



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Alex Gurza

SUBJECT: Proposed Ballot Measure-
Retirement Board Governance

DATE: July 24, 2014

Approved

Paula Artip

Date

7/25/14

RECOMMENDATION

- a. Council discussion and consideration of a Retirement Board Governance Modification ballot measure for the November 4, 2014, election;
- b. Adopt a resolution of the City Council calling and giving notice, on its own motion, for a Special Municipal Election to be held on November 4, 2014, to submit to the electors of the City of San Jose, the following measure:

“Retirement Board Governance

Shall the Charter be amended to (1) allow the Council to establish one or more Retirement Boards with specified authority, including, hiring an at-will chief executive, (2) specify the hiring authority of the Retirement Services chief executive; (3) exclude certain future Retirement Services employees from the classified civil service and the City’s defined benefit retirement plans; and (4) establish the process for setting stipends paid to non-employee Retirement Board members?”

1. Council discussion and consideration whether the full text of the proposed ordinance should be printed in the November 4, 2014, Voter’s Sample Ballot, pursuant to Elections Code 12111, to be incorporated in the resolution calling the election;
2. Council discussion and consideration of whether to permit rebuttal arguments in the November 4, 2014, Voter’s Sample Ballot, pursuant to Elections Code Section 9285, to be incorporated in the resolution calling the election;
3. Council discussion and consideration of whether to authorize the City Council or any member or members of the City Council to submit an argument in favor of the City measure on the November 4, 2014, Voter’s Sample Ballot, pursuant to Elections Code Section 9282, to be incorporated in the resolution calling the election; and
4. Direct the City Clerk to take all actions necessary to place this measure for a November 4, 2014, Special Municipal Election, if needed.

BACKGROUND

Cortex Phase I

In 2009, the City engaged Cortex Applied Research, Inc., to review the Retirement Boards' governance structure and a [report](#) was issued. A January 26, 2010, Council memo entitled, "[Retirement Board Governance](#)," outlined the recommended changes to Board structure and explained two different policy alternatives for City Council to amend the ways in which Board members were appointed. In 2010, the Council approved the "3-3-1" structure for the Federated City Employees' Retirement System Board and the "4-4-1" structure for the Police and Fire Department Retirement Plan Board based on the [February 4, 2010 supplemental memo](#). These changes were considered Phase I in that they did not address all of the recommendations made by Cortex in their initial report.

Cortex Phase II

The Retirement Boards separately engaged Cortex in 2012 to provide an update on the consultant's initial report. Cortex conducted an analysis of the Board's governance models which included reviewing other public plans and interviewing Board members, staff, City Council and labor representatives. The resulting report provides 15 recommendations, based on the following categories:

- Authority of the Federated and Police and Fire Boards
- Safeguards for stakeholders
- Transparency and disclosure
- Risk oversight
- Scale and efficiency

In 2012, the Federated City Employees' Retirement System and the Police and Fire Department Retirement Board contracted with Cortex Applied Research to evaluate the boards' governance models and to provide recommendations for improvement. Cortex presented their [fifteen \(15\) recommendations](#) to the City Council on November 19, 2013. The Council directed the City Administration to develop a workplan on the implementation of the Cortex recommendations in time for a June or November election. At the January 22, 2014, Rules and Open Government Committee meeting, the City Administration brought forward a [strategic workplan](#) that included timelines for each election. The City Administration was directed to bring forward policy alternatives for the implementation of Cortex's recommendation. In February 2014, Cortex released an [addendum](#) to their original report that described the implication of the Measure B decision on the recommendations.

At the [March 4, 2014](#), City Council meeting, the City Administration recommended to the Council that policy alternatives should be explored that would not require a ballot measure. At that meeting, the Council directed the City Administration to go back to the Rules Committee with a workplan for the critical dates and timelines necessary to complete a retirement board governance ballot measure. The City Administration's workplan was taken to the [March 19, 2014](#) meeting of the Rules Committee. Subsequent to the Rules Committee meeting, Mayor

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Reed and Councilmember Constant brought forward a [memo](#) to the April 8, 2014, Council meeting that recommended that a City Charter amendment and ordinances be prepared to grant the retirement boards autonomy using the Council appointee model and to engage the stakeholders on the proposed retirement board governance changes. This direction was approved by the Council on April 8th. During the [June 17, 2014](#), City Council meeting, the Council provided direction for the City Administration to continue working on the ballot measure and to bring forward ballot measure language at the August 5, 2014, City Council meeting.

