

**SENT VIA EMAIL**

September 20, 2011

Yolanda Cruz  
President  
Municipal Employees' Federation (MEF),  
AFSCME Local 101

LaVerne Washington  
President  
Confidential Employees' Organization (CEO),  
AFSCME Local 101

Tom Brim  
President  
Association of Building, Mechanical and  
Electrical Inspectors (ABMEI)

William H. Pope  
Business Representative  
International Union of Operating Engineers,  
Local No. 3 (OE#3)

Dan Rodriguez  
Business Agent  
International Brotherhood of Electrical  
Workers, Local No. 332 (IBEW)

**RE: Letter Dated August 31, 2011**

Dear Bargaining Unit Representatives:

We are writing in response to your letter dated August 31, 2011, which attached a letter from the Legislative Counsel Bureau. Your letter and the letter from the Legislative Counsel Bureau are enclosed. Please also find enclosed the City Attorney's Office response to the Legislative Counsel Bureau.

Sincerely,



Alex Gurza  
Deputy City Manager

cc: Nancy Ostrowski, Sr. Business Representative IFPTE Local 21  
John Mukhar, AEA IFPTE Local 21 President  
Cay Denise Mackenzie, CAMP IFPTE Local 21 President  
Dale Dapp, AMSP IFPTE Local 21 President  
George Beattie, POA President  
Robert Sapien, San Jose Fire Fighters President  
Vera Todorov, ALP President

Enclosures

ASSOCIATION OF BUILDING,  
MECHANICAL AND ELECTRICAL  
INSPECTORS (ABMEI)



August 31, 2011

VIA EMAIL & HAND DELIVERY

Honorable Mayor and City Council  
200 E. Santa Clara Street  
San Jose, CA 95113

Dear Mayor Reed and Council Members:

On August 10, 2011, the Legislative Counsel Bureau issued an opinion clearly stating that the City of San Jose does not have the authority to declare a Fiscal and Public Safety Emergency due to ongoing budget shortfalls. It further stated that charter amendments to limit retirement benefits for current city employees and retirees – as proposed in the July 5, 2011 draft proposed ballot measure - would clearly violate the California and United States Constitutions. This follows a similar opinion released by the State Attorney General's office highlighting the legal weakness of the proposed State of Emergency.

Given the overwhelming evidence that the City of San Jose lacks the legal authority to enact a State of Emergency and pension measures as proposed, we request that you officially withdraw these proposals.

We all recognize the budget challenges facing the City of San Jose, and are united in our commitment to addressing these issues in a constructive, fair, open and legal manner. Our goal is to develop solutions to the budgetary problems facing the city, while simultaneously maintaining vital city services and protecting the rights of the city workforce. As you are aware, we have made substantive proposals to address unfunded pension liabilities, including the development of a 2<sup>nd</sup> tier for new employees, a cap on total pension payouts, and triggers to increase contribution rates and eliminate some COLA's should funding fall below 75%. These proposals will greatly reduce the volatility of pension funding going forward, and offers a shared sacrifice to ensure a healthy pension plan.

Continued efforts to advocate for proposals that clearly violate the California and United States Constitutions is at best a distraction to developing real and realistic solutions to the budget difficulties, and at worst will result in delay, increased antagonism with your workforce, and costly

legal fights at the taxpayers expense. To date, the Legislative Council Bureau has stated your proposals are unconstitutional, the State Attorney General's office has indicated similar concerns, and CalPERS has recently issued a report highlighting the legal protections to which current workers and retirees are entitled. The only legal argument supporting the City proposals comes from a law journal article authored by the same firm currently under contract with the City to conduct labor negotiations.

Should you continue with your advocacy for these suspect proposals, we believe city workers and all San Jose residents deserve an explanation clearly articulating why you believe the Legislative Council, State Attorney General's office and CalPERS opinions are all in error, including your legal justification and citations. Failure to provide such information can only be viewed as indications that these proposals are politically motivated, and evidence that the City is more interested in blaming others for the challenges we face, rather than working together to resolve the budget issues and properly serve all San Jose residents.

We eagerly await your response.

