

**SENT VIA EMAIL**

October 27, 2011

Vera Todorov  
President  
Association of Legal Professionals (ALP)  
c/o City Attorney's Office  
200 East Santa Clara Street  
San Jose, CA 95113

**RE: Revised Draft Proposed Ballot Measure**

Dear Ms. Todorov:

On July 6, 2011, the City provided ALP a copy of the draft proposed ballot measure that incorporates the relevant elements from the May 13<sup>th</sup> memo and the City Manager's Fiscal Reform Plan, as approved by the City Council. Subsequently, the City Council provided additional direction and revised draft proposed ballot measures were provided to ALP on September 9<sup>th</sup>, October 5<sup>th</sup> and October 20<sup>th</sup>. Since then, the City Council has provided further direction regarding the draft proposed ballot measure. Enclosed please find a revised draft proposed ballot measure.

As you know, recent drafts of the proposed ballot measure include increased employee retirement contributions for employees who do not opt into the VEP but remain in the current level of benefits. Some bargaining units have expressed concerns that increasing employee contributions to pay for retirement benefits is not permissible. While the City maintains its position that increasing retirement contributions for current employees is permissible, Section 15 has been amended to clarify this provision. In summary, Section 15 now states that in the event that any increase in the employee's share of the cost to amortize the unfunded liabilities for pension benefits cannot be implemented, the equivalent cost savings will be achieved through compensation reductions.

As our previous discussions and comments have indicated, the City Council has determined that the retirement measure will be considered by the voters at a special election in early March 2012. Based on state and local election laws, the measure must be finalized and submitted approximately 90 days before the election. Meet and confer should be completed by the end of October if you wish to utilize any impasse procedures. Such procedures must be completed in early November.

Given the critical timeline and the lack of any meeting of the minds regarding any aspect of the ballot measure despite more than two months of meetings, we plan to devote our next meeting to discussion of the revised proposed ballot measure. In addition, assuming no agreement is reached at the next session, please be prepared to discuss whether you wish to take advantage of the mediation provisions of the City's Employer-Employee Relations Resolution #39367 so that we can make the appropriate arrangements as soon as possible.

If you have any questions or concerns regarding this information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gina Donnelly', written in a cursive style.

Gina Donnelly  
Deputy Director of Employee Relations

c: Debra Figone, City Manager  
Rick Doyle, City Attorney

Enclosure

**PUBLIC EMPLOYEE PENSION PLAN AMENDMENTS - TO  
ENSURE FAIR AND SUSTAINABLE RETIREMENT BENEFITS  
WHILE PRESERVING ESSENTIAL CITY SERVICES**

The Citizens of the City of San Jose do hereby enact the following amendments to the City Charter which may be referred to as: *“The Employee Fair Pay Act for Fiscal Sustainability.”*

**Section 1: FINDINGS**

The following services are essential to the health, safety, quality of life and well-being of San Jose residents: police protection; fire protection; street maintenance; libraries; and community centers (hereafter “Essential City Services”).

The City’s ability to provide its citizens with Essential City Services has been and continues to be threatened by budget cuts caused mainly by the climbing costs of employee benefit programs, and exacerbated by the economic crisis. The employer cost of the City’s retirement plans is expected to increase dramatically in the near future. In addition, the City’s accrued unfunded liability for other post employment benefits – primarily health benefits – is similarly increasing. To adequately fund these costs, the City would be required to make dramatic cuts to Essential City Services.

These cuts to Essential City Services have already created a public service emergency in the current fiscal year, an emergency that is projected to worsen significantly in Fiscal Year 2012-2013 and beyond. Because the cost of retirement benefits is rising so rapidly, and current economic conditions and legal restrictions severely limit revenue growth, there is no

reasonable prospect that further critical reductions in Essential City Services can be avoided. By any measure, projected levels of services are unsustainable, and endanger the health, safety and well-being of the residents of San Jose.

