

Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 236-6220

**DATE:** June 19, 2008  
**TO:** The Honorable Mayor and Members of the City Council  
**FROM:** City Attorney  
**SUBJECT:** Pension Ballot Measure Questions

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INTRODUCTION

The City Attorney has been asked to provide a legal opinion on a number of issues, all relating to placing a pension ballot measure to amend the City Charter, before the voters of San Diego.<sup>1</sup>

QUESTIONS PRESENTED

1. Can the City Council propose a ballot measure, apart from the Mayor, to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?
2. Can the Mayor, on behalf of the City, propose a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?
3. Can the City Council waive Council Policy 300-6 regarding labor relations impasse procedures for the Mayor's proposal on behalf of the City?
4. Can the Mayor initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?

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<sup>1</sup> The City Charter, Article IX: The Retirement of Employees, Sections 141 - 149 states the current pension system for the City of San Diego.

5. Can a citizen residing in the City of San Diego, initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?

### SHORT ANSWERS

**1. Can the City Council, apart from the Mayor, propose a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?**

Yes, the City Council has an absolute constitutional right under the California Constitution to propose a ballot measure amending the City Charter provisions related to retirement pensions.

The City Council must comply with the "meet-and-confer" requirement in Government Code section 3505, before placing its proposed amendment on the ballot. However, the City Council is not obligated to change the substance or language of its proposal if it is not persuaded to do so by the unions, through the meet-and-confer process. The California Constitution, article XI, section 3, subdivision (b), provides the Council with the power to present its proposal to amend the Charter to the voters, after going through the meet-and-confer process.

The City Council would request the Mayor present its proposal to the labor organizations and return to the Council to report on the conduct of negotiations over the Council's proposal. The Council can also appoint a Council Member to sit as an observer at the negotiations. If agreement is reached with the labor organizations on the Council's proposal, it would be ratified by both parties. If no agreement is reached, the City will declare its final ballot proposal language and hold a hearing on its proposal. At the end of the hearing, the Council will vote whether to approve its ballot proposal and place it on the ballot.

**2. Can the Mayor, on behalf of the City, propose a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?**

Yes, the Mayor is empowered to propose, on behalf of the City, a ballot measure to amend the Charter provisions related to retirement pensions. The Mayor is obligated to meet and confer with the labor organizations prior to bringing a final ballot proposal to the City Council. If the parties reach agreement, the Council would be asked to ratify the language to be placed on the ballot. If the Mayor is not able to reach agreement with the unions, the Mayor would present his last, best, and final offer to the Council for its vote. If the Council votes in favor the Mayor's last, best, and final proposal, it goes on the ballot. If the Council does not pass the Mayor's proposal, it does not go on the ballot.

**3. Can the City Council waive Council Policy 300-6 regarding labor relations impasse procedures for the Mayor's proposal on behalf of the City?**

No. The City Council can not waive Council Policy 300-6 regarding the Mayor's proposal. The Policy was created in part as an impasse procedure for resolving labor disputes.<sup>2</sup> In order to change the impasse procedure the City must meet and confer with the unions, reach agreement and ratify a new impasse procedure, or declare impasse under the current procedure and take a Council vote on whether to impose the City's last, best, and final offer regarding a change in the impasse procedure. Until these steps are concluded, the City can not change (or waive) Council Policy 300-6.

**4. Can the Mayor initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?**

The Mayor has the same rights as a citizen with respect to elections and propositions. The Mayor does not give up his constitutional rights upon becoming elected. He has the right to initiate or sponsor a voter petition drive. However, such sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions. As the Mayor is acting with apparent authority with regard to his sponsorship of a voter petition, the City would have the same meet and confer obligations with its unions as set forth in number two, above.

**5. Can a citizen residing in the City of San Diego, initiate or sponsor a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions? If so, what, if any are the meet-and-confer requirements under the California Government Code, and how would those be fulfilled?**

A Charter amendment proposal can be brought by citizens using the initiative process. San Diego City Charter sections 23 and 223; California Constitution Article XI, Section 3. A voter-initiated Charter amendment can not be altered by the City. Since this is voter-initiated, rather than under the imprimatur of the City, Government Code sections 3500 et seq. (Myers-Milias-Brown-Act) is not applicable, and there is no meet-and-confer obligation with the unions.