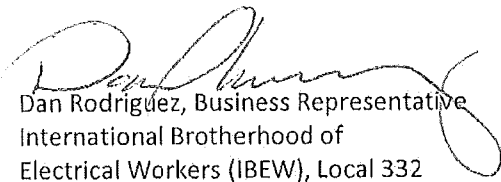
Sincerely,



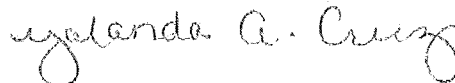
Tom Brim, President  
Association of Building, Mechanical  
and Electrical Inspectors (ABMEI)



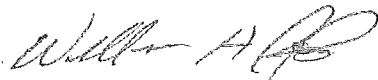
LaVerne S. Washington, President  
Confidential Employees' Organization (CEO),  
AFSCME Local 101



Dan Rodriguez, Business Representative  
International Brotherhood of  
Electrical Workers (IBEW), Local 332



Yolanda A. Cruz, President  
Municipal Employees' Organization (MEF),  
AFSCME Local 101



William H. Pope, Business Representative  
Operating Engineers, Local 3

CC: Charles E. Allen, Business Agent, AFSCME Local 101



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August 10, 2011

Honorable Paul Fong Room 5135, State Capitol

LOCAL FISCAL EMERGENCY: CONTRACTS - #1123253

Dear Mr. Fong:

You have asked us whether the City of San Jose may act under the California Emergency Services Act (Ch. 7 (commencing with Sec. 8550), Div. 1, Title 2, Gov. C.)<sup>1</sup> to validly declare a local emergency based upon a chronic budget deficit caused by rising employee retirement costs, and use the emergency powers under the act to limit retirement benefits for current and future city employees and retirees. If the act does not authorize this declaration and use of emergency powers, you have asked whether proposed amendments to the City of San Jose's charter, that would limit the retirement benefits of current and future city employees and retirees, would violate the prohibitions in the California and United States Constitutions against the impairment of contracts.

By way of background, the facts presented to us are that on May 13, 2011, the Mayor of the City of San Jose sent a memorandum to the City Council of San Jose declaring his intent to declare a fiscal and public safety emergency that "describes the necessity of making fiscal reforms to avert a fiscal disaster, prevent substantial degradation of public safety and other vital city services, and maintain the integrity of our retirement system so that earned and accrued benefits can be paid to current and future retirees" (Memorandum, Mayor of the City of San Jose to the San Jose City Council, May 13, 2011, p. 1; hereafter memorandum). In support of this proposal, the memorandum states that the rising cost of retirement benefits to city employees had grown dramatically, and that this increase has led to millions of dollars in unfunded liabilities that must be addressed (Id., at pp. 5-6). Specifically, the memorandum states that the cost of retirement could reach \$650 million by 2016, which would result in the city having to lay off a substantial number of workers (Ibid.).

<sup>1</sup> All further section references are to the Government Code, unless otherwise indicated.

Honorable Paul Fong --- Request # 1123253 --- Page 2

In order to alleviate this problem, the mayor proposed to amend the city charter to impose various limitations on the retirement benefits of both current and future employees and retirees (Ibid.). We have not been provided with the exact text of those proposals. Nor have we been provided with any independent assessment of the fiscal health of the City of San Jose. Therefore, for the purposes of this opinion, we will assume that the memorandum is accurate, and that the memorandum states the asserted rationale for an emergency declaration.

#### I. Exercise of Emergency Powers

As a general matter, a city has only those powers expressly or impliedly granted to it by the Legislature or the California Constitution (Secs. 1 and 7, Art. XI, Cal. Const.; *Coffineau v. Eu* (1977) 68 Cal.App.3d 138, 142). The California Constitution grants a city authority to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws" (Sec. 7, Art. XI, Cal. Const.). Also, in the case of a city that has adopted a charter for its governance, the charter and local ordinances adopted thereunder prevail over conflicting state statutes with respect to matters that are municipal affairs (subd. (a), Sec. 5, Art. XI, Cal. Const.).