Without the reasonable cost containment provided in this Act, the economic viability of the City, and hence, the City's employment benefit programs, will be placed at an imminent risk.

The City and its residents always intended that its pension and post employment benefit plans be fair, reasonable and subject to the City's ability to pay without jeopardizing City services. At the same time, the City is and must remain committed to preserving the health, safety and well-being of its residents.

By this Act, the voters find and declare that pension and other post-employment benefits must be adjusted in a manner that protects the City's viability and public safety, at the same time allowing for the continuation of fair post-employment benefits for its workers.

This Act is intended to strengthen the finances of the City to ensure the City's sustained ability to fund a reasonable level of benefits as contemplated at the time of the voters' initial adoption of the City's retirement programs. It is further designed to ensure that future retirement benefit increases be approved by the voters.

The voters hereby find that the facts and circumstances constitute an emergency within the meaning of the Meyers-Milias-Brown Act ("MMBA"), Government Code section 3504.5, and pursuant to the City's authority as a charter city under the California Constitution. *E.g.*, Cal. Const., Art XI, §5.

**Section 2: INTENT**

This Act is intended to ensure the City can provide reasonable and sustainable post employment benefits while at the same time delivering Essential City Services to the residents of San Jose.

The City reaffirms its plenary authority as a charter city to control and manage all compensation provided to its employees as a municipal affair under the California Constitution.

The City reaffirms its inherent right to act responsibly to preserve the health, welfare and well-being of its residents.

This Act is not intended to deprive any current or former employees of benefits earned for prior service as of the time of the Act's effective date; rather, the Act is intended to preserve earned benefits as of the effective date of the Act.

This Act is not intended to reduce the pension amounts received by any retiree, including any cost of living increases received by retirees as of the effective date of the Act.

This Act is not intended to grant any vested rights to any post employment benefit. The City expressly retains its authority to amend, change or terminate any retirement or other post employment benefit program provided by the City; provided, however, nothing in the Act shall be construed to require the forfeiture of any contribution made by an employee toward a pension plan benefit.

### **Section 3. Measure Supersedes All Conflicting Provisions**

The provisions of this Act shall prevail over all other conflicting or inconsistent wage, pension or post employment benefit provisions in the Charter, as well as all ordinances, resolutions or other enactments.

### **Section 4. Reservation of Voter Authority**

The voters expressly reserve the right to consider any change in matters related to pension and other post-employment benefits. The City Council shall have no authority to agree to any increase in pension and/or retiree healthcare benefits, except that the Council shall have the authority to adopt Tier 2 pension benefit plans within the limits set forth herein.

### **Section 5. Reservation of Rights to City Council**

Subject to the limitations set forth in this Act, the City Council retains its authority to take all actions necessary to effectuate the terms of this measure, to ensure the preservation of the tax status of the plan, and to amend, change or repeal any retirement or other post employment benefit program subject to the terms of this measure.

### **Section 6. Current Employees**

(a) "Current Employees" means employees of the City of San Jose as of the effective date of this Act and who are not covered under the Tier 2 Plan (~~section~~ Section 8).

(b) ~~Unless they opt into a lower cost plan as provided in the Voluntary Election Program ("VEP," described herein),~~ All Current Employees who fail to opt in to the Voluntary Election

Program (“VEP,” described herein) will share 50% of the costs to amortize any pension unfunded liabilities, except for any pension unfunded liabilities that may exist due to Tier 2 benefits in the future.

(c) A Current Employee’s share of the cost to amortize pension unfunded liabilities shall be 5% of pensionable pay starting June 24, 2012, and increased by 5% annually until the employee’s proportionate share of the cost reaches 50% of the amortized pension unfunded liabilities, with each employee’s share capped at 25% of the employee’s pensionable pay.

(d) The starting date for an employee’s compensation adjustment under this Section shall be June 24, 2012, regardless of whether the VEP has been implemented. If the VEP has not been implemented for any reason, the compensation adjustments shall apply to all Current Employees.

