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OPINION NUMBER 2012-3

DATE: November 7, 2012

SUBJECT: Legality of AB 1248 (State Legislation Related to Mandatory Social Security Coverage for City of San Diego)

PREPARED FOR: Honorable Mayor and City Councilmembers

PREPARED BY: City Attorney

INTRODUCTION

On September 30, 2012, California Governor Jerry Brown signed into law Assembly Bill 1248 (AB 1248), which adds section 7500.5 to the California Government Code (Government Code). By its express language, the section only applies to the City of San Diego. Gov't Code § 7500.5(a). AB 1248 mandates that the City provide coverage under the federal Social Security system[1] for all employees who are not covered under a defined benefit plan. Gov't Code § 7500.5(c).[2] AB 1248 takes effect January 1, 2013.

AB 1248 was adopted by the California Legislature (Legislature) as a special law, meaning the City is the only "local public employer" covered by the measure. *See* Gov't Code § 7500.5(b)(2). The Legislature made the following findings in relation to AB 1248's adoption:

> The Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution because of the unique circumstances in the City of San Diego with respect to retirement benefits.

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[1] AB 1248 defines the federal Social Security system as "the old age, survivors, disability, and health insurance provisions of the federal Social Security Act (42 U.S.C. Sec. 301 et seq.)." Gov't Code § 7500.5(b)(1).

[2] AB 1248 provides, "The requirements of this section shall not apply with regard to replacing or changing an employer's defined contribution plan that was in place on July 1, 2012, unless the defined contribution plan will replace or change the employer's existing defined benefit plan." Gov't Code § 7500.5(d).

See AB 1248 (Hueso), California Legislative Session 2011-2012, Chapter 853 (chaptered Sept. 30, 2012), at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1201-1250/ab_1248_bill_20120930_chaptered.pdf.

The Legislature's adoption of AB 1248 followed voter approval of Proposition B in June 2012, which amended the San Diego Charter (Charter) to reform retirement benefits of City employees. Proposition B requires that all City officers and employees, except sworn police officers, initially hired or assuming office on or after the effective date of Proposition B (July 20, 2012, the date the approved Charter amendment was chaptered by the California Secretary of State) shall participate only in a defined contribution plan, not the City's defined benefit plan. San Diego Charter § 140. *See also* San Diego Charter §§ 150, 151.

Proposition B gives the San Diego City Council (Council) discretion, subject to the City's meet and confer obligations under the Meyers-Milias-Brown Act (MMBA) and applicable federal laws, to determine whether or not officers and employees under Proposition B will receive Social Security in addition to any defined contribution plan established for these officers and employees. AB 1248 takes away that discretion. The decision about whether City officers and employees will receive Social Security under Proposition B has instead been made by the Legislature and the Governor, with approval of AB 1248.

This Office has been asked to give its opinion as to the legality of AB 1248. This Legal Opinion analyzes state constitutional issues related to AB 1248.

QUESTION PRESENTED

Is AB 1248 legal under state law?

SHORT ANSWER

A court would likely find that the Legislature exceeded its authority in adopting AB 1248, making the legislation illegal on the grounds that it violates the California Constitution (Constitution).[3] The legislation likely infringes on the plenary authority of charter cities, under the "home rule" doctrine of the Constitution, to set compensation of their officers and employees, which is a municipal affair. However, the question of whether state legislation infringes on the "home rule" provisions of the Constitution is a question of law for a court to decide. A court may also determine that AB 1248 violates the restriction on special statutes, in article IV, section 16 of the Constitution, if the court determines there is no rational relationship between the purpose of AB 1248 and the singling out of this City.

[3] All references in this Legal Opinion to "Constitution" mean the "California Constitution," except where the United States Constitution is expressly referenced.