With respect to emergency powers, the California Emergency Services Act (Ch. 7 (commencing with Sec. 8550), Div. 1, Title 2, Gov. C.; hereafter CESA) grants local government entities limited powers in the event of a duly declared emergency. The CESA is a statutory scheme that grants to the Governor and local government entities the authority to declare certain types of emergencies, with certain powers flowing from any such declaration. The Governor's powers under the CESA are broad and extensive, and include the power to exercise all police power vested in the state. The CESA specifically authorizes the Governor to make, amend, and rescind orders and regulations; to suspend statutes, rules, and regulations; to direct the activities of state agencies to carry out the CESA, that is, to mitigate the emergency situation identified in the proclamation; to acquire property; and to cooperate and contract with public and private agencies for the performance of certain acts (see Secs. 8550, 8565, 8567, 8571, 8627, 8628, and 8646). In contrast, a local government's powers under the CESA are more limited and include the power to provide mutual aid to an affected area (Sec. 8631), and to "promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety" (Sec. 8634).

In order for these emergency powers to be triggered, the local government entity is required to declare a valid local emergency as defined by the CESA. The CESA defines a local emergency as follows:

"(c) 'Local emergency' means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning

of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission." (Emphasis added.)

In addition to the requirements set out above, the CESA describes a local emergency declaration that may be made under its provisions as being made with regard to a temporary condition (see Sec. 8630). In this respect, the CESA provides that a "local emergency" must be declared by the local governing body or by an official designated by ordinance adopted by that governing body (Sec. 8630). If a local emergency is declared by an official designated by ordinance, it may not remain in effect for more than seven days unless ratified by the governing body. Once adopted, the emergency declaration must be reviewed by the governing body every 14 days but no less than every 21 days, and the governing body must terminate the local emergency at the earliest possible date (subs. (b), (c), (d), and (e), Sec. 8630).<sup>2</sup> In addition, Section 8631 authorizes political subdivisions to have full power to provide mutual aid to any affected area "in periods of local emergency" (emphasis added).<sup>3</sup>

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<sup>2</sup> Section 8630 states as follows:

"8630. (a) A local emergency may be proclaimed only by the governing body of a city, county, or city and county, or by an official designated by ordinance adopted by that governing body.

"(b) Whenever a local emergency is proclaimed by an official designated by ordinance, the local emergency shall not remain in effect for a period in excess of seven days unless it has been ratified by the governing body.

"(c) (1) The governing body shall review, at its regularly scheduled meetings until the local emergency is terminated, the need for continuing the local emergency. However, in no event shall a review take place more than 21 days after the previous review.

"(2) Notwithstanding paragraph (1), if the governing body meets weekly, it shall review the need for continuing the local emergency at least every 14 days, until the local emergency is terminated.

"(d) The governing body shall proclaim the termination of the local emergency at the earliest possible date that conditions warrant."

<sup>3</sup> For example, the Attorney General has opined that a needle exchange program would not qualify as a local emergency because the harm intended to be prevented by it, the AIDS epidemic, is not essentially temporary in nature (78 Ops. Cal. Atty. Gen. 171).

In sum, we think that a situation is a local emergency within the meaning of the CESA if it is (1) a condition of disaster or extreme peril to the safety of persons and property that is within the territorial limits of a city, county, or city and county, (2) caused by a condition similar to the ones enumerated in Section 8558, (3) of a temporary nature, (4) beyond the control of the resources of the political subdivision, (5) requires the combined forces of other political subdivisions to combat, and (6) declared by the local governing body.

Applying the above-stated factors to the question of whether the City of San Jose may validly declare a local emergency within the meaning of the CESA because of a chronic budget deficit caused by rising employee retirement costs, the fundamental issue raised is whether any of the resulting consequences that are asserted in the mayor's memorandum qualify as a condition of "disaster or of extreme peril to the safety of persons and property" within the territorial limits of the city. In some limited circumstances, the asserted consequences of a severe fiscal crisis may result in such a clear risk to public health and safety such that they could support the declaration of an emergency under the CESA. For example, in the case of *California Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802 (hereafter *Schwarzenegger*), inadequate funding and a surge in prison population led the Governor to proclaim a state of emergency under the CESA based on overcrowding in the state's prisons. In the litigation, it was contended that a state of emergency could not be proclaimed because the basis of the emergency, prison overcrowding, was entirely within the control of the government to correct (*Id.*, at p. 811). Rejecting this argument, the Court of Appeal held that the Governor was authorized to proclaim a state of emergency under the CESA whenever "a condition of extreme peril to the safety of persons and property exists 'within the state,' even [where the basis for that condition arose from] an area under the exclusive control of the state government" (*Id.*, at p. 813). In reaching that conclusion, the court found that the chronic overcrowding in the state prisons lead to direct and immediate risks to the public by increasing the likelihood prisoners would be released earlier, increasing the spread of infectious disease, and potentially contaminating groundwater (*Id.*, at pp. 818-820).

