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LABOR AND EMPLOYMENT VOTER INITIATIVES:

Legal Pitfalls and Hurdles in Seeking Reform at the Ballot Box

A Public Law Group® White Paper

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I. INTRODUCTION

As employment and benefit costs grow, public services in many cities are eroding. Most cities have not been able to restore all of the services lost during the Great Recession. This development, combined with voter frustration over pension costs, has led to an increasing number of voter-sponsored initiative measures designed to control labor costs. In addition, many charter cities are considering placing measures on the ballot to rein in labor costs.

For City Attorneys, these measures can be a blessing or a curse. Many proposed measures are legally challenging to effectuate, and may create great uncertainty among city workers. Internally-generated measures require meet and confer, and are virtually guaranteed to be challenged in PERB and in court. The cost of defending such measures can be great.

And yet, of course, we are public servants. As frustrating as some initiatives can be, they reflect an expression of growing voter frustration with government and must be treated with the greatest respect – not to mention, constitutionally-mandated deference. Moreover, city-sponsored charter amendments can be an important way to control labor costs for the long-term.

This paper discusses some of the legal issues that arise in connection with voter initiatives and charter amendments placed on the ballot by cities themselves that address public employment and labor matters.

II. PRESUMPTION IN FAVOR OF INITIATIVES

Among the core constitutional rights of Californians are those designed to protect and further the powers of the State's citizens in the political sphere and to hold government accountable to the citizenry. Included in those fundamental political freedoms are (1) the right of the people to "instruct their representatives";[1] (2) the power of initiative, i.e. the power voters have reserved to themselves to propose statutes and amendments and to adopt or reject them;[2] (3) the power of referendum, i.e. the power of electors to approve or reject statutes or parts of statutes;[3] and (4) the power of recall, i.e. the power of electors to remove an elective officer.[4]

Courts have consistently recognized the precious nature of these rights of self-government and have analyzed challenges to the reserved rights of the electorate to political self-definition with a strong presumption in favor of the right of initiative. In 1911, California voters

[1] Cal. Const., art. I, § 3.
[2] Cal. Const., art. II, §§ 8, 11.
[3] Cal. Const., art. II, §§ 9, 11.
[4] Cal. Const., art. II, §§ 13, 19.

amended the state Constitution to reserve to themselves the power to enact initiative measures.[5] This amendment has been described as one of the "outstanding achievements of the progressive movement of the early 1900's."[6] And pursuant to this constitutional mandate, courts are required to go to great lengths to protect the reserved rights of citizens with regard to initiative and referenda:

> Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them.... If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it.[7]

As a result, the consistent, long-standing judicial policy has been "to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled."[8] All presumptions will favor the validity of initiative and referenda measures, which "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears."[9]

The reluctance of courts to interfere with the right of initiative has been described as either a "judicial policy of liberally construing the power of initiative" or as a presumption in favor of the initiative power absent a clear showing of legislative intent to the contrary.[10] Courts have long held that the electorate's power of initiative is co-extensive with the legislative power of the local governing body.[11] Courts have similarly held that local governments have a duty to enforce and apply initiative measures consistent with the voters' intent.[12] Consequently, city representatives, including city attorneys, must enforce and apply voter-enacted initiatives, absent a finding that the initiative is constitutionally infirm or otherwise invalid.

III. PRE-ELECTION CHALLENGES

Consistent with the strong presumption in favor of initiatives, pre-election review of initiatives is generally disfavored. Indeed, as one court recognized: "Even grave doubts as to the

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[5] Cal. Const., art. II, § 11(a) ("All political power is inherent in the people. Government is instituted for their protection, security and benefit, and they have the right to alter or reform it when the public good may require.").
[6] *Associated Home Builders, etc., Inc. v. City of Livermore*, 18 Cal. 3d 582, 591 (1976).
[7] *Fair Political Practices Com. v. Superior Court*, 25 Cal. 3d 33, 41 (1979); see also *Associated Home Builders*, 18 Cal. 3d at 591 (describing the right to initiative and referendum as a fundamental right the voters have reserved to themselves, a right that must be "jealously guarded" by the court).
[8] *Associated Home Builders*, 18 Cal. 3d at 591 (quoting *Meryvnne v. Acker*, 189 Cal. App. 2d 558, 563-64 (1961)).
[9] *Legislature v. Eu*, 54 Cal. 3d 492, 501 (1991).
[10] *Empire Waste Management v. Town of Windsor*, 67 Cal. App. 4th 714, 718 (1998).
[11] *DeVita v. County of Napa*, 9 Cal. 4th 763, 775 (1995).
[12] See *S.D. Meyers, Inc. v. City and County of San Francisco*, 336 F.3d 1174, 1179 (9th Cir. 2003).