DISCUSSION

I. THE STATE CONSTITUTION IS A LIMITATION ON THE AUTHORITY OF THE LEGISLATURE TO ACT.

As a general rule, the acts of the Legislature are presumed to be constitutional "until the contrary is shown." *City and County of San Francisco v. Industrial Accident Commission*, 183 Cal. 273, 280 (1920) (citation and internal quotations omitted).The California Supreme Court has explained that a statute will not be held unconstitutional unless its violation of fundamental law is clear and palpable:

> [I]t is only when they manifestly infringe some provision of the constitution that they can be declared void for that reason. In case of doubt, every presumption, not clearly inconsistent with the language or subject-matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict.

Id. at 280. "[A]ll intendments favor the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." *County of Riverside v. Superior Court*, 30 Cal. 4th 278, 284 (2003) (*County of Riverside*) (citations and internal quotations omitted).

However, the Constitution "is a limitation or restriction on the powers of the Legislature." *Id.* This means that the Legislature "may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution." *Id.* A court deciding whether the state Legislature has exceeded its authority under the Constitution, "do[es] not look to the Constitution to determine whether the [L]egislature is authorized to do an act, but only to see if it is prohibited." *Id.* (citations and internal quotations omitted).

The Supreme Court explained that in deciding whether the Legislature has exceeded its authority to act, a court must be guided by rules of "constitutional construction." *Id.* (citing and quoting *Methodist Hospital of Sacramento v. Saylor*, 5 Cal. 3d 685, 691 (1971)).

II. AB 1248 LIKELY VIOLATES THE "HOME RULE" PROVISION OF THE CONSTITUTION, AT ARTICLE XI, SECTION 5, BECAUSE THE STATE LAW INFRINGES ON THE CITY'S AUTHORITY OVER OFFICER AND EMPLOYEE COMPENSATION, WHICH IS A MUNICIPAL AFFAIR.

A. San Diego is a Charter City Within the Meaning of the Constitution, With Authority to Govern its Own "Municipal Affairs."

San Diego is a charter city under the Constitution, with authority to establish a retirement system for compensated public officers and employees. The City's retirement system is set forth in the Charter. *See* San Diego Charter, art. IX. The "home rule" provision at article XI,

section 5(a)[4] of the Constitution grants to charter cities plenary authority over "municipal affairs," free from any constraint imposed by general law and subject only to constitutional limitations or applicable federal law. *See* Cal. Const. art. XI, § 5(a); *Ex Parte Braun*, 141 Cal. 204, 209 (1903); *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61 (1969); *Committee of Seven Thousand v. Superior Court* (*City of Irvine*), 45 Cal. 3d 491, 505 (1988). The "home rule" provision was "'enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.'" *State Building & Construction Trades Council of California v. City of Vista* (*City of Vista*), 54 Cal. 4th 547, 556 (2012) (*City of Vista*) (citing and quoting *Fragley v. Phelan*, 126 Cal. 383, 387 (1899)).

While charter cities are free to govern their "municipal affairs," they are subject to and controlled by applicable state laws that relate to matters of statewide concern, regardless of the provisions in their charters. Cal. Const. art. XI, § 5(a). *See also Baggett v. Gates*, 32 Cal. 3d 128, 136 (1982) ("As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters." (quoting *Bishop*, 1 Cal. 3d at 61)).[5]

The question of whether the state Legislature has infringed on a charter city's authority over municipal affairs is a question of law for a reviewing court to decide. The California Supreme Court has set forth "an analytical framework for resolving whether or not a matter falls within the home rule authority of charter cities." *City of Vista*, 54 Cal. 4th at 556 (citing *California Federal Savings & Loan Ass'n v. City of Los Angeles*, 54 Cal. 3d 1, 16 (1991)).