(e) Current Employees’ share of the cost to amortize any unfunded liabilities shall be calculated separately for employees in the Police and Fire Department Retirement Plan and employees in the Federated City Employees’ Retirement System.

(f) The City Council shall adopt by ordinance the procedure and formulae necessary to implement this Section.

### **Section 7: One Time Voluntary Election Program (“VEP”)**

The City Manager shall propose, and the City Council shall adopt by ordinance to be effective not later than June 30, 2012, a Voluntary Election Program (“VEP”) for all Current

Employees who are members of the existing retirement plans of the City as of the effective date of this Act. The implementation of the VEP is contingent upon receipt of IRS approval. The VEP shall permit Current Employees a one time limited period to enroll in an alternative retirement program which, as described herein, shall preserve an employee's earned benefit accrual; the change in benefit accrual will apply only to the employee's future City service. Employees who opt into the VEP will be required to sign an irrevocable election waiver (as well as their spouse or domestic partner, former spouse or former domestic partner, if legally required) where they acknowledge that they irrevocably relinquish their existing level of retirement benefits and have voluntarily chosen reduced benefits, as specified below.

The VEP shall have the following features and limitations:

(a) The plan shall not deprive any Current Employee who chooses to enroll in the VEP of the accrual rate (e.g. 2.5%) earned and accrued for service prior to the VEP's effective date; thus, the benefit accrual rate earned and accrued by individual employees for prior service shall be preserved for payment at the time of retirement.

(b) On and after the effective date of the ordinance, pension benefits under the VEP shall be based on the following limitations:

(i) ~~(i)~~ the accrual rate shall be 1.5% of "final compensation", hereinafter defined, per year of service for future years of service only.

(ii) the maximum benefit shall remain the same as the maximum benefit for Current Employees.



(iii) the current age of eligibility for service retirement under the existing plan as approved by the City Council as of the effective date of the Act for all years of service shall increase by six months annually on July 1 of each year until the retirement age reaches the age of 60 for employees in the Police and Fire Department Retirement Plan and the age of 65 for employees in the Federated City Employees' Retirement System. Earlier retirement shall be permitted with reduced payments that do not exceed the actuarial value of full retirement. For service retirement, an employee may not retire any earlier than age of 55 in the Federated City Employees' Retirement System and age of 50 in the Police and Fire Department Retirement Plan.

~~(iii)~~(iv) The eligibility to retire at thirty (30) years of service regardless of age shall increase by 6 months annually.

(iv) cost of living adjustments shall be limited to the increase in the consumer price index, (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1% per fiscal year. The first COLA adjustment following the effective date of the Act will be prorated based on the number of remaining months in the year after retirement of the employee.

- (vi) — “final compensation” shall mean the average salary of the three highest consecutive years preceding the date of retirement.
  
- (c) The cost sharing for the VEP for current service or current service benefits (“Normal Cost”) shall not exceed the ratio of 3 for employees and 8 for the City, as presently set forth in the Charter. Employees who opt into the VEP will not be responsible for the payment of any pension unfunded liabilities of the system or plan related to past service.
  
- (d) For employees who opt into the VEP, survivorship benefits shall be the same as the survivorship benefits in Tier 2 (benefits for new employees, ~~as described in Section 8.~~).
  
- (e) VEP Disability Retirement Benefits.
  - (i) A service connected “disability” retirement benefit, as hereinafter defined, shall be as follows:

The employee or former employee shall receive an annual benefit based on 45% of annual pensionable pay based on the average of the highest three consecutive years of service.
  
  - (ii) A non-service connected disability retirement benefit shall be as follows:
    - a. The employee or former employee shall receive 1.5% times years of City Service (minimum 20% and maximum of 37.5%) of annual pensionable pay based on the average of the highest three

consecutive years of service. Employees shall not be eligible for a non-service connected disability retirement unless they have 5 years of service with the City.