constitutionality of an initiative measure do not compel a court to determine its validity prior to its submission to the electorate."[13]

Where a party asserts a substantive challenge to a ballot measure – for example, by claiming that the measure is unconstitutional – a court will engage in pre-election review only if the challenger makes, as a thresholder matter, *a clear showing of invalidity*.[14] This principle of judicial restraint is based on the strong presumption of validity, the general policy that the reserved rights of initiative and referendum are to be liberally construed, the recognition that courts will have sufficient time after the election to fully and properly analyze the legal issues presented, and the practical reality that any legal dispute with an initiative or referendum measure would become moot if the measure fails.[15]

Courts must also exercise restraint in determining whether to entertain a pre-election challenge where a party asserts that a measure is beyond the voters' power to adopt. In this context, not only will a court ascertain the strength of the legal challenge to the measure, it will also examine the potential costs of postponing judicial resolution until after the measure has been submitted to and approved by the voters. As the California Supreme Court in *Independent Energy Producers Association v. McPherson*[16] explained:

> Because this type of claim is potentially susceptible to resolution either before or after an election, there is good reason for a court to be even more cautious … before deciding that it is appropriate to resolve such a claim prior to an election rather than wait until after the election. Of course … potential costs are incurred in postponing the judicial resolution of a challenge to an initiative measure until after the measure has been submitted to and approved by the voters, and such costs appropriately can be considered by a court in determining the propriety of pre-election intervention. *Nonetheless, because this type of challenge is one that can be raised and resolved after an election, deferring judicial resolution until after the election – when there will be more time for full briefing and deliberation – often will be the wiser course.*[17]

This policy of judicial restraint is also predicated on the fact that every election is a unique moment in political time that cannot be recreated; as a result, absent a clear and

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[13] *Gayle v. Hamm*, 25 Cal. App. 3d 250, 256 (1972).
[14] See *Brosnahan v. Eu*, 31 Cal. 3d 1, 4-5 (1982) ("it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity").
[15] See *Stanislaus Area Farm Economy v. Bd. of Supervisors*, 13 Cal. App. 4th 141, 150 (1993).
[16] 38 Cal. 4th 1020 (2006).
[17] *Id.* at 1030 (emphasis added, internal citations omitted).

compelling showing that a measure is invalid, courts should defer ruling on such challenges until after voters have had a chance to make a decision at the polls. As one court stated in denying a party's pre-election challenge to a ballot measure:

> Because an election reflects a unique moment in time, the Court is skeptical that an election held months after its scheduled date can in any sense be said to be the same election. In ordering the contemplated remedy, the Court would prevent all registered voters from participating in an election scheduled in accordance with the California Constitution. Arguably, then, the Court by granting the relief sought could engender a far greater abridgement of the right to vote than it would by denying that relief.[18]

Furthermore, as a practical matter, post-election review promotes judicial economy. If the voters approve the challenged initiative, the parties may then brief the issues more comprehensively, allowing them to be fully addressed by a trial court (and subsequent reviewing courts).[19] Moreover, if the voters do not adopt the measure, the claims asserted will become moot, and there will be no need for the court to address them.[20]

IV. COMMON LEGAL CHALLENGES TO LABOR AND EMPLOYMENT INITIATIVES

While most public agencies are coming "out of the woods" from a financial standpoint following the Great Recession, many are still struggling to provide essential public services at acceptable levels. This reality is largely driven by the high costs associated with employee wages and benefits (including pensions and other post-employment benefits) – which can account for approximately 75 to 80 percent of a public agency's budget.

Consequently, the citizenry and elected officials have increasingly resorted to the ballot box to curb these skyrocketing labor costs. Some measures have sought to amend charters so as to repeal interest arbitration as a means of resolving labor disputes between their employee organizations. Others have sought to change pension or retiree health benefits, or the amounts employees pay for those benefits. Still others have sought to limit some forms of compensation.

