RULES COMMITTEE: 2-16-11
Item: F

CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: Honorable Mayor & City Council Members

FROM: Dennis Hawkins, CMC City Clerk

SUBJECT: The Public Record February 4 - 10, 2011

DATE: February 11, 2011

ITEMS TRANSMITTED TO THE ADMINISTRATION

ITEMS FILED FOR THE PUBLIC RECORD

(a) Letter from Roelof van Ark, Chief Executive officer, California High-Speed Rail Authority to Mayor Reed dated January 31, 2011 regarding Mayor Reed's letter regarding the HST project in the San Jose area.

(b) Email from Wayne Martin to Mayor Reed and Council dated February 4, 2011 regarding Caltrain vs. Our Highway System.

(c) Fax from Amalia Chamorro, Director of Local Government Affairs, California Restaurant Association to the Transportation and Environment Committee dated February 7, 2011 regarding Litter and Trash Reduction Plan (TE Committee Meeting on 2/7/11)

(d) Letter from William Clark, President, Association of Legal Professionals to Mayor Reed and Council dated February 10, 2010 regarding City Council/Staff Study Session 2/14/11.

(e) Letter from David Wall to Mayor Reed and Council dated February 10, 2011 regarding "The Ghetto Life: Update of SCEP...the disappeared toilet is still under investigation."

(f) Letter from David Wall to Mayor Reed and Council dated February 10, 2011 regarding "Neighborhood Services and Education Committee did an Excellent Job!"

(g) Notification letter from T-Mobile West Corporation as successor in interest to Omnipoint Communications, Inc. d/b/a/ T-Mobile (U-3056-C) to Consumer Protection and Safety Division dated February 3, 2011 for T-Mobile Site No. SF55685E.

(h) Notification letter from T-Mobile West Corporation as successor in interest to Omnipoint Communications, Inc. d/b/a/ T-Mobile (U-3056-C) to Consumer Protection and Safety Division dated February 7, 2011 for T-Mobile Site No. SF44339B.

Dennis Hawkins, CMC
City Clerk

DH/tld

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PUBLIC RECORD ____ a

CALIFORNIA High-Speed Rail Authority

RECEIVED
San Jose City Clerk

2011 FEB -8 A 8:40

January 31, 2011

Chuck Reed, Mayor
City of San Jose
200 East Santa Clara Street, 18th Floor
San Jose, CA 95113

Dear Mayor Reed:

Thank you for your recent communication regarding the proposed high-speed train (HST) project in the San Jose area. As you know, we are now in the process of preparing a series of planning and environmental studies and will consider your input as part of our technical analysis. We greatly appreciate receiving your correspondence and your strong support of the HST project.

We look forward to working with the City of San Jose to prepare Visual Design Guidelines for the HST alignment within San Jose. It is our intent that these be completed and accepted prior to the release of the draft Project EIR/EIS for the HST project sections that include the City of San Jose, and that these guidelines will include visual, graphical descriptions of the proposed project.

We agree that it is important for the public to review a reasonable range of alternatives and we understand your desire to include both aerial and tunnel alignment options in the downtown San Jose Area within the scope of the project EIR/EIS documents. Tunnel alternatives for the downtown San Jose HST station (Diridon) were considered in our Preliminary Alternative Analysis for the Merced to San Jose section, but found to be impracticable for a number of reasons. The full Preliminary Alternative Analysis document is available on our website (www.cahighspeedrail.ca.gov). Based on input we have received on this document, we expect to make some revisions to the San Jose to Merced Preliminary Alternatives Analysis Report, which will be presented to our board as a Supplement Alternatives Analysis. We currently expect this document to be presented in May 2011. We will continue to consider information that we receive, but at this point, we continue to believe that the facts we have gathered and analyzed demonstrate that underground Diridon Station solutions are not practicable.

Once the draft environmental impact report/environmental impact statement (EIR/EIS) is released, the agencies and the public will have an opportunity to review and provide formal written comments on the document. We anticipate the draft document for the San Jose to Merced section being released for a 45-day formal review at the end of 2011. Comments received during the formal public comment period will then be used by the California High-Speed

Rail Authority (Authority) and the Federal Railroad Administration (FRA) to identify issues that may require evaluation and/or additional consideration to be included in the Final EIR/EIS.

In preparing the Final EIR/EIS, the Authority will respond in writing to the issues raised during the formal comment period of the Draft EIR/EIS. The Authority Board will also be provided copies of all comments and responses so it can determine whether the issues raised have been adequately addressed.

Again, we appreciate receiving your input and look forward to your continued participation in our environmental processes and your continued support of this HST project that is so critical to the future of California and the San Jose area.

Sincerely,

Roelof van Ark

CEO

s/s

PUBLIC RECORD b

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San Jose City Clerk

2011 FEB -4 P 4:33

From: Wayne Martin
Sent: Friday, February 04, 2011 3:37 PM
To: Wayne Martin
Subject: Caltrain vs Our Highway System

Elected Public Official:

Caltrain's yearly Ridership report show that during the weekday about 8500 unique people, from San Jose's 1+M population, and 2,500 unique people from San Francisco's 800,000+ population, board trains headed north and south. Together, this very small group generate about 55% of the passenger traffic of the whole Caltrain system on a weekday basis. These 11,000 unique people constitute less than .4% of 3+M living in Caltrain's Peninsula service area.

Looking forward at Caltrain's funding problems, and understanding the extremely high costs of government-managed/subsidized transportation systems, the operating/maintenance costs of this system can be shown to be about $8+B for the coming 30 years. That's $8+B providing transportation for no more than 18,000-20,000 unique people a day.

Our Bay Area highway system, on the other hand, provides perhaps half-million(estimated) "trips" for vehicles of all kinds for the 6.5+M residents, and who knows how many travelers who pass through the Bay Area on a daily basis. There is no one in the Bay Area who is not dependent on the goods that are delivered, and the services that are facilitated, on Highway 101 and Highway 280. Caltrain, on the other hand, outside of transporting this small segment of our population, does not enable our general economy, as these two highways do.

Caltrain needs to be terminated, and any/all public dollars intended for its future improvement redirected to our very neglected, and very useful, highway system.

Wayne Martin
Palo Alto, CA

Note: Please see that this communication is included in your City's public record.

PUBLIC RECORD C

CALIFORNIA
RESTAURANT
ASSOCIATION

City of San Jose
Transportation and Environment Committee
200 East Santa Clara Street
San Jose, CA 95113

February 7, 2011

Re: Litter and Trash Reduction Plan (Transportation and Environment Committee – 2/7/11 Meeting)

Dear Committee Members:

The California Restaurant Association is the definitive voice of the food service industry in California and is the oldest restaurant trade association in the nation. On behalf of our members in the City of San Jose, we submit this letter expressing our concern with one of the goals set out in the Litter and Trash Reduction Plan before you today, to ban foam food packaging at eating establishments in San Jose. The report states stakeholder meetings will be conducted; however, we believe strongly that starting out the stakeholder process with the intended goal of banning a product for a specific segment of the business community would be premature and unfair. Rather the outreach process should be an opportunity to educate the community on the city's challenges dealing with litter and trash and gather valuable input from stakeholders. Not only will this approach generate a wide range of ideas and solutions but it will also help guarantee an open and fair political process.

After all, the report claims the city hopes to enlist new and existing community partners to eradicate litter. We would like to work collaboratively with the city to address litter and trash; however a ban should not be the only option on the table for food service establishments. The report sets out the intent to ban without taking into account any of the challenges eating establishments would face with a ban such as higher cost and product performance issues with alternative products. We would appreciate the opportunity to engage with the city in exploring other ideas and solutions. As such, we urge the Transportation and Environment Committee to see the stakeholder process through before including a goal to ban in the Litter and Trash Reduction Plan.

Should you have any questions, please do not hesitate to contact me at 408.416.6344 or achamorro@calrest.org

Sincerely,

Amalia Chamorro

Amalia Chamorro
Director of Local Government Affairs

PUBLIC RECORD d

Association of Legal Professionals

February 10, 2011

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

Re: CITY COUNCIL/STAFF STUDY SESSION 2/14/2011 –Comments on Memorandum dated February 8, 2011 from City Manager Debra Figone to the Mayor and City Council

Dear Mayor Reed and Councilmembers:

The Memorandum referenced above was prepared on February 8, 2011 for the Special Council Meeting occurring on February 14, 2011. Both the timing and the minimal content of the memorandum provide us with virtually no opportunity to provide meaningful comment on what are potentially monumental issues in the City's relationship with its workforce, including those of us at the City Attorney's Office.

Page 4 of the memorandum contains a single paragraph entitled "Options for Addressing Projected City Retirement Contributions and Retirement Reform". This one short paragraph appears to be a request from the Administration that City Council somehow identify substantive proposals to change retirement benefits for <u>current City employees and retirees</u>. Neither the posted City Council Agenda language as of February 9, 2011, nor the Recommendation Section of the Memo mentions that the Council may discuss changing the benefits of current employees and retirees.

We certainly hope that it is not the intention of the administration to seek City Council direction or approval of changes to the pension benefits of existing employees or retirees. Reasonable advance notice of this discussion has not been given to the City employees nor to City's retirees. Moreover, a clear analysis of the underlying issues of this proposal has not been provided to the Council or to the citizens of San Jose. To turn a preliminary discussion of this topic into Council direction, without adequate prior notice to the most affected stakeholders, and without public review of any substantive analysis of the issues, would be directly contrary to the administration's statements that it will conduct this year's labor negotiations process in a more collaborative and transparent manner than in past years.

The memo raises an issue that is very important to ALP members, as well as all other represented and unrepresented City workers – the issue regarding the vested rights in our pension benefits and retiree healthcare benefits.

The Council has previously sought legal advice on its ability to change the pension rights of its current workforce. That legal advice can be found in the Memorandum from Kirstin D. Poirier-Whitely of Jones Day to City of San Jose, dated February 7, 2008 – on Retiree Heath Benefits and Vested Rights ~~that is attached to this letter.~~ A few months after Jones Day's advice to the City of San Jose was issued, that firm published a newsletter on its website entitled "Everything You Always Wanted to Know About a Public Employer's Ability to Modify Retiree Benefits but Were Too Afraid to Ask," August 2008. (copy attached).

The legal advice in these two opinions unequivocally states that California law requires the City to honor the vested rights of City employees in their pension benefits and to the retiree healthcare benefits that were promised by the City of San Jose on the date that the employees were hired.

The fact that there are legal constraints affecting the City's ability to reduce vested benefits of employees and retirees is not new information and has been mentioned numerous times in public, but seems to be dismissed or discounted by the Administration, without substantial analysis. For example, consideration of these legal issues is part of the recommendation of the City Auditor's Report on Pension Reform which was completed last Fall. Also, in response to questioning on this issue, the Administration acknowledged that there were legal issues regarding changing pension benefits of existing employees at the 4th meeting of the Pension Reform Task Force in October, 2010. These legal issues were also the subject of a brief discussion during the City Council Labor Negotiations Update several weeks ago. Yet there still has not been a reasonable analysis of how the Administration intends to approach that goal in a lawful manner.

The vested nature of pension rights of public employees was recently reaffirmed in COUNTY OF ORANGE vs ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS et al. B218660 (Los Angeles County Super. Ct. No. BC389758) filed 1/26/11. (attached).

Based upon these very reliable legal authorities, it is our position that the rights of current City employees vest upon the date that the employee is hired by the City. Furthermore, under California law, the City of San Jose may not reduce an employee's vested benefits without providing the employee with comparable advantages to offset the reduction in benefit.[1]

In particular we would like to bring to your attention the following statement in the Jones Day publication "Everything You Always Wanted to Know About a Public

[1] See also Letter from Robert J. Bezmek to Little Hoover Commission, dated June 22, 2010 which includes a detailed analysis of the history of public pensions and the vesting rights of public employees in California (attached).

Employer's Ability to Modify Retiree Benefits but Were Too Afraid to Ask" August 2008:

> "Thus, modifications to public pension plans must be "reasonable" as determined under a two-part test. Under the first part, if the change results in disadvantages to a member, ***it must be accompanied by comparable, offsetting advantages***. *Miller,* 18 Cal. 3d at 816. Under the second part, the modification of pension rights must bear some material relation to the theory of a pension system and its successful operation." (emphasis added)

Indeed, the City Auditor noted in her report, it was for this reason that the State of Vermont did not even attempt to change the pension rights of its employees who were within five years of retirement because the offset vis-à-vis those employees would not be to the state's advantage.

We are unaware of California legal authority that would lead anyone to the conclusion that it would be legal for the City to attempt to take away vested pension benefits from its current City employees or retirees. If the City has received a legal opinion that is contrary to the opinions attached to this letter, then we request that the City provide ALP and the public with a copy of that opinion so that the basis of that opinion may be properly reviewed.

If, indeed, it is the City administration's intention to begin a discussion of these important issues, we urge you to allow for a full discussion of all of the issues including the legal authority for any of its proposals, the possible economic effect on this year's budget, the possible changes to the City's expected unfunded liability, the effect that a nonconsensual change to vested rights might have on the City's disclosure requirement to lenders, and the certainty with which actuarial contribution rates may be calculated in an environment when the take away is in litigation.

We apologize that we have not had an opportunity to fully respond to all of the issues that may potentially be raised by the February 8, 2011 memorandum due to the short turnaround time before the Special Meeting of City Council.

We urge you to delay any action on the issues raised until a full public discussion of the issues can be provided.

Sincerely,

William Clark

William Clark
President

Everything You Always Wanted to Know About a Public Employer's Ability to Modify Retiree Benefits but Were Too Afraid to Ask

August 2008

Mothers like to remind fighting children that there are two sides to every story. This maternal wisdom seems to underpin one of the great questions facing public-sector retirees: Can a public employee's retirement benefits be changed? No other issue makes public-sector retirees and their employers quite as mad. Changes made to a public-sector employee's retirement plan are almost always contested, and the outcome usually depends on the court's interpretation of the ordinance or statute giving rise to the retirement coverage.

The good news for baby boomers is that we are living longer. The bad news for public employers is that the longer baby boomers live, the costlier their retirement benefits become. Three trends pushing public-sector employers to reduce retirement costs are: (1) new accounting rules requiring employers to show on their books how much promises to retirees will cost; (2) the spiraling cost of providing medical benefits to retirees; and (3) the increasing longevity of retirees.

Hard choices lie ahead. State governments have promised to spend $2.73 trillion over the next 30 years on retiree benefits. This number includes $2.35 trillion for pensions. The remaining $381 billion is owed for retiree medical anc other nonpension benefits. *See* Pew Center on the States, "Promises with a Price: Public Sector Retirement Benefits" ("Pew Report"), published December 18, 2007. About 97 percent ($370 billion) of the 30-year bill for retiree medical and other benefits was unfunded at the end of fiscal year 2006. The $370 billion in unfunded promised benefits is a conservative estimate because it does not include promises made to teachers or local government workers. Pew Report at p. 7. Many states owe so much that they may find it cost-prohibitive to provide the promised retiree medical benefits. *Id*. For example, California and New York each face approximately $50 billion in unfunded retiree medical liabilities.

Compounding the problem of out-of-control costs is that governmental plans are lightly regulated. Congress exempted its own employee benefit plan and other plans sponsored by governmental employers from the rigors of complying with the Employee Retirement Income Security Act of 1974 ("ERISA"). This "comprehensive and reticulated statute" regulates most aspects of employee benefit plans in the private sector. Although ERISA contains cradle-to-grave regulations for qualified retirement plans in the private sector, it does not contain any vesting or funding rules for public-sector retirement arrangements. ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1) (2006).

As described in more detail below, early cases—and modern cases in some jurisdictions—view public retirement benefits as a gratuity subject to change at any time. The weight of modern authorities in most jurisdictions, however, has rejected this gratuity approach and treated public retirement benefits as constitutionally protected contract rights.

The Rights of Public Pensioners Under Federal Law

Retirement Rights as a Gratuity. The last United States Supreme Court decision concerning the rights of *public* employees to receive a pension was in 1889. The case involved a claim by the estate of a deceased police officer of the City and County of San Francisco who had participated in a mandatory Police Officers' Relief and Pension Fund ("Officers' Fund"). *Pennie v. Reis*, 132 U.S. 464 (1889). The Officers' Fund established a $1,000 death benefit payable to the officer's estate. Ten days before the officer died, the State of California repealed the Officers' Fund and established a new fund that did not offer a death benefit. James Pennie, the administrator of the officer's estate, asked Mr. Reis, the treasurer of the Officers' Fund, to pay the money to the estate. The treasurer refused to pay, and Pennie filed a writ of mandate with the state court to compel the treasurer to pay. The Supreme Court of California ultimately dismissed Mr. Pennie's writ, holding that the repeal of the Officers' Fund was lawful. The United States Supreme Court affirmed, ruling that public-employee pension programs do not create vested rights against legislative modifications. The Court explained that the deceased officer's interest in the fund was "a mere expectancy created by the law and liable to be revoked or destroyed by the same authority." *Id.* at 471. Because the "law of April 1, 1878, [was] repealed before the death of the intestate, [the officer's] expectancy became impossible of realization. The money which was to pay the amount claimed had been previously transferred and mingled with another fund and was no longer subject to the provisions of that act." *Id.*

More recently, the United States Supreme Court reached a similar conclusion with regard to railroad retirement benefits created by statute. It concluded that such benefits were changeable at any time: "There is no claim here that Congress has taken property in violation of the Fifth Amendment, since railroad benefits, like Social Security benefits, are not contractual and may be altered or even eliminated at any time." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174 (1980) (*citing Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979), and *Flemming v. Nestor*, 363 U.S. 603, 608–11 (1960)).

Because *Pennie* has never been overruled, some lower federal courts have felt obliged to support its holding. For example, in *Zucker v. United States*, 578 F. Supp. 1239, 1243 (S.D.N.Y. 1984), claims by federal civil-service retirees to a constitutionally protected property interest in a pension were rejected, based on "85 years of unbroken Constitutional law at the Federal level beginning [with *Pennie*]," *aff'd*, 758 F.2d 637 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 842 (1985). *See also Muzquiz v. City of San Antonio*, 378 F. Supp. 949, 955–60 (W.D. Tex. 1974) (rejecting due process and equal protection claims of unconstitutionality of a statute barring refunds of pension contributions to departing employees), *aff'd*, 520 F.2d 993, 1001–02 (5th Cir. 1975).