By way of analogy, an argument may be made that if the City of San Jose is unable to meet its retirement-related budget obligations, the city would be unable to provide its residents with essential services, the absence of which could imperil their health and safety. In this connection, the mayor's memorandum described the "substantial degradation of public safety and other vital city services" that would result if retirement benefits to current city employees and retirees are not limited. In our view, however, this analogy is not appropriate because the asserted risk posed to the health and safety of the residents of the City of San Jose is far more attenuated in this instance than was the case with the conditions contemplated in the *Schwarzenegger* decision. Unlike in *Schwarzenegger*, the memorandum does not state that, if the city fails to act immediately, specific events would occur that would pose direct and severe risks to the health and welfare of the residents of the city. This reading is consistent with other portions of the memorandum, that state that the declaration was due to rising employee retirement costs, and that the proposed actions are necessary to "preserve the retirement benefit levels" of employees, and to prevent "jobs and services" from being

"decimated" (memorandum, supra, at p. 1). Although the memorandum generally discusses employee benefit levels and city jobs and services, it does not state that if immediate action is not taken, the decline in these items, however severe, will result in a particular disaster or a condition of extreme peril to the health and safety of the residents of the City of San Jose. As such, we think that, as a threshold matter, the chronic budget deficit caused by retirement-related expenses described in the memorandum would not qualify as a disaster or a condition of extreme peril as required by the CESA.

Furthermore, as stated above, the declaration of a local emergency within the meaning of the CESA is reserved for the rendering of mutual aid under circumstances where the emergency conditions associated with a disaster or condition of extreme peril to persons and property are, or are likely to be, beyond the capacity of the services, personnel, equipment, and facilities of a political subdivision and require the combined forces of other political subdivisions to combat (subd. (c), Sec. 8558; Sec. 8631). For example, if a city is decimated by an unexpected serious earthquake, that city likely does not have the resources to combat that disaster on its own. However, in this case, the memorandum has not asserted a particular disaster or condition of extreme peril necessarily requiring a regional response, but has instead asserted a fiscal crisis particular to the City of San Jose that may be solely addressed by that city pursuant to various options. For example, it could cut existing services, raise additional revenue, seek aid from the state or the federal government, or, if all of those options failed, it could declare bankruptcy (see 11 U.S.C. 901 and following). Fundamentally, a city fiscal crisis, as opposed to a particular disaster or condition of extreme peril to persons or property, does not appear to be an emergency condition that is contemplated by the CESA as requiring, on some temporary basis, mutual aid from other political subdivisions in the region. Indeed, the memorandum does not state that the City of San Jose requires the aid of other political subdivisions to confront this crisis, nor does it mention any plans to seek aid from other political subdivisions.

Therefore, we conclude that a chronic budget deficit caused by retirement-related employee expenses, and asserted resulting reductions in employee benefits and city services, would not qualify as a local emergency under the CESA, as a municipal fiscal crisis and these asserted consequences are not a disaster or a condition of extreme peril to persons or property that is beyond the control of the city or requires mutual aid from other political subdivisions in the area.

## II. Amendment of City Charter

We turn to the issue of whether proposed amendments to the City of San Jose's charter, that would limit the retirement benefits of current and future city employees and retirees, would violate the prohibitions in the California and United States Constitutions



Honorable Paul Fong — Request # 1123253 — Page 6

against the impairment of contracts.<sup>4</sup> In the case of existing employees, the proposed amendments would make various modifications to retirement benefits, including revising the rate at which benefits accrue to the employees, increasing the age at which certain employees may retire, and increasing the number of years of service required to qualify for retirement health benefits (*Ibid.*). With respect to future employees, the proposed amendments would require a retirement program that consists of "a hybrid plan that may consist of a combination of social security, defined benefits or defined contributions[, with a] maximum city contribution of not ... less than 6.2% nor greater than 9% of base salary or 50% of the cost of the benefits, whichever is less" (*Ibid.*). In addition, the proposed amendments would also modify the retirement benefits of existing and future retirees to slow the rate of increase in benefit payments, and restrict the payment of bonuses. We have not been provided with the specific language of the proposed city charter emergency authority or retirement benefit modifications. Accordingly, our answer is general in nature, and based on the general information provided in the memorandum.