These measures are often subject to various legal challenges, the most prevalent of which include that the measure at issue: (1) impermissibly intrudes upon a matter that is exclusively

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[18] *Southwest Voter Registration Education Project v. Shelley*, 278 F. Supp. 2d 1131, 1145 (C.D. Cal. 2003), overruled on other grounds, 344 F.3d 882.

[19] See *Hernandez v. County of Los Angeles*, 167 Cal. App. 4th 12, 16 (2008) (in post-election decision, court explained that it previously rejected a pre-election challenge after determining that "the court's interest in a careful and full consideration of the issues took precedence over any potential voter confusion that might result from a postelection judicial decree invalidating the ballot measure").

[20] *Gayle*, 25 Cal. App. 3d at 257.

reserved for a public agency's governing body; (2) substantially violates some statutory or constitutional mandate (e.g., the asserted "vested" rights of employees and/or retirees); or (3) was improperly placed on the ballot without satisfying certain procedural requirements (e.g., that a local government employer did not satisfy its bargaining obligation under the Meyers-Milias-Brown Act (MMBA) before placing a matter on the ballot). These challenges have been met with mixed results.

A. Interference With Essential Government Functions

1. Overview

A common challenge to voter initiatives addressing labor and employment matters is that they impermissibly intrude upon a local governing body's plenary authority to set employee compensation and other terms and conditions of employment. The crux of these challenges is that the subject matter of the measure is outside voters' initiative powers since the measure, if enacted, would interfere with a matter that the Legislature has delegated exclusively to a local governing body.

The presumption in favor of local initiative may be rebutted where a party demonstrates that the Legislature has clearly indicated its intent to "delegate the exercise of … authority exclusively to the governing body [of a local government agency], thereby precluding initiative and referendum" by local voters.[21] The Legislature's plenary authority over matters of statewide concern provides "sufficient authorization for legislation barring local exercise of initiative and referendum as to matters which have been specifically and exclusively delegated to a local legislative body."[22]

The California Supreme Court has adopted guidelines for determining whether the Legislature intends to restrict the power of initiative by delegating exclusive authority to a local governing body. Under these guidelines, a court must examine the specificity of the statutory language granting authority and construe "reference[s] to 'legislative body' or 'governing body'" as carrying only a "weak inference that the Legislature intended to restrict the initiative or referendum power, and reference[s] to 'city council' ... [as carrying] a stronger one."[23] Additionally, courts consider "whether the subject at issue was a matter of 'statewide concern' or a 'municipal affair,' with the former indicating a greater probability of intent to bar initiative and

[21] *DeVita*, 9 Cal. 4th at 776.
[22] *Voters for Responsible Retirement v. Bd. of Supervisors*, 8 Cal. 4th 765, 779 (1994).
[23] *DeVita* (citing *Committee of Seven Thousand v. Superior Court*, 45 Cal. 3d 491, 505 (1988) (observing that "many powers conferred by statute on the 'legislative body' of a local entity have been held to be subject to initiative....")).

referendum."[24] Finally, courts will examine any other indication of legislative intent to remove a matter from the scope of voter initiative.[25]

2. Examples

a. *Walker v. Mitchell*

In *Walker v. Mitchell*,[26] the Second Appellate District invalidated an effort by voters to enact a salary ordinance for police and firefighters by initiative. The initiative would have required the city council to adjust the basic salaries for police and firefighters annually to reflect the amount paid to comparable members of the Los Angeles County Sheriff's Office and the Los Angeles County Fire Department. When the city council refused to place the initiative on the ballot, the proponents sought a writ of mandate from the court of appeal directing the city council to place the measure on the ballot.

The *Walker* Court denied the writ and held that the ordinance was not one that the voters could lawfully enact by initiative. The court based its holding on two separate grounds. First, by requiring the wages of police and firefighters to be determined according to the wages set for county sheriffs and firefighters, the court concluded that the initiative unlawfully delegated the city council's powers to set employee wages and other terms and conditions of employment under Government Code section 36506 to a county board of supervisors.[27] Second, and more significantly, the Walker court observed that the voters of a general law city "do not have the power to initiate legislation which contravenes a general statute passed by the Legislature."[28] The voters were thus precluded from using their initiative powers to determine city employee compensation because to do so would contravene section 36506's exclusive delegation of that duty to "the city council."[29]

b. *Bagley v. City of Manhattan Beach*

The California Supreme Court reached a similar conclusion in *Bagley v. City of Manhattan Beach*.[30] In that case, the Court upheld a general law city council's refusal to place an initiative on the ballot that would subject future labor negotiations to binding interest arbitration. In doing so, the Court found that such a measure, if enacted by the voters, would constitute an unlawful delegation of the council's legislative authority to set employee wages. In its analysis, the Court recognized that "[w]hen the Legislature has made clear its intent that one public body