More recently, the Third Circuit ruled that changes to a Pennsylvania public pension plan did not violate either state or federal constitutional impairment of contract clauses where the public plan expressly reserved the right of modification. *Transp. Workers Union v. SEPTA*, 145 F.3d 619, 629 (3d Cir. 1998). The Third Circuit did observe, however, that "[w]hile *Pennie* has never been expressly overruled, most state supreme courts subsequently rejected the 'gratuity' approach in favor of an approach that viewed such programs as creating implied-in-fact unilateral contracts." *Id.* at 623.

Retirement Rights Are Contractual in Nature. The two other circuit courts of appeal that have more recently considered the question have sided with the state-law-created "implied-in-fact unilateral contract" approach. For example, in *Nevada Employees Ass'n v. Keating*, 903 F.2d 1223, 1227 (9th Cir. 1990), the Ninth Circuit agreed with the Nevada Supreme Court that the "better reasoned view recognizes that non-vested employees have contractual rights in pension plans subject to reasonable modification in order to keep the system flexible to meet changing conditions, and to maintain the actuarial soundness of the system" (*quoting Public Employees' Ret. Bd. v. Washoe County*, 615 P.2d 972, 974 (Nev. 1980)). In *Keating*, the Ninth Circuit ultimately concluded that a Nevada law penalizing the withdrawal of pension contributions (which altered a previous law that did not contain a penalty) violated the Contract Clause because it was not a reasonable modification of the pension plan. Likewise, the Fourth Circuit in *Kestler v. Bd. of Tr. of North Carolina Local Gov't Employees Ret. Sys.*, 48 F.3d 800, 804 (4th Cir. 1995), observed that it too did not view pensions as gratuities. However, the court ultimately decided that legislative amendments to a North Carolina disability benefit plan did not violate the Contract Clause because rights to disability benefits did not vest until retirement.

The issue of whether a contract was established for protection by the federal constitutional Contract Clause is to be decided under federal law. In *General Motors v. Romein*, 503 U.S. 181, 186 (1992), the Supreme Court developed a three-part test to determine whether a contract has been impaired under the Contract Clause. Under this paradigm, a court is to first ask whether a contract exists. If it does, the court is then to determine whether the law in question impairs an obligation under the contract. If it does, the court is then to inquire whether the discerned impairment can fairly be characterized as substantial. If the answer to each of these three questions is yes, a federal court is compelled to void the proposed application of the challenged state law. *Id.*

The Rights of Public Pensioners Under State Law

A review of the state case law surrounding public employees' pension rights yields one sobering conclusion—it is a mess. While some cases take the *Pennie* approach and view the promise of a pension as a gratuity, most states addressing the issue have rejected the gratuity theory as outdated.

California Law. Probably the most prolific jurisdiction to have rejected the gratuity theory is the State of California. In general, the terms and conditions of public employment in California are controlled by statute or ordinance rather than by contract. *See Miller v. State of California*, 18 Cal. 3d 808, 813 (1977) ("It is well settled in California that public employment is not held by contract but by statute"). Nevertheless, "[u]nlike other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the contract clause of the federal and state Constitutions."[1] *United Firefighters of Los Angeles City v. City of Los Angeles*, 210 Cal. App. 3d 1095, 1102 (Ct. App. 1989).

In the seminal case of *Kern v. City of Long Beach*, 29 Cal. 2d 848 (1947), the California Supreme Court reversed course from *Pennie v. Reis* and announced:

> [P]ublic employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned. . . . Since a pension right is an "integral portion of contemplated compensation" . . . it cannot be destroyed, once it has vested, without impairing a contractual obligation.

Id. at 853.

The *Kern* case involved unusual facts. Mr. Kern had been a member of the City of Long Beach's fire department for 19 years and 11 months. When he began working as a firefighter, the city's charter had a provision that provided a pension for firefighters equal to 50 percent of annual salary after completing 20 years of service. For 15 years of his service, 2 percent of Mr. Kern's salary had been deducted and paid into the pension fund. On March 29, 1945, 32 days before Mr. Kern completed the required 20 years' service, a new section was added to the city charter repealing the pension provisions and eliminating pensions as to all persons not then eligible for retirement. *Id.* at 850. Upon completing his 20 years of service, Mr. Kern requested that he be retired and paid a pension. The city refused, and Mr. Kern filed suit. *Id.* The Supreme Court in *Kern* decided that Mr. Kern's right to his pension benefits vested upon his acceptance of employment. *Id.* at 852.

The Supreme Court, while recognizing the unilateral nature of a public employee's pension rights, did not make them unchangeable:

> Thus it appears, when the cases are considered together, that an employee may acquire a vested contractual right to a pension but that this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered.

Id. at 855.

The Supreme Court concluded that Mr. Kern had a vested pension right and that the City of Long Beach, by completely repealing his pension, had improperly attempted to impair its contractual obligations. *Id.* at 856.

A more modern and refined version of this "vested rights" doctrine was set forth by the California Supreme Court in the leading case of *Betts v. Bd. of Admin.*, 21 Cal. 3d 859, 863 (1978):

> A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity [*citing Kern*]. The employee does not obtain, prior to retirement, any absolute right to fixed or specific benefits, but only to a "substantial or reasonable pension."

In summary, "[b]y entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer," *Carman v. Alvord*, 31 Cal. 3d 318, 325 (1982) (*citing Betts*), and to earn additional pension benefits pursuant to improved terms conferred during continued employment. *See Betts*, 21 Cal. 3d at 866 ("An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure"). This means that the employee has a vested right not merely to preserve the pension benefits already earned, but also to continue to earn benefits under the terms previously promised through continued service. *See Legislature v. Eu*, 54 Cal. 3d 492, 530 (1991) ("We conclude that incumbent legislators had a vested right to earn additional pension benefits through continued service"); *see also Pasadena Police Officers Ass'n v. City of Pasadena*, 147 Cal. App. 3d 695 (Ct. App. 1983) ("the employee has a vested right not merely to preservation of benefits already earned pro rata, but also, by continuing to work until retirement eligibility, to earn the benefits, or their substantial equivalent, promised during his prior service").

Under *Kern* and its progeny, determining whether a particular change to retirement benefits impairs a vested right involves a two-step inquiry. The first question is whether the change actually alters the contract between the employer and the employee. If it does, the next question is whether the change constitutes a reasonable modification.

Looking at the Terms of the Contract. In California, whether a proposed change impairs a vested right under a public pension plan depends upon how the member's rights are defined under the terms of the governing "contract." *See Int'l Ass'n of Firefighters v. City of San Diego*, 34 Cal. 3d 292, 302 (1983). Thus, the nature and extent of a member's vested right to a retirement benefit must be ascertained from the language of the statute and other legally operative documents, such as resolutions implementing the retirement plan—*see, e.g., id.* at 302 (looking to city charter and ordinance); *Ventura County Retired Employees' Ass'n v. County of Ventura*, 228 Cal. App. 3d 1594, 1598–99 (Ct. App. 1991) (looking to the Government Code to determine an employer's obligations), *rev. denied*, 1991 Cal. Lexis 3034 (1991); *Orange County Employees Ass'n, Inc. v. County of Orange*, 234 Cal. App. 3d 833, 843–44 (Ct. App. 1991) (looking to the Government Code), *rev. denied*, 1991 Cal. Lexis 5658 (1991); *Thorning v. Hollister School. Dist.*, 11 Cal. App. 4th 1598, 1607–08 (Ct. App. 1992) (looking to official declaration of policy issued pursuant to Government Code); 2000 Cal. AG Lexis 3 (January 28, 2000) (benefits provided pursuant to city resolution adopted under Government Code)—and judicial construction of those provisions or similar provisions at the time the contractual relationship was established. *Kern,* 29 Cal. 2d at 850. "[I]t is necessary to perceive the terms of the contract and to utilize those terms to measure the claimed impairment." *Lyon v. Flournoy*, 271 Cal. App. 2d 774, 783 (Ct. App. 1969), *appeal dismissed*, 396 U.S. 274 (1970). It is the reasonable expectations of the employee that are protected. *See generally Allen v. Bd. of Admin.*, 34 Cal. 3d 114 (1983); *see also Ass'n of Blue Collar Workers v. Wills*, 187 Cal. App. 3d 780, 792 (Ct. App. 1986) (right vested in employees is their "reasonable expectation" that the city would meet its statutory obligation to fund past-service liability).

The case law bears out the conclusion that the scope of a member's vested right is defined by the terms of the promise. For example, the California Supreme Court has held that if a member's contribution rate under a pension plan is fixed and the pension plan does not give the plan sponsor the right to change the rate, any increase in that rate would constitute an impairment. *See generally Allen v. City of Long Beach*, 45 Cal. 2d 128 (1955); *see also Abbott v. City of Los Angeles*, 50 Cal. 2d 438, 451–53 (1958) (changes, including imposition of member contributions where plan provisions previously required full cost to be paid by employer, held invalid), *Wisley v. City of San Diego*, 188 Cal App. 2d 482, 486 (Ct. App. 1961) ("It is obvious that the increase in the percentage of the employee's contribution to the retirement fund is a detriment"). In contrast, where the plan terms state that a member's contribution rate is subject to adjustment based upon actuarial assumptions, an increase in the member's contribution rate attributable to changes in such actuarial assumptions is not an impairment. *See Int'l Ass'n of Firefighters*, 34 Cal. 3d at 300, 302–03; *see also Pasadena Police Officers Ass'n*, 147 Cal. App. 3d at 711 (because the authority of the retirement board to adopt and approve actuarial assumptions was a condition of entitlement to benefits at all times, the decision of the board in the exercise of that authority to use an assumption as to salary inflation in calculating contributions did not deprive members of vested rights); *accord Walsh v. Board of Admin.*, 4 Cal. App. 4th 682, 700 (Ct. App. 1992) ("If the modification of Walsh's retirement benefits was consistent with the reservation of power to the Legislature, then it was valid regardless [of] whether the [retirement system] can be said to have granted contractual rights to members of the Legislature").

The Reasonable Modification Doctrine. Generally, a California public pension plan may be modified *prior to an employee's retirement* for the limited purpose of keeping the system sufficiently flexible to accommodate changing conditions so as to maintain the integrity of the system. *Int'l Ass'n of Firefighters v. City of San Diego*, 34 Cal. 3d at 300–01. Thus, modifications to public pension plans must be "reasonable" as determined under a two-part test. Under the first part, if the change results in disadvantages to a member, it must be accompanied by comparable, offsetting advantages. *Miller,* 18 Cal. 3d at 816. Under the second part, the modification of pension rights must bear some material relation to the theory of a pension system and its successful operation. *Abbott*, 50 Cal. 2d at 453. Courts have concluded that retirees, unlike active employees, are not subject to the reasonable modification doctrine. *See Terry v. City of Berkeley*, 41 Cal. 2d 698, 702–03 (1953); *Claypool v. Wilson*, 4 Cal. App. 4th 646, 664 (Ct. App. 1992).

Employers have been successful in applying this doctrine in only a handful of cases. In most cases, the courts have concluded that there were insufficient (if any) offsetting advantages to justify the change.

Comparable Offsetting Advantages. In determining whether a disadvantage to employees is offset by a comparable new advantage, California courts focus on the particular employees who are disadvantaged and whether those employees tend to gain advantages from the proposed pension plan amendment. *Abbott*, 50 Cal. 2d at 453. Changing a public pension plan so that a person convicted of a felony would forfeit all pension rights was not "reasonable," according to the California Supreme Court, because forfeiture was a "detriment" without any corresponding advantages to the particular disadvantaged employee. *Wallace v. Fresno,* 42 Cal. 2d 180, 185–86 (1954).

Similarly, the "comparable new advantages" test was used to invalidate an increase in the employee contribution rate to a retirement system from 2 percent of salary to 10 percent. *Allen v. City of Long Beach*, 45 Cal. 2d at 130. The California Supreme Court ruled that the 8 percent increase constituted a substantial increase in the cost of pension protection to the affected employees without any corresponding increase in the amount of pension benefit payments. *Id.* at 131. In other words, when the employee's contribution rate is a fixed element of the pension system under the governing documents, the rate cannot be increased unless the employee receives comparable new advantages for making an increased contribution. *Pasadena Police Officers Ass'n*, 147 Cal. App. 3d at 702. On the other hand, a "comparable offsetting advantage" was found when the Public Employees' Retirement Law was changed to eliminate the ability of state employees to retire at age 55. *See Amundsen v. PERS*, 30 Cal. App. 3d 856, 859 (Ct. App. 1973). In *Amundsen*, a public employee who was on the verge of attaining age 55 filed suit, claiming his pension rights had been impaired because the new law required state employees to complete five years of service before retiring. *Id.* at 858. An offsetting comparable advantage was found by the court in upholding the new law because the amount of employee contributions was decreased and substantially higher pensions would be paid. *Id.* at 859.

Material Relation to the Theory of a Pension System. The case law interpreting the "material relation" requirement is sparse. The California Supreme Court ruled early on that a pension plan amendment that terminated all pension rights of a pensioner upon conviction of a felony after retirement did not have a "material relation" to the theory of the pension system or to its successful operation. *Wallace,* 42 Cal. 2d at 185.

The court pointed out that the change was designed to mollify taxpayers who objected to their tax monies going toward payment of a felon's pension. Similarly, the California Supreme Court found in *Allen v. City of Long Beach,* 45 Cal. 2d at 133, that amendments that increased employee contribution rates, provided for a new fixed pension, and required an additional contribution from employees returning from military service did not bear a relation to the functioning and integrity of the pension system. Rather, the changes were needed because newer employees, not eligible for the original pension, were disgruntled, and the city wished to equalize the compensation of the two employee groups to ease the tensions. *Id.*

California courts have held that to satisfy the "material relation" prong of the reasonableness test, the change:

> [m]ust relate to considerations internal to the pension system, *e.g.*, its preservation or protection or the advancement of the ability of the employer to meet its pension obligations. Changes made to effect economies and save the employer money do "bear some material relation to the theory of a pension system and its successful operation . . ." [*quoting Betts,* 21 Cal. 3d at 864]. That is not to say that a purpose to save the employer money is a sufficient justification for change. The change must be otherwise lawful and must provide comparable advantages to the employees whose contract rights are modified. We hold only that the monetary objective will not invalidate a modification which is otherwise valid.

Claypool v. Wilson, 4 Cal. App. 4th at 666.

Other State Jurisdictions. Numerous states have followed California's example and adopted some form of unilateral contract theory to enforce the rights of public employees to their pensions. *See generally Police Pension & Relief Board of Denver v. Bills*, 148 Colo. 383 (1961); *Nash v. Boise City Fire Dept.*, 104 Idaho 803 (1983); *Brazelton v. Kansas Public Employees Ret. Sys.*, 227 Kan. 443 (1980); *Eisenbacher v. City of Tacoma*, 53 Wash. 2d 280 (1958).

For example, in *City of Frederick v. Quinn*, 35 Md. App. 626 (Md. Ct. Spec. App. 1977), the question presented was whether the City of Frederick could unilaterally repeal a noncontributory police pension plan. The trial court ruled that the police officers' pension rights vested upon employment and were immune from prospective legislative impairment. *Id.* at 629. The Maryland court of appeals found that the trial court had gone too far, but it agreed that a public pension is subject to significant contractual protections:

> Tracing the evolution of theories in the decisional law of public employee statutory pension rights [ ] leaves one with the same sense of disturbing disbelief we feel when we see caricatures of our neanderthal forebearers. The unfortunate result revealed by such research is that the majority of the states have not evolved from this prehistoric immaturity . . . . The medieval or even colonial concepts of a compassionate and generous sovereign rewarding his humble, devoted subjects is completely alien to our modern views of a democratic government's obligations to its citizens.
>
> Only slightly less bemusing, on the other hand, is the picture of a citizen whose contractual strength is so formidable that the government which employs him

> can neither terminate nor vary the terms of the employment contract which is the essence of the strict constructionist views explicated by [*Yeazell v. Copins*, 98 Ariz. 109 (1965)]. Such rigid interpretation is the inevitable pitfall of seeking pigeonholes with labels as substitutes for logic and common sense.

Id. at 629–30.

Ultimately, the Maryland court of appeals followed the "modified" unilateral contract approach articulated by the California courts in *City of Downey v. Bd. of Admin. Pub. Emp. Ret. Sys.*, 47 Cal. App. 3d 621, 630–31 (Ct. App. 1975):

> The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make *reasonable modifications* in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee.

Halpin v. Nebraska State Patrolmen's Ret. Sys., 211 Neb. 892 (1982), is likewise illustrative. It involved the question of whether a retiring employee's monthly average salary should include the lump-sum payment received for accumulated but unused vacation and sick leave. *Id* at 896. Prior to 1979, accumulated vacation and sick leave had been included in calculating a Nebraska patrolman's monthly retirement benefit. The Nebraska attorney general opined in 1978 that accumulated vacation and sick leave should not be counted in determining retirement benefits. *Id.* at 895. The Nebraska State Patrolmen's Retirement Board adopted a new rule effective January 4, 1979, that accumulated vacation and sick leave would no longer be used in calculating a patrolman's final average monthly salary. Mr. Halpin sued, claiming the Retirement Board's action was void because it impaired his vested contractual rights. The Nebraska Supreme Court concluded Mr. Halpin was right—the Retirement Board's failure to include lump-sum leave payments in his patrolman's annuity calculations was an impairment of a vested contractual right. *Id.* at 901. It explained that pension payments constitute deferred compensation for services rendered, and it agreed with the California Supreme Court that "the right to pension benefits vests upon acceptance of employment." *Id.* at 900 *(citing Miller v. State of California*, 18 Cal. 3d 808, 815 (1977)).

A few states have provisions in their state constitutions stating that an employee's right to his or her pension vests at the time he or she starts employment. *See, e.g.,* Alaska Constitution Article XII, section 7; Hawaii Constitution Article XVI, section 2; and Michigan Constitution Article IX, section 24. Some states, like Arizona, view public pensions as property rights and guarantee a contractual right to a pension even though there is no specific state constitutional provision. In *Yeazell v. Copins*, 98 Ariz. 109, 116 (1965), the Arizona Supreme Court ruled that the Arizona legislature could not alter the eligibility rules for public pension participation, nor could it reduce the amount of contributions to the pension fund even if the actuarial soundness of the public pension fund was in jeopardy.

Minnesota is different. It uses the doctrine of promissory estoppel to determine whether a public employee's right to a pension is enforceable. *Law Enforcement Labor Serv., Inc. v. County of Mower*, 483 N.W.2d 696, 701 (Minn. 1992).