As a threshold matter, we note that a public employee's pension has long been held by the courts in this state as constituting an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863; *California Teachers Assn. v. Cory* (1984) 155 Cal.App.3d 494, 506). A proposal to revise existing pension benefits with respect to current employees covered by a pension plan, or to modify the pension benefits of former employees currently receiving those benefits, raises the constitutional issue of impairment of contract.

Both the United States and California Constitutions contain express prohibitions against any law "impairing the obligations of contracts" (Sec. 10, Art. I, U.S. Const.; Sec. 9, Art. I, Cal. Const.). The contract clause analysis is the same under either the California Constitution or the United States Constitution because the California Supreme Court uses the federal contract clause analysis to determine whether a statute violates the parallel provision in the California Constitution (*Campanelli v. Allstate Life Ins. Co.* (9th Cir. 2003) 322 F.3d 1086, 1097, citing *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805). The United States Supreme Court has held that the prohibition against impairment of the obligation of contracts is not absolute in that "its prohibition must be accommodated to the inherent police power of the State" to protect the vital interests of the people of the state (*Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 410; hereafter *Energy Reserves Group*).

The threshold inquiry in determining whether a law would violate the contract clause is whether that law substantially impairs a contractual relationship (*Id.*, at p. 411). To

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<sup>4</sup> We have not been asked to opine whether a city charter provision that authorizes the declaration of a city fiscal emergency and, in response, the modification of retirement benefits of current city employees or retirees, would address a municipal affair, such that this authority and actions taken under that authority would prevail over any conflicting state statute.

make this determination, the courts must first determine whether there is a contractual relationship between the parties that would be impaired by the law in question and, if so, whether that impairment is substantial (*General Motors Corp. v. Romets* (1992) 503 U.S. 181, 186).

If it is determined that the law substantially impairs a contractual relationship, the government must demonstrate a "significant and legitimate public purpose behind the regulation [citations], such as the remedying of a broad and general social or economic public problem" (*Energy Reserves Group*, supra, at pp. 411-412). Finally, if a significant and legitimate public purpose is identified, the court must determine whether the law in question provides a reasonable means to address that significant and legitimate public purpose (*Id.*, at p. 412; *U.S. Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 25-26; hereafter *U.S. Trust*). Because of the interrelationship between these last two steps, courts sometimes examine these factors together. Thus, an act that substantially impairs the obligations of a contract is permissible if the impairment is both reasonable and necessary to fulfill a significant and legitimate public purpose.

As to whether an impairment is necessary, courts have identified certain factors that are used by the courts to evaluate the sufficiency of the justification for an impairment of a contract. As stated by the Court of Appeal in *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, at pages 1154 and 1155 (hereafter *Board of Administration*), quoting *Valdes v. Cory* (1983) 139 Cal.App.3d 773, at pages 790 and 791:

"Both the California and United States Supreme Courts have identified factors which may warrant legislative impairment of vested contract rights on the grounds of necessity: '(1) the enactment serves to protect basic interests of society, (2) there is an emergency justification for the enactment, (3) the enactment is appropriate for the emergency, and (4) the enactment is designed as a temporary measure, during which time the vested contract rights are not lost but merely deferred for a brief period, interest running during the temporary deferment.'" (Emphasis added.)