Current Department of Retirement Services Operational Structure

Except as otherwise provided elsewhere in the City Charter, the City Manager appoints all officers and employees of the City. As a result, the Director and Assistant Director of Retirement Services currently fall under the appointing authority of the City Manager. While this structure is consistent with the rest of the City's departments, the Department of Retirement Services' staff has a unique responsibility to provide services to the two retirement boards. This has created a situation where the Retirement Services staff reports to three different entities. Cortex reported that this reporting structure led to "an inefficient and challenging work environment for all parties."

In their report, Cortex also noted that the majority of public pension plan boards have the authority to appoint the chief executive officer of the plan. Cortex' research indicated that the 20 County plans under the 1937 Act, CalPERS, CalSTRS, and many other independent municipal plans have the appointing authority. In California, Cortex was only able to determine that Los Angeles City Employees' Retirement System and City of Los Angeles Fire and Police pensions where the appointment of the director is subject to confirmation by the Mayor and City Council.

Except as specifically excluded in the City Charter, City officers and employees participate in the City's retirement plans. The current Retirement Services staff participates in the City's defined benefit pension and retiree healthcare retirement plans. Again, although consistent with the other City departments, having employees who manage the retirement systems' assets belong to the same plan may appear to be a conflict of interest. In Cortex's report, described the systemic conflict as such, "[The employees] may occasionally be required to provide analysis and recommendations to the Board of [FCERS] or to other stakeholder on matters that affect their own personal pension benefits." Cortex's recommendation is that staff serving the retirement boards should not be entitled to receive benefits from either of the City's retirement systems.

Except as specifically excluded in the City Charter, City officers and employees participate in the City's civil service system. Currently, all employees other than the Director, Assistant Director and Deputy Director are part of the City's civil service system, meaning that they are subject to Civil Service Rules, including having due process rights. In addition, most of the employees in the Department of Retirement Services are represented by a bargaining unit. Cortex's recommendation is that the Retirement Boards be granted full authority to appoint, direct, evaluate, and, if necessary, terminate their own staff and the authority to set compensation levels and determine other human resource policies in connection with their staff. Cortex stated

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that if the above recommendations are accepted, retirement staff would no longer be hired by or accountable to the City Manager and would not be subject to the civil service rules of the City.

Timeline

The City Council must approve putting a ballot measure before the voters 88 days in advance of the election in November. The election date is November 4, 2014, and 88 days prior to that date is August 8, 2014. Therefore, in order to put a ballot measure on for a November 4, 2014, election, the City Council must decide to put this matter on the ballot at its Council meeting scheduled for August 5, 2014.

Stakeholder Outreach

As part of the Council direction from the April 8th meeting, the City Administration engaged the stakeholders through public stakeholder meetings and discussions with the bargaining units. Two public stakeholder meetings were held that featured a presentation on the current structure of the retirement boards, Cortex's recommendations, and the proposed retirement board governance changes as directed by Council. These meetings were held on May 28 and May 29, 2014.

The comments made by the stakeholders at these meetings were summarized in an [Information Memorandum](#) dated June 2, 2014. The vast majority of the speakers were City employees, retirees and union representatives. The majority of the speakers opposed any change to the retirement board structure and governance and felt that the current system was not "broken" and therefore, no change was needed. There was very little opposition to the proposed change to the reporting structure where the CEO and CIO would report directly to the Boards and they could hire, fire, and compensate them, other than concerns about the impact to the retirement plans' funds and the salaries of other staff if compensation for the CEO and CIO were at high amounts. Additionally, there were several requests for clarification regarding the recommendations provided in the Cortex report to the Boards and the subsequent City Council direction.

Meet and Confer

Pursuant to the original direction from the City Council to amend the City Charter so that new employees hired into the Department of Retirement Services would not become members of the City's retirement system or hold classified status, the City provided advance notice of the ballot measure to the bargaining units who represented classifications in Retirement Services. The City Administration met separately with MEF, CEO and CAMP to discuss the potential impacts that these changes would have on the employees they represent in Retirement Services. MEF, CEO and CAMP expressed concerns with the changes to the representation, classified status, and eligibility for retirement benefits.

A draft ballot measure was provided to the eleven (11) bargaining units on June 5, 2014, that contained the above amendments to the City Charter and others that may be subject to meet and confer, which included:

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- Increasing the Federated Board from seven (7) to nine (9) members
- Employees and retirees directly appointing the employee and retiree representatives of both Boards
- At least one of the employee and retiree Board members must meet the minimum qualifications of an independent member
- All staff in the Department of Retirement Services would become unclassified and unrepresented, by attrition and not part of the City's Retirement Plan

One of the issues that arose during the discussion related to the proposed ballot measure was what items were subject to the meet and confer process (negotiations) with the City's bargaining units. The initial draft of the ballot measure had items in it that were subject to the meet and confer process, such as the changes impacting the employees in the Department of Retirement Services.

