

MEMORANDUM OF LAW

DATE: August 19, 1986

TO: Bruce Herring, Risk Management Director via  
Coleman Conrad, Deputy City Manager

FROM: City Attorney

SUBJECT: Supplemental Pension Savings Plan - Withdrawal  
of Matching Employer Voluntary Contributions

You indicated in your memorandum to this office dated July 24, 1986, that you have been advised by the City's consultant (the Wyatt Company) for the Supplemental Pension Savings Plan (SPSP) that the provisions of SPSP allowing employees to withdraw the City's matching voluntary contributions after five years of participation have been disallowed by the Internal Revenue Service (IRS). They informed you that if The City of San Diego desires to obtain a favorable Determination Letter from the IRS, the City must amend the Plan. You also indicated that this matter came to the City's attention after the Wyatt Company filed a request for a Letter of Determination on the City's behalf with the IRS in order to obtain approval for the Plan amendments which were approved in 1985 by the participants in the Plan and the City Council. Evidently, the IRS did not analyze the withdrawal provision adequately when it issued the Letter of Determination for the original Plan which contained the controversial provision. Upon their review of the amended Plan, they made the above determination. You have asked this office to review the documents given to you by the Wyatt Company and by the IRS in order to ensure that the IRS position is correct.

The position of the IRS that SPSP will not qualify as a pension plan under section 401(a) of the Internal Revenue Code (26 USC 401(a)) if participants are allowed to withdraw any amount of the employer's contributions or its earned interest prior to death, retirement or termination of employment is supported by Revenue Rulings 56-693, 60-323, 69-277 and 74-417. Although The City of San Diego is exempt from the funding and vesting provisions of the Employee Retirement Income Security Act of 1974 (ERISA) (Public Law 93-406, 93 Stats. 691 1974) as a governmental plan, section 401(a) of the Internal Revenue Code

applies to all pension plans whether private or governmental. We must conclude therefor that the position the IRS has taken is consistent with current tax law.

The City of San Diego has two realistic options in this matter. The first, of course, is to amend the Plan in accordance

with the draft amendment proposed by the Wyatt Company which will prohibit the early withdrawal of employer contributions and their earned interest. The second option, which is not recommended, is to terminate the Plan and return all contributions and interest to the employees with interest after the appropriate taxes have been deducted. We believe that attempts to obtain amendments to the Internal Revenue Code to allow the contested withdrawals would be futile.

JOHN W. WITT, City Attorney

By

John M. Kaheny

Deputy City Attorney

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