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<sup>2</sup> See expanded discussion below of question 1 regarding the inapplicability of Council Policy 300-6 to the Council's own ballot proposal.

## DISCUSSION

### I. A City Council ballot measure to amend the Charter provisions related to retirement pensions.

- A. The City Council has an absolute constitutional right under the California Constitution to propose a ballot measure amending the City Charter provisions related to retirement pensions.

The California Constitution, article XI, section 3, states, in part:

(a) For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. ....

(b) *The governing body or charter commission of a county or city may propose a charter or revision. Amendment or repeal may be proposed by initiative or by the governing body.*

(c) An election to determine whether to draft or revise a charter and elect a charter commission may be required by initiative or by the governing body. [Emphasis added.]<sup>3</sup>

### B. Meet-and-Confer Obligations over the Council's Own Proposal.

The California Supreme Court has held that a city council is required to meet and confer with labor organizations over a proposed charter amendment affecting wages, hours or other terms and conditions of employment, before placing the charter amendment on the ballot. *Seal Beach Police Officers Association v. City of Seal Beach*, 36 Cal.3d 591(1984). The City Council's proposal to amend the Charter pension provisions would be a change in the current City policy on pensions and it must comply with the "meet-and confer" requirement in Government Code, section 3505, before placing its proposed amendment on the ballot.

However, the City Council is not obligated to change its proposal if it is not persuaded to do so through the meet-and-confer process with unions. Although Government Code Section 3505 encourages binding agreements resulting from the parties' bargaining, the City Council is not obligated to change the substance or the language of its proposal, unless it is convinced to do so. The California Constitution, article XI, section 3, subdivision (b), provides the Council with the

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<sup>3</sup> The San Diego City Charter references the State Constitution as authority for amending the Charter. The Charter, Article XIV, Section 223 "Amendment of Charter" states: "This Charter may be amended in accordance with the provisions of Section Eight, Article Eleven, of the Constitution of the State of California, or any amendment thereof or provision substituted therefore in the State Constitution."

power to present its proposal to amend the Charter to the voters, after going through the meet-and-confer process.

The Supreme Court in *Seal Beach* emphasized the need to harmonize, whenever possible, the State Constitutional provisions guaranteeing the right of the city council to propose charter amendments to the electorate (article XI, §3, subd. (b)) with the Government Code bargaining requirements (Gov. Code §3505), when the amendment concerns terms and conditions of public employment. *Id. at 597-602.*

The *Seal Beach* Court emphasized that the meet-and-confer requirement did not prevent a city council from proposing its own charter language, only that meet-and-confer with its unions prior to placing it on the ballot was necessary to satisfy the requirements of the Government Code. *Id. at 600.*

The Court made it clear that the City Council was in no way obligated to reach agreement with the union, or change its proposed ballot language, if it found the unions' proposals unacceptable. To the contrary, the City Council could refuse an agreement if the union's terms were unacceptable, make its own decision on the language, and take that to the people, after participating in the meet-and-confer process. *Id. at 601.*

After reviewing cases where there were actual conflicts between a state statute and the city "law", the *Seal Beach* Court returned to the situation before it:

All these cases involved actual conflicts between state statutes and city "law." No such conflict exists between a city council's power to propose charter amendments and section 3505. Although that section encourages binding agreements resulting from the parties' bargaining the governing body of the agency – here the city council—retains the ultimate power to refuse an agreement and to make its own decision. (See *Glendale City Employees' Assn., Inc. v. City of Glendale* (1985) 15 Cal.3d 328, 334-336.) This power preserves the council's rights under article XI, section 3, subdivision (b) – it may still propose a charter amendment if the meet-and-confer process does not persuade it otherwise. *Id. at 601.*

C. Procedures for fulfilling the meet-and-confer obligation related to the Council's own ballot proposal.

Effective January 1, 2006, the City began operating under a Strong Mayor form of government, as reflected in San Diego Charter article XV, which provides that "[a]ll executive authority, power, and responsibilities conferred upon the City Manager in Article V, Article VII, and Article IX [are] transferred to, assumed, and [will be] carried out by the Mayor..." San Diego City Charter §260 (b).