- (iii) Cost of Living Adjustment ("COLA") provisions will be the same as for the service retirement benefit in the VEP.

### **Section 8: Future Employees – Limitation on Retirement Benefits – Tier 2**

To the extent not already enacted, the City Manager shall propose, and the City Council shall adopt by ordinance, to be effective not later than June 30, 2012, a retirement program for employees hired on or after the effective date of such ordinance. This retirement program – for new employees – shall be referred to as "Tier 2."

The Tier 2 program shall be limited as follows:

(a) The maximum City contributions shall not be less than 6.2% nor greater than 9% of pensionable salary. In no event shall the City contribution to such plan exceed 50% of the cost of the Tier 2 plan (both normal cost and unfunded liabilities). The program may be designed as a "hybrid plan" consisting of a combination of Social Security, a defined benefit plan and/or a defined contribution plan.

(b) For any defined benefit plan, the age of eligibility for payment of accrued service retirement benefits shall be 65, except for sworn police officers and firefighters, whose service retirement age shall be 60. Earlier retirement may be permitted with reduced payments that do not exceed the

actuarial value of full retirement. For service retirement, an employee may not retire any earlier than age of 55 in the Federated City Employees' Retirement System and age of 50 in the Police and Fire Department Retirement Plan.

(c) For any defined benefit plan, cost of living adjustments shall be limited to the increase in the consumer price index (San Jose – San Francisco – Oakland U.S. Bureau of Labor Statistics index, CPI-U, December to December), capped at 1% per fiscal year. The first COLA adjustment will be prorated based on the number of months retired.

(d) For any defined benefit plan, the measuring period for determining "final compensation" shall be the average salary of the three highest consecutive years preceding the date of retirement.

(e) For any defined benefit plan, benefits shall accrue at a rate not to exceed 1.5% per year of service.

(f) Employees who leave or have left City service and are subsequently rehired or reinstated shall be placed into the second tier of benefits (Tier 2). Employees who have at least five (5) years of service credit in the Federated City Employees' Retirement System and at least ten (10) years of service credit in the Police and Fire Department Retirement Plan on the date of separation and who have not obtained a return of contributions will have their benefit accrual rate preserved for the years of service prior to their leaving City service.

(g) Any plan adopted by the City Council is subject to termination or amendment in the Council's discretion. No plan shall create a vested right to any benefit.

## Section 9: Disability Retirements

To receive any disability retirement benefit under any pension plan, City employees must be incapable of engaging in any gainful employment for the City, but not yet eligible to retire (in terms of age and years of service). The determination of qualification for a disability retirement shall be made regardless of whether there are other positions available at the time a determination is made.

- (a) An employee is considered “disabled” for purposes of qualifying for a disability retirement, if all of the following is met:
  - (i) An employee cannot do work that they did before; **and**
  - (ii) It is determined that the employee cannot perform any other jobs described in the City’s classification plan because of his or her medical condition(s); **and**
  - (iii) The employee’s disability has lasted or is expected to last for at least one year or to result in death.
- (b) Determinations of disability shall be made by an independent panel of medical experts, appointed by the City Council. The independent panel shall serve to make disability determinations for both plans. Employees and the City shall have a right of appeal to an administrative law judge.

## **Section 10: Emergency Measures to Contain Retiree Cost of Living Adjustments**

(a) The City Manager shall propose, and the City Council shall adopt by ordinance, the following, applicable to retirees (current and future retirees employed as of the effective date of this Act):

(i) Cost of living adjustments (“COLAs”) shall be temporarily suspended for all retirees until January 2017;

After January 2017, the City Council may restore COLAs prospectively (in whole or in part), based upon the following considerations: (a) whether the fiscal emergency has eased sufficiently to ensure that the City can provide services protecting the health and well-being of City residents; (b) whether the criterion set forth Section 14 (b) (ii) has been met for the three year period beginning January 2017 or thereafter; and (c) whether retirees are continuing to receive a substantial and fair pension.