> First, a court must determine whether the city ordinance at issue regulates an activity that can be characterized as a "municipal affair." Second, the court "must satisfy itself that the case presents an actual conflict between [local and state law]." Third, the court must decide whether the state law addresses a matter of "statewide concern." Finally, the court must determine whether the law is "reasonably related to . . . resolution" of that concern and "narrowly tailored" to avoid unnecessary interference in local governance. "If . . . the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its

[4] Article XI, section 5(a) states:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

[5] Examples of state laws applicable to charter cities are the Ralph M. Brown Act, relating to open and public meetings, and the California Public Records Act, relating to disclosure of public documents. In the context of employment matters, the MMBA is an example of a law applicable to general law and charter cities, alike.

> sweep], then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by article XI, section 5(a) from addressing the statewide dimension by its own tailored enactments."

Id. at 556 (citations omitted).

In declaring an activity a municipal affair or a statewide concern, the Supreme Court has cautioned that courts must "avoid the error of compartmentalization, that is, of cordoning off an entire area of governmental activity as either a municipal affair or one of statewide concern." *Id.* at 557 (citation and internal quotations omitted).

> [T]he question whether in a particular case the home rule provisions of the California Constitution bar the application of state law to charter cities turns ultimately on the meaning and scope of the state law in question and the relevant state constitutional provisions. Interpreting that law and those provisions presents a legal question, not a factual one. Courts accord great weight to the factual record that the Legislature has compiled, and also to any relevant facts established in trial court proceedings. Factual findings by the Legislature or the trial court, however, are not controlling. The decision as to what areas of governance are municipal concerns and what are statewide concern is ultimately a legal one.

Id. at 558 (citations omitted).

B. The Decision About What Retirement Benefits to Provide to City Officers and Employees is a Municipal Affair.

Applying this analytical framework to the present issue, the first question a reviewing court will consider is whether a decision about what retirement benefits to provide to City officers and employees is a "municipal affair."

Article XI, section 5(b) of the Constitution sets out a nonexclusive list of core categories that are by definition "municipal affairs." *Johnson v. Bradley*, 4 Cal. 4th 389, 398 (1992). This list of core municipal affairs includes compensation of municipal officers and employees. Cal. Const., art. XI, § 5(b).[6] A public employee's pension constitutes an element of compensation. *Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978).

The California Supreme Court has repeatedly concluded that compensation paid by a charter city or county to its own employees is a municipal affair and not subject to regulation by the state Legislature. *See, e.g., Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 316-317 (1979) (*Sonoma County*); *San Francisco Labor Council v. Regents of University of California*, 26 Cal. 3d 785, 788, 791 (1980) (rejecting effort by state Legislature to compel the Regents of the University of California to pay prevailing wages to university employees on the basis that under article IX, section 9 of the Constitution, the University of California enjoys an autonomy like that of charter cities under article XI, section 5 of the California Constitution); *County of Riverside*, 30 Cal. 4th at 290 (holding state legislation requiring binding arbitration of local labor disputes unconstitutional on grounds that it violated constitutional provision at article XI, section 1(b), which provides that the governing body of each county "shall provide for the number, compensation, tenure, and appointment of employees"); *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 600, n.11 (1984) (stating salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws).[7]

In the recent *City of Vista* decision, the Supreme Court held that the state's prevailing wage law, which requires that certain minimum wage levels be paid to contract workers constructing public works, is not a statewide concern and, therefore, a charter city is not mandated to comply with it. *City of Vista*, 54 Cal. 4th at 566. The Court relied on the earlier

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[6] Article XI, section 5(b) of the Constitution states:

> It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) *plenary authority is hereby granted*, subject only to the restrictions of this article, *to provide* therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several *municipal officers and employees whose compensation is paid by the city* shall be elected or appointed, and for their removal, and *for their compensation*, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.

(Italics added.)

[7] There are certain employment-related state laws that are applicable to charter cities, despite the home rule provisions of article XI, section 5(b) of the Constitution. These state laws deal with procedural aspects of the relationship between a charter city and its employees, specifically the Public Safety Officers' Procedural Bill of Rights, which provides procedural protections to police officers, and the meet and confer requirements of the MMBA, which sets forth certain collective bargaining procedures between public agency employers and their recognized employee organizations. *County of Riverside,* 30 Cal. 4th. at 287 (citing *Baggett v. Gates*, 32 Cal. 3d 128, 136 (1982); *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591 (1984)).

