SDCERS
San Diego City Employees' Retirement System

June 3, 2009

City Attorney Jan Goldsmith
City of San Diego
1200 Third Avenue
16th Floor, MS 59
San Diego, CA 92101

BY HAND

Dear City Attorney Goldsmith:

SDCERS has received and reviewed your Memorandum of June 1, 2009, regarding the City Attorney's new interpretation of San Diego City Charter section 143.1's requirement of a "majority vote of the members of said system" for approval of an ordinance amending the retirement system which affects the benefits of any employee thereunder. As you know, for the past thirty years or more, the City, the City Attorney, and SDCERS have applied Charter section 143.1 to require approval of a majority of the voting members.

Unfortunately, you fail to address a number of significant issues in the Memorandum. These issues must be resolved before action is taken that is potentially disastrous for the City and SDCERS' members. Foremost among these issues is the Memorandum's failure to acknowledge City Attorney John Witt's 1996 opinion, "Election law consistently holds that a 'majority vote' means a majority of the actual votes cast" (copy enclosed). City Attorney Witt's analysis is directly contrary to your surprising interpretation of Charter section 143.1, yet its existence is not even acknowledged in the Memorandum, nor is its legal research and analysis addressed therein. Such a complete reversal of the City Attorney's interpretation of a critical Charter provision governing both SDCERS' administration of the Retirement System and the pension benefits available to its members cannot simply be ignored. For this reason alone, the Memorandum should be withdrawn until your office reconciles its current conclusions with the long-standing analysis of your predecessors.

In addition, your complete reversal of this long-standing application of Charter section 143.1 is a cause of extraordinary concern to SDCERS as the administrator of the City's pension plan, and the many members who have relied upon the City's enactment and maintenance of the DROP pension benefit. Of paramount concern is the absence of any discussion or analysis in the Memorandum of the severe consequences that would necessarily result from the actions you propose the City take – invalidation of the DROP ordinance, *ab initio*. Nor does the Memorandum address the legality of applying the new interpretation of Charter section 143.1 to a subset of DROP participants selected by the City Council. A responsible analysis must consider, at the very least, the potential jeopardy

to SDCERS' tax-deferred qualification and the resulting economic implications to the City and SDCERS' membership.

Although I appreciate your statement that you do not wish to act precipitously on this issue, and have published the Memorandum as part of an ongoing analysis of the City's effort to eliminate the DROP benefit, the limited review of the Memorandum we have been able to conduct in the past 24 hours indicates your office has in fact acted precipitously by publishing a legal analysis that has failed to address, or analyze, relevant legal principles bearing on the issue. Indeed, the Memorandum even misquotes the October 2, 2002, legal analysis by Ms. Parks. The Memorandum purports to quote Ms. Parks as stating approval must be obtained by "a majority of all retirement system members." The authors' decision to place this phrase in bold font shows their awareness of its significance, yet Ms. Parks in fact framed the issue not as "a majority of all...members" but as a "majority vote of all...members." Insofar as the City Attorney's analysis turns on the phrase "majority vote of the members," it is disturbing that the Memorandum misquotes Ms. Parks in a manner which causes the word "majority" to modify the word "members" -- not coincidentally favoring the conclusion reached by the Memorandum's authors -- rather than Ms. Parks' statement, in which the word "majority" modifies the word "vote," as it does in Charter section 143.1. Furthermore, we have recently learned that upon being advised of the Memorandum's misquote of the determinative phrase in Ms. Park's analysis, you stated it was irrelevant to your analysis whether "majority" modified "vote" or "membership." Given that this is the central issue in the new interpretation of Charter section 143.1 offered by your office, indifference to the actual language of the phrase subject to interpretation undermines the reliability of the Memorandum.

Conspicuously absent from the Memorandum is citation to any case from any jurisdiction supporting your new interpretation of the phrase "majority vote of the members." Nor does the Memorandum explore other sources of authority bearing on the issue. We feel the absence of such analysis renders the Memorandum unreliable in its present form, and that it should be withdrawn until further research into the issue is performed, and appropriate analysis of that research is conducted. To that end, I suggest you consider the following sources of authority bearing on the issue.