Illinois entertains due process of law claims to protect public pension benefits. It has a constitutional provision (Article XIII, section 5) that states: "Membership in any pension or retirement system of the State . . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired." In *Miller v. Ret. Bd. of Policemen's Annuity & Benefit Fund*, 329 Ill. App. 3d 589 (2001), a class-action lawsuit was filed concerning a legislative amendment that reduced police officers' pension benefits. The court ruled that the Illinois constitutional provision gave the police officers a constitutionally protected property interest in their pension benefits and that the proposed statute would deprive them of this property without due process of law in violation of 42 U.S.C. § 1983 (a civil rights claim).

Finally, some states, like Texas, continue to view the promise of a pension as a gratuity. *Cook v. Employees Ret. Sys.*, 514 S.W.2d 329 (Tex. Ct. App. 1974), is illustrative. Joyce Cook's husband was killed in the line of duty as a fireman for the City of Richardson, Texas. She filed suit to protect the right of her three children to receive annuity benefits until they reached the age of 21. At the time of Mr. Cook's death, Texas law provided that children who hac not reached the age of 21 would receive monthly annuities. In 1973, the Texas legislature changed the definition of "minor" to a child who had not reached the age of 18. Ms. Cook filed suit, claiming that changing the definition of "minor" was unlawful because it caused a forfeiture of her children's entitlement to receive their father's vested pension benefits. The trial court dismissed Ms. Cook's claim. The Texas court of civil appeals affirmed, explaining that the right to benefits of a pension fund are subordinate to the right of the legislature to diminish benefits or abolish the pension fund. *Id.* at 331.

The Role of Collective Bargaining

While retirement benefits generally are terms and conditions of employment subject to collective bargaining, several jurisdictions have held that a collective bargaining unit may not bargain away constitutionally protected individual rights such as vested pension rights. *Welter v. City of Milwaukee*, 214 Wis. 2d 485, 495 (Ct. App. 1997), *rev. denied*, 217 Wis. 2d 519 (1998) ("The City's argument that the officers should be deemed to have consented tc the modification of their vested retirement-system rights because the concessions were agreed to by their unions ignores that a union may not bargain away the vested rights of its members without the express consent of those members"); *In re Morris Sch. Dist. Bd. of Educ.*, 310 N.J. Super. 332, 345 (1998), *cert. denied*, 156 N.J. 407 (1998) (noting that "[i]n a variety of factual settings, courts have held that a union has no authority on behalf of its membership to bargain away various forms of deferred compensation earned during the terms of prior collective bargaining agreements absent knowing consent by those who would be adversely affected"); *cf. Wright v. City of Santa Clara*, 213 Cal. App. 3d 1503, 1506 (1989) (stating that a "collective bargaining agreement may not waive statutory rights which arise from an extraordinarily strong and explicit state policy"); *Phillips v. State Pers. Bd.*, 184 Cal. App. 3d 651, 660 (1986), *disapproved on other grounds in Coleman v. Dep't of Pers. Admin.*, 52 Cal. 3d 1102, 1123 n. 8 (1991) (holding that a collective bargaining agreement could not waive an employee's right to due process); *see also Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 n. 20 (1971) (noting that "[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent").

To the extent the retirement rights originate in a collective bargaining agreement, however, it may be possible to renegotiate some of these rights, at least prior to an employee's retirement. In *San Bernardino Public Employees Ass'n v. City of Fontana*, 67 Cal. App. 4th 1215 (1998), a labor union sought to set aside provisions in several memoranda of understanding relating to reductions in personal leave accrual and longevity pay benefits. The court held that personal leave and longevity pay were negotiable, which distinguished them from vested pension rights. While pension benefits are entitled to contract clause protection, personal leave and longevity pay could not become irrevocably vested because they were provided for in collective bargaining agreements of fixed duration only and because no outside statutory source protected those benefits. *Id.* at 1223–25.

A Public Employee's Right to Retiree Medical Benefits

It appears that, depending upon the nature and terms of the "contract" involved, retirement health benefits, like pension benefits, may become "vested" and constitutionally protected from impairment in some jurisdictions. For example, *Thorning v. Hollister School District*, 11 Cal. App. 4th 1598 (1992), was the first case in California to extend the vested rights doctrine to protect retirement health benefits. In *Thorning*, the court considered the decision by a school district board to eliminate retirement health benefits provided to retired board members under a declaration of policy previously adopted by the board. In 1988, during the terms of office of the plaintiffs and pursuant to Government Code section 53201, the school district adopted Policy No. 9250(a) as part of the "Bylaws of the Board." Policy No. 9250(a) provided:

> Any members retiring from the [school district] Board after at least one full term shall have the option to continue the health and welfare benefits program if coverage is in effect at time of retirement, except that Board members who have served less than twelve (12) years, but at least one term shall pay the full cost of health and welfare benefits coverage.

Id. at 1604–05. In July 1990, the Board revised this policy to provide that "[t]he Board *may* authorize payment of premiums for retired members who have served twelve (12) years or more." *Id.* at 1605. On November 27, 1990, the Board voted to continue payment of health benefits for the plaintiffs for the next 10 years. The plaintiffs' terms ended as of December 1, 1990, and on December 11, 1990, the new Board voted to suspend payment of plaintiffs' health benefits.

The court looked to Policy No. 9250(a) as adopted in 1988 as the governing contract setting forth the plaintiffs' rights to retirement health benefits. It concluded that the July 1990 change in the Policy could not diminish the benefits already awarded to the plaintiffs during their term of office. Considering the three criteria established by the *California League* case, the court indicated that the rights set forth under the 1988 Policy were akin to pension benefits, and it concluded that they vested because they were part of the compensation promised to the Board members and as such were important to the Board members as an inducement for their continued service on the Board and a factor in their ultimate decision to retire. The court further concluded that because the terms of the policy provided that only individuals with less than 12 years of service were required to contribute to the cost of coverage, the vested contractual right for the plaintiffs (who had more than 12 years of service) included the right to have the employer pay the cost of their coverage.

While there are a number of arguments that may be made about the viability and scope of the *Thorning* decision, there do not appear to be any cases in California that hold that retiree health benefits are not constitutionally protected from impairment. A number of cases, however, have taken a careful look at the "contract" involved and have determined that the challenged changes were permitted. *See Sappington v. Orange Unified School Dist.*, 119 Cal. App. 4th 949 (2004) (finding it unnecessary to determine whether the retiree health rights at issue were vested because contract did not promise payment of the entire cost of coverage and language of contract was so broad that it obligated employer to provide only a program of health insurance, not any particular kind); *Mayers v. Orange Unified School Dist.*, 2003 Cal. App. Unpub. LEXIS 6346 (2003) (contract provided only for the same health benefits as provided to active employees; not entitled to free enrollment in a PPO if the employer did not provide the same benefit for actives); *see also Ventura County Retired Employees' Ass'n v. County of Ventura*, 228 Cal. App. 3d. 1594 (1991) (county did not have mandatory duty to provide retiree health benefits under applicable statute; provision of benefits was discretionary); *Orange County Employees Ass'n v. County of Orange*, 234 Cal. App. 3d 833 (1991) (same).

Similar to California, Alaska views retirement medical benefits as part of the overall retirement benefit package. As such, retirement medical benefits, like pension benefits, are protected by the Alaska Constitution from being diminished. In *Duncan v. Retired Public Employees of Alaska, Inc.*, 71 P.3d 882 (Alaska 2003), the Alaska Supreme Court stated that the term "accrued benefits" as used in the Alaska Constitution includes the retirement medical benefits offered to public employees.

The courts' treatment of retirement medical benefits has been less favorable to public employees in other jurisdictions. For example, in *Bremerton Public Safety Ass'n v. City of Bremerton*, 104 Wn. App. 226, 231 (Wash.

Ct. App. 2001), the court permitted the city to reduce or eliminate retirement medical benefits where retirees declined to purchase available Medicare supplemental coverage because the state law that protected these benefits simply stated that the employer shall pay any medical costs incurred by the retired member "not payable from some other source."

The Michigan Supreme Court also permitted changes to retirement health benefits in *Studier v. Michigan Public Sch. Employees Ret. Bd.*, 472 Mich. 642, 645 (2005). The school retirees in that case challenged increases in prescription drug copayments and medical deductibles as violating the state constitutional provision protecting "accrued financial benefits" from reduction. The Michigan Supreme Court ruled that the definition of "accrued financial benefits" applied only to those benefits that consisted of monetary payments that were earned and became vested through the passage of time. It observed that health-care benefits were neither cash payments nor the type of benefits that increased in value over time, such as defined-benefit pension benefits. *Id.* at 664–65. The Michigan Supreme Court was guided by the fundamental principle of jurisprudence recognizing that one legislature cannot bind the power of a successive legislature. *Citing United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996). The Michigan Court observed that the United States Supreme Court established a strong presumption that statutes do not create contractual rights in its *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985), decision:

> For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise."
>
> * * *
>
> This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 104-105 . . . .
>
> The first step in this cautious procession is to examine the statutory language itself. *Nat'l R.R., supra*, at 466. In order for a statute to form [an enforceable contract,] the statutory language "must be plain and susceptible of no other reasonable construction" than that the legislature intended to be bound to a contract. *Stanislaus County v. San Joaquin & King's River Canal & Irrigation Co.*, 192 U.S. 201, 208 (1904). "[A]bsent an 'adequate expression of an actual intent' of the State to bind itself," courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party. *Nat'l R.R., supra*, at 466-467 . . . some federal courts, when interpreting statutes involving public-employee pension benefit plans, have expressed greater reluctance to infer a contractual obligation where a legislature has not explicitly precluded amendment of a plan. *Nat'l Ed. Ass'n-Rhode Island v. Retirement Bd. of the Rhode Island Employees' Retirement System*, 172 F.3d 22, 27 (CA 1, 1999).

472 Mi. at 661–63.

Vehicles for Prefunding Retiree Health Benefits

Many public employers have made promises concerning retiree health that are being paid on a "pay as you go" basis. To the extent the looming unfunded liabilities generated by these promises cannot be reduced by changes to the retirement health program, it is at least possible to begin to ameliorate the unfunded liability by beginning to prefund the retirement health obligation.

Prefunding may be accomplished using one of several types of trust that would be tax-exempt under federal law: (i) an entity that is exempt from taxation because the entity is either an integral part of a governmental entity or maintained by a governmental entity under Internal Revenue Code section 115 (collectively "Government Trusts"), (ii) an entity organized to qualify as a voluntary employees' beneficiary association under Code section 501(c)(9) ("VEBA"), and (iii) an account established under Code section 401(h) ("401(h) account") to provide retiree medical benefits through a pension plan. All three vehicles may be funded by employer contributions on a pretax basis, and the income accrued thereon should be tax-free. In addition, amounts received by retirees and their dependents (directly or indirectly) from these entities to pay for health insurance or to provide reimbursement for incurred medical expenses generally should be excludable from gross income (unless the plan is self-insured and discriminates in favor of highly compensated employees).

The three vehicles identified above are those that, in our experience, have most often been used by employers to prefund retirement health obligations. While each vehicle has relative strengths and weaknesses, a Government Trust appears to provide employers with the greatest flexibility to prefund retirement medical benefits.

What Steps Should Public Employers Take to Evaluate and Perhaps Limit Liabilities?

Over the next 25 years, the ratio of active to retired workers will decrease from three active employees for every one retiree to two active employees for each retiree. 65 Ohio State Law Journal 1 (2004). As baby boomers begin to swell the ranks of the retired population, an increasing number of them will likely live longer than ever before. The Congressional Research Service reports that life expectancy for men increased from 67 years in 1960 to 75 years in 2003. Life expectancy for women increased from 73 years in 1960 to 80 years in 2003. Congressional Research Service, Life Expectancy in the United States 3 (2006). By 2025, the 65-and-over population will almost double, from 36.7 million Americans in 2005 to 63.5 million. Congressional Research Service, Older Workers: Employment in Retirement Trends 2 (2005). These demographic trends raise obvious sustainability issues for the pay-as-you-go retirement programs for public-sector employers.

Faced with this dizzying array of statistics, constitutionally protected contract rights, and judge-made mandates, what can a public employer do to control the increasing costs of retirement benefits?

1. Assess the current and project the future financial impact of retirement benefits.

- What are the current costs?
- What will the program cost in five years if no changes are made?
- Ten years?
- What is the impact on the public entity's credit rating if no changes are made?
- What impact will retiree benefits have on the public entity's ability to provide ongoing services?
- What is the financial impact of reducing or eliminating retirement benefits for new hires? For existing employees?

2. Carefully assess what retirement promises have been made.

- Determine who made them.
- Did they have the authority to do so?
- How were the retirement promises made?
- What do the words of the "contract"—*i.e.*, the statute, the ordinance, the governing board's resolutions, or other plan documents—say?
- What do applicable collective bargaining agreements say?
- Has the promise changed over time? In what way?
- What did the legislative body say about making changes to retirement benefits?

- Have there been court challenges to changing retirement benefits?
- What were the results?

3. Examine the available options based on the terms of the "contract."
- Can the public employer make future changes to retiree benefits for active employees or retirees?
- What changes are permitted?
- Must future changes be offset with comparable advantages?
- Can you reach agreement with applicable bargaining units with regard to changes that can be made?
- If you are not currently prefunding benefits (*e.g.*, retirement health), would it be advantageous to do so?

4. Initiate a dialogue.
- Communicate the "whys and hows" of the current dilemma.
- Solicit public comment and support for proposed changes to the retirement program.

5. Take action.
- Develop a plan for controlling retirement costs—*e.g.*, making permissible changes and/or prefunding benefits currently paid on a pay-as-you-go basis.
- Identify key decision makers and key dates for implementation.
- Is there a political solution?

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[1] Both the United States and the California Constitutions prohibit the impairment of contractual rights. Article I, section 10, of the U.S. Constitution states: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law

impairing the Obligation of Contracts, or grant any Title of Nobility." The California Constitution similarly states at Article I, section 9: "A bill of attainder, ex post facto law, or law impairing the obligation of contracts may not be passed."

Filed 1/26/11

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COUNTY OF ORANGE, Plaintiff and Appellant, v. ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS et al., Defendants and Respondents.	B218660 (Los Angeles County Super. Ct. No. BC389758)

APPEAL from a judgment of the Superior Court of Los Angeles County, Helen I. Bendix, Judge. Affirmed.

Kirkland & Ellis, C. Robert Boldt, Elizabeth M. Kim, Robert R. Gasaway and Jeffrey Bossert Clark for Plaintiff and Appellant.

Pacific Legal Foundation, Meriem L. Hubbard and Harold E. Johnson for Pacific Legal Foundation and Fullerton Association of Concerned Taxpayers as Amici Curiae on behalf of Plaintiff and Appellant.

Filice Brown Eassa & McLeod and Paul R. Johnson for California Foundation for Fiscal Responsibility as Amicus Curiae on behalf of Plaintiff and Appellant.

John C. Eastman, Karen J. Lugo; Law Office of Anthony T. Caso and Anthony T. Caso for Center for Constitutional Jurisprudence, as Amicus Curiae on behalf of Plaintiff and Appellant.

Lurie Zepeda Schmalz & Hogan and Andrew W. Zepeda for Accounting Professionals as Amicus Curiae on behalf of Plaintiff and Appellant.

Morrison & Foerster, Miriam A. Vogel, Joseph L. Wyatt, Jr., James P. Bennett, Tritia M. Murata; Manatt, Phelps & Phillips and Thomas J. Umberg for Defendant and Respondent Association of Orange County Deputy Sheriffs.

Reed Smith, Harvey L. Leiderman and Jeffrey R. Rieger for Defendant and Respondent Orange County Employees' Retirement System.

Carroll, Burdick & McDonough, Gary M. Messing, Gregg McLean Adam, Jonathan Yank and Jason H. Jasmine for State and Local Public Employees as Amicus Curiae on behalf of Defendants and Respondents.

Edmund G. Brown, Jr., Attorney General, Jonathan K. Renne, Assistant Attorney General, Stephen P. Acquisto and Hiren Patel, Deputy Attorneys General, for California Public Employees' Retirement System as Amicus Curiae on behalf of Defendants and Respondents.

In 2008, the County of Orange (Orange County or the County) sued the board of the County's retirement plan, claiming that an enhanced retirement formula for prior years of service adopted in 2001 by the County Board of Supervisors violated the California Constitution. The County now appeals from the trial court's grant of motions for judgment on the pleadings and entry of judgment in favor of the Association of Orange County Deputy Sheriffs and the Board of Retirement of the Orange County Employees' Retirement System. We conclude that the past service portion of the enhanced retirement formula does not violate the Constitution, and we affirm.

BACKGROUND

I. The Orange County retirement system

The Orange County Employees' Retirement System (OCERS) is a public employees' retirement trust fund, an independent entity that administers the County's retirement system. OCERS is governed by the County Employees Retirement Law of

1937 (CERL). (Gov. Code, §§ 31450, 31468, subd. (*l*)(1).)[1] Orange County employees, including law enforcement (safety members), receive retirement and other benefits under CERL, which vests the management and funding of the retirement system in a board of retirement (OCERS Board). (§§ 31558, 31520.)

The County funds its retirement benefits through employee and employer contributions, and the retirement system investment earnings; the retirement fund is overseen by the OCERS Board. (§§ 31453.5, 31587.) These annual contributions are intended to fund the retirement benefits earned in the year the contributions are made. (§§ 31620 et seq., 31639 et seq.) The amount of the contributions is set based upon a normal contribution rate, which is a percentage of compensation required to fund the retirement benefits allocated to the current year of service being worked by county employees. Any shortfall between the normal cost and the actual amount determined to be necessary to fund future benefits (an amount based on actual experience) is made up through increases in employer contributions, and is amortized over a period of up to thirty years. (§ 31453.5.)

The benefits that an employee receives upon retirement are calculated according to a statutory formula that takes into account the employee's final compensation,[2] the number of credited years of service the employee had with the County, and a statutory multiplier. CERL provides for a variety of possible formulas for safety members. These include what is commonly called the "2% at 50" formula, which means two percent of final compensation, multiplied by the number of service years, for employees retiring at the age of 50. (§ 31664.) Section 31664.1, enacted in 2000, provides for an "additional pension for safety members," commonly called the "3% at 50" formula, which similarly

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[1] Unless otherwise specified, all subsequent statutory references are to the Government Code.

[2] An employee's "final compensation" is the highest annual compensation the employee earns while in active service, based on one year or the average of three years. (§§ 31462, 31462.1.)

means three percent of final compensation, multiplied by the number of service years, for employees retiring at the age of 50. (§ 31664.1, subd. (b).)