Sonoma County and *County of Riverside* cases, and noted that "compensation of public employees is not a statewide concern justifying state law interference in the autonomy of independent governmental entities." *City of Vista*, 54 Cal. 4th at 563 (citations omitted).

The California Court of Appeal, Fourth Appellate District, has concluded that pensions are municipal affairs, in a case involving this City. In *Grimm v. City of San Diego*, 94 Cal. App. 3d 33 (1979), the court explained that charter cities "can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law." *Id.* at 37. The court stated that article XI, section 5(b) of the state Constitution, gives "full power to charter cities to provide for the compensation of their employees. It is clear that provisions for pensions relate to compensation and are municipal affairs within the meaning of the Constitution." *Id.* (citing and quoting *City of Downey v. Board of Administration*, 47 Cal. App. 3d 621, 629 (1975)). "A city council's decision regarding a pension system must be upheld unless expressly prohibited by the city charter." *Grimm*, 94 Cal. App. 3d at 38. *See also Estes v. City of Richmond*, 249 Cal. App. 2d 538, 543 (1967) (stating that pensions of police officers and firefighters are a municipal affair in charter city, and council's decision to place future employees under a different pension system must be upheld unless expressly prohibited by city charter).

C. There is an Actual Conflict Between AB 1248 and Proposition B.

The second question a reviewing court must consider in determining whether the state Legislature has violated the "home rule" doctrine is whether there is an actual conflict between the local law and the state law in question.

The California Supreme Court has explained that a court asked to resolve a putative conflict between a state statute and a charter city measure "initially must satisfy itself that the case presents an actual conflict between the two. If it does not, a choice between the conclusions 'municipal affair' and 'statewide concern' is not required." *California Federal Savings & Loan Ass'n*, 54 Cal. 3d at 16. "To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other." *Id.* at 16-17.

The Legislature adopted AB 1248 in response to Proposition B, which provides the parameters for a defined contribution plan for officers and employees under Proposition B, as follows:

> This [Defined Contribution] Plan shall meet the legal requirements established under the United States Internal Revenue Code in order to allow the City to retain its Social Security Safe Harbor Status, under the Internal Revenue Code, as amended, unless the City enrolls in the Social Security System under the restrictions established hereunder. . . .

> The City shall not contribute in excess of 9.2% of an Officer's or employee's compensation, as required by the Internal Revenue Code as amended, to defined contribution retirement accounts for that individual officer or employee. For a Uniformed Public Safety Officer, the City may contribute up to 11% of that Officer's or employee's compensation to his or her defined contribution retirement account. The City may elect to re-enroll in the Social Security System, provided that the City's total cost for retirement benefits do not exceed 9.2% for each Officer's or employee's compensation, or 11% for Uniformed Public Safety Officers.
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> . . . .
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> The implementation of this section shall be subject to the requirements of applicable law including, but not limited to, applicable labor relations laws and the requirements of the Internal Revenue Code, as amended.

San Diego Charter § 150.

Proposition B gives discretion to the Council, subject to the requirements of applicable laws, including the Social Security Act (SSA) and the MMBA, to provide Social Security benefits to City officers or employees initially hired or assuming office on or after July 20, 2012. There is a stated desire under Proposition B for the City to remain out of Social Security by providing a retirement benefit that serves as a "safe harbor" or "[Federal Insurance Contributions Act] FICA replacement plan."[8] AB 1248 eliminates the Council's discretion; it mandates Social Security coverage.