Article XV of the Charter also expressly conferred on the Mayor a number of "additional rights, powers, and duties" to those conferred by Charter section 260(b). These rights include the right

“to recommend to the Council such measures and ordinances as he or she may deem necessary or expedient...” San Diego Charter §265 (b)(3). The City Council may not interfere with the Mayor’s hiring or administrative powers. San Diego Charter § 270 (g) and (h).

However, Article XV provides the Council with the ‘right to determine its own rules and order of business...’ San Diego Charter § 270 (d). The Mayor is to “perform ... [the] duties as may be prescribed by [the] Charter or required of him by ordinance or resolution of the Council.” San Diego Charter §28.

Generally speaking, the Mayor is the spokesperson for the City in labor relations with the labor unions and has authority to set the City’s bargaining position so long as he acts reasonably and in the best interests of the City.

However, the California Constitution, article XI, section 3 and the San Diego City Charter, Article XIV, Section 223, grant the City Council the absolute and unfettered right to present its own ballot proposal to the voters to amend the City Charter, apart from any proposal the Mayor may wish to present to the Council for its consideration.<sup>4</sup>

In order to harmonize the City Charter provision of Strong Mayor and the California Constitutional provision (and City Charter provision) granting the City Council the absolute right to place its own ballot proposal before the voters, and in the spirit of the Strong Mayor form of government, the Mayor would act as the intermediary and conduit between the City Council and the labor organizations regarding the City Council’s meet and confer obligations. Because the City Council, apart from the Mayor, has the right under the California Constitution to present its own ballot proposal to the voters to amend the City Charter, it would control the decisions related to the substance and language of its proposal, and not the Mayor.

Procedurally, it would work as follows: After the City Council approves the language of a proposal for a pension ballot measure, it would request the Mayor present its proposal to the labor organizations, and return to the Council to report on the conduct of negotiations over the Council’s proposal. The Council can also appoint a Council Member to sit as an observer at the negotiations. If agreement is reached with the labor organizations on the Council’s proposal, it would be ratified by the parties. If no agreement is reached, the City will declare its final ballot proposal language and hold a hearing on its proposal. At the end of the hearing, the Council will vote whether to approve its ballot proposal and place it on the ballot. If there is a majority vote, the Council’s proposal will be placed on the ballot.

D. No impasse procedure exists or is required regarding the Council’s own ballot proposal.

The Government Code requires the City Council to comply with its meet and confer obligations, prior to voting to present a final ballot measure to the voters. However, the Government Code does not require an impasse procedure should the parties not reach agreement over the Council’s own proposal.

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<sup>4</sup> Addressed within is the question of the Mayor’s own proposal for a pension ballot measure.

Government Code section 3505, in referring to the meet and confer obligation states, "The process should include adequate time for resolution of impasses *where specific procedures for such resolution are contained in local rule, regulation, or ordinance*, or when such procedures are utilized by mutual consent." [Emphasis added.]

In the absence of an impasse procedure, the process, if the City finds the unions' suggestions unacceptable, the City has met its meet and confer obligation, and can take a final vote on its language, and take that to the people.

Council Policy 300-6 is not applicable to the City Council's own ballot proposal.

Council Policy 300-6 does not contemplate or create impasse procedures when the City Council proposes its own ballot measure, based upon its unfettered Constitutional right to present such a proposal to the voters, irrespective of the Mayor's position on such a measure.

Council Policy 300-6 provides for the Mayor to present and negotiate his proposals on behalf of the City to the labor unions, to change wages, hours, or other terms or conditions of employment. The Policy contains an impasse procedure which allows the Mayor to declare when he is at impasse with the unions over his proposals, and for him to present the Mayor's last, best, and final offer on his proposal to the Council.

The Council has no authority to add new provisions to the Mayor's proposal, change provisions of the Mayor's proposal, mediate between the City and the unions, or integrate union proposals with the Mayor's last, best, and final offer.<sup>5</sup>

Under the Council Policy the role of the Council is limited to either ratifying an agreement reached between the Mayor and a labor organization, or at the request of the Mayor after he declares impasse, voting whether to approve and implement the Mayor's last, best, and final offer to the labor organizations.<sup>6</sup>

Council Policy 300-6 addresses the impasse procedure related to the Mayor's proposals to labor organizations. It does not address to the City Council's own proposals to present to the voters an amendment the City Charter, apart from the Mayor's proposals.