A "majority" may be either an "absolute majority," i.e., a majority of all those who are entitled to vote in a particular election whether they cast a vote or not, or a "simple majority," meaning a majority of those who actually vote in a particular election. (Black's Law Dictionary, (7th ed. 1999), p. 966.) The City and SDCERS have historically applied Charter section 143.1's "majority vote of the members" phrase as requiring a simple majority. The Memorandum fails to address the fact that the "simple majority" definition is favored by every body of authority to consider the issue. Robert's Rules of Order (10th ed. § 44) states that "when the term *majority vote* is used without qualification -- as in the case of the basic requirement -- it means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions..." In light of the fact the City incorporates Robert's Rules of Order into its own governing documents, the Memorandum's disregard for this source of interpretive authority undermines the conclusions it reaches. (San Diego Municipal Code § 22.0101.5, Rule 2.8.) Respected legal commentators have also concluded that a

"simple majority" is the "fundamental requirement for giving new policies legal effect and legitimacy." (Roberts & Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Cal.L.Rev. 1773, 1797.) The Memorandum does not acknowledge the existence of such legal commentary, let alone explain the validity of its conclusions in light of such contrary interpretive authority.

Most importantly, however, cases considering exactly the same language analyzed in the Memorandum have reached exactly the opposite conclusion stated therein, yet the Memorandum does not mention the cases existence, let alone explain why they do not apply here. For example, in *Lake County Sheriff's Merit Board v. Buncich* (2007) 869 N.E.2d 482, the court addressed the validity of an election in which the winner received a majority of the votes cast, under language requiring "a majority vote of the members of the county police force." (*Id.* at 485-486.) The court concluded that:

> The statutory language, pared down to the relevant words, is 'majority vote of the members of the county police force.' Here, the word 'majority' is used as an adjective modifying the noun 'vote.' The word 'majority' does not describe 'the members of the county police force.' The prepositional phrase 'of the members of the county police force' further modifies the term 'majority vote,' describing those who may vote. We therefore conclude as a matter of statutory construction that Indiana Code section 36-8-10-3(b) does not require that a successful candidate obtain the vote of a majority of all the members of the county police force, but only a 'majority vote' of the members who do participate. (*Id.* at 486.)

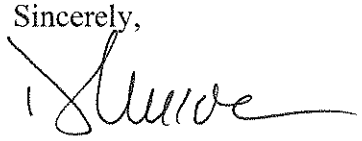
Other relevant precedents include the United States Supreme Court's recognition that "[t]he almost universally accepted common-law rule is...in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for a body. Where the enabling statute is silent on the question, the body is justified in adhering to that common law rule." (*Federal Trade Commission v. Flotill Products, Inc.* (1967) 389 U.S. 179, 183.) California courts that have considered this issue have also favored SDCERS' longstanding interpretation. (*Thompson v. Union of Flight Attendants* (C.D. Cal. 1982) 1982 WL 2153, *1, *5 - *6 [The reason "majority of the membership" means "a majority of those voting rather than a majority of the membership is that the latter interpretation would lead to harsh and nonsensical results."].)

SDCERS has conducted votes under Charter section 143.1 in a manner consistent with all of the foregoing authority. The Memorandum reverses the City's position on this issue not only without citing any authority in support of its interpretation of the phrase "majority vote of the members" -- misquoted as "majority of all the members" -- but also while failing to mention, let alone distinguish, the authority which supports SDCERS' (and the City's) longstanding application of Charter 143.1.

Given the short time we have had to analyze the Memorandum, this represents only a preliminary review by SDCERS of your Memorandum. Nonetheless, it appears significant questions exist

regarding the sufficiency of the legal research and analysis upon which you have reversed decades of pension system administration. Given the extremely serious consequences that will result from unilaterally invalidating the DROP ordinance, particularly on the basis of such demonstrably incomplete legal research and analysis, SDCERS urges the City Attorney to withdraw the Memorandum unless and until sufficient legal research and analysis is performed on the issues addressed in this letter, as well as any additional issues which may come to light once SDCERS has had sufficient time to fully analyze the Memorandum.