Here, there is a genuine conflict between AB 1248 and Proposition B. Proposition B provides authority to the Council to determine whether to provide a defined contribution plan only or a defined contribution plan in conjunction with Social Security. AB 1248 eliminates the Council's discretion; it mandates Social Security. AB 1248 also takes away discretion from the City in negotiations with its recognized employee organizations regarding implementation of Proposition B.

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[8] *See* Internal Revenue Service Publication, "Quick Reference Guide for Public Employers" (Feb. 2012), at http://www.irs.gov/pub/irs-tege/public_employers_outreach_guide.pdf. The wages of a state or local government employee whose employer has withdrawn from Social Security are subject to Social Security taxes unless the employee is a member of a retirement system maintained by the governmental employer that provides at least a minimum level of retirement benefits. I.R.C. § 3121(b)(7)(F). A defined contribution retirement plan satisfies the minimum retirement benefit requirement (safe harbor) for a particular employee when at least 7.5% of the employee's compensation is allocated to his or her retirement account. Treas. Reg. § 31.3121(b)(7)-2(e)(2)(iii)(A). The 7.5% requirement applies only up to the Social Security wage base,[8] which is currently $110,100 per year. *See* Treas. Reg. §31.3121(b)(7)-2, example under subsection (e)(2(iii)(B).

As this Office has previously advised,[9] Proposition B's implementation is subject to the meet and confer requirements of the MMBA,[10] and the City has been actively engaged in labor negotiations with its recognized employee organizations regarding implementation of Proposition B. On October 1, 2012, the Council approved a tentative agreement with the City's recognized employee organizations to amend the City's Supplemental Pension Savings Plan - Hourly (SPSP-H) plan document to provide an interim defined contribution plan for all employees hired on or after July 20, 2012, who are ineligible for the defined benefit pension plan. San Diego Ordinance O-20196 (Oct. 2, 2012); San Diego Resolution R-307704 (Oct. 2, 2012).

The City's contributions under the interim plan are set at the maximum amount allowed under Proposition B. The interim plan is intended to be in place until the City is able to complete labor negotiations with its impacted employee organizations and establish a permanent defined contribution plan for affected employees.

Implementation of AB 1248, which takes effect January 1, 2013, mandates modification of the interim defined contribution plan because the City's contributions to the defined contribution plan, as negotiated and approved, and to Social Security, will exceed the contribution limits established by Proposition B.[11]

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[9] *See* City Att'y Report 2012-14 (June 7, 2012); City Att'y Report 2012-17 (June 29, 2012).

[10] This Legal Opinion does not address the state collective bargaining issues related to implementation of AB 1248. However, we note that retirement benefits are a mandatory subject of bargaining. *Clovis Unified School District*, PERB Dec. No. 1504 (2002). They are a form of wages or, more specifically, deferred compensation, which accrues to employees as a result of their employment relationship. *Id.* Further, Social Security benefits require employer and employee contributions so they "embody both deferred wages and a reduction of employees' wages." *Id.* The California Public Employment Relations Board (PERB) has stated that any election related to Social Security is a mandatory subject of bargaining. *Id.* Therefore, if implementation of AB 1248 is required, the issues related to implementation must be discussed at the bargaining table by the City and the representatives of the City's recognized employee organizations.

It is also important to note that an employee organization may not bargain away individual statutory or constitutional rights, which flow from sources outside the collective bargaining agreement itself. *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal. App. 4th 1215, 1225 (1998) (citing *Wright v. City of Santa Clara*, 213 Cal. App. 3d 1503 (1989)). *See also California Teachers' Ass'n v. Parlier Unified School Dist.*, 157 Cal. App. 3d 174, 183 (1984) (holding that a collective bargaining agreement could not waive benefits to which employees were statutorily entitled). Therefore, another issue raised with AB 1248 is whether it could be construed as an individual statutory right of an employee to receive Social Security if the employee has only a defined contribution retirement plan. If the City enters into a collective bargaining agreement with the City's recognized employee organizations that does not comply with AB 1248, there is risk of litigation by individual employees, who view AB 1248 as providing a statutory right to Social Security benefits.