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<sup>5</sup> If the Council majority does not approve the Mayor's last, best, and final offer, as to economic provisions, the last Agreement between the City and union continues in full force and effect until a successor agreement is ratified or the Council imposes a last, best and final offer by the Mayor.

<sup>6</sup> In opinions of the City Attorney since the passage of the Strong Mayor Charter provision, Policy 300-6 has been interpreted to mean that at the Impasse Hearing, the Council is only presented with the Mayor's last, best, and final offer to the labor organizations. The Council votes to implement or reject the Mayor's last, best, and final offer. The Public Employment Relations Board (PERB) has ruled and approved the impasse procedure set forth in Council Policy 300-6, as interpreted by the City Attorney, i.e. Council authority under Council Policy 300-6 is solely to adopt or reject the Mayor's last, best, and final Offer, without alteration. Deputy City Attorney's Association v. City of San Diego, PERB Case No. LA-CE-359-M (June 22, 2007). That Council Policy is not applicable to the Council's unfettered Constitutional right to present its own ballot initiative, irrespective of the Mayor's desires.

Simply stated, the Council has the absolute Constitutional right to have its proposal presented in the meet and confer process, and it is the Council that controls what, if any changes to its proposal it is willing to make. To permit anyone other than the Council to make those decisions would abrogate the Council's unfettered Constitutional right to place ballot measures of their own choosing before the people. Since it is the City Council that must ultimately decide whether to place its proposal on the ballot, there can not be any restriction on the Council changing or altering its proposal, nor any requirement that the Council to vote solely on what the Mayor proposes, rather than the Council.

The City has no impasse procedure, and none is required by law, regarding the Council's duty to meet and confer with the labor organizations prior to voting to present its own ballot measure to the voters. If agreement can not be reached between the Council and labor organizations regarding the Council's charter proposal, the Council holds a hearing and votes whether to place its measure on the ballot. If it passes, the Council's ballot measure goes to the voters.

II. The Mayor's ballot measure, on behalf of the City, to amend the Charter provisions related to retirement pensions.

The Mayor is empowered to propose, on behalf of the City, a ballot measure to amend the Charter provisions related to retirement pensions. The Mayor is obligated to meet-and-confer with the labor organizations prior to bringing a final ballot proposal to the City Council. If the parties reach agreement, the Council would be asked to ratify the language to be placed on the ballot. If the Mayor is not able to reach agreement with the unions, since this is the Mayor's proposal, Council Policy 300-6 would apply. Briefly, the Mayor would present his last, best, and final offer to the Council for their vote. The Council would vote solely on the Mayor's last, best, and final offer regarding the language of the Pension Ballot measure he proposes. If the Council votes in favor the Mayor's proposal, it goes on the ballot. If the Council does not pass the Mayor's proposal, it does not go on the ballot.

III. The City Council can not waive Council Policy 300-6 regarding the Mayor's proposal.

The City Council can not simply waive Council Policy 300-6 regarding the Mayor's proposals. The Policy was created in part pursuant to Government Code section 3507 as the procedure for the Mayor to bring to the City Council to resolve disputes over wages, hours, and other terms and conditions of employment. Council Policy 300-6 has been incorporated into each of the collective bargaining agreements with the City's labor unions.

Hence, where applicable, Council Rule provides the Impasse procedure for the City. As noted earlier Council Policy 300-6 impasse procedures are inapplicable to the Council's own Constitutionally guaranteed right to propose a charter amendment to the people.

In order to change the impasse procedure of Council Policy 300-6, which waiving it would do, requires the City to meet-and-confer with the labor organizations, reach agreement and ratify a new impasse procedure, or declare impasse and take a Council vote on whether to impose the Mayor's last, best, and final offer regarding the change in impasse procedure proposed. Until



these steps are concluded, the City can not change (waive) Council Policy 300-6 regarding the Mayor's proposal.

IV. The Mayor initiating or sponsoring a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions.

The Mayor has the same rights as a citizen with respect to elections and propositions. However, those rights are restricted as noted below. While he does have the right to initiate or sponsor a voter petition drive (see Government Code section 3203), such sponsorship is legally considered as acting with apparent governmental authority, and will require the Mayor to meet-and-confer with the labor organizations over a voter initiative pension ballot measure that he sponsors. In *Inglewood Teachers Association v. Public Employment Relations Board*, 227 Cal.App.3d 767 (1991), the Court approved the Public Employment Relations Board (PERB) decision to apply a case by case approach on the basis of whether agency employees could reasonably believe that an individual had apparent authority to act on behalf of the agency.<sup>7</sup>

The *Inglewood Teachers Association* Court noted that under Civil Code section 2317, ostensible or apparent authority is that which "a principal, intentionally or by want or ordinary care, causes or allows a third person to believe the agent possess."