A "higher level of scrutiny is required" when the legislative interference involves a public obligation, such as a government retirement program (*University of Hawai'i Professional Assembly v. Cayetano* (9th Cir. 1999) 183 F.3d 1096, 1107; hereafter *Cayetano*; see also, *Board of Administration*, supra, at p. 1154). Contract clause cases recognize that when the government is a contracting party, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake" (*U.S. Trust*, supra, at p. 26; see also *Energy Reserves Group*, supra, at pp. 412-413, and fn. 14, noting that a stricter level of scrutiny applies under the contract clause when a state alters its own contractual obligations). In order to survive strict scrutiny, the government bears the burden of establishing "a compelling interest for the impairment" (*Board of Administration*, supra, at p. 1155). To meet this burden, the government must show, among other things, that the impairment was necessary, and that no other "evident and more moderate course" of action [existed] that would serve Defendants' "purposes equally well" (*Cayetano*, supra, at p. 1107,

quoting *U.S. Trust*, supra, at p. 31). Moreover, a government agency cannot justify an impairment of contract if the "problem sought to be resolved by the impairment existed at the time the contractual obligation was incurred" (*Cayetano*, supra, at p. 1107, quoting *Massachusetts Community College Council v. Com.* (Mass. 1995) 649 N.E.2d 708, 713). In sum, an act that substantially impairs a governmental entity's own contractual obligations is unconstitutional unless the governmental entity can demonstrate that the impairment is both reasonable and necessary to fulfill a compelling public purpose.

Relying on these principles, several courts have held that a state or local government entity may not generally use a budget deficit to justify impairing employee contractual rights (see *Cayetano*, supra, at p. 1107). For example, in *Cayetano*, Hawaii attempted to address the state's budget deficit by deferring employee pay on six occasions (*Id.*, at p. 1099). The Ninth District Court of Appeals held that action was an unconstitutional impairment of the contractual rights of state employees because other more moderate options were available to address Hawaii's budget deficit, and Hawaii was aware of the budget crisis when it negotiated and entered into the collective bargaining agreements in question (*Id.*, at p. 1107).

Similarly, the California Supreme Court in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 (hereafter *Sonoma County*), at pages 304-306 and 313-314, considered whether a severe fiscal emergency would qualify to impair the obligations of contract on the grounds of necessity. In *Sonoma County*, following the approval of Proposition 13 at the June 6, 1978, statewide primary election (hereafter Proposition 13), local government entities faced a dramatic decrease in property tax revenue. In order to mitigate the effect of that decrease, the Legislature enacted Section 16280 of the Government Code that declared "null and void any agreement by a local agency to pay a cost-of-living increase in excess of that granted to state employees" (*Id.*, at p. 302). Various local government entities challenged this statute as violating contracts between those entities and their employees. The California Supreme Court held that a substantial impairment of the contract rights of local employees was found because "there was a 'severe, permanent and immediate change'" in the employees' rights under the contract (*Id.*, at p. 309). The state attempted to argue that this impairment was nonetheless justified because of the fiscal emergency created by Proposition 13. Specifically, the Legislature found that Proposition 13 would result in an average loss of revenues of nearly 22 percent, and that low level of funding would result in a substantial reduction in essential state services, and a higher unemployment rate (*Id.*, at pp. 309-310). However, the court rejected these findings, and instead held that, after one took into account the \$5 billion the state paid to local agencies to make up for the reduction in revenue, the actual reduction of revenues was only 6 percent. That reduction of revenues was insufficient to justify an impairment of contracts on the basis of necessity (*Id.*, at pp. 311-312).

In so holding, the California Supreme Court appeared to leave open the possibility that in some rare circumstance a declaration of fiscal emergency may authorize a state or local government entity to take certain limited actions to impair contractual obligations. However, the court appears to recognize this authority only narrowly. For example, the court noted

that even if an emergency was to be recognized, it must only last a limited period of time, and a court may decline to recognize the emergency if the "emergency ceases or the facts change even though valid when passed" (*Sonoma County*, supra, at p. 311, quoting *Home Bldg. & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 442). Moreover, the only case cited by the court that recognized this principle was *Subway-Surface Sup'rs Ass'n v. New York City Transit Authority* (1978) 375 N.E.2d 384 (hereafter *Subway-Surface*). In that case a New York court held that a statute deferring a wage increase provision in a collective bargaining agreement between a public agency and its employees did not violate the United States Constitution. In its discussion of *Subway-Surface*, the California Supreme Court in *Sonoma County* noted that in that case the employee organization conceded that "the fiscal emergency was so severe that the city could be forced to cease operating if the crisis was not relieved" (*Sonoma County*, supra, at p. 312). The court also noted that in *Subway-Surface* the wage increase was only deferred, and not eliminated entirely (*Ibid.*). However, even in that extreme instance, the California Supreme Court still "seriously [questioned] the New York court's rationale" (*Sonoma County*, supra, at p. 312). Therefore, the California Supreme Court in *Sonoma County* appeared to leave open only the limited possibility that a temporary unforeseen fiscal emergency, that is so severe that the city would cease to operate or be substantially unable to provide essential services if the emergency is not addressed immediately, may allow a state or local government entity limited authority to temporarily suspend certain contractual rights.