[24] *DeVita*, 9 Cal. 4th at 776.
[25] *Ibid.*
[26] 140 Cal. App. 2d 239 (1956), *overruled, in part, by Kugler v. Yocum*, 69 Cal. 2d 371 (1968).
[27] *Id.* at 243.
[28] *Id.* at 244.
[29] *Ibid.*
[30] 18 Cal.3d 22 (1976).

or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization."[31] The Court therefore concluded that "the city council may not delegate its power and duty to fix compensation."[32]

c. *Voters for Responsible Retirement v. Board of Supervisors*

In *Voters for Responsible Retirement v. Board of Supervisors*,[33] the Court disallowed the use of voter referendum to overturn the provisions of a memorandum of understanding (MOU) negotiated by representatives of a general law county and recognized employee organizations under the MMBA. In so ruling, the Court reasoned that permitting the electorate to overturn collectively-negotiated MOUs would thwart the purposes of the MMBA:

> If the bargaining process and ultimate ratification of the fruits of this dispute resolution procedure by the governing agency is to have its purpose fulfilled, then the decision of the governing body to approve the MOU must be binding and not subject to the uncertainty of referendum.[34]

d. *Totten v. Board of Supervisors*

In *Totten v. Board of Supervisors*,[35] the First Appellate District concluded that a ballot measure imposing a minimum public safety budget was invalid in that it interfered with essential government functions. In doing so, the court distinguished *Kugler v. Yocum*, *supra*, wherein the California Supreme Court held that adoption of an ordinance establishing a public employee wage formula was a legislative act falling within the voters' initiative powers. In particular, the court explained that the ordinance considered in *Kugler* "did not establish a minimum annual budget for the fire department. The city council could control the fire department's budget by increasing or decreasing the number of firemen."[36] In contrast, the ballot measure before the court would establish a minimum budget for the county and thereby seriously impair the exercise of essential governmental functions.[37]

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[31] *Id.* at 24.
[32] *Id.* at 25.
[33] 8 Cal. 4th 765 (1994).
[34] *Id.* at 782.
[35] 139 Cal. App. 4th 826 (2006).
[36] *Id.* at 842.
[37] *Ibid.*

B. Impairment of Vested Rights

1. Overview

In recent years, public employee pensions and retiree health benefits have been the frequent subject of voter and public employer-sponsored ballot measures aimed at curbing the astronomically high costs associated with these benefits. Such measures, however, are often subject to substantive challenges on the ground that they impermissibly impair employees' or retirees' "vested" rights.

In California, the terms and conditions of public employment are governed by statute, not contract.[38] Accordingly, as a general matter, "public employees have no vested right to particular levels of compensation and salaries may be modified or reduced by the proper statutory authority."[39]

Under certain circumstances, however, public employment may also "give[] rise to certain obligations that are protected by the contract clauses of the federal and state constitutions…."[40] Consequently, courts have found that pension benefits promised to public employees as deferred compensation may become "vested," thereby precluding a public employer from modifying those benefits on a going forward basis.[41]

Courts have extended this doctrine to other employment benefits, beyond traditional service pensions. For example, in *California League of City Employees Association v. Palo Verdes Library District*,[42] the court held that employees had a contractual vested right to certain longevity benefits, awarded after a number of years of service. In reaching this conclusion, the court noted that the benefits had served as an inducement for employees to remain employed and were a form of compensation already earned, explaining that "it would be grossly unfair to allow [the employer] to eliminate such benefits and reap the rewards of such long-time service without payment of an important element of compensation for such services."[43]

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[38] See *Miller v. California*, 18 Cal. 3d 808, 813 (1977).
[39] *Tirapelle v. Davis*, 20 Cal. App. 4th 1317, 1332-33 (1993).
[40] *Kern v. City of Long Beach*, 29 Cal. 2d 848, 853 (1947).
[41] See *id.* at 855 ("While payment of [pension] benefits is deferred, and is subject to the condition that the employee continue to serve for the period required by statute, the mere fact that performance is in whole or in part dependent upon contingencies does not prevent a contract from arising"); *Betts v. Board of Administration*, 21 Cal. 3d 859, 863 (1978) ("A public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefit accrues upon acceptance of employment").
[42] 87 Cal. App. 3d 135 (1978).
[43] *Id.* at 140; see also *Thorning v. Hollister Unified School Dist.*, 11 Cal. App. 4th 1598, 1608 (1992) (extending vested rights doctrine to retiree health benefits).