II. December 2001 vote: 3% at 50

The Association of Orange County Deputy Sheriffs (AOCDS) is the exclusive representative of Orange County deputy sheriffs, sergeants, and investigators for the district attorney's office, all of whom are safety members entitled to OCERS retirement benefits. (§§ 31469.3, 31470, 31470.2.) In May 2001, AOCDS's 1999 memorandum of understanding, reached after collective bargaining with the County and set to expire in October 2002, provided that AOCDS members were entitled to retirement under the 2% at 50 formula.[3] In May 2001, AOCDS formally asked the County to restructure the retirement terms to the enhanced 3% at 50 formula. After negotiations, in October 2001 the County negotiators and AOCDS representatives signed a tentative agreement to amend the AOCDS contract to adopt the 3% at 50 formula for members retiring on or after June 28, 2002. AOCDS agreed that its members would contribute 1.78 percent of their base salary for fifteen months, toward part of the cost of increased payouts under the increased formula. The agreement extended the AOCDS contract for an additional year, to October 2003.

On December 4, 2001, the County Board of Supervisors unanimously approved the amended AOCDS contract. The board voted to adopt Resolution No. 01-410, which authorized the 3% at 50 formula for AOCDS members, effective June 28, 2002. The accompanying memorandum of understanding between the County and AOCDS provided that the increased retirement formula would apply to "all years of service," including those years served before the date of the resolution. This portion of the new retirement formula was authorized by section 31678.2, subdivision (a), enacted in 2000, which provides that the board of supervisors could, by resolution, make the benefit formula "applicable to service credit earned on and after the date specified in the

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[3] The AOCDS contract required the County to pay all employee contributions that AOCDS members would otherwise pay.

resolution, which date may be earlier than the date the resolution is adopted." Pursuant to section 31678.2, subdivision (c), members who had already retired before June 28, 2002 did not receive any increase in pension benefits.

The County had secured an actuarial report in November 2000, which analyzed (among other options) the financial impact of adopting the 3% at 50 formula for all years of service, both past and future. The analysis estimated that the increase in the County's "actuarial accrued liability" for the benefit enhancement for past service was between $99 and $100 million.

The board of supervisors approved and renewed the 3% at 50 formula in subsequent contracts with AOCDS in 2003, 2005, and 2007.

On January 29, 2008, however, the County had a change of heart. The board of supervisors unanimously voted to approve Resolution No. 08-005, which stated that the past service portion of the 3% at 50 formula (applying the enhanced benefit formula to past years of service), as adopted in 2001 by the board of supervisors then in office, "was unconstitutional at the time of its adoption and remains unconstitutional today." The board cited a September 2007 actuarial analysis[4] which concluded that the past service portion of the increased retirement benefit totaled $187 million. The resolution authorized the County's attorneys to "seek to obtain a declaration of unconstitutionality and an injunction against OCERS prohibiting it from paying out any benefit increases arising from Board Resolution 01-410 and based on years of service rendered before June 28, 2002, the effective date of that Resolution." The resolution also provided that the County would not seek to recover any amounts already paid out to retirees under the enhanced benefit formula.

III. The County's lawsuit

On February 1, 2008, the County filed the initial complaint in this action in Orange County Superior Court, naming as the sole defendant the OCERS Board.

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[4] In 2007, OCERS had retained an actuarial consulting firm to evaluate the impact of the past service portion (pre-June 28, 2002) of the increase in the pension benefit formula.

OCERS filed a motion to transfer venue to Los Angeles County and AOCDS intervened by stipulation. The case was transferred to Los Angeles Superior Court in April 2008. Following a demurrer by OCERS, on July 23, 2008 the County filed a first amended complaint adding AOCDS as a defendant.

The first amended complaint alleged in its first cause of action that the 2001 action by the prior board of supervisors adopting the past service portion of the enhanced 3% at 50 retirement formula violated the California Constitution's municipal debt limitation in article XVI, section 18, subdivision (a), because without voter approval, the resolution created an immediately incurred and legally enforceable debt or liability of more than $99 million, which exceeded the County's available unappropriated funds for the year. The second cause of action alleged that the past service portion also violated article XI, section 10 of the California Constitution, which prohibits the payment of extra compensation to public employees, because the retroactive portion "grants extra compensation to public employees 'after service has been rendered.'" The complaint requested declaratory and injunctive relief, including an injunction to prevent the County from commencing or continuing to pay the past service portion of the enhanced benefits to retired AOCDS members.

In January 2009, AOCDS filed a motion for judgment on the pleadings, in which OCERS joined. In an order filed February 27, 2009, the trial court granted AOCDS's motion, allowing the County leave to amend the municipal debt limitation cause of action "to the extent the County can allege that its liability for that portion of the 3% at 50 pension benefit attributable to past service as of 6/28/02 caused its indebtedness to exceed revenue in any given year since 6/28/02." The order granted the motion without leave to amend on the cause of action alleging extra compensation, concluding "the extra compensation clause does not apply to pension benefits."

The County filed a second amended complaint in April 2009, limited to the municipal debt limitation cause of action. AOCDS, joined by OCERS, filed a motion to strike the new pleading on the ground that it exceeded the limitation imposed by the trial court in its order granting the demurrer. The trial court construed the motion to strike as a motion for judgment on the pleadings, and in an order filed May 22, 2009, the court granted the motion without leave to amend.

The County appeals from the judgment filed July 15, 2009.

DISCUSSION

In reviewing the trial court's grant of the motions for judgment on the pleadings under Code of Civil Procedure section 438, subdivision (b)(1), we apply the same rules governing the review of an order sustaining a general demurrer. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.) A defendant's motion for judgment on the pleadings should be granted if, under the facts as alleged in the pleading or subject to judicial notice, the complaint fails to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) We accept the complaint's properly pleaded factual allegations as true and give them a liberal construction. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166; *Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 606, fn. 2.) We do not accept as true "any contentions, deductions or conclusions of fact or law contained therein." (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1298.) We review de novo, and "'are required to render our independent judgment on whether a cause of action has been stated'" (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401), without regard for the trial court's reasons for granting the motion. (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448.)

I. The municipal debt limitation

Article XVI, section 18, subdivision (a) of the California Constitution provides: "No county . . . shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose . . . ." This municipal debt limitation means "'*the legislative body may not encumber the general funds of the city beyond the year's income without first obtaining the consent of two thirds of the electorate.*' [Citation.]" (*Starr v. City and County of San Francisco* (1977) 72 Cal.App.3d 164, 175.) This "establish[ed] the 'pay as you go' principle as a cardinal rule of municipal finance." (*Westbrook v. Mihaly* (1970) 2 Cal.3d

765, 776, vacated on other grounds, *Mihaly v. Westbrook* (1971) 403 U.S. 915.) "Each year's income and revenue must pay each year's indebtedness and liability, and no indebtedness or liability incurred in one year shall be paid out of the income or revenue of any future year. The taxpayers of [counties] are thus protected against the improvident creation of inordinate debts, which may be charged against them and their property in ever increasing volume from year to year." (*McBean v. City of Fresno* (1896) 112 Cal. 159, 164.)

The County's second amended complaint alleges that in 2001, when the board of supervisors approved the past service portion of the enhanced 3% at 50 retirement formula for AOCDS members, the board created a "$100 million long-term liability (that has since grown to approximately $187 million) . . . ." The County alleges that the board's action violated article XVI, section 18, subdivision (a), which it characterizes as a "'balanced budget' requirement," because the $100 million was an immediately enforceable debt incurred in a year in which the County's unappropriated revenue (for fiscal year 2002) totaled less than $99 million, and the County did not hold the required election to obtain voter approval.

AOCDS rejoins that the $100 million amount which the County on this appeal characterizes as a "debt" is not an "'indebtedness' or 'liability'" within the meaning of article XVI, section 18, subdivision (a). Instead, it is an actuarial calculation of what the County's obligations are likely to be in the future for the past service portion of the 3% at 50 retirement formula for AOCDS members. As an actuarial projection, the $100 million did not belong on the liability side of the County's balance sheet in the 2002 fiscal year, and it thus escapes the application of the municipal debt limitation.

To evaluate the parties' arguments, we must explain in some detail what the $100 million figure represents.

A. Unfunded Actuarial Accrued Liability calculations

The OCERS Board, which has "plenary authority and fiduciary responsibility for . . . administration of the [retirement] system . . . [¶] [and] sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries," also has "the sole and exclusive power to provide for actuarial services in order to assure the competency of the assets of the public pension or retirement system." (Cal. Const., art. XVI, § 17, subds. (a), (e).) The OCERS Board is required to conduct regular actuarial evaluations to determine the employer and employee contributions necessary to fund the retirement benefits of county employees, and to "determine the extent to which prior assumptions must be changed."[5] (*In re Retirement Cases* (2003) 110 Cal.App.4th 426, 459–460.) The OCERS Board commissioned an actuarial analysis in November 2000 of the proposed changes to the AOCDS pension benefits. The 2000 actuarial analysis produced the $100 million estimate (educated and justified estimate, but estimate nonetheless) that the County now claims was a debt exceeding the County's 2002 annual income, and therefore triggered the municipal debt limitation's requirement of a two-thirds vote of the public.

That $100 million figure was an estimated "unfunded actuarial accrued liability" or UAAL, predicting the *unfunded* cost of the retroactive portion of the proposed 3% at 50 retirement formula. This UAAL was not projected in earlier actuarial valuations which did not contemplate the enhancement of the AOCDS retirement formula to 3% at 50. "'Unfunded accrued actuarial liability' is the difference between actuarial accrued

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[5] Section 31453, subdivision (a) provides: "An actuarial valuation shall be made within one year after the date on which any system established under this chapter becomes effective, and thereafter at intervals not to exceed three years. The valuation shall be conducted under the supervision of an actuary and shall cover the mortality, service, and compensation experience of the members and beneficiaries, and shall evaluate the assets and liabilities of the retirement fund. Upon the basis of the investigation, valuation, and recommendation of the actuary, the board shall . . . recommend to the board of supervisors the changes in the rates of interest, in the rates of contributions of members, and in county and district appropriations as are necessary." Section 7507, subdivision (b)(1) requires that a local legislative body "when considering changes in retirement benefits . . . shall secure the services of an actuary to provide a statement of the actuarial impact upon future annual costs, including normal cost and any additional accrued liability, before authorizing changes in public retirement plan benefits . . . ."

liability and the valuation assets in a fund." (*Bandt v. Board of Retirement* (2006) 136 Cal.App.4th 140, 147, fn. 3.) "'Most retirement systems have [UAAL]. They arise each time new benefits are added and each time an actuarial loss is realized. . . . [UAAL] does not represent a debt that is payable today.'" (*Id.* at p. 157.)

The County's 2007 Comprehensive Annual Financial Report explains the assumptions underlying the OCERS UAAL: "The UAAL for OCERS is an estimate based on a series of assumptions that operate on demographic data of OCERS' membership. This process is necessary to determine, as of the date of the calculation, how sufficient the assets in OCERS are to fund the accrued costs attributable to active, vested[,] terminated and retired employees. This determination of underfunding rests on actuarial assumptions regarding expected return on invested assets, the assumed future pay increases for current employees, assumed rates of disability, the assumed retirement ages of active employees, the assumed marital status at retirement, the post-employment life expectancies of retirees and beneficiaries, salary increases, contributions to OCERS, inflation, and other factors." Given the multiple assumptions about the future involved in calculating the OCERS UAAL (investment returns, pay increases, marital status at retirement, retiree and beneficiary life expectancies, salary increases, contribution rates, and inflation), it is clear that the UAAL is a highly variable amount, which may or may not prove accurate depending upon actual future events and experience.

An unfunded liability such as a UAAL will affect the contribution rate of an employer such as the County. (*In re Retirement Cases, supra*, 110 Cal.App.4th at pp. 459–460.) In projecting the cost of funding the benefits provided to OCERS members, OCERS uses a method described in section 31453.5, which (as explained by OCERS) divides the likely cost of future benefits between the "normal cost" (the employer contributions required to fund the benefits allocated to the current year of service) and the UAAL (the shortfall between the past years' projected normal cost and the actual past experience of the retirement system), which is to be amortized over thirty years.[6] Section 31453.5 authorizes but does not require OCERS to use this method, providing "the board *may* determine county or district contributions" (italics added) by dividing the cost into normal cost and UAAL. OCERS therefore is not mandated to calculate a UAAL in projecting what the County's future contribution rate will need to be to fund the past service portion of the 3% at 50 formula for AOCDS members. OCERS could employ another method to predict the County's future contributions.

B. 1982 Attorney General opinion

Article XVI, section 1 of the California Constitution, the debt limitation provision applicable at the state level, is similar to and construed in tandem with the municipal debt limitation in issue here, article XVI, section 18, subdivision (a). (*Dean v. Kuchel* (1950) 35 Cal.2d 444, 446; *State ex rel. Pension Obligation Bond Com. v. All Persons Interested etc.* (2007) 152 Cal.App.4th 1386, 1397–1401; 67 Ops.Cal.Atty.Gen. 349, 351 (1984).) In 1982, the Attorney General concluded that the state retirement system's "unfunded liability" did not violate the state debt limitation provision. The Attorney General explained that "[d]etermining how much income to the [state] Fund is necessary to pay all benefits as they become due is the business of actuaries. Actuaries predict the future financial operation of an insurance or retirement system by making certain assumptions regarding the variables in the system." (65 Ops.Cal.Atty.Gen. 571, 572 (1982).)

The state Public Employees' Retirement System (PERS) actuarial balance sheet showed an "unfunded actuarial liability" above the state debt limitation amount. The Attorney General concluded: "The actuarial term 'unfunded liability' fails to qualify as a legally enforceable obligation of any kind. As previously noted the very existence of such an 'unfunded liability' depends upon the making of an actuarial evaluation and the use of an evaluation method which utilizes the concept of an 'unfunded liability.' Further the amount of such an 'unfunded liability' in the actuarial evaluation of a pension system

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[6] "The Board's power to amortize the fund's UAAL over a 30-year period . . . allows the County to grant an increase in benefits and to pay for the increased cost of the benefits over time as the associated pension obligations become due." (*Bandt v. Board of Retirement*, *supra*, 136 Cal.App.4th at pp. 158–159.)

will depend upon how that term is defined for the particular valuation method employed. Finally the amount of such an 'unfunded liability,' however defined for the method used, depends upon many assumptions made regarding future events such as size of work force, benefits, inflation, earnings on investments, etc. In other words *an 'unfunded liability' is simply a projection made by actuaries based upon assumptions regarding future events. No basis for any legally enforceable obligation arises until the events occur and when they do the amount of liability will be based on actual experience rather than the projections.*" (65 Ops.Cal.Atty.Gen., *supra*, at p. 574, italics added.) Such calculations did not result in a legally binding debt or liability, but instead provided "useful guidance in determining the contributions necessary to fund a pension system." (*Ibid.*)

We acknowledge that the Attorney General opinion is not binding, but it is entitled to considerable weight. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1087, fn. 17.) "Reliance on Attorney General opinions is particularly appropriate where, as here, no clear case authority exists, and the factual context of the opinions is closely parallel to that under review." (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 662–663.) There is no clear case authority on this issue, and the 1982 opinion has a similar factual context involving the state's analogous debt limitation provision. We find the analysis in the 1982 opinion persuasive, and that analysis supports the conclusion that a UAAL such as the $100 million cited by the County in this case is an actuarial estimate projecting the impact of a change in a benefit plan, rather than a legally enforceable obligation measured at the time of the County's 2001 resolution approving the 3% at 50 formula.

C. The County's arguments

The County argues that pension obligations are incurred for the purposes of the debt limitation provision at the time of an award of pension benefits, citing *Carman v. Alvord* (1982) 31 Cal.3d 318. In *Carman*, a taxpayer argued that article XIII of the California Constitution (Proposition 13) prohibited a tax levied to meet a city's annual payment obligation to PERS. In determining that the city's 1978-1979 payment to PERS was "indebtedness as traditionally understood," the Court emphasized: "'The term "indebtedness" has no rigid or fixed meaning, but rather must be construed in every case in accord with its context.' [Citations.] It can include all financial obligations arising from contract [citation], and it encompasses 'obligations which are yet to become due as [well as] those which are already matured.'" (*Id.* at pp. 326–327.) This unexceptional statement does not control our case, which does not involve an annual payment to OCERS but rather a projection of what the past service portion of the enhanced benefit may cost the County, subject to all the variables inherent in projecting cost over time. In the context of this case, the actuarial projection is not "indebtedness as traditionally understood." (*Id.* at p. 327.) An unfunded liability such as a UAAL is not created at the time of the award of enhanced benefits, but occurs over years "and may have been avoided entirely if, for example, the retirement fund experienced better than expected investment returns . . . ." (*City of San Diego v. San Diego City Employees' Retirement System* (2010) 186 Cal.App.4th 69, 83.)

None of the other debt-limitation cases cited by the County involves a factual situation similar to this case. (See *Chester v. Carmichael* (1921) 187 Cal. 287 [installment contract to purchase land for a county park]; *Mahoney v. City and County of San Francisco* (1927) 201 Cal. 248 [same]; *Garrett v. Swanton* (1932) 216 Cal. 220 [installment contract to purchase a water pumping plant], overruled in *City of Oxnard v. Dale* (1955) 45 Cal.2d 729, 737; *In re City and County of San Francisco* (1925) 195 Cal. 426 [conditional purchase of land for city marina]; *City of Saratoga v. Huff* (1972) 24 Cal.App.3d 978 [$2 million in special assessment bonds payable over 10-year period].) In each case, the obligation to repay the indebtedness was spread over years, but the total amount owed was not in question. Here, the County committed to paying increased benefits over time when it approved the enhanced benefit for AOCDS members, but the UAAL is not a certain total for which the County is immediately liable.[7]

[7] In *Starr v. City and County of San Francisco*, *supra*, 72 Cal.App.3d 164, the city financed a community center with a repayment agreement which, in addition to payments out of a special fund, required the city to make a lump-sum payment five years later out

The County also cites an Attorney General opinion from 2005, which states: "A retroactive improvement in retirement benefits not only requires an increase in the city's future retirement contributions, but also creates a 'past service liability,' or debt to the retirement fund, which must be paid." (88 Ops.Cal.Atty.Gen. 165, 167 (2005).) That may be true as far as it goes, but the 2005 opinion did not address the municipal debt limitation and is not inconsistent with the earlier 1982 Attorney General opinion. The Attorney General in 1982 approvingly quoted an article in the state retirement system newsletter, which explained: "'[T]he "*past service liability*" and the "unfunded liability" are a function of the actuarial methods and assumptions used to fund a pension plan. . . . [¶] [T]he "liabilities" are not owed by the plan. They are primarily a function of the methods and assumptions used by the actuary to fund the plan.'" (65 Ops.Cal.Atty.Gen., *supra*, at pp. 572–573, fn. 2.)[8]

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of the general fund. The city conceded that the potential lump sum indebtedness was $14.1 million, but the court noted that the actual amount was "of unknown proportions." (*Id.* at pp. 170, 176.) This agreement to make a lump sum final payment violated the requirement that an installment contract is valid only if the yearly payment is within the city's income and is supported by consideration in that year. (*Id.* at p. 172). The UAAL in this case is not a liability which the county has expressly agreed to pay in a lump sum in a future year.