Due to the response of the stakeholders at the public meetings and the meetings held separately with the bargaining units regarding the June 5, 2014, draft ballot measure, the City revised the draft ballot measure to contain only the items from the Council direction that were not subject to the meet and confer process on June 11, 2014, and the four items above were removed from the ballot measure. However, the City indicated an interest in continuing to discuss those issues.

A further revised draft ballot measure was provided to the bargaining units on June 20, 2014. This revised version contained edits mentioned verbally at the June 11, 2014, Council meeting. These changes included removing the last sentence of Section 810(d) regarding the administrative expenses of the plan, changing Section 810.1(e) to consider the total compensation of equivalent positions in other public pension plans, and clarifying that non-employee Board members will be eligible for the stipend. Responses to this version of the ballot measure were received by six out of the eleven bargaining units, the San Jose Police Officers' Association, the San Jose Fire Fighters IAFF Local 230, the Association of Engineers and Architects, City Association of Management Personnel, Association of Maintenance Supervisory Personnel and International Union of Operating Engineers, Local 3. In addition, concerns were received from the Association of Retired San Jose Police Officers and Firefighters. The concerns raised are addressed below. In addition, the six bargaining units where feedback has been received since June 20, 2014, are still contending that what remains in the ballot measure is also subject to meet and confer. However, the current version of the ballot no longer contains items the City believes are within the scope of bargaining.

The POA has also filed a grievance over this issue. The City and the POA are proceeding through the grievance process over this issue.

Key Elements of Proposed Changes

Proposed Changes Related to Retirement Services Staff

The ballot measure contains an amendment to the City Charter that the two retirement boards will jointly appoint the Director (Chief Executive Officer) and Assistant Director (Chief Investment Officer). This change grants the Boards the authority to hire, fire, discipline, and evaluate the Director and Assistant Director. The CEO will become the Appointing Authority for employees in the Department of Retirement Services, and they are comprised mostly of classified and represented employees. Therefore, the CEO will have the authority to hire, fire, discipline, compensate and evaluate the Retirement Services staff, subject to the City Charter, Municipal Code, including the Civil Service Rules, applicable labor agreements, and any applicable City policies and procedures.

Neither the City Council nor the City Manager will have the authority to hire or fire anyone employed by the Boards or the CEO. This change serves to improve the operations of the Retirement Services by aligning the reporting structure with other public pension plans and streamlining the chain of command. This change would provide the Retirement Boards with “Appointing Authority” in the City Charter, similar to the City Attorney and the City Auditor. Like the other Council Appointee offices, the Office of Retirement Services will utilize the City’s internal administrative services, such as Finance for payroll and Human Resources for human resources related matters.

Additionally, the ballot measure contains language regarding setting the total compensation for the Director, Assistant Director and professional investment classifications (currently the Investment Officer classification). It should be noted that since the Retirement Boards will become an Appointing Authority of the City Council, the ballot measure does not grant them the sole discretion to set compensation. If the Boards want to increase the total compensation outside of the current salary ranges and benefits, they would need to make a recommendation to the City Council and any changes to the total compensation would need to be approved by the City Council. This is in accordance with Charter Section 902 which states that the compensation of all City appointive officers and employees shall be fixed by the Council. The effective change is that the City Manager will no longer be involved in this process as the Boards can go directly to the City Council. In considering the total compensation for these positions, the Boards shall consider the total compensation for an equivalent position in a comparable United States pension plan in making a recommendation. This is an additional safeguard for the stakeholders.

The Director, Assistant Director and professional investment classifications (currently the Investment Officer classification) are also modified in the ballot measure. New employees hired into the above positions after the implementation date would not participate in the City’s defined benefit pension or retiree healthcare retirement plans to avoid the systemic conflict of interest. Any persons currently holding these positions would be able to remain in their current retirement plan. While the Director and Assistant Director positions are already unclassified, this change would also make professional investment classifications (currently the Investment Officer classification) unclassified and therefore “at will.” It should be noted that the ballot measure contains the language “at the pleasure of,” which is similar to language used in the City Charter

for other Council appointees. “At the pleasure of” is synonymous with “at will.” The Board(s) would have the authority to suspend without pay, demote or discharge anyone in these classifications as is the case for any other at will employee.