In *Retired Employees Association of Orange County, Inc. v. County of Orange* (*REAOC*),[44] the California Supreme Court clarified the circumstances under which a vested contractual right may arise from legislation adopted by a public agency's governing body. Initially, the Court noted that "the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the [agency]."[45] Policies, unlike contracts, are "inherently subject to revision and repeal" and to "construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body."[46]

Accordingly, the *REAOC* Court recognized that, in evaluating whether a vested right exists, "it is presumed that a statutory scheme is not intended to create private contractual or vested rights" and a party who asserts the existence of such rights "has the burden of overcoming that presumption."[47] A party may overcome this presumption by demonstrating that the "statutory language or circumstances accompanying its passage clearly evince a legislative intent to create private rights of a contractual nature."[48] The Court cautioned that "as with any contractual obligation that would bind one party for a period extending far beyond the terms of the contract of employment, implied rights to vested benefits should not be inferred without a clear basis in the contract or convincing extrinsic evidence."[49] This high bar "ensure[s] that neither the governing body nor the public will be blindsided by unexpected obligations."[50]

2. Examples

a. *International Assn. of Firefighters v. City of San Diego*

International Association of Firefighters v. City of San Diego[51] involved a challenge to the city's decision to increase employee pension contribution rates. In 1955, the city amended its charter to provide for a new retirement system under which contributions to the pension fund would be determined based on actuarial advice designed to ensure that the city would be able to provide a guaranteed retirement allowance upon retirement. In 1977, the board administering the city's retirement system, acting on the advice of its actuary, raised the contribution rates of safety members from 8.22 percent to 11.68 percent. The firefighters union then sued the city, claiming that the increase in rates violated its members' vested rights under the retirement system. The trial court ruled in favor of the city and the union appealed.

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[44] 52 Cal. 4th 1171 (2011).
[45] *Id.* at 1185.
[46] *Ibid.*
[47] *Id.* at 1186.
[48] *Ibid.*
[49] *Id.* at 1188.
[50] *Id.* at 1189.
[51] 34 Cal. 3d 292 (1983).

On review, the California Supreme Court upheld the city's ability to increase employee contribution rates because, under the express provisions of the charter, the rates were adjustable in accordance with actuarial assumptions and other factors that were part and parcel of the retirement system. The Court explained: "no modification was made in the retirement system; instead the revision in the factor representing future compensation of employees and the resulting revision in the rate of contribution of employees were made pursuant to the charter and ordinances which delineate City's retirement system and prescribe the employees' vested rights."[52]

b. *United Firefighters of Los Angeles v. City of Los Angeles*

In *United Firefighters of Los Angeles v. City of Los Angeles*,[53] Los Angeles voters adopted a charter amendment that placed a 3 percent cap on any cost-of-living increases provided under the city's pension plan. Previously, cost-of-living increases were based on changes in the Consumer Price Index, and were not subject to any maximum increase. Two employee organizations challenged the cap, arguing that it impaired a vested right.

In arguing that the contractual impairment was reasonable and necessary to serve a public purpose, the city "took the position that unexpected and unforeseen increases in the rate of inflation had caused pension costs to escalate sharply, exceeding salary increases." The city further argued that, "the enactment of Proposition 13 destroyed the traditional funding mechanism for the pension systems and these factors combined to create a budgetary crisis in an era of increasingly scarce public revenue."[54]

The court rejected these arguments, concluding that the city's desire to "spend city revenues on other things they deemed more important … never justifies the impairment of a public entity's contractual obligations."[55] The court also noted that capping cost of living increases bore "no material relation to the theory of a pension system and its successful operation," given that "the theory of a pension system is affording retirees with a reasonable degree of economic security, and the sole legitimate purpose of a cost of living adjustment is the preservation of a retiree's standard of living."[56]

c. *San Jose Measure B Litigation*

In March 2012, the San Jose city council voted to place a proposed charter amendment – titled Measure B, "The Sustainable Retirement Benefits and Compensation Act" – on the June ballot. By its express terms, Measure B was designed to adjust "post-employment benefits in a