The County also cites In re County of Orange (C.D.Cal. 1998) 31 F.Supp.2d 768, in which a federal district court concluded that "reverse repo transactions" were not transactions or loans for the purpose of the debt limitation provision. (Id. at p. 775.) The court emphasized, "The validity of a transaction, whether it creates indebtedness or liabilities, is measured at the time the transaction is entered into. [Citations.] [¶] . . . [¶] The Court looks to the economic substance of the transaction to determine whether excess indebtedness or a liability has been incurred. [Citation.]" (Id. at pp. 776–777.)

[8] The full quoted text of the article in the 1982 opinion bears repeating: "'Over the years, the term "unfunded liability" has created considerable confusion for the readers of actuarial reports. The confusion arises when the term is thought of in the same manner as accounting liabilities. That is, the connotation was that the money was "owed" by the plan or somehow the plan was deficient. The truth of the matter is that the "past service liability" and the "unfunded liability" are a function of the actuarial methods and assumptions used to fund a pension plan.

Nor do existing accounting standards support a conclusion that the UAAL was a legally enforceable obligation when the board of supervisors voted to adopt the enhanced benefit formula in 2001. As the amicus brief in support of the County from the Accounting Professionals explains, the Government Accounting Standards Board (GASB) recognizes a pension "liability" as the difference between the government employer's *annual* pension cost and the employer's actual contributions to the pension plan. The GASB requires the "unfunded accrued benefit obligation" to be disclosed in notes to the financial statement, rather than reported on the balance sheet as a liability. (GASB, *Financial Reporting for Defined Benefit Pension Plans and Note Disclosures for Defined Contribution Plans,* Statement No. 25 (1994) and GASB, *Accounting for Pension by State and Local Governmental Employees*, Statement No. 27 (1994).)[9] While some pension liabilities must be reported on the balance sheet, the UAAL in this case is not one of them.

The County emphasizes its current difficult financial situation and the "ruinous fiscal irresponsibility" of the prior board of supervisors. Imprudence, however, is not unconstitutional. "Courts examining a potential violation of the Debt Limit are not directed to sit in *post hoc* judgment of the *wisdom* of a municipality's income and revenue estimates." (*In re County of Orange*, *supra*, 31 F.Supp.2d at p. 776.)

"'The actuarial profession has been called upon on numerous occasions to explain these "liabilities"; however, the confusion continues to exist. In an attempt to clarify these values, the actuaries at PERS have adopted new terminology which, hopefully, will help resolve the question. In lieu of the previous term, the terms "actuarial liability" and "unfunded actuarial liability" [UAAL] will be used. These terms distinguish the liabilities presented from accounting liabilities. Remember, the "liabilities" are not owed by the plan. They are primarily a function of the methods and assumptions used by the actuary to fund the plan.'" (65 Ops.Cal.Atty.Gen. 571, *supra*, pp. 572–573, fn. 2.)

[9] The Accounting Professionals also state that they agree with invited comments which support changing the GASB rules to require reporting the "'unfunded accrued benefit obligation . . . on the face of the financial statements to measure the annual cost of pension benefits earned and the demands on future cash flows.'" This is simply a *suggested* change to *future* accounting standards, however, and does not support a conclusion that the board's action in 2001 created a liability under the then-existing standards.

We affirm the trial court's grant of judgment on the pleadings on the municipal debt limitation cause of action in the second amended complaint.

II. The prohibition against extra compensation

Article XI, section 10, subdivision (a) of the California Constitution provides: "A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part . . . ." The County alleged in its first amended complaint that the board of supervisors' approval of the past service portion of the 3% at 50 benefit enhancement granted extra compensation to AOCDS members employed by the County on June 28, 2002 (the effective date of the resolution) for services they had already rendered to the County, and this violated Article XI, section 10.

"Early decisions interpreting the extra compensation clause demonstrate that its framers had a particular, narrow objective in mind . . . . The primary purpose of the prohibition . . . was to prevent the Legislature from enacting 'private statutes' in recognition of 'individual claims.'. . . [T]he provision 'denied to the Legislature the right to make direct appropriations to *individuals* from general considerations of charity or gratitude, or because of some supposed moral obligation . . . .'" (*Jarvis v. Cory* (1980) 28 Cal.3d 562, 577.) The prohibition on extra compensation does not apply to every grant of additional compensation for work already performed. In *Jarvis v. Cory*, a bill granting additional compensation to state employees for work performed during the fiscal year prior to the enactment of the statute did confer retroactive compensation. (*Id.* at p. 569.) Nevertheless, the Supreme Court concluded that "the extra compensation clause is not offended when state employees receive retroactive salary adjustments for periods during which they worked with justifiable uncertainty regarding their salary levels." (*Id.* at p. 579.)[10] The retroactive compensation served several public purposes, including the

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[10] Those salary levels had been rendered uncertain by events surrounding the enactment of Proposition 13, which events included alterations in state employees' salary levels and uncertainty about possible salary freezes. (*Jarvis v. Cory*, *supra*, 28 Cal.3d at pp. 574–576.)

legislature's finding that it was necessary "'to ensure the continued recruitment and retention of qualified and competent state employees.'" (*Id.* at p. 578, fn. 10; *Theroux v. State* (1984) 152 Cal.App.3d 1, 6.)

Similarly, the Third Appellate District held that pay adjustments made retroactive to the start of a county's fiscal year were not unconstitutional as a gift of public money[11] or as extra compensation, where an employee association and the county met and conferred to establish salary levels after the date of expiration of a salary ordinance. (*San Joaquin County Employees' Association, Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83, 88 (*San Joaquin*).) "[I]n the area of employment, public agencies must compete, and if to so compete they grant benefits to employees for past services, they are not making a gift of public money but are taking self-serving steps to further the governmental agency's self-interest in recruiting the most competent employees in a highly competitive market." (*Id.* at pp. 87–88.)

Under very different circumstances, courts have found unconstitutional extra compensation taking a variety of forms: retroactive pay for overtime already worked (*Longshore v. County of Ventura* (1979) 25 Cal.3d 14, 27; *Martin v. Henderson* (1953) 40 Cal.2d 583, 590–591), lump sum payment for accumulated unused vacation not authorized when work was performed (*Seymour v. Christiansen* (1991) 235 Cal.App.3d 1168, 1178–1179), and retroactive payment for overtime or work on holidays (*Jarvis v. Henderson* (1953) 40 Cal.2d 600, 607). Courts have also invalidated pension benefits which did not vest because they were conferred by mistake. (*Medina v. Board of Retirement* (2003) 112 Cal.App.4th 864, 871–872 [no vested right to safety member pension when employees were erroneously classified as safety members]; *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 585–586 [same; "correction of an erroneous classification cannot be equated to a modification or alteration of earned pension rights"].) No court, however, has found that changes to pension benefits

[11] The County's first amended complaint did not contain an allegation that the retroactive portion of the 3% at 50 formula was a gift of public money in violation of article XVI, section 6 of the Constitution.

awarded for past service to employees with already vested pension rights are unconstitutional extra compensation.

A. Vested pension rights

"A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment. Such a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing public entity. [Citation.]" (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.) Before retirement, the employee does not have "any absolute right to fixed or specific benefits, but only to a 'substantial or reasonable pension.'" (*Ibid.*)

"[P]ension laws are to be liberally construed to protect pensioners and their dependents from economic insecurity. [Citation.] Unlike other terms of public employment, which are wholly a matter of statute, pension rights are obligations protected by the contract clause of the federal and state Constitutions. [Citations.] . . . . [¶] As the Supreme Court notes, 'upon acceptance of public employment [one] acquire[s] a vested right to a pension *based on the system then in effect.*' [Citation.]" (*United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 1102, quoting *Miller v. State of California* (1977) 18 Cal.3d 808, 817 (*Miller*).) Nevertheless, "pension rights are not immutable." (*Miller, supra*, 18 Cal.3d at p. 816.) A government entity may make "'reasonable modifications and changes before the pension becomes payable. . . .'" (*Ibid.*) Any subsequent modification to vested pension rights must be reasonable based on the facts of each case, and "'changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.'" (*Ibid.*) "The saving of public employer money is not an illicit purpose if changes in the pension program are accompanied by comparable new advantages to the employee.'" (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1145.) Therefore, "[a]n employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure." (*Betts v. Board of Administration*, *supra*, 21 Cal. 3d at p. 866; *United Firefighters of Los Angeles City v. City of Los Angeles*, *supra*, 210 Cal.App.3d at p. 1102, fn. 3; *Thorning v. Hollister School Dist.* (1992) 11 Cal.App.4th 1598, 1606.)

The County argues, however, that the general rule that current employees have a vested right to increases in pension benefits conferred during employment does not govern this case. Although 3% of 50 is an enhanced pension benefit conferred during the tenure of AOCDS employees working for the County on June 28, 2002, the County argues that the new benefit formula did not vest as to service before that date, because the past service portion of the enhanced benefit is prohibited extra compensation. Case law stands in the County's way.

B. Extra compensation and pensions

1. *Sweesy*

In *Sweesy v. L.A. etc. Retirement Board* (1941) 17 Cal.2d 356 (*Sweesy*), the widow of a police officer who retired in 1935 and had died in 1939, applied for a widow's pension that had been authorized by legislation in 1937, after her husband had retired but before he died. The legislation specifically provided "that its provisions shall be retroactive as to the past service of any member who shall be entitled to the benefits 'contained herein.'" (*Id.* at p. 359.) The retirement board argued that the amendment should only apply prospectively, to surviving widows of pensioners who were in active service at the time of the adoption of the legislation, because otherwise it would be unconstitutional as a gift of public money.[12] The board also argued that the retroactivity provision referred only to the past service of members on active duty at the time of the amendment, as distinguished from members who had already retired. (*Ibid.*)

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[12] When *Sweesy*, *supra*, 17 Cal.2d 356 was decided in 1941, the California Constitution did not prohibit extra compensation to public employees; the "public employee" language in article XI, section 10, subdivision (a) was added in 1970. (*Longshore v. County of Ventura*, *supra*, 25 Cal.3d at p. 23.) Gifts of public money violate California Constitution article XVI, section 6. (*Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 207.)

The Supreme Court observed: "'A pension is a gratuity only where it is granted for services previously rendered which at the time they were rendered gave rise to no legal obligation . . . . But where, as here, services are rendered under a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment itself.'" (*Id.* at pp. 359–360.) The court concluded that it was "the settled law of this state that unless the contrary intention plainly appears persons having a pensionable status are entitled to receive any increase of benefits which may be provided." (*Id.* at p. 360.) The police officer's "pension rights vested at the time he was retired from service;"[13] he "had a status as a pensioner at the time of the adoption of the amendment . . . [whose] provisions were made expressly retroactive so as to include past service of any member entitled to the benefits 'contained herein.' Unquestionably [he] was a member entitled to the benefits of the system. No distinction is made by the legislature between members in active duty on full pay and those on retirement, in so far as the retroactive provisions are concerned, and no distinction may here be drawn on that basis. Therefore, the provisions must be held to apply to members who had a vested as well as to those [such as the widow] who merely had an inchoate right to members' pension benefits at the time of the adoption of the amendment." (*Id.* at p. 361.)

The Supreme Court also rejected the contention that the retroactive benefit was additional compensation: "The problem cannot be solved merely by stating as a proposition that a provision will not be upheld which purports to grant a pension after the completion of the services for which the pension is contemplated as additional compensation. The law is well settled that additional benefits may constitutionally be provided for members of the system who have acquired a pensionable status. . . . There

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[13] The Supreme Court later noted, in a case discussing *Sweesy, supra*, 17 Cal.2d 356, that as to employees "[i]nsofar as the *time* of vesting is concerned, there is little reason to make a distinction between the periods before and after the pension payments are due," and an employee "has actually earned some pension rights as soon as he has performed substantial services for his employer." (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855.)

is some language in the decisions which refers to pension benefits as additional or increased compensation for services performed and to be performed. [Citations.] But that designation may not be strictly accurate in every case. As in this case, the members of the system make contributions to the pension fund, even though contributions may also come from public funds. Such systems are usually founded on actuarial calculations. Therefore, the question of what benefits would be warranted by either the individual or mass contributions to the fund is for the legislative body, and not for the pension board or the courts, whose respective functions in such cases are to administer and interpret the provisions of the law as written." (*Id.* at pp. 361–362.) The court added that "the provision for pension to members' widows benefits all members, whether on active or retired duty; but as to any prospective grantee of the pension it is an inchoate right which may be taken away at any time before it becomes vested in her [the widow]." (*Id.* at p. 362.) "[I]ncreased benefits to one already having a pensionable status are constitutional and economically appropriate." (*Id.* at p. 363.)

In *Sweesy*, *supra*, 17 Cal.2d 356, the Supreme Court approved the retroactive application of an increased pension benefit to the widow of a police officer who had retired before the amendment authorizing the additional benefit was enacted. Although the police officer had already retired, the legislature had not distinguished between retired and active members, and the court declined to draw any distinction between those active members on full pay and those in retirement.

2. *Nelson*

In *Nelson v. City of Los Angeles* (1971) 21 Cal.App.3d 916 (*Nelson*), the petitioners were a member of the police department who had retired in 1947 and the widow of a member who died while employed in 1948. Both were receiving pensions from the city in 1971, when the city adopted a charter amendment increasing the minimum pension payable and raising the annual cost of living increases from two to three percent. (*Id.* at p. 917.) The "narrow issue" was "is an increase in pension benefits payable to a city pensioner extra compensation or an extra allowance prohibited by article XI, section 10? We conclude that it is not." (*Id.* at p. 918.)

"[A]n increase in benefits to persons occupying a pensionable status is not to be treated as the payment of 'extra compensation or allowance,' as those terms are used in the proscription of article XI, section 10." (*Nelson*, *supra*, 21 Cal.App.3d at p. 918.) Quoting *Sweesy*, *supra*, 17 Cal.2d 356 for its holding that such an increase was not a gift of public funds and *Jorgensen v. Cranston* (1962) 211 Cal.App.2d 292, 295 (disapproved on other grounds in *Olson v. Cory* (1983) 35 Cal.3d 390, 406) for the rule that a similar increase was not extra compensation, the court concluded: "Uniform precedent thus leads us to the conclusion that the increases in pension benefits granted to persons in a pensionable status[14] by the 1971 amendments to the Los Angeles City Charter are not proscribed by California Constitution, article XI, section 10." (*Nelson*, *supra*, 21 Cal.App.3d at pp. 919–920.)

3. *American River*

In *American River Fire Protection Dist. v. Brennan* (1997) 58 Cal.App.4th 20 (*American River*), the district sued to recover payments it had made to firefighters upon retirement for portions of accrued but unused sick leave. Before November 1, 1988, the memorandum of understanding between the district and the firefighters' union provided that upon retirement, accrued but unused sick leave would convert to additional service credit. Effective November 1, 1988, the memorandum provided that employees had the option to elect to receive pay for up to one-half of unused sick leave; the remainder would become service credit upon retirement. (*Id.* at p. 22.) After several firefighters retired and were paid by the district for sick leave accrued before November 1988, counsel for the district opined that the sick leave buy-out program was unconstitutional as

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[14] "The words 'pensionable status' although not precisely defined . . . in *Sweesy*[, *supra*, 17 Cal.2d 356] . . . were intended by the courts using this language to encompass the expectation in the public officer or employee and his spouse that if the former (the 'breadwinner') continues faithfully in his governmental position until his death or eligible retirement, his widow upon his death will receive not only the pension benefits then provided by the retirement system but any benefits which the Legislature, in its discretion, may thereafter provide to then active judges for the benefit of *their* spouses, in view of changing conditions and circumstances in the economic world." (*Jorgensen v. Cranston*, *supra*, 211 Cal.App.2d at p. 298.)

applied to any sick leave accrued before the November 1, 1988 effective date of the program. Although the district conceded that the intent of the negotiators was that the sick-leave buyout be retroactive, the district asked the firefighters to repay the amounts paid for their accrued sick leave, and indicated that it would file a legal action if they did not comply. (*Id.* at pp. 22–23.) The district did file a complaint, and the trial court granted summary adjudication, finding that the payments for sick leave accrued before November 1, 1988 were unconstitutional. (*Id.* at p. 24.)

The court of appeal noted, "[e]arly decisions interpreting the extra compensation clause found its framers had a narrow intention to prohibit government appropriations motivated by charity or gratitude," responding to legislative abuses in enacting private statutes to address individual claims. (*American River*, *supra*, 58 Cal.App.4th at p. 24 [citing *Jarvis v. Cory*, *supra*, 28 Cal.3d at p. 577].) In this case, the sick leave was a negotiated benefit, and public agencies had to compete with private employers who offered not only salaries but sick leave, vacations, and other benefits. (*Id.* at pp. 24–25 [citing and quoting *San Joaquin*, *supra*, 39 Cal.App.3d at pp. 87–88].) The court discussed the cases cited above regarding retroactive compensation for overtime and vacation time, which the district considered dispositive, and pointed out that although sick leave "as such" was a benefit that provided compensation during employment, "upon retirement unused sick leave became a component in calculating the employee's pension benefit." (*Id.* at p. 27.) "The sick leave buyout provision applied only to retiring firefighters. It continued the long-standing policy of granting additional benefits at retirement to firefighters with accrued sick leave. There was no right to a cash payment for unused sick leave simply upon separation from service. This limited application shows the sick leave buyout was not extra compensation; it added an alternative to established pension benefits and perhaps an incentive to retire." (*Ibid.*)

In a paragraph with direct application to this case, the court stated: "The District acknowledges that the extra compensation clause does not apply to pension benefits. 'If this creates an anomaly in the law, it is one sanctioned by the California Supreme Court.' (*United Firefighters of Los Angeles City v. City of Los Angeles* (1989) 210 Cal.App.3d

1095, 1105 [259 Cal.Rptr. 65].) The right to pension benefits vests upon the acceptance of employment. (*Miller*, *supra*, 18 Cal.3d at p. 815.) An increase in pension benefits even after retirement is not extra compensation as that term is used in article XI, section 10 of the California Constitution. (*Nelson v. City of Los Angeles* (1971) 21 Cal.App.3d 916, 918 [98 Cal.Rptr. 892].)" (*American River*, *supra*, 58 Cal.App.4th at pp. 27–28.) After describing the facts in *Nelson*, the court quoted the opinion: "'[A]n increase in pension benefits payable to a retired public employee or his widow on pensionable status is paid as the result of rights incident to that status and not as a matter of increased compensation or allowance.' [Citation.] [¶] Here, rather than increasing the pension benefit, the buyout program provided an alternative that would result in increased benefits upon retirement for some firefighters. This increased benefit is payable due to their status at retirement, not as extra compensation for work already performed." (*Id.* at p. 28.)