(ii) In the event the City Council restores all or part of the COLA, it shall not exceed 3% for Current Retirees and Current Employees who did not opt into the VEP and 1% for Current Employees who opted into the VEP and employees in Tier 2.

## **Section 11: Supplemental Payments to Retirees**

Any supplemental payments to retirees in addition to those authorized herein shall not be funded from plan assets.

## **Section 12: Retiree Healthcare**

(a) **Minimum Contributions.** Existing and new employees must contribute a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded liabilities.

(b) **Reservation of Rights.** No retiree healthcare plan or benefit shall grant any vested right, as the City retains its power to amend, change or terminate any plan provision.

(c) **Low Cost Plan.** For purposes of retiree healthcare benefits, "low cost plan" shall be defined as the medical plan which has the lowest monthly premium available to any active employee in either the Police and Fire Department Retirement Plan or Federated City Employees' Retirement System.

## **Section 13: Actuarial Soundness (for both pension and retiree healthcare plans)**

(a) All plans adopted pursuant to the Act shall be subject to an actuarial analysis publicly disclosed before adoption by the City Council, and pursuant to an independent valuation using standards set by the Government Accounting Standards Board and the Actuarial Standards Board, as may be amended from time to time. All plans adopted pursuant to the Act shall: (i) be actuarially sound; (ii) minimize any risk to the City and its residents; and (iii) be prudent and reasonable in light of the economic climate. The employees covered under the plans must share in the investment, mortality, and other risks and expenses of the plans.

- (b) All of the City's pension and retiree healthcare plans must be actuarially sound, with unfunded liabilities determined annually through an independent audit using standards set by the Government Accounting Standards Board and the Actuarial Standards Board. No benefit or expense may be paid from the plans without being actuarially funded and explicitly recognized in determining the annual City and employee contributions into the plans.
- (c) In setting the actuarial assumptions for the plans, valuing the liabilities of the plans, and determining the contributions required to fund the plans, the objectives of the City's retirement boards shall be to:
  - 1) achieve and maintain full funding of the plans using at least a median economic planning scenario. The likelihood of favorable plan experience should be greater than the likelihood of unfavorable plan experience; and
  - 2) ensure fair and equitable treatment for current and future plan members and taxpayers with respect to the costs of the plans, and minimize any intergenerational transfer of costs.
- (d) When investing the assets of the plans, the objective of the City's retirement boards shall be to maximize the rate of return without undue risk of loss while having proper regard to:
  - 1) the funding objectives and actuarial assumptions of the plans; and



- 2) the need to minimize the volatility of the plans' surplus or deficit and, by extension, the impact on the volatility of contributions required to be made by the City or employees.

## **Section 14: Safety Net Provisions**

### **(a) Preservation of Essential City Services:**

At any time that any of the following conditions arise as determined in the reasonable discretion of the City Manager:

- ÷(Condition 1) Essential City Services are not provided at or above the service levels of January 1, 2011; (Condition 2) any library, community center, fire station, or police station or substation built or under construction as of January 1, 2011, is not operational due to a ~~budget~~lack of funds; or (Condition 3 ~~(limited as described herein)~~) any of the City's pension or retiree healthcare plans have unfunded liabilities calculated on a market value or actuarial value greater than those liabilities existing as of June 30, 2010, then the Mayor, the City Council, the City Manager and other officers of the City, or any arbitrator or board of arbitrators, shall be prohibited from making or approving any contract, memorandum, agreement, award, grant, decision, resolution, ordinance or other official or binding act that allows or requires the City to do any of the following, without prior approval by the voters: (i) pay for unused sick leave time (ii) pay for accrued and unused vacation time, except at separation of City service as may be required by applicable state or federal law; (iii) grant retroactive increase~~compensation increases to~~ ~~for~~ members of bargaining units after an applicable memorandum of agreement has ~~contracts expired prior to the date until~~ a new contract is in effect; (iv) give automatic step increases or other raises for time in the job that are not based on performance;