[52] *Id.* at 302.
[53] 210 Cal. App. 3d 1095 (1989)
[54] *Id.* at 1112.
[55] *Id.* at 1115.
[56] *Id.* at 1113.

manner that protects the City's viability and public safety, at the same time allowing for continuation of fair retirement benefits for its workers." To achieve this goal, Measure B proposed a number of modifications to the charter provisions addressing employee pensions and retiree health benefits. During the June 2012 election, San Jose voters adopted Measure B by a majority vote of approximately 70 percent.

Shortly after Measure B was enacted, six, separate sets of plaintiffs – including several employee organizations – filed lawsuits in Santa Clara County Superior Court challenging the measure.[57] As a group, the plaintiffs claimed that Measure B impermissibly impaired employees' and retirees' "vested contractual rights" with regard to promised post-employment benefits, in violation of the Contract Clause of the California Constitution.

Following a five-day bench trial, the Superior Court issued a 38-page statement of decision, invalidating portions of Measure B and upholding others.[58] At the outset, the Superior Court noted that the question before it, similarly before the Supreme Court in *REAOC*, was "one of law, not policy." The Court then proceeded to address the various challenged portions of Measure B. Notably, the Court invalidated the portion of Measure B that allowed for increased pension contributions, finding that this section violated active employees' vested right to have the City pay for unfunded actuarially accrued liabilities.

The City appealed the Superior Court's ruling; however, it has recently reached tentative agreement with a number of its unions regarding Measure B. As a result, the case will likely settle.

C. Failure to Satisfy *Seal Beach* Bargaining

1. Overview

Needless to say, both voters and public agencies must go through a number of procedural "hoops" before placing a measure on the ballot. One of the most difficult hoops that cities face is satisfying their bargaining obligations under the Meyers Milias Brown Act (MMBA).[59]

The MMBA governs labor relations between local public agencies and recognized employee organizations. The MMBA requires public agencies and employee organizations to

[57] See *San Jose Police Officers' Association v. City of San Jose, et al.*, Case No. C-1-12-CV-225926; *Sapien, et al. v. City of San Jose, et al.*, Case No. C-1-12-CV-225928; *Harris, et al. v. City of San Jose, et al.*, Case No. C-1-12-CV-226570; *Mukhar, et al. v. City of San Jose, et al.*, Case No. C-1-12-CV-226574; *American Federation of State, County, and Municipal Employees, Local 101 v. City of San Jose, et al.*, Case No. 1-12-CV-227864; and *San Jose Retired Employees' Association v. City of Jose, et al.*, Case No. C-1-12-CV-233660.

[58] A copy of the Superior Court's statement of decision is available at: https://www.sanjoseca.gov/DocumentCenter/View/27385

[59] Cal. Gov't Code § 3500 *et seq.*

"meet and confer in good faith regarding wages, hours, and other terms and conditions of employment."[60] "Meet and confer in good faith" means that the parties shall meet promptly upon the request of either party "and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation."[61]

In *People ex rel. Seal Beach Police Officers' Association v. City of Seal Beach*,[62] the California Supreme Court considered the extent to which the MMBA's meet-and-confer requirement may apply where a city council seeks to exercise its constitutional authority to submit a proposed charter amendment to voters. Initially, the Court recognized that the constitutional authority of a city council to propose charter amendments to the electorate "may be subject to legislative regulation."[63] The Court emphasized, however, the distinction between legislation that sought to control the "substance" of matters reserved for local government control and those that merely established a "procedure" for exercising such rights, noting that the latter types of legislation are constitutionally permissible while the former are not.[64]

Applying these principles, the *Seal Beach* Court found that the MMBA's meet-and-confer requirement could be "harmonized" with the city council's right to propose charter amendments to voters because "the burden on the city's democratic functions is minimal."[65] Accordingly, the Court held that a city must engage in meeting and conferring "before it proposed charter amendments which affect matters within the scope of representation."[66] However, once that process is complete, the city council retains unfettered authority to place a charter amendment on the ballot.[67]