The City Charter itself under the Strong Mayor provisions, grants the Mayor the authority to represent the City regarding labor issues and labor negotiations, including employee pensions. In addition, as noted above, the Council has confirmed this authority in Council Policy 300-6, providing for the Mayor to present and negotiate his proposals on behalf of the City with the labor unions.<sup>8</sup> Since the Strong Mayor Amendment was added, the City Council has repeatedly acknowledged the Mayor's authority as the City's spokesperson on labor negotiations by enforcing Council Policy 300-6. In some instances, this included his authority to negotiate on behalf of the City over his ballot proposals to amend the charter.<sup>9</sup> The Mayor has ostensible or apparent authority to negotiate with the employee labor organizations over any ballot measure he sponsors or initiates, including a voter-initiative. The City, therefore, would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal implicating wages, hours, or other terms and conditions of employment.

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<sup>7</sup> The Court approved the PERB decision in *Inglewood Unified School District*, PERB Decision No. 792, (1990).

<sup>8</sup> Council Policy 300-6 specifically provides that its reference to the authority of the "City" under the Policy includes the City Council and any duly authorized city representative. Clearly the Mayor would qualify. (Council Policy 300-6, Section IV. "Definitions" subd. (d).)

<sup>9</sup> The Council has at least ten times affirmed the Mayor's authority in such matters, including: the ballot language for Propositions B and C in March 2006; the POA Impasse in April 2006; the implementing ordinances for Ballot measures B and C in December 2006; the Impasse hearings for Local 145 and DCAA in April 2007, and the Impasse hearings for Local 147, MEA, and DCAA in May 2008.

V. A citizen initiating or sponsoring a voter petition drive to place a ballot measure to amend the City Charter provisions related to retirement pensions.

A Charter amendment proposal can be brought by citizens using the initiative process. San Diego City Charter sections 23 and 223; California Constitution article XI, section 3. A voter-initiated Charter amendment can not be altered by the City. Since this is voter-initiated, rather than under the imprimatur of the City, Government Code sections 3500 et seq. (Myers-Milias-Brown-Act) is not applicable. The obligation to meet-and-confer is only involved when there is a proposal by a public agency or union representing the public employees of the agency, not a private citizen. (Gov't. Code §§ 3501, 3505.)

However, it should be noted, regardless of the method used to propose a Charter amendment, if a Charter amendment is approved by a majority of the voters, the City would still need to meet-and-confer with the labor unions as required under the Meyers-Milias-Brown-Act prior to enacting implementing legislation.

CONCLUSION

The City Council has an absolute right under the California Constitution to propose a ballot measure amending the City Charter provisions related to retirement pensions. The City Council must comply with the meet-and confer requirement in Government Code section 3505, before placing its proposed amendment on the ballot. However, the City Council is not obligated to change the substance or language of its proposal if it is not persuaded to do so by the unions, through the meet-and-confer process, nor is any impasse procedure required.

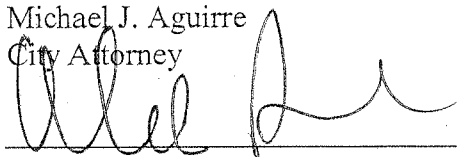
The Mayor is empowered to propose, on behalf of the City, a ballot measure to amend the Charter provisions related to retirement pensions. The Mayor is obligated to meet-and-confer with the labor organizations prior to bringing a final ballot proposal to the City Council. The Council can not waive Council Policy 300-6 without the Mayor first negotiating with the labor unions over a new procedure.

The Mayor may initiate or sponsor a voter petition to place a pension ballot measure on the ballot. However, in so doing, he is acting with apparent authority on behalf of the City, which would trigger the meet-and-confer obligations with the unions on any such measure.

A qualified citizen's initiative ballot measure can be placed on the ballot without alteration and is not subject to the meet-and-confer requirements of the Meyers-Milias-Brown Act.

By:

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