(v) use hours not actually worked in determining eligibility for overtime; (vi) pay overtime to executive, professional, or administrative employees or to other employees who are exempt from overtime requirements under the Fair Labor Standards Act ("FLSA"), or who are otherwise exempt from the FLSA; (vii) pay workers' compensation benefits for disability on top of disability retirement benefits without an offset to eliminate duplication of benefits for the same cause of disability; (viii) pay workers' compensation benefits beyond what state or federal laws require; (ix) allow existing or former employees to grant workers' compensation or disability benefits for existing or former employees; (x) calculate retirement benefits on any compensation other than actual base salary paid, or years-pensionable regular hours (not including overtime) and paid leave (up to 2080 hours)-actually worked for the City of San Jose, except as required by applicable state law; (xi) make layoff or rehiring decisions without considering individual employee performance; (xii) pay for more than 50% of the increase in the cost of healthcare benefits. ~~Nothing in this section shall be construed to mandate a particular level of service or method of service delivery.~~

Nothing in this Act shall be construed to mandate a particular level of service or method of service delivery nor to interfere with or limit the City from adopting more efficient or less costly means of delivering services.

For the purposes of this Act, unfunded liabilities for employees covered under the Federated City Employee's Retirement System and the Police and Fire Department Retirement Plan shall be treated separately. Thus, if Condition (3) arises, the consequences as specified in this Act shall apply only to those employees in the plan that has the unfunded liabilities.

Accordingly, -if there is an unfunded liability in only the Federated plan the safety net provisions shall apply to employees in the Federated plan, and not those in the Police and Fire plan. Similarly, if there is an unfunded liability in only the Police and Fire plan, the safety net provisions shall apply only to employees in the Police and Fire plan.

**(b) Unfunded Liabilities in Pension and Other Post Employment Benefit Programs**

The City Manager shall propose, and the City Council shall adopt by ordinance, safety net provisions with the following minimum features:

- (i) At any time City pension or retiree healthcare plans have unfunded liabilities based on market value or actuarial value for pension or retiree healthcare greater than those existing on June 30, 2010, bonuses, or supplemental pension payments to retirees shall not be allowed, except upon prior approval of the voters.
- (ii) The limitations shall be temporary and shall remain in effect until the unfunded liabilities based on market value or actuarial value have remained below the level of June 30, 2010 for three consecutive years.

**Section 15: Savings and Severability**

(a) This Act shall be harmonized and interpreted to be consistent with all federal and state laws, rules and regulations. If any ordinance adopted pursuant to the Act is held to be invalid, unconstitutional or otherwise unenforceable

by a final judgment, the matter shall be referred to the City Council for determination as to whether to amend the ordinance consistent with the judgment, or whether to determine the section severable and ineffective. This Act shall be broadly construed to achieve its stated purposes.

(b) In the event Section ~~6~~, 7 or 10 (as that Section applies to Current Employees), of this Act is determined to be illegal, invalid or unenforceable as to Current Employees, then the Current Employees' share of the costs to amortize any unfunded liabilities shall be 50% of the plan covering the respective employees.

(c) In the event Section 6 (b) and (c), and/or the employee payment of the unfunded liability referenced in Section 15(b), is determined to be illegal, invalid or unenforceable as to Current Employees (using the definition in Section 6(a)), then, to the maximum extent permitted by law, an equivalent amount of savings shall be obtained through pay reductions. Any pay reductions implemented pursuant to this section shall not exceed 5% of compensation each year, capped at a maximum of 25% of pay or the equivalent of what would be 50% of the amortized pension unfunded liability.

(~~d~~e) The City Council shall adopt ordinances as appropriate to implement and effectuate the provisions of this Act.