It follows that, if the loss of revenue to local agencies following the passage of Proposition 13 does not qualify as a fiscal emergency that would justify the impairment of contractual rights, then rising retirement costs caused by the past actions of the San Jose City Council likewise would likely also not qualify as a fiscal emergency that would allow the city, by amending its charter, to impair vested retirement benefits to which current city employees and retirees are contractually entitled. In that regard, the proposed charter amendments would include changing the rate of accrual of benefits, increasing the age to be eligible for retirement, slowing pension increases, and various other changes. It is our view that these changes would substantially impair the contractual rights of current city employees and retirees by interfering with contracted retirement benefits (see *Cayetano*, supra, at pp. 1104-1105, discussing a line of cases that show interfering with pay may cause a substantial impairment of contract). Accordingly, the proposed modification of retirement benefits of current employees and retirees would be unconstitutional, unless the city could demonstrate that the action is both necessary and reasonable to fulfill a compelling public purpose.

In this connection, the memorandum does not include reasons to justify the proposed modifications to retirement benefits within the standards applicable to the contract clause, as described above. As stated above, the memorandum speaks of the "substantial degradation of public safety and other vital city services," and states that the proposed modifications to retirement benefits are necessary in order to "preserve the retirement benefit levels" of employees and to prevent "jobs and services" from being "decimated" (memorandum, supra, at p. 1). The memorandum also states that if action is not taken to impose the proposed modifications to retirement benefits, the city would have to undertake

Honorable Paul Fong — Request # 1123253 — Page 10

staff reductions (*Id.*, at p. 5). However, unlike in *Subway-Surface*, the memorandum does not go so far as to state that if the proposed modification to retirement benefits are not implemented, the immediate impact on the city would be so severe that the city would cease to operate, or be substantially unable to provide essential services. Nor does the memorandum state that the proposed modifications to retirement benefits are the only option available to the city to address the chronic budget deficit. Accordingly, it is our view that, with respect to the retirement benefits of existing employees and retirees, the memorandum does not provide adequate findings to demonstrate that the proposed modifications to retirement benefits are a necessary and reasonable means of addressing the City of San Jose's chronic budget deficit, such that they would not be an unconstitutional impairment of contract.<sup>5</sup>

In support of this conclusion, we note that in *Sonoma County* the fiscal crisis invoked in that case was sudden, not caused by the state directly, and arguably was not contemplated at the time the employee contracts were entered into. Even in that case, the court held that these facts were not enough to avoid an impairment of contract. In contrast, the budget crisis facing the City of San Jose was arguably foreseeable and caused by the past actions of the San Jose City Council. In this regard, the memorandum states that retirement costs have been growing since the year 2000 (memorandum, *supra*, at p. 1). Accordingly, the City of San Jose could be found to have been aware of potential budget deficits when it entered into current contracts with city employees (*Sonoma County*, *supra*, at p. 1107).

In contrast to existing city employees and retirees, as to future city employees the impairment of existing contractual rights, as discussed above, would not be placed at issue by the proposed charter amendments, inasmuch as future employees are not yet parties to an

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<sup>5</sup> While the vested pension rights of public employees are protected, they are not immutable. "[V]ested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system" (*International Assn. of Firefighters v. City of San Diego* (1983) 34 Cal.3d 292, 300). The modifications are required to be reasonable and, to be sustained as reasonable, the "alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages" (*Id.*, at p. 301; see also *Board of Administration*, *supra*, at pp. 1132-1133). In this regard, a comparable advantage is one that generally relates to the benefit that has been diminished (*Frank v. Board of Administration* (1976) 56 Cal.App.3d 236, 244). Furthermore, "it is the advantage or disadvantage to the particular employees [sic] whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured" (*Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 449). In this regard, "it is for the courts to determine upon the facts of each case what constitutes a permissible change" (*Allen v. City of Long Beach* (1955) 45 Cal.2d 128, 131).