The *American River* court rejected the district's argument that permitting the retroactive buyout would "eviscerate" the prohibition against extra compensation and "lead to rampant abuses in pension programs." (*American River*, *supra*, 58 Cal.App.4th at p. 28.) The firefighters always received some benefit (increased service credit) from unused sick leave upon retirement, and therefore there was a prior authorization for this type of benefit, which resulted in increased benefits upon retirement for some employees. "[T]he extra compensation clause retains its vitality to preclude granting new benefits retroactively for services previously rendered." (*Ibid.*) The enhanced sick leave policy "merely substituted a cash benefit at retirement for an increased pension, [and] did not result in extra compensation prohibited by article XI, section 10, subdivision (a) of the California Constitution." (*Ibid.*)

4. Application to this case

We describe the preceding cases in detail because they show the progression of the law in this area. We continue the progression, and conclude that the past service portion of the 3% at 50 enhanced pension benefit formula for AOCDS members is not unconstitutional extra compensation.

The pension rights of AOCDS members employed on June 28, 2002 vested when they accepted public employment. (*Miller*, *supra*, 18 Cal.3d at p. 817.) The vested rights are not immutable. (*Id.* at p. 816.) The County may make reasonable changes to a pension plan before the pension becomes payable, so long as any disadvantages to the employees are accompanied by comparable new advantages. (*Ibid.*) The AOCDS members' contractual pension expectations include not only those benefits in effect when they accepted employment, but also those conferred during their tenure. (*Betts v. Board of Administration*, *supra*, 21 Cal.3d at p. 866.) Therefore, when the County Board of Supervisors approved the increase to 3% at 50 to take effect on June 28, 2002, the vested rights of AOCDS members employed on that date included the enhanced pension benefit formula, which was conferred during their employment.

The resolution adopting 3% at 50 specifically provided that the enhancement applied to all years of service, including years worked before June 28, 2002. This retroactive application also became part of the contract of employment of all AOCDS members. (*Sweesy*, *supra*, 17 Cal.2d at pp. 359–360.) The increased benefits were not extra compensation. (*Id.* at p. 363; *Nelson*, *supra*, 21 Cal.App.3d at p. 918.) The 3% at 50 enhancement did not provide AOCDS members with additional compensation while they worked for the County. Rather, it would become part of the calculation of the employees' pension benefits upon retirement. (*American River*, *supra*, 58 Cal.App.4th at p. 27.) The 3% at 50 resulted in increased benefits upon retirement, but was not additional compensation. (*Id.* at p. 28.) Instead, it altered the prior pension benefits and perhaps provided an incentive to retire. (*Id.* at p. 27.)

The County argues that *Sweesy* and *Nelson* are not applicable because those cases involved retroactive benefits awarded to already retired employees rather than active employees. (Under section 31678.2, subdivision (c), the past service portion of the enhanced benefit formula in issue in this case did not apply to AOCDS members who had already retired.) Although the County argues that there is a "clear distinction between retirees and current employees," that distinction is one the Supreme Court in *Sweesy* declined to draw. The retirement board argued that the new widow's pension benefit applied not to retirees but only to current employees, but the court noted that the legislation did not draw a distinction between members in active duty and retired members, "and no distinction may here be drawn on that basis." (*Sweesy*, *supra*, 17 Cal.2d at p. 361.) Given that the right to pension benefits vests at the time of employment, the current employees in this case are in a similar situation to the retired employees in *Sweesy* and *Nelson*. In *Nelson*, the petitioners were retired employees, but the city argued that the charter amendment increasing pension benefits applied only to those persons not yet retired on the date of the amendment. (*Nelson*, *supra*, 21 Cal.App.3d at p. 918.) Although the County argues that article XI, section 10 only mentions "public employees," not retirees, *Nelson* did not hesitate to apply that section to retired public employees.[15]

The County further argues that the statement in *American River*, *supra*, 58 Cal.App.4th at p. 27 that "the extra compensation clause does not apply to pension benefits" is dictum. We do not depend upon that general statement, however, but upon a careful analysis of the facts and law in *Sweesy*, *Nelson*, and *American River*. That analysis leads us to the conclusion that the first amended complaint in this case does not state a claim that the past service portion of the 3% at 50 formula violates the extra compensation clause. We affirm the trial court's grant of judgment on the pleadings on the extra compensation cause of action in the first amended complaint.

C. Section 31678.2

Section 31678.2, subdivision (a) of CERL, the County Employees Retirement Law, specifically authorizes past service pension benefit increases, providing "a board of supervisors . . . may, by resolution adopted by majority vote, make any section of this chapter prescribing a formula for calculation of benefits applicable to service credit

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[15] We also note that the County's argument that the past service portion of the enhancement is extra compensation would logically seem to apply with more force to employees who had already retired on June 28, 2002. In any event, section 31678.2, subdivision (c) provides that the statute does not apply to employees retired at the time of a resolution changing the retirement formula.

earned on and after the date specified in the resolution, which date may be earlier than the date the resolution is offered." Subdivision (c) provides that such a benefit for past service "shall only be applicable to members who retire on or after the effective date of the resolution described in subdivision (a)." "Before 2000, the Legislature expressly prohibited a county from providing increased pension benefits on a retroactive basis. (§ 31678.) However, in 2000, the Legislature adopted a broad exception to this rule, specifically providing counties with the option of applying an improved benefit formula in a retroactive manner." (*San Diego County Employees Retirement Assn. v. County of San Diego* (2007) 151 Cal.App.4th 1163, 1175.) "The statute does, however, contain an express limitation that counties may not offer the retroactive benefit to employees who retired before the effective date of the resolution." (*Id.* at p. 1176.)

The County Board of Supervisors adopted Resolution No. 01-410 in December 2001, authorizing the 3% at 50 formula for "all years of service" by AOCDS members employed by the County on June 28, 2002. The resolution complies with the statute: a majority (unanimous) vote of the board of supervisors made the enhanced formula applicable to all years of service, as authorized by section 31678.2, subdivision (a) ("the date specified in the resolution . . . may be earlier than the date the resolution is adopted.") The limitation of the enhanced benefit formula to employees who had not retired before June 28, 2002, was in compliance with section 31678.2, subdivision (c), which provides: "This section shall only be applicable to members who retire on or after the effective date of the resolution described in subdivision (a)." The County Board of Supervisors in 2001 did precisely what section 31678.2 authorizes.

The County's present argument—that applying increases in pension benefits for current employees to their past service violates the extra compensation clause—necessarily also contemplates that section 31678.2 authorizes unconstitutional actions by a board of supervisors or governing body. The County ignores the obvious implications of its extra compensation argument, neglecting to address the constitutionality of section 31678.2 in its reply brief, although the brief by respondent OCERS discusses the section at length. The County continues its silence on the issue in its response to the amicus brief from the California Public Employees' Retirement System (CALPERS), which points out that the County fails to acknowledge the implications of its arguments for statutes which allow increased pension benefits for state employees to be applied to prior years of service.[16]

Our conclusion that applying the 3% at 50 formula to past service does not violate article XI, section 10's prohibition of extra compensation makes it unnecessary for us to address the constitutionality of section 31678.2, or the other, wider implications of the County's argument. Nevertheless, we note that this case involved the collective bargaining process, in which AOCDS bargained with the County for the past service application of the 3% at 50 formula. "The legislative history underlying section 31678.2 . . . show[s] that the supporters of this legislation were seeking to provide counties with '"maximum local control"' in determining the appropriate retirement formula and to require the counties to engage in collective bargaining on the retroactive benefit issue. [Citations.] These objectives are consistent with a conclusion that the Legislature intended to provide the counties with broad discretion in deciding the manner in which to apply this optional retroactive benefit." (*San Diego County Employees Retirement Assn. v. County of San Diego*, *supra*, 151 Cal.App.4th at p. 1176.) The County exercised its discretion, as authorized by the statute, when after collective bargaining the board of supervisors approved the resolution authorizing 3% at 50 for all years of service for AOCDS members employed on June 28, 2002.

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[16] CALPERS points to numerous legislative authorizations allowing pension benefits to be calculated based on state employees' past service, and concludes "including prior years of public service to calculate benefits has been a fundament[al] part of public employees' pension benefits for at least the past 97 years."

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.

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June 22, 2010

Little Hoover Commission
925 L Street
Sacramento, CA 95814

Re: Public Pension Systems - Advisory Group Meeting June 23, 2010

Dear Ladies and Gentlemen,

I want to thank the Commission for its thoughtful invitation to participate in a discussion concerning pertinent issues regarding public pensions. I submit these comments on behalf of the California Federation of Teachers, AFT, AFL-CIO (CFT) and the California Community Colleges Independents' Association (CCCI). As counsel for the California Federation of Teachers and many associations of retired school and college employees, I have a perspective to offer based on my handling of cases involving vested retirement health benefit rights, since 1985. While most of my experience has focused on retirement health benefits, much of what I've had direct experience with pertains to public pension rights as well.

I am enclosing with this letter some information which may be of interest to the Commission. This includes two articles I've written:

A Short Primer on Retirees Vested Health Benefits, *CPER*, Vol 163 (Dec. 2003)

Retiree Health Benefits: Still Misunderstood ... Still Protected, *CPER* Vo. 186 (Oct. 2007)

I am also including copies of a legal brief I wrote about the subject, and the recent final decision of the Fresno Superior Court in the case of *Fresno Unified Retirees Association (FURA) v. Fresno Unified School District.* (Fresno County Superior Court).

These documents outline many issues relevant to vested rights.

I have reviewed one of the two papers identified by Mr. Stern, "Public Pension Plan Reform: Legal Framework" by Professor Amy Monahan. I did not have time to read "Employee Benefits: Identifying Solutions in Difficult Economic Times" by Jeffrey C. Chang, Esq.

I have several critical comments about the paper by Professor Monahan (the "Paper" herein). Since I've had but a day to put this together, I'll apologize in advance for any errors or omissions.

I. Vested Retirement Health Benefits

A. The Policy of Employer Paid Retiree Health Benefits Arose From Legislative Encouragement

Many of my comments are pertinent to both pensions and retiree health benefits, but I'm planning to put particular focus on health benefits.

In 1963 the State of California adopted legislation encouraging local public jurisdictions, from schools to special districts, to offer retirement health benefits to their employees. This legislation articulated the public policy of the State. The lack of such retiree coverage was at the time a serious concern, thus spurring considerable interest in this benefit from both employers and employees around the State. At the time, very few public employees were unionized, and none had the right to negotiate binding contracts. The Legislature's interest arose out of the widely shared concerns, such as that after retirement, many public employees would not enjoy the benefits of the new Medicare program (teachers, for instance, were exempt at the time). Public employers soon endorsed the idea employer-provided of retiree health benefits. At the time these benefits are relatively inexpensive, and they had the potential to help in recruiting and retaining employees. The benefit was often viewed as a *quid pro quo* for lower public sector wages.

Within the California public schools and community colleges, the benefit was welcome, and according to a survey of 800 of 1,000 school districts conducted by the California Department of Education in 2000, for retired employees under the age of 65, 62% of the Districts contribute 100% of the premium and 84% of the districts contribute some or all of the premium. For employees over age 65, 38% contribute all of the premium, and 53 % contribute some or all of the premium. These statistics indicate how important this benefit has proven to be.

B. Development of Judicial Protection

There are hundreds of retiree health benefits in the private sector. There are far fewer in the public sector, but these cases have been growing in number. I personally handled by first such case in 1985, and many since then.

In one case I handled, Contra Costa Community Colleges Retirees Association, decided favorably for the retirees in 1994, the College District argued that the right to retirement health benefits is not contractual prior to retirement. This argument harkened back to the early part of the 20th century when the law held that a pension did not vest and was a gratuity until the happening of the contingency upon which the pension depended. See, e.g., *Burke v. Police Relief* *and Pen. Fund* (1906) 4 Cal.App. 235, 87 P. 421. However, this state of the law was long age discredited in a string of cases which have held that pensions are deferred compensation which vests upon acceptance of employment. See, e.g., *Kern v.* , 29 Cal.2d 848; *O'Dea v. Cook* (1917) 176 Cal. 659; *Aitken v. Roche* (1920) 48 Cal.App. 753.

In her article, Professor Monahan dismisses the legal theories which support nearly 100 years of legal history. I take issue with her analysis. I have identified specific areas of her Paper with which I disagree.

II. <u>The Introduction - pp. 1-2 and the Gratuity Approach to Pensions</u>

> The paper asserts that *"interest in reforming public pension plans"* is *"driven by the high costs associated with such plans and concerns about changing labor market where it is no longer the norm to remain employed by a single employer for a thirty year career."*

There are numerous reasons for "interest" in reform, of which the cost is one of them. However, to say that there is a "changing labor market" where it is "no longer the norm to remain employed" by a single employer is inaccurate when it comes to public employment. In the public schools, California community colleges, cities, counties and special districts, it is still common for many people to remain employed for a 30 year career. I haven't looked for California statistics, but I question this comment as being applicable in the California public sector.

A. The History of Pensions and Retiree Health Benefits

It has been recognized for nearly a hundred years that long-term public employment is induced by pension and health benefits. This inducement is often critical to the government, because the public sector is neither funded well enough, nor logistically agile enough, to match private sector salaries. Similarly, the public sector has used pensions and life-time retirement to induce the hiring of the best available candidates or jobs.

The Monahan paper offers a fair amount of historical perspective about the fact that public pensions were once viewed as gratuities and why this view changed. However, I disagree with several of the comments, and feel they give a misimpression of the historical record. This record is important to understanding why the courts have, for a hundred years, offered constitutional protection to vested retirement benefits. .

I agree with the paper that at one time pensions were viewed as gratuities. As Ms. Monahan writes,

> *"Historically, public pensions in this country were viewed as mere gratuities that could be withdrawn or amended by the state at any time.* (Monahan, p. 1)

The paper then offers reasons why this approach was rejected, and I disagree with those suggested:

1. Supposed "judicial dissatisfaction" with the gratuity approach because it was unfair.

Unsatisfied with a rule that allowed states to freely abrogate pension obligations, the vast majority of states have rejected the gratuity theory and instead protect public pensions under contract or property rights theories... " (p. 1)

Although it is obvious that by the early 1900s, most courts had rejected the "gratuity approach," the reason was not simple "dissatisfaction." Rather, the cases document a logical and convincing reason - that these benefits were earned.

2. Supposed "Policy reasons" for the shift from gratuities.

"In some cases, the shift away from the gratuity approach was policy driven. Courts simply could not tolerate the absurd result of the gratuity approach, which allowed states to retroactively amend or terminate pension benefits at any time for any reason. In other states, the move .... was requiem by state constitutional provisions that prohibit ... gifts to individuals." (pp. 3-4)

While retroactive rescission of promised benefits was, and remains, absurd, the "gift" rationale was not central to the court cases. Rather, it was a recognition that the benefit was earned, as part of a contractual agreement.

3. And, third, a judicial desire to "protect employees" from a State's outsized power.

"Discussion of reasonable expectations, then, may have arisen from a desire to protect an employee from the state's outsized power that results from long vesting periods, rather than an effort to determine what is actually reasonable for an employee to expect." (Id. p. 33)

While I have not gone back and read all of the old cases, many of those I've read did not have long vesting periods. In the public sector in California, there is no law which restricts the negotiation of a vesting period - however, the cases hold that benefits, unless otherwise provided, vest when one is hired, or the benefit is improved. What matters then, in California, is the *accrual period* - the service required for the already vested right to be "earned."

The three reasons offered by the Paper are not actually born out in the historical record. But understanding the history is important to understand why the current "rules" developed. In fact, the "shift" from viewing pensions as "gratuities" and "charity" began with pensions for service in the military (the Civil War) and from a judicial recognition that the pensions were in fact the trade-off for work - they were deferred compensation for services rendered.

A fairly thorough history of the historical antecedents of our current pension and public retiree health benefits is Serving the State Constitutionalism and Social Spending, 1860's - 1920's, by Susan Sterett, a political scientist..[1] Sterett's study recounts that from "1865 onward courts addressed the constitutionality of military pensions, civil service pensions ..." *Id.* at 316. Pensions arose in the context of societal stereotypes about gender and disability, and arose from concepts "that were divorced from any social reality." *Id.* at 314. Pensions evolved, and by the late 1800s pensions were justified on a contractual basis - as a way to "entice people into public service ..." *Id.*

Sterett says that "pensions were the subject of widely cited litigation ..." in several states. And then the U.S. Supreme Court decided *Pennie v. Reis*, 132 U.S. 464 (1889)[2] There a death benefit had been promised to the widow of a police officer, the monies coming from various sources including "fines imposed upon the members of the police force ... for violation of the rules and regulations of the police department."[3] The facts are simple: from 1878 until his death, pursuant to a city ordinance, Mr. Ward, a police officer of San Francisco since 1869, contributed $2 per month toward a life and health insurance fund, and upon the officer's death, his widow was to be paid $1,000. But shortly before he died, in 1889, the contributory law was *repealed.* Hence the City refused to pay his widow the $1,000 benefit when he died shortly after the law was repealed.

Mrs. Ward sued alleging she was deprived of a vested property right *without due process.* (In other words, she did not assert contractual impairment, and as becomes evident, the Court neglected this theory as well.) The California Supreme Court found for Ms. Ward, and the City appealed to the U.S. Supreme Court , which ruled for the City. It held that the City's promise

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[1] *Law and Social Inquiry*, Spring 1997 at p. 311 (22 LSINQ 311)

[2] Sometimes cited as *Pennie v. Res*

[3] I mention this to illustrate the landscape existing in the late 1800s and into the early 1900s, where workers could be fined by their employers for incompetence, speaking out, etc. The culmination of this principle came in the famous Danbury Hatters case *(Loewe v. Lawlor*, 108 U.S. 274 (1908)), where employees sued by their employer for going on strike lost their homes. This outmoded notion of employee servitude was finally declared illegal in *Complete Auto Transit*
v. Reis (1981) 451 U.S. 401, and other cases.

was "subject to *change or revocation at any time*, at the will of the legislature. There was no contract on the part of the state that its disposition should always continue as originally provided ..." *Id.* at 471.