2. Examples

a. *City of Fresno v. People ex rel. Fresno Firefighters*

One of the first decisions to apply *Seal Beach* was *City of Fresno v. People ex rel. Fresno Firefighters*.[68] In that case, section 809 of the city's charter established a formula for the establishment of minimum salaries for police and firefighters but still allowed wages to be set through labor negotiations. After attempting to meet and confer with employee organizations to

[60] *Id.* at § 3505.
[61] *Ibid.*
[62] 36 Cal. 3d 591 (1984).
[63] *Id.* at 598.
[64] *Id.* at 601, fn. 11.
[65] *Id.* at 599-601.
[66] *Id.* at 602.
[67] *Id.* at 601.
[68] 71 Cal. App. 4th 82 (1999).

no avail, the city council voted to place on the ballot a proposed charter amendment that, if passed by the voters, would repeal section 809's salary formula.

After voters approved the measure, the unions filed suit challenging the validity of the election on the ground that the city failed to satisfy its meet-and-confer obligation under the MMBA prior to placing the measure on the ballot. The trial court entered judgment in favor of the city and the unions appealed.

In affirming the trial court's judgment, the Fifth Appellate District held that repeal of section 809's salary formula could not support an alleged violation of the MMBA because it constituted a permissive, rather than mandatory, subject of bargaining and therefore *Seal Beach* did not apply. The court reasoned:

> [T]he eight-city formula [under section 809] only establishes a 'policy of parity' between local firefighters and police wages and those in other large California cities…. As such, it merely sets the City's initial bargaining position, as the unions recognize…. Charter section 809, in fact, only establishes wages directly when the collective bargaining process has broken down and impasse on the issue of wages has resulted. Then, and outside of the collective bargaining process, charter section 809 becomes a wage-setting provision; before that time, it merely establishes a mandatory bargaining position for the City….[69]

b. *Santa Clara PERB Cases*

In early 2004, three Santa Clara County employee organizations sponsored a ballot initiative that would amend the county's charter so as to subject the county's labor negotiations with the unions to binding interest arbitration. Upon learning of the unions' initiative, the county developed countermeasures of its own: one dealing with the unions' interest arbitration initiative, if it was passed by the voters, and one that sought to modify the manner in which prevailing wages were determined.

Pursuant to the Supreme Court's *Seal Beach* decision, the county, over the span of several months, participated in numerous meetings with the unions over the proposed countermeasures, but to no avail. Thereafter, in order to meet the immutable statutory deadline established by the Elections Code, the county board of supervisors certified the countermeasures for placement on the same ballot as the unions' initiative. In response, the unions filed unfair practice charges with PERB.

[69] *Id.* at 94-95.

In two separate decisions,[70] PERB found that the County did not violate the MMBA when it placed its interest arbitration countermeasure on the ballot. Relying on the Sixth Appellate District's decision in *DiQuisto v. County of Santa Clara*,[71] the Board held that "interest arbitration provisions in general are permissive subjects of bargaining" under Government Code section 3505 and, as such, the county did not have a duty to provide the unions with notice and an opportunity to bargain prior to placing the countermeasure on the ballot.

PERB did, however, hold that the County violated the MMBA when it placed the prevailing wage countermeasure on the ballot. Although the Board recognized that the county participated in several meetings with the unions, it concluded that the county breached its duty under the MMBA because it did not negotiate to agreement or formally declare impasse prior to placing its measure on the ballot.

c. *San Diego PERB Case*

In April 2011, proponents of a San Diego voter initiative – the Comprehensive Pension Reform Initiative (CPRI) – circulated petitions to qualify it for placement on the ballot. The CPRI proposed amending the city's charter to reduce retirement benefits for certain city employees.

Once the CPRI was certified for placement on the ballot, the San Diego Municipal Employees Association filed an unfair practice charge with PERB, claiming that the City had engaged in an unfair labor practice by not satisfying its meet-and-confer requirements under *Seal Beach* before placing the CPRI on the ballot. Contending that the CPRI was not a citizen-sponsored measure but rather the work of the city, the association demanded that the city meet and confer before placing the matter on the ballot.

The outcome of the case turned on whether CPRI was a citizen's initiative or a government-sponsored ballot measure. Pointing to the mayor's advocacy and support of the measure, the association contended that the mayor was acting as an agent of the city and that the initiative process was a "sham device" used by the city to evade its meet-and-confer obligations. The city, on the other hand, contended that the mayor's advocacy was an exercise of his individual right to freedom of expression under the First Amendment.