Honorable Paul Fong — Request # 1123253 — Page 11

employment contract with the City of San Jose. Not being parties to such a contract, future employees do not yet possess any entitlement under contract to city retirement benefits. Because there are no existing contractual rights to retirement benefits on the part of future employees, the City of San Jose may limit or otherwise modify retirement benefits that will be applicable to future employees without impairing any contractual obligations.

Therefore, it is our opinion that the proposed amendments to the City of San Jose's charter that would limit the retirement benefits of current and future city employees and retirees would substantially impair the contractual rights of current city employees and retirees, and that this impairment would violate the California and United States Constitutions because the mayor's memorandum does not provide findings that demonstrate that the proposed limitations on retirement benefits are necessary and reasonable to fulfill a compelling public purpose.

### III. Summary

Under the facts presented to us, the City of San Jose may not validly declare a local emergency under the California Emergency Services Act (Ch. 7 (commencing with Sec. 8550), Div. 1, Title 2, Gov. C.) based upon a chronic budget deficit caused by rising employee retirement costs. Nor may the city amend its charter to validly limit the retirement benefits to which current city employees and retirees are contractually entitled. The proposed limitations would substantially impair the contractual rights of current city employees and retirees, and this impairment would violate the California and United States Constitutions because the mayor's memorandum does not provide findings that demonstrate that the proposed limitations on retirement benefits are necessary and reasonable to fulfill a compelling public purpose.

Very truly yours,

Diane P. Boyer-Vine  
Legislative Counsel



By  
Daniel S. Vandekoolwyk  
Deputy Legislative Counsel

DSV:ktm

September 15, 2011

Diane E. Boyer-Vine  
Legislative Counsel  
925 L Street  
Sacramento, CA 95814

Re: Local Fiscal Emergency Opinion

Dear Ms. Boyer-Vine:

I was surprised to see the unprecedented Legislative Counsel opinion dated August 10, 2011 in response to Assemblymember Fong's request to review certain legislative actions regarding employee pensions currently under consideration by the City of San Jose. Your attempt to analyze the issues facing the City was based on a preliminary proposal made by the Mayor and the Council which is currently undergoing further analysis and discussion with local bargaining groups.

Your opinion considers assumptions and facts which were presented to you by parties outside the City. The letter states "(w) e have not been provided with the exact text of the proposal. Nor have we been provided with any independent assessment of the fiscal health of the City of San Jose." In fact, you did not discuss any aspect of the issues addressed in the response with anyone in the City. I find it difficult to believe that the Legislative Counsel would provide an analysis of the issues without confirming the basic facts and assumptions underlying those issues.

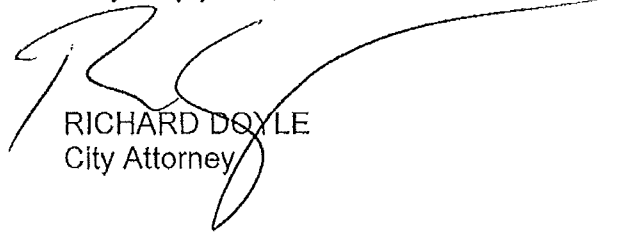
The foundation of your opinion is that the California Emergency Services Act ("CESA") is inapplicable to the consideration of a local fiscal emergency in San Jose. The assertion that CESA is the basis for the City proposed declaration of emergency or the basis for suspension or modification of City contractual obligations is not based on any City statement but rather in an assumption stated in Assemblymember Fong's request. Indeed, the City is not relying on the CSEA. Rather, the City's authority to consider the declaration of a fiscal emergency and suspend and/or modify existing contractual obligations does not stem from any statutory source, but from the City's inherent police powers granted under the State Constitution and recognized by the courts.

Diane E. Boyer-Vine  
Re: Local Fiscal Emergency Opinion  
September 15, 2011  
Page 2

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Please let me know if you wish to discuss this matter further.

Very truly yours,

A handwritten signature in black ink, appearing to be 'R. Doyle', with a long horizontal flourish extending to the right.

RICHARD DOYLE  
City Attorney

cc: Mayor and City Council