The *Pennie v. Reis* decision cites *no precedent* for abrogating a clear promise. Even under an ordinary contract approach, the death benefit was contractual. However, the court saw the death benefit as resulting from the largesse of the sovereign state, and thus subject to change without notice. Pensions, to Supreme Court Justice Field, were gratuities, to be taken back for any reason, at any time. Rather, a pension beneficiary had no property interest in a fund until the happening of the contingency (i.e. the payment of the monies).

However, society soon recognized the contractual nature of pensions, partly because it was essential to encourage people to work for the government, and likely out of rejection of the *Pennie* decision. As Sterett astutely notes, this period saw women moving *en masse* into the teaching profession in the cities around the country, and a widespread recognition of education as serving a *public purpose*. "As civil service employment expanded into teaching, the constitutional arguments required to make the programs legally acceptable," that is, as *compensation for service*, ran counter to the historical view of pensions as charity for disabled veterans or widows and their children. It was this *service element* that held sway. Cities began establishing pensions for firefighters, police, then teachers, and eventually most categories of civil servants. Sterett explains that there was no more talk of "the pitiable and dependent condition of widows ...," now the analogy was to "service." *Id.* at 331-332.

Reis' narrow and monarchical approach was rejected soon by many states. This rejection had nothing to do with an "oppressive" and bullying government, but everything to do with government as a profession, with service as the commodity which was "traded" for the benefit, and because of a need to encourage teaching and other forms of government service as a profession..

B. *O'Dea v. Cook* Establishes Contractual Nature of Benefits in California

In California this transition became complete in 1917, when the California Supreme Court held in *O'Dea v. Cook* (1917) 176 Cal. 659, that pension benefits were vested rights. This decision rejected *Pennie*.

Once again, the facts were simple and straight-forward: Edward O'Dea joined the SFPD and received injuries in December, 1912 that directly resulted in his death in 1915. His widow was entitled to his pension upon his death. But after he had been injured, the Charter of the City had been changed to allow a widow's benefit only where one died within an officer year of his injuries. On this basis the City denied his widow Bessie, his pension. The Superior Court issued a writ of mandate requiring the trustees of the fund to honor the policy in effect when Edward

O'Dea had been injured.

The court held that:

"[A pension] is not a gratuity or a gift .. where ... services are rendered under such a pension statute, the pension provisions become a part of the contemplated compensation for those services and so in a sense a part of the contract of employment." [relying on the New York cases which had rejected *Pennie v. Reis*] *Id.* at 661.

The court finally relied on the fact that the change in *O'Dea* resulted from a statute, and on the still settled principle that it was a "fundamental and universal rule in the construction of statutes that they shall be given prospective effect and not retrospective effect ..." *Id.* at 662.

From the decision in *O'Dea,* California courts have consistently recognized that retirement health benefits arise from a contractual relationship - the exchanger of labor for deferred, post-retirement compensation. The many cases decided in California in the last 100 years, fulfilling promises and preserving millions of dollars of earned compensation, are a testament to the recognition of this *quid pro quo* contractual relationship - earned employment in exchange for deferred compensation, the retirement benefit.

Ms. Monahan's paper neglects to afford proper credit to the contractual nature of this relationship. Indeed, her "solution" to pension and benefit "problems" would be to return us to the day when workers could be fined for doing their job and when civil servants worked for a sovereign that held nearly absolute control over their lives. That day has thankfully passed.

III. The Paper Affords Insufficient Weight to the Law Governing Changes in Vested Rights

The Paper is somewhat misleading when it notes that the government retains a "police power" to "make all laws necessary and proper to preserve the public security ..." [citing Blacks Law Dictionary]. (Paper, note 9, p. 8) The Paper adds that the state "*always* retains the power to amend the contract in accordance with the state's police power." Id., p. 7. It correct notes, then, in note 9 that the "[police] power is tempered by the requirements of the contract clause." [citation omitted] It is the later fact which deserves emphasis.

As one California court explained, "although the state may not contract away its police power, it may 'bind itself in the future exercise of the taxing and spending power ..." *California Teachers Association v. Cory* (1984) 155 Cal. App. 3d 494, relying on United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) and *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 307-309.

As the many cases cited in my two articles and FURA brief explain, the State's power is tempered by the Contracts Clause of the Constitution. It is simply too late to revisit this proposition - it has widespread judicial support throughout the country.

IV. While Most Contracts Providing Retirement Benefits are Clear and Explicit, They May be Implied

The Paper asserts that most states do not have a specific constitutional provision discussing retirement benefits, but "imply the existence of a contract." Not so in California. Most of the cases in which vested benefits have been upheld involved explicit contractually-vested rights. These explicit promises appear in employer resolutions, ordinances and policies, and in bilateral collective bargaining agreements.

With a collective bargaining agreement (or a employer ordinance or policy), a court must often review documents and "interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." *Riverside Sheriff's Association v. County of Riverside* (2009) 173 Cal. App. 4th 1410, 1424. California courts may imply contractual obligations "from the particular words" at issue, and implied contracts are "of equal dignity with an express contract for purposes of the prohibition against impairment." *California Teachers Assn. v. Cory* (1984) 155 Cal. App. 3d 494, 505. An intent to grant contractual rights can be implied from *an unambiguous exchange of consideration between a private party and the state. Id.* The rules of interpretation are applied in light of this policy. In *Valdes v. Cory*, 139 Cal. App. 3d 773, 787 (1983) the Court focused initially on the specific provisions of a Retirement Law which demonstrated the State's vested commitment, then agreed that words in the statute "must be *read in context with the nature and purpose* of the statute as a whole. [citations]." *Id.* at 788, emphasis added.

A. The Contracts Clause

At the root of vested retirement health benefits is the Contracts Clause. The legal framework of this dispute is straightforward. The Contract Clause of the United States Constitution, Article I, Section 10, provides "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts ..." Article I, Section 9 of the California Constitution contains a parallel provision: "[a] ... law impairing the obligation of contracts may not be passed." This legal sanctity granted contracts is a *distinctive attribute of the U.S. Constitution.* James Madison saw the this clause as the "constitutional bulwark in favor of personal security and private rights," explaining that contract impairment was "contrary to the first principles of the social compact and to every principle of sound, legislation.[4] (*The Federalist* No. 44, at 282, C. Rositer ed. 1961.)

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[4] The clause was designed to prevent endless legislative battles between factions aimed at redistributing property through "legislative interferences, in cases affecting personal rights . . . ."

Today the constitutional contract clauses are the only safeguards against public agencies solving their fiscal problems by shifting costs onto their retirees through the impairment of retirees' contracts. Since retirees have finished their service, they are left with no bargaining power - so this protection is essential. To treat contracts covering retirement benefits less protectively than agreements for property rental, or sales, would be unjustified. In fact, contracts covering retirement benefits are given special protection. Back in 1917 the California Supreme Court ruled, "It is a firmly established principle of judicial construction that pension statutes serving a beneficial purpose are to be liberally construed." *O'Dea, supra.*, 176 Cal. at 662.

In California, many of the promises of retiree benefits appear in bilateral collective bargaining agreements. California holds that a collective agreement imposes a binding obligation on a school district.[5] A CBA assures employees that they may rely with confidence on promises of deferred compensation. The Promise protected retirees from unexpected premium charges, and worry about them, allowing them to enjoy the benefits of retirement. Some of these agreements recognize explicitly that employees accept lower pay in exchange for and reliance on promised deferred compensatoin. Retirement benefits are, in legal terms, "an indispensable part of the contract of employment ... , creating a right ... as an *integral part* of compensation payable under such contract." *Abbott v. City of San Diego* (1958) 165 Cal. App. 2d 511, 517.

B. The Paper Disregards the Distinction Between Contractual Impairments, and Substantial Impairments Under the Reasonable Modification Doctrine

Contracts "enable individuals [and public entities] to order ... their affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely upon them." *Allied Structural Steel v. Spannaus*, 438 U. S. 234, 245 (1977) The purpose of the Contract Clause is to protect the *reasonable expectations* of the parties. They promote stability in employment.

It is true that a retirement health benefits clause or a pension is at the heart of the employment relationship, and is frequently a *quid pro quo* for accepting lower salaries while one is employment. As an integral term of the contract, the impairment is almost always legally substantial.

This same principle, that impairment of an integral term of a contract amounts to a substantial impairment of the contract, governs almost all contractual agreements, whether for

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Id.

[5] Cal. Gov. Code § 3540.1(h); " ... a written document incorporating any agreements reached ... shall, when accepted by the ... public school *employer, become binding on both parties ..."; Glendale City Employees' Assn., supra.*, 15 Cal. 3d at 335.

the purchase of crops by a grocery chain, or the selling of parts to Ford Motor Company.

There law treats pre-retirement changes in benefits for government employees differently than it does such changes in the private sector, however, in recognition of their status as government employees. This is the doctrine of reasonable and minimal impairments.

> "An employee's vested contractual ... rights may be modified *prior to retirement* in accord with changing conditions, for the purpose of keeping a pension system flexible to permit adjustments ... and ... maintain the integrity of the system." *Allen v. City of Long Beach* (1955) 45 Cal. 2d 128, 131, emphasis added; *Wallace v. City of Fresno* (1954) 42 Cal. 2d 180, 184. Changes must "bear some material relation to the theory of a pension system and its successful operation, and changes ... which result in disadvantages to employees must be accompanied by comparable new advantages." *Id.*

But post-retirement changes are restricted because the "reasonable modification doctrine" does not apply to post-retirement impairments. *Terry v. City of Berkeley* (1953) 41 Cal. 3d 698, 702-703. This is a crucial distinction which is not mentioned by the Paper.

The law already allows some flexibility in the future treatment of present benefits. It is clear that vested benefits can be changed prior to retirement "for the purpose of keeping a . . . system flexible to permit adjustments in accord with changing conditions and at the same time maintaining integrity of the system." *Allen v. City of Long Beach, supra.,* 45 Cal.2d at 131. However, as noted by the Supreme Court:

> "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 26, 97 S.Ct. 1505, 1519.[6]

Thus, under the "reasonable modification doctrine," any modifications to the system "must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." *Allen,* 45 Cal.2d at 131. To be justified, it must be shown that

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[6] California law has placed pension rights and other deferred forms of compensation under the protection of the federal contract clause. *Legislature v. Eu,* (1991) 54 Cal. 3d 492, at 534. Although the language in the federal cases differs, the facts to be considered and analyzed appear to be the same in both state and federal cases. *Accord, Allen v. Bd. of Admin. of PERS* (1983) 34 Cal.3d 114, 120.

the changes were *necessary* to preserve the pension system as it existed prior to the changes, not as it applied to persons hired after the changes. *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 453, 455 (citing *Allen v. City of Long Beach*, 45 Cal.2d at 133). The government bears the burden of proof on this issue. Sonoma County, 23 Cal.3d at 310, 312; *Ass'n of Blue Collar Workers v. Wills* (1986) 187 Cal. App.3d 780, 791. This properly places a heavy burden on the government. The burden cannot ordinarily be filled by a prediction of future pension shortfalls.

In *United Fire Fighters of Los Angeles v. City of Los Angeles* (1989) 210 Cal.App.3d 1095, 259 Cal.Rptr. 65 (*rev. den. cert. den.* 1990) the court held that a cap on pension benefit cost-of-living adjustments was not justified by unforeseen pension cost increases or enactment of Proposition 13 which made the city unable to fund the pension through taxes. Evidence was presented that the savings from the cap were not used to meet an unfunded liability but merely spent on other items or added to the city's general reserve fund. Noting that the purpose of a cost-of-living adjustment is the preservation of a retiree's standard of living and that the cap lessened such economic security, the court struck the cap because the savings did not go to enhance the integrity or soundness of the pension fund. *Id.* at 1113.

An employer's assertion of changed circumstances "will not justify a substantial impairment unless it was unforeseen and unforeseeable." *United Fire Fighters*, 210 Cal. App.3d at 1111, citing *United States Trust Co.*, 431 U.S. at 31-32, 97 S.Ct. at 1522-1523. In *United States Trust Co.*, the Supreme Court held that the foreseeability of increased need for mass transportation in New York and the likelihood of substantial future deficits defeated the state's argument that repeal of a law affecting certain bond obligations was fiscally necessary. 431 U.S. at 31-32, 97 S.Ct. at 1522-1523. In *United Fire Fighters*, the city failed to consider the rate of inflation and the effect of annual salary increases on the pension system. The fund had unfunded liabilities from the outset. These and other errors in judgment and practice led the court to conclude that "a public entity cannot justify the impairment of its contractual obligations on the basis of the existence of a fiscal crisis created by its own voluntary conduct." 210 Cal. App.3d at 1113.

The reasonable modification doctrine offers protection for employees and retirees, and flexibility for the government.

V. The Contract Approach Does Offer Considerable Guidance in Identifying Which "Modifications" May be Legally Made

The Paper asserts that the "contract approach does not provide a great amount of clarity in identifying which pension modifications may legally be made." (Paper, p. 21) I disagree. The tests which have been adopted to identify and apply the contracts clause doctrine and the reasonable modification doctrine, are actually quite well known, and relatively easy to apply, as shown by the last section of this letter.

VI. The Paper Incorrectly Claims That Wages Are "Inherently" Different

The Paper asserts that the contractual rights theory, and others which have been judicially applied to protect vested rights, are "deeply problematic." It offers observations about "wages" versus "benefits" as a means of disregarding 100 years of sound, evolved and frankly essential precedent. It contends that "characterizing a public pension statute as a contract that begins at the time of employment often provides greater protection than it reasonable." (Paper p. 31) Yet it is when one is employed and begins to rely on a promise, or when the promise is made and thereafter relies, which establishes the fundamental basis for protecting benefits as vested rights. That is, employees rely on the benefit for future service, in exchange for deferred compensation in the form of pensions and retiree health benefits.

The Paper makes several errors in its discussion of pensions and post-retirement benefits as being different than how wages are treated. The Paper is wrong in two major ways. First of all, wages are not necessarily treated differently than pensions. In fact, wages can and sometimes do vest.

A. Salary and Other Compensation is Subject to Vesting

Apart from this rich history of enforcing pension statutes, California has recognized that benefits *including salary* may contractually vest:

Future *cost-of-living salary increases* for the 1978-79 fiscal year were held vested so that passage of a June 1978 initiative measure could not impair such contracts, even though the salary for that following year had not yet been completely earned. *Sonoma County Org. of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 304.

The Contract Clause protects other forms of deferred compensation like judicial salaries. *Legislature v. Eu* (1991) 54 Cal. 3d 492, 534; *Olson v. Cory*, 27 Cal.3d at 538 ["[T]he elements of compensation for [judicial] office become contractually vested upon acceptance of employment." *Id.* at 538-539 (n.3, citing *v. Bd. of Admin.* (1947) 21 Cal. 3d 859, 863)].

Disability benefits were held vested in *Frank v. Board of Administration of PERS* (1976) 56 Cal. App. 3d 236). There the Court of Appeal held that a disability pension vested at the time of employment despite the fact there was no service requirement for receiving disability benefits; the court rejected the argument that the benefits were not earned and did not vest until the employee was disabled. *Id.* at 242, 243.

Vacation pay was held vested in *Suastez v. Plastic Dress-Up Co.*(1982) 31 Cal. 3d 774, 781; and survivor benefits; *Dickey v. Retirement Board* (1976) 16 Cal. 3d 745, 749.

Scores of decisions recognize the right to enforce the statutes granting wages, through the writ of mandamus. The courts uniformly hold that mandate is the appropriate remedy to collect wages due teachers. *A.B.C. Federation of Teachers v. A.B.C. Unified School District* (1977) 75 Cal. App. 2d 332, 341-342[7] As *A.B.C.* makes clear, faculty should proceed in mandate to enforce statutes providing pay. Indeed, since 1857 California school teachers have enforced promised salary by judicial means. *Knox v. Woods* (1857) 8 Cal. 545 [writ of mandate issued to compel payment of salary owed to teacher].

Similarly, California has long recognized the employer policies are part of an employee's contract of employment, and judicially enforceable. *Goddard v. South Bay Union High School District* (1978) 79 Cal. App.3d 98, 105; *Frates v. Burnett* (1970) 9 Cal.App.3d 63, 69; *American Federation of Teachers v. Oakland Unified School District* (1967) 251 Cal. App. 2d 91, 97.

B. There Is a Distinction Between Wages and Benefits

The observation that it is "odd" for employees to *expect* to receive promised pensions disregards the reality of the workplace is itself rather odd. When an employer promises deferred compensation if one serves 10 or 20 years, and sets forth the parameters of what will be provided in retirement, there is nothing odd about expecting the benefit. Wages are, however, a different matter.

First, since the 1960s and 1970s, most wages are set either by collective bargaining or a formula which determines a comparable "prevailing wage." In the case of public service, employees ordinarily *expect annual wage increases*, such as COLAs (cost of living adjustments). In the collective bargaining context, most agreements are for 3 years have salary schedules and most public employees have a column and step on the employer's schedule, and defined rules for advancing. Although the negotiated changes to the schedule are sometimes known or uncertain, that one through services "advances" on the schedule is commonplace.

And while agreements for wages are subject to period renegotiation, even during the term of a contract. Such a system has existed since 1937, under the National Labor Relations Act.

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7 Other mandate cases enforcing wage statutes include: *Caminetti v. Board of Trustees* (1934) 1 Cal. 2d 354, 356; *United Teachers of Ukiah v. Board of Education* (1988) 201 Cal. App. 3d 632, 640-644 [enforcing§45028]; *CSEA v. Azusa USD* (1984) 152 Cal. App. 3d 580 [enforcing §45203]; *Veguez v. Governing Board* (2005) 127 Cal.App. 4th 406 [enforcing§44977]; *CTA v. Governing Board* (1983) 145 Cal. App. 3d 735, 747 [mandamus appropriate to enforce § 44977, as case"depends on the interpretation of a statute or ordinance."]; *Napa Valley Educators v. Napa Unified School District* (1987) 194 Cal. App. 3d 243, 248 [enforcing §44977]

Wages in some ways like seniority system rights,[8] which the federal courts have held can be changed by collective bargaining, citing *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed 1048, and *International Longshoremen's and Warehousemen's Union v. Kuntz* (9th Cir. 1964) 334 F.2d 165. However, seniority rights in the private sector are collective rights. The Union's authority to negotiate over seniority is based in part on its authority to act for "mutual aid or protection." *Huffman*, 345 U.S. at 337. The court in *Phillips v. California State Personnel Bd. (1986) 184 Cal. App. 3d 651* followed this distinction between collective and individual rights when it held that unions may not waive minimum due process in termination procedures. 184 Cal.App.3d 651. In contrast, the *Kuntz* and *Ford Motor Co. v. Huffman* cases do not involve individual rights, but seniority, a collective right. Wages are the same - they are generally a "collective right," subject to negotiations" except where the contract is open for negotiations of wages.