Proposed Changes Related to Administrative Expenses

The ballot measure amends the City Charter section that currently outlines the process for the Council Salary Setting Commission. In the new section, the term “Council” is removed from the Charter and the responsibility of recommending the stipend for the non-employee Board members is given to the newly titled Salary Setting Commission. It is important to note that the language in the ballot measure ensures that only non-employee Board members would be eligible for a stipend. Concerns have been raised that this gives the Salary Setting Commission the authority to set the stipend for the non-employee Board members. It should be noted that the proposed Charter language does not change the City Council’s ultimate authority to set the stipend for Board members. The Salary Setting Commission would make a recommendation to the City Council, who would then set the stipend for the non-employee Board members, which is paid out of the Retirement Fund, pursuant to San Jose Municipal Code Section 2.08.1270.

Based on one of the Cortex report recommendations, the ballot measure also grants the Boards the authority to appoint their own legal counsel. In the current structure, the City Attorney’s Office procures legal counsel for the Board. Cortex believed this change would increase the efficiency of the retirement systems.

Administrative Practices

Although the Boards are currently subject to transparency legislation, including the Brown Act and the City’s Open Government rules, the City Charter amendment codifies that the Retirement Boards shall comply with all open and public meeting requirements. Currently, the Council appoints all members of the Boards. Certain positions on the Boards are appointed after recommendations from specific employee and retiree groups. The Council would retain the ability to appoint the majority of the Board members and approve the Boards’ adopted operating budgets. The intent is that the same budget that is approved now by the City Council would be approved in the future if the Boards become an appointing authority, which is the operating budget.

Other Issues

Concerns have been raised that the ballot measure allows the City Council to establish one or more Boards and that this gives the City Council authority to combine the Boards into one. It is important to note that the City Council already has the authority to establish retirement boards and has created two such Boards. This authority is pursuant to City Charter Section 1002, which states, “...the Council may create such other boards and commissions as in its judgment are required.” The proposed Charter language would not change the status quo and the two existing Boards would remain in place under these Charter changes. In addition, it is important to note City Charter Section 1502 which states, “...the City, by and through its Council, is hereby empowered, but not required, to join or continue as a contracting agency in a retirement or

pension system.” Under this Charter section, the Council could contract with another eligible retirement system.

It is important to set out the establishment of the board or boards in the draft ballot measure since section 810(a) is to provide context for the later sections of the draft ballot measure referencing the retirement boards. These sections were not written for the purpose of changing the current number of retirement boards at this time, although Cortex recommended such a change.. In the future if the Council were to decide to change the number of Boards and, to the extent that any changes to the number of Boards would be subject to the meet and confer process, the City would have those discussions with the appropriate bargaining units. This would also be discussed with all stakeholders and established by ordinance.

In addition, a concern was raised regarding the language that the City Council would appoint the majority of the Board. This is also not a change in the status quo pursuant to City Charter Section 1002, which states that the members of the Boards, “...shall be appointed by the Council or by the Mayor if such is authorized by the Council, for such terms as the Council may deem advisable.” Thus, the City Council currently appoints *all* Board members. This section would allow the Council to appoint less than all of the members of the retirement boards.

Another concern was raised that there may be conflicts with current and future Board member fiduciary responsibilities under the California Constitution and the provisions of the Pension Protection Act. However, San Jose Municipal Code Sections 3.28.350 and 3.36.540 provide that the Boards discharge their duties in a manner consistent with the California Constitution and the Pension Protection Act.

Ballot Measure Rebuttal Arguments

If the City Council wishes to allow rebuttal arguments to the ballot measure, then the resolution calling for the Charter amendment to be placed on the November 4, 2014, election ballot will provide for rebuttal arguments pursuant to Elections Code 9285. If allowed by the City Council, the City Clerk may accept rebuttal arguments from either the author(s) of a primary argument in support of or in opposition to a ballot measure, or any other person(s) authorized in writing by the author(s) to submit a rebuttal argument. Rebuttal arguments may not exceed 250 words and may be signed by no more than five (5) persons.

Councilmember Argument

If the Council wishes to permit an individual Councilmember or group of Councilmembers to submit an argument for or against the City measure, Elections Code 9282 requires the City Council provide specific authorization to do so.

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PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1,000,000 or greater. **(Required: Website Posting)**

- Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**

- Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This does not meet any of the above criteria but will be posted on the August 5, 2014, City Council Agenda.

COORDINATION

This memo has been coordinated with the City Clerk's Office and the City Attorney's Office.

COST SUMMARY/IMPLICATIONS

The City Clerk will issue a separate memorandum which provides the ballot measure costs and the associated budget.



Alex Gurza
Deputy City Manager

For questions, please contact Alex Gurza, Deputy City Manager, at (408) 535-8155.