. California Public Employees' Retirement System Board of Administration*, 105 Cal. App. 4th 1095, 1102, 1107-1109 (2003).

C. The Legislature Expressly Made the Conforming Municipal Code Change Retroactive

In all events, San Diego Municipal Code Section 24.1402.1 conforms precisely to the provisions of the binding MOUs, and confirms the intent of the 2005 MOUs. Section 24.1402.1 states: "Members hired or assuming office on or after July 1, 2005, may not participate in DROP." Although the legal opinion you enclose fails to mention this point, the law is clear that legislation will have retroactive effect if such is the clear intent of the statute. *E.g.*, *Marriage of Bouquet*, 16 Cal. 3d 583, 587 (1976); *Mannheim v. Super. Ct.*, 3 Cal. 3d 678, 686-87 (1970). This ordinance is retroactive on its face—expressly impacting and governing employees hired on or after July 1, 2005. Because the legislative body plainly has the authority to make a statute retroactive, *id.*, and because the Council did so here, SDCERS is violating not only the City's contractual obligations, but the City Municipal Code, with its current interpretation.

D. There Can Be No "Vested Right" to a Benefit that Never Arose

Your letter and the enclosed opinion attempt to avoid the plain language of the MOUs and the retroactivity of the statute by suggesting that the Council could not "retroactively" impair "vested rights" to participate in DROP. What this ignores, however, is that for a right to be vested, there must be a right created in the first instance. Under the binding MOUs, there was no vested right (or any right) to participate in DROP for employees hired on or after July 1, 2005—they are not eligible. Because no right existed or arose, the later statute confirming that change does not impair any such "right." *San Bernardino Employees Ass'n v. City of Fontana*, 67 Cal. App. 4th 1215, 223-24 (1998) (benefits provided in earlier collective bargaining agreements and set forth in MOUs did not give rise to vested rights; they expired with the prior MOUs according to their terms); *see also Crumpler v. Board of Administration Employees' Retirement System*, 32 Cal. App. 3d 567, 585-86 (1973) ("no vested right in an erroneous classification").

Moreover, the DROP program was an employee benefit, not a retirement benefit, and the vested rights analysis is inapplicable. For this reason, and many others, the City may also terminate the DROP program retroactively as to existing employees should it so elect, in addition to the action taken in the 2005 MOUs as to new hires. *See, e.g.*, *Palaske v. City of Long Beach*, 208 Cal. App. 2d 120, 132 (1949); *Houghton v. City of Long Beach*, 164 Cal. App. 2d 298, 308 (1958); *Allen v. City of Long Beach*, 101 Cal. App. 2d 15, 18-19 (1951); *Allstot v. City of Long Beach*, 104 Cal. App. 2d 441, 445 (1951). *See also Robertson v. Kulongoski*, 466 F.3d 1114, 1116-19 (9th Cir. 2006).

In sum, the position that you have taken on behalf of SDCERS on this issue and the overall issue of the City Attorney's role as SDCERS lawfully constituted attorney is contrary to the express intent of the City Council, and of the City employees acting through their representatives, as set forth in their written contracts executed, ratified and approved in 2005. If you do not withdraw your erroneous position, in writing, the City will have no choice but to pursue its legal remedies to halt SDCERS' unlawful actions, which not only usurps the Council's lawful authority to set benefits and negotiate MOUs, but also interferes with the City's contractual relationship with its employees. I am hopeful that you will reconsider your unfounded position.

Very truly yours,

MICHAEL J. AGUIRRE, City Attorney

cc: Honorable Mayor Jerry Sanders and Members of City Council
SDCERS Board Members
David B. Wescoe, Retirement Administrator
Jay Goldstone, Chief Financial Officer and Acting Chief Operating Officer
Lisa Briggs
Scott Chadwick
William Gersten

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