[11] In addition, the only way that City employees could be made eligible to participate in Social Security on January 1, 2013 would be to reduce the employee and employer contributions to the interim plan to below the safe harbor level. The combined employer and employee contributions could not exceed 7.49% of an employee's compensation.

Further, under the federal Social Security system, the City must make contributions equal to 6.2 percent of an employee's compensation, as defined by the SSA. With the City's contribution limits established by Proposition B, AB 1248 reduces the contributions the City may make to any defined contribution plan the Council desires to establish for post-Proposition B employees.

It may be possible for the City to comply with AB 1248 by reducing its defined contribution plan for employees under Proposition B so that the City no longer provides a "safe harbor" or "FICA replacement plan," making the employees' wages subject to employer and employee Social Security taxes. But, this would conflict with the positions the City and its recognized employee organizations have taken at the bargaining table.

A court is likely to determine that the elimination of this Council discretion to determine whether or not to provide Social Security benefits to officers and employees under Proposition B presents an actual conflict between Proposition B and AB 1248. AB 1248 also eliminates the City's plenary authority to set compensation as it desires, without state mandates.

D. AB 1248 Does Not Set Forth a Convincing Statewide Concern.

The third issue a reviewing court must address is whether AB 1248 addresses a matter of statewide concern. The Supreme Court has explained:

> The phrase "statewide concern" is thus nothing more than a conceptual formula employed in aid of the judicial mediation of jurisdictional disputes between charter cities and the Legislature, one that facially discloses a focus on *extramunicipal concerns* as the starting point for analysis. By requiring, as a condition of state legislative supremacy, a dimension demonstrably transcending
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> identifiable municipal interests, the phrase resists the invasion of areas which are of intramural concern only, preserving core values of charter city government.
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> . . . .
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> When a court invalidates a charter city measure in favor of a conflicting state statute, the result does not necessarily rest on the conclusion that the subject matter of the former is not appropriate for municipal regulation. It means, rather, that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city.
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> . . .
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> In cases presenting a true conflict between a charter city measure – whether tax or regulatory – and a state statute, therefore, the hinge of decision is the identification of a *convincing basis* for legislative

> action originating in extramunicipal concerns, one justifying legislative supersession based on sensible, pragmatic considerations.

California Federal Savings & Loan Ass'n, 54 Cal. 3d at 17, 18 (italics added).

AB 1248 was authored by Assemblymember Ben Hueso, who provided the following comments in support of the measure:

> Today, San Diego would like to eliminate the defined benefit pension plan by vote of the people and replace it with a 401(k) plan? [sic] Volatility in the stock market raises concerns about the security of defined contribution retirement systems. This volatility becomes an even larger concern for workers who would not be covered under the federal Social Security system.
>
> Allowing local governments to offer a 401(k) only retirement system will leave workers without a financial safety net in their retirement years and will shift the burden to the state in the long-run. If retired workers require health services, Medi-Cal will have to step in. Our state's budget for Medi-Cal today is $41 billion, $13 billion of which comes directly from the state's general fund. If workers do not have enough money in their 401(k) when they retire, as is common with 401(k) plans, California will have to supplement their income through our already burdened SSI/SSP program. These costs are currently $2.7 billion and already represent the highest figures in the nation. Allowing California workers to participate in the Social Security System will protect them in the future.

Bill Analysis, AB 1248 (May 21, 2012), at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1201-1250/ab_1248_cfa_20120828_213248_asm_floor.html. *See* http://www.cdss.ca.gov/agedblinddisabled/pg1422.htm for a discussion of SSI/SSP.