Nevertheless, certain aspects of wages are subject to vesting, and the most important is vacation pay. A vacation with pay is in effect additional wages. Thus, terminated employees often enjoy a vested right to severance pay. See, e.g., *Owens v. Press Publishing Co.*, 120 A. 2d 442 ((1956) There, once service had been performed, the right to severance pay vested. That right was a product of their collective bargaining agreement.

In California, in *Suastez, supra.*, the Supreme Court held that employees did expect to receive their vacation pay wages, and that the right to this pay vested as it was earned.

The essence of the above is that the Papers reliance on "wages" as undermining the right to deferred compensation in the form of pensions or retirement benefits is utterly misplaced. The laws distinct treatment of deferred compensation, earned and expected, differs somewhat among wages and benefits - in no case does it prove odd, however, that employees and retirees expect deferred earned pension and retirement health benefits to be provided as *promised*.

C. Employers and Unions Cannot Negotiate Away Vested Benefits for Retirees Because Unions do Not Represent Retirees

Wages can be changed, while one is employed, through negotiations and collective bargaining for unionized employees, and by policy for non-unionized employees. And, thanks to the reasonable modification doctrine, even vested retirement benefits can be changed in negotiations, provided legal limitations are observed. However, post-retirement changes cannot be modified, for unionized retirees, for unions cannot negotiate for retired individuals.

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[8] Reference to seniority as a "vested" right in the Kuntz case was the result of the plaintiffs' characterization, 334 F.2d at 167, a characterization not shared by the court. Id. at 171.

The federal courts have held that vested pension rights cannot be bargained away by unions. "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent." *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.* (1971) 404 U.S. 157, 181, 92 S.Ct. 383 (n. 20)[9] Although *Allied Chemical* spoke to the relationship between unions and retired employees, the concept that unions cannot bargain away vested retirement rights has been applied to vested rights of employees still represented by the union. State courts have agreed. And so has the California Public Employment Relations Board. To the extent the Paper suggests otherwise it is simply wrong.

Here are some of the cases. In *Terpinas v. Seafarer's Int'l Union of N. America* (9th Cir. 1984) 722 F.2d 1445, it was held that once an employee became vested in a disability plan after 10 years of service, the union agreement to amend the disability plan could not operate retroactively to destroy or alter the employee's vested rights. 722 F.2d at 1447-1448.

In *Hauser v. Farwell, Ozmun, Kirk & Co.* (D. Minn. 1969) 299 F.Supp. 387, the court rejected the purported analogy to *Kuntz* and *Huffman* and held that "without explicit authority or a power of attorney from the individual members" the union could not bargain away the vested pension rights of employees, even though those employees had been at a meeting discussing the modification of the retirement plan and had received a copy of the modified agreement. 299 F.Supp. at 393.

In *Bokunewicz v. Purolator Products, Inc.* (3rd Cir. 1990) 907 F.2d 1396, it was held that disability pension benefits vested prior to application for the benefits and that a collective bargaining agreement which modified the plan between the date of injury and the date of application for the benefits could not waive the vested rights of the employees. Id. at 1401-1402. Thus, in the private sector vested retirement rights cannot be amended through collective bargaining without individual consent.

There are many more cases, the above is from an old brief.

The Paper's characterization of the contract theory as "problematic" is unwarranted. The sanctity of contracts motivated the Founding Fathers to include it in the Constitution. California included a similar clause. The law is now well-settled, for nearly 100 years, that pensions and retirement health benefits are subject to vesting. The rules are clear - often the facts of any particular situation are disputed.

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[9] *Allied Chemical v. Pittsburgh Plate Glass* held that retirees were not "employees" under the federal labor laws, and that unions may, but are not required to negotiate concerning benefits of retired employees. The footnote explained that even though unions could bargain for retirees, they could not bargain away vested rights without individual retiree consent.

VIII. Conclusion

The Paper indicates that it would be preferable to specify that any contract with an employee "is formed on an *ongoing basis* as services are performed," thus allowing that the "terms of the contract can be modified by either party." *Id.* at pp. 34-35 This is simply not possible. And it shouldn't be. Civil servants are not second-class citizens, they enjoy the same contractual protections we all do. There is not, and need not be an "exception" for tenured teachers. Firefighters, janitors, crossing guards, cooks, clerks, all employees deserve the same constitutional protection, not just professors or teachers.

The Paper rather callously offers that an employee "dissatisfied" by a change in his or her expected benefits, may "choose to terminate employment at any time if she desires a different salary and benefit package ...." These comments are inconsistent with reality. Hardly any governmental employee can "modify" the terms of her employment. Without a union, they have no bargaining power. And even with a union, a union cannot modify benefits for those who have retired with a vested right.

Although terms wages and benefits are negotiable for unionized employees, the reasonable modification doctrine restricts a negotiated change in benefits for employees who have already received vested rights. And of course, it notion that a governmental employee can just decide to quit when she dislikes a change in her retirement benefits, is unrealistic, for anyone who has worked years towards satisfying the conditions for deferred compensation is not going to quit.

The Paper acknowledges that once one has "served" in reliance on the state's offer, the state should not be free to retroactively change the terms under which service was performed. I find this comment difficult to rationalize with many that come before it. Of course, a public entity is usually free to make changes for new hires, but sometimes not those currently employed and not for those retired (insofar as vested rights are involved). But two tier systems have a way of causing severe morale issues, and turmoil, and are often not useful at all..

An understanding of the origins, features and protections of retiree health benefits and pensions in the public sector requires a knowledge of the *historical origins* of the constitutional protection of contracts, the judicial and societal recognition that public employees have contractually-protected benefits, and the extensive case law which has developed over a century.

The basis of *stare decisis* is the recognition that precedent matters. The Paper, for the most part, only gives lip service to precedent, and disregards the fine points of settled precedent..

Very truly yours,

Robert J. Bezemek
Counsel for the CFT and CCCI

PUBLIC RECORD e

David S. Wall

RECEIVED
San Jose City Clerk

2011 FEB 10 P 12:31

February 10, 2011

Mayor Reed and Members San José City Council
200 East Santa Clara Street
San José, California 95113-1905

Re: THE GHETTO LIFE: UPDATE ON THE SCEP...the disappeared toilet is still under investigation.

On Wednesday (02.09.11), after a lengthy but productive Rules and Open Government Committee Meeting, I ventured over to North Tenth Street @ Horning Street to "take the pulse" of the **SCEP** (**S**hopping **C**art **E**ntitlement **P**rogram). I arrived on station at approximately 1541 hours and found two (2) stolen and abandoned shopping carts. *A 67% decrease as to the number of stolen and abandoned shopping carts from last week is hereby recorded.*

The "perennial garbage pile" (PGP) has been reduced. The area behind the Horning Street railroad crossing control box also has undergone a significant change. Many of the piles of human excrement have vanished, although there is one "crusted over" pile still present. Another mystery unfolds, where did the piles of human stool go? Did someone pick them up? Or, did they just dry up and were dispersed by the wind? The "**toilet**" is still missing, the investigation continues. I included E. Younger Street on my neighborhood watch patrol. I made several passes in the neighborhood and did not see the missing toilet. A broader sweep of the adjoining streets is currently under way. All criminal and related suspicious activities will be reported to the Police as they are observed.

The "perennial growing debris field" (PGDF) north of the Horning Street railroad crossing control box, the garbage and assorted debris field has stabilized. Debris from the San José Metals fire is still present near the railroad tracks. One vagrant was sighted today. **It appears the Union Pacific Railroad Police have a successful, "Vagrant Management Plan (VMP)"**. The City of San José should "partner" with the Union Pacific Railroad Police to create a "VMP" for the city implementation.

Mayor Reed has taken decisive action concerning; "***The Golden Falcon***" CA # JT 9621 which *is still* at the N.W. corner of Horning Street @ North 10th Street. A late model, **Dodge Sportsman motor home** CA# 525 WJY is still in front of "***The Golden Falcon***". Madera Street is a "dump", still. The travel trailer, "***All Scouts Plus***" CA # FQ 3542 can be seen on the N.E. corner of Santa Paula Avenue @ North 11th Street. "Uncle Sam" (aka his Honor Councilmember Liccardo) should thank Mayor Reed!

Ownership of the stolen and abandoned shopping carts is as follows;

Safeway (1), and Toys "R" Us (1).

*"Unmarked stolen and abandoned shopping carts have been "purposefully altered" to shield true identity.
*****special note***** the overall cleanliness of shopping carts picked up off the streets and returned to stores should be addressed by some governmental agency. Unsuspecting customers may use excrement coated shopping carts without their knowledge. Shopping carts picked up off the street are "filthy" and are potential reservoirs of microbial agents waiting to spread contagion(s).

Manuel's chickens clucked in on the apparent incompetence of the Transportation and Environment Committee's support of the Environmental Services Department's (ESD) "Litter and Trash Reduction Plan" which was [Item d(2) on the (02.07.11) T&E Agenda].

I said, "Wait a minute...since when have you chickens taken an interest in "T&E meetings?" Mabel clucked, "What makes you think we are not following every issue at City Hall?" Bert also clucked, "I watched the meeting and those over paid, goofy Environmental people could have brought in a sack of chicken manure with a pink bow on it and with a smile or a twitch or two of their eyelids could have easily convinced those three council stooges, that the sack of chicken manure contained the deeds to five thousand gold mines. Sure the three stooges would have asked a few questions about the smell emanating from the bag, but those wily ESDers would have just said, "That's just the smell of the gold mine deeds, go ahead and vote *Yes*, stoogies."

Cc: City Attorney / City Auditor / City Manager...**Respectfully submitted:** David S. Wall
02.10.11

David S. Wall

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San Jose City Clerk

2011 FEB 10 P 4: 29

February 10, 2011

Mayor Reed and Members San José City Council
200 East Santa Clara Street
San José, California 95113-1905

Re: Neighborhood Services and Education Committee did an Excellent Job!

The Neighborhood Services and Education Committee's first meeting of the year (02.10.11) was an excellent example of "performance based" service to the needs of the voting members of the City of San José.

Under the expert tutelage of veteran Chairperson Pyle, the timely exegesis of many issues contained in today's agenda were brought forward for discussion and inclusion into the record.

Councilmember Rocha is proving to be a Councilmember who not only asks germane questions, but his questioning style of "bracketing" issues so as not to provide staff "the wiggle room of incompetent responses" was refreshing, on point and sends a clear and present message to staff. A noted improvement over the Transportation and Environment Committee's meeting on Monday (02.07.11), which the Chairman of T&E is to be held solely accountable. "Outstanding job and rebound" to Councilmember Rocha.

Councilmember Constant, "The Rock", continues to champion the safety of children. Be it the problem with funding for "Crossing Guards" as well as safety issues pertaining to parents driving their kids to school. "The Rock" is going to ensure "the safety of the cross walks".

Deputy City Manager Norberto Dueñas continues to demonstrate that his retention of employment with this City is preferred by orders of magnitude due in part with his numerous achievements with the "Schools Collaborative"

Presenters of the Recreation E-Commerce System Pilot Project (RECS) (Parks, Recreation and Neighborhood Services) also are to receive high marks for "Performance" as to program content and success but, also to excellent, poignant responses to questions from Councilmembers. **I don't know how to spell their names but, to "Brother Jay and crew", Outstanding presentation and performance.**

However, the Environmental Services Department's presentation, with pictures of school children performing unsafe acts illustrates a reckless disregard for the safety of school children. Again, ESD serves to embarrass the city, themselves and a toll of "Poor Performance' should be immediately inflicted upon the requisite and responsible management of ESD. Regime change in this pathetic department is way over due.

The Library's "Fly by the big seat of their pants policy making", embarrassing presentation, five (5) years after Mayor Reed requested policy change raises significant questions as to management decision making during these tough budgetary times. "Poor to abject mediocre Performance" is hereby recorded or the record.

The need for permanent funding for the Office of the City Attorney from each item on the agenda (especially due to the Library's actions) was adamantly discussed.

Cc: City Attorney / City Auditor / City Manager…**Respectfully submitted**: David S. Wall
02.10.11

T · ·Mobile·

PUBLIC RECORD 9

T-MOBILE WEST CORPORATION a
Delaware Corporation
1855 Gateway Boulevard, 9th Floor
Concord, CA 94520

February 3, 2011

Anna Hom
Consumer Protection and Safety Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

RE: T-Mobile West Corporation as successor in interest to Omnipoint Communications, Inc. d/b/a T-Mobile (U-3056-C).
Notification Letter for T-Mobile Site No. SF55685E

This letter provides the Commission with notice pursuant to the provisions of General Order No. 159A of the Public Utilities Commission of the State of California (CPUC) that with regard to the project described in Attachment A:

☒ (a) T-Mobile has obtained all requisite land use approval for the project described in Attachment A.

☐ (b) No land use approval is required because

____

____

A copy of this notification letter is being sent to the local government agency identified below for its information. Should the Commission or the local government agency have any questions regarding this project, or if anyone disagrees with the information contained herein, please contact Joni Norman, Senior Development Manager for T-Mobile, at (925) 521-5987, or contact Ms. Anna Hom of the CPUC Consumer Protection and Safety Division at 415-703-2699.

Sincerely,

Joni Norman
Sr. Development Manager
T-MOBILE WEST CORPORATION a Delaware corporation

Enclosed: Attachment A

CC:
Debra Figone City Manager, City of San Jose, 200 East Santa Clara St., San Jose CA 95113
Joseph Horwedel , Planning Dir, City of San Jose, 200 East Santa Clara St., San Jose CA 95113
Lee Price, City Clerk, City of San Jose, 200 East Santa Clara St., San Jose CA 95113

ATTACHMENT A

1. Project Location

Site Identification Number:	SF55685E
Site Name:	Simple Solution
Site Address:	East side of N.5th Street, 460 feet southerly of Commercial Street, San Jose, CA 95132
County:	Santa Clara
Assessor's Parcel Number:	235-11-028
Latitude:	37° 21' 31.78" N
Longitude:	121° 54' 03.97" W

2. Project Description

Number of Antennas to be installed:	Six (6) Panel, One (1) GPS
Tower Design:	Monopole
Tower Appearance:	Antennas concealed on Slimline Monopole, behind radome
Tower Height:	60'
Size of Building:	N/A

3. Business Addresses of all Governmental Agencies

City of San Jose Debra Figone, City Manager 200 East Santa Clara St. San Jose, CA 95113	City of San Jose Joseph Horwedel, Planning Dir. 200 East Santa Clara St. San Jose, CA 95113	City of San Jose Less Price, City Clerk 200 East Santa Clara San Jose, CA 95113

4. Land Use Approvals

Date Zoning Approval Issued: January 26, 2011

Special Use Permit #: SP10-032

If Land use Approval was not required: N/A

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PUBLIC RECORD h

T-Mobile West Corporation
a subsidiary of T-Mobile USA Inc.
Engineering Development
1855 Gateway Boulevard, 9th Floor
Concord, California 94520

February 7, 2011

Anna Hom
Consumer Protection and Safety Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

RE: Notification Letter for T-Mobile Site No. SF44339B:

During a routine review of our files, we were unable to locate the attached letters of notification. Out of an abundance of precaution, we are resending the letters for your records.

Thank you for your time,

Timothy Williams

Timothy Williams
Regulatory Compliance Coordinator (SF)

Enclosed Attachments

cc:
Debra Figone, City Manager, City of San Jose, 200 E. Santa Clara St., San Jose, CA 95113
Joseph Horwedel Planning Director, City of San Jose, 200 E. Santa Clara St., San Jose, CA 95113
Lee Price, City Clerk, City of San Jose, 200 E. Santa Clara St., San Jose, CA 95113

T · ·Mobile·

T-MOBILE WEST CORPORATION a
Delaware Corporation
1855 Gateway Boulevard, 9th Floor
Concord, CA 94520

February 3, 2011

Anna Hom
Consumer Protection and Safety Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

RE: T-Mobile West Corporation as successor in interest to Omnipoint Communications, Inc. d/b/a T-Mobile (U-3056-C).
Notification Letter for T-Mobile Site No. SF44339B:

This letter provides the Commission with notice pursuant to the provisions of General Order No. 159A of the Public Utilities Commission of the State of California (CPUC) that with regard to the project described in Attachment A:

☒ (a) T-Mobile has obtained all requisite land use approval for the project described in Attachment A.

☐ (b) No land use approval is required because

____

____

A copy of this notification letter is being sent to the local government agency identified below for its information. Should the Commission or the local government agency have any questions regarding this project, or if anyone disagrees with the information contained herein, please contact Joni Norman, Senior Development Manager for T-Mobile, at (925) 521-5987, or contact Ms. Anna Hom of the CPUC Consumer Protection and Safety Division at 415-703-2699.

Sincerely,

Joni Norman
Sr. Development Manager
T-MOBILE WEST CORPORATION a Delaware corporation

Enclosed: Attachment A

CC:
Debra Figone, City Manager, City of San Jose, 200 E. Santa Clara St., San Jose, CA 95113
Joseph Horwedel Planning Director, City of San Jose, 200 E. Santa Clara St., San Jose, CA 95113
Lee Price, City Clerk, City of San Jose, 200 E. Santa Clara St., San Jose, CA 95113

ATTACHMENT A

1. Project Location

Site Identification Number:	SF44339B
Site Name:	SF04339 - Tottori Building
Site Address:	2180 Story Road
County:	Santa Clara
Assessor's Parcel Number:	486-37-081
Latitude:	N 37° 20' 43.53"
Longitude:	W 121° 50' 03.88"

2. Project Description

Number of Antennas to be installed:	6
Tower Design:	Rooftop
Tower Appearance:	Antennas behind roof screen
Tower Height:	23' 6" building parapet height
Size of Building:	29' 4" top of antennas

3. Business Addresses of all Governmental Agencies

Debra Figone, City Manager City of San Jose, 200 E. Santa Clara St. San Jose, CA 95113	Joseph Horwedel, Planning Dir. City of San Jose 200 E. Santa Clara St. San Jose, CA 95113	Lee Price, City Clerk City of San Jose 200 E. Santa Clara St., San Jose, CA 95113

4. Land Use Approvals

Date Zoning Approval Issued: 12/17/10

Land Use Permit #: AD10-906 (Permit adjustment to H81-181)

If Land use Approval was not required: N/A