[70] *Santa Clara County Correctional Peace Officers Assn. v. County of Santa Clara*, PERB Decision No. 2114-M (2010); *Santa Clara County Registered Nurses Professional Assn. v. County of Santa Clara*, PERB Decision No. 2120-M (2010).
[71] 181 Cal. App. 4th 236 (2010).

Following a lengthy evidentiary hearing, the PERB Administrative Law Judge issued a proposed decision,[72] siding with the association and finding that the mayor was acting as an agent of the city when he sponsored the initiative. In particular, the ALJ stated:

> The Mayor under the color of his elected office, supported by two City Councilmembers and the City Attorney, undertook to launch a pension reform initiative campaign, raised money in support of the campaign, helped craft the language and content of the initiative, and gave his weighty endorsement to it, all while denying the unions and opportunity to meet and confer over his policy determination in the form of a ballot proposal. By this conduct the Mayor took concrete actions toward implementation of the reform initiative, the consequence of which was a unilateral change in terms and conditions of employment for represented employees to the City's considerable financial benefit … by virtue of the Mayor's status as a statutorily defined agent of the public agency and common law principles of agency, the same obligation to meet and confer applies to the City because it has ratified the policy decision resulting in the unilateral change, and because the Mayor was not legally privileged to pursue implementation of that change as a private citizen. These conclusions make it unnecessary to address any other contentions urged by the unions.[73]

The City has filed exceptions with PERB challenging the ALJ's proposed decision. The matter has been fully briefed and on the Board's docket for decision.

d. *Palo Alto PERB Case*

In July 2011, the Palo Alto city council placed a proposed charter amendment on the ballot that would repeal interest arbitration as a means of resolving labor disputes with its public safety unions. After voters passed the amendment by an overwhelming majority, the firefighters union filed an unfair practice charge with PERB, claiming that the city failed to satisfy its bargaining obligations under the MMBA before certifying the measure for placement on the ballot.

Following an expedited hearing, the PERB ALJ issued a proposed decision, finding that the city did not violate the MMBA when it placed its measure on the ballot. In his proposed decision, the ALJ concluded that – despite having ample notice of the proposed measure and participating in the political process – the union unreasonably delayed its request to consult over the measure until the night the city council voted to place the measure on the ballot and therefore

[72] *San Diego Municipal Employees Assn. v. City of San Diego*, 37 PERC ¶ 173 (2013).
[73] *Id.* at p. 53.

had waived any rights under the MMBA. The union then filed exceptions with PERB, appealing the ALJ's decision.

Almost three years later, PERB overturned the ALJ's decision, concluding that the city failed to satisfy its bargaining obligations under the MMBA before placing the charter amendment on the ballot. [74] PERB acknowledged that in its prior County of Santa Clara decisions it had recognized because of its nature, interest arbitration is a permissive, not mandatory, subject of bargaining under Government Code section 3050. Nevertheless, the Board concluded that interest arbitration is subject to bargaining as an employee relations rule under Government Code section 3507.

The city has filed a petition for writ of extraordinary relief with the Sixth Appellate District, seeking judicial review of PERB's decision.[75] The matter has been fully briefed and the parties are currently waiting to hear from the Court as to whether it will exercise discretionary review.

V. CONCLUSION

As the above demonstrates, ballot measures involving employee benefits and wages pose unique legal challenges. Despite strong presumptions in favor of such measures, they are subject to challenge on a variety of legal theories. And yet, the likelihood is that we will see more of them.

Particularly in the area of retirement benefits, there is increasing pressure for a state-wide measure that would require voter approval of benefit increases. With pension costs – and especially PERS costs – likely to continue their rapid advance, public expressions of frustration through ballot measures are likely to continue and take new forms.

For city governments, these measures can create legal and practical challenges. We should bear in mind, however, that they are an unvarnished expression of local democracy, recognize the strong presumptions of validity to which they are entitled, and make every effort to effectuate the will of the voters.

[74] *International Assn. of Firefighters, Local 1319 v. City of Palo Alto*, PERB Decision No. 2388-M (2014).
[75] *City of Palo Alto v. Public Employment Relations Bd.*, Case No. H041407.

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