A concern about City employees not having enough money in their retirement accounts and making them dependent on the state for health care and other state supplemental payments may be an "*extramunicipal concern.*" But it does not appear to be a "*convincing basis*" for the legislative action. The Supreme Court explained in the *City of Vista* case that "for state law to control there must be something more than an abstract state interest, as it is always possible to articulate some state interest in even the most local of matters. Rather, there must be 'a convincing basis' for the state's action – a basis that 'justif[ies] the state's interference in what would otherwise be a merely local affair." *City of Vista*, 54 Cal. 4th at 560 (citation omitted). This is ultimately a question for a reviewing court to decide.

E. AB 1248 Does Not Appear to be Reasonably Related to Resolution of a Statewide Concern or Narrowly Tailored to Avoid Unnecessary Interference in the City's Governance.

The final question for a reviewing court to consider is whether the state law is reasonably related to resolution of the statewide concern and narrowly tailored to avoid unnecessary interference in local governance. Again, this is a question for a reviewing court. AB 1248 provides no flexibility to the City, thus it is arguably not narrowly tailored.

There is a strong argument that the state Legislature exceeded its authority in adopting AB 1248, by interfering with the City's authority to determine compensation of its employees, including retirement benefits. Ultimately, the question of whether AB 1248, as a state law, infers with the City's plenary authority over municipal affairs is a question of law for a court.

III. AB 1248 MAY VIOLATE THE CONSTITUTIONAL RESTRICTIONS ON SPECIAL LAWS IF THERE IS NO RATIONAL RELATIONSHIP BETWEEN THE PURPOSE OF THE LEGISLATION AND THE SINGLING OUT OF THE CITY, WHICH IS THE ONLY LOCAL PUBLIC EMPLOYER AFFECTED BY THE LEGISLATION.

Another constitutional issue raised by the adoption of AB 1248 is whether the Legislature violated article IV, section 16 of the Constitution, which provides:

> (a) All laws of a general nature have uniform operation.
>
> (b) A local or special statute is invalid in any case if a general statute can be made applicable.

AB 1248 was approved by the state Legislature as a special law, applicable only to the City. In adopting AB 1248, "[t]he Legislature finds and declares that a special law is necessary and that a general law cannot be made applicable within the meaning of Section 16 of Article IV of the Constitution because of the unique circumstances in the City of San Diego with respect to retirement benefits."

It appears that this City is the first municipality in the state to limit its employee retirement benefits to a defined contribution plan only, which may be implemented in conjunction with Social Security under the terms of Proposition B. Therefore, no general law appears to be applicable. The Court of Appeal, Fourth Appellate District has explained:

> It is well settled that article IV, section 16 does not prohibit the Legislature from enacting statutes that are applicable solely to a particular county or local entity. By its express terms, article IV, section 16 prohibits this type of legislation only if "a general statute can be made applicable." In determining whether "a general statute can be made applicable," the issue is not whether the Legislature could conceivably enact a similar statute affecting

> every locality. Rather, it is whether "there is a rational relationship between the purpose of the enactment . . . and the singling out of [a single] . . . county affected by the statute." The Legislature's determination that this rational relationship exists is entitled to great weight and will not be reversed unless the determination is arbitrary and without any conceivable factual or legal basis.

White v. State, 88 Cal. App. 4th 298, 305 (2001) (citations omitted).

Here, the state Legislature made findings that a special statute was needed because of the City's "unique circumstances . . . with respect to retirement benefits." There is nothing more than this statement. These findings are not detailed or specific, and the Legislature does not appear to set forth a rational relationship between the purpose of AB 1248 and its focus, solely on this City.

CONCLUSION

The City should have plenary authority, provided by the Constitution, to determine retirement benefits of its officers and employees, including implementation of Proposition B, without state intervention. There are strong arguments and case precedent on which to rely to support a contention that AB 1248 is unconstitutional. But the final determination rests with a reviewing court. A determination of what constitutes a municipal affair over which the state Legislature has no authority and what constitutes a statewide concern, allowing for state legislative control, is a matter for the courts, not the Legislature, to decide.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ *Joan F. Dawson*
Joan F. Dawson
Deputy City Attorney

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