Sincerely,



David B. Wescoe

Enclosure

cc: Board of Administration
Mayor Jerry Sanders
City Councilmembers
Jay Goldstone
Scott Chadwick

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MEMORANDUM OF LAW

DATE: July 23, 1996

TO: Cathy Lexin, Labor Relations Manager

FROM: City Attorney

SUBJECT: Supplemental Pension Savings Plan Amendment Vote

QUESTION PRESENTED

Under Article XI, section 11.01 of the City's Supplemental Pension Savings Plan ("SPSP") does a majority of votes cast constitute a "majority vote of all active participants" to approve an amendment to the SPSP?

SHORT ANSWER

Yes. "Majority vote" has consistently been interpreted by the courts to mean a majority of the votes actually cast, not a majority of the votes eligible to be cast.

BACKGROUND

Recently an election was held to amend the SPSP by allowing the investment and administrative functions to be contracted out to a third party administrator. The vote was overwhelmingly in favor of allowing this action. However, the plan document requires amendments be made by a "majority of the plan participants" and, while those actually voting were in favor of the proposed amendment, low voter turnout resulted in a total vote of less than a majority of plan participants. Consequently, the election results have been challenged by an employee who maintains the plan language compels a majority vote of all plan participants, not a majority of those actually voting.

ANALYSIS

"Majority vote" is defined as a vote by more than half of the voters for a candidate or other matter on a ballot. Black's Law Dictionary 955 (6th ed. 1990). Courts have interpreted provisions designating the number of votes needed to elect a candidate or proposition to mean the proportion of voters voting at the particular election or on the proposed position. See Carrol County v. Smith, 111 U.S. 556 (1888) ("two-thirds vote of the qualified voters"); NLRB v. Standard Lime & Stone Co., 149 F.2d 435 (4th Cir. 1945) ("majority of employees in a unit"); NLRB v. Whittier Mills Co., 111 F.2d 474 (5th Cir. 1940) ("majority of qualified voters"); Alaska Native Ass'n of Oregon v. Morton, 417 F. Supp. 459 (D.D.C. 1974) ("majority of all eligible Natives"). Eligible voters not present and participating in a vote are presumed to acquiesce in the choice made by the majority of those actually voting. See Carrol County v. Smith, 111 U.S. at 565; NLRB v. Standard Lime & Stone Co., 148 F.2d at 438.

The SPSP amendment provision is similar to a provision in the Alaska Native Claims Settlement Act which required a vote of a "majority of all eligible Natives" to establish a thirteenth region for nonresident Alaska Natives. In the Alaska Native Ass'n case, an Alaska Native Claims Settlement Act provision requiring a vote of "a majority of all eligible Natives" was interpreted to mean a majority of all nonresident Alaska Natives who voted for or against the establishment of a thirteenth region. Id. In that case, the court noted that federal courts have consistently followed the proposition that election rules providing for the approval of a proposal by a specified majority of the electorate are to be construed as requiring the approval of the specified majority of those actually participating in the election unless the legislative intent clearly expresses otherwise. Id. at 467-468. The defendant in that case emphasized the language of the statute in an effort to show a contrary construction of the statute, specifically the requirement of a "majority of all eligible Natives." The court found that, despite the wording, statutory language did not clearly demonstrate a legislative intent to require approval of a "majority of all eligible Natives" rather than a majority of Natives actually voting. Id. at 468. Similarly, in the SPSP document, the drafter's intent did not contemplate a voting process that compels all plan participants to vote or otherwise have an invalid election. Rather, those participants who did not vote are deemed to have agreed with the majority opinion of those who did vote. Thus, all SPSP previous elections, following the logic of the cited

cases, have construed the voting results to rest upon a majority of votes cast.

Section 11.01 of the SPSP should be interpreted in a manner consistent with federal interpretations of election laws. Like the provision in Alaska Native Ass'n of Oregon, the requirement of approval of all active participants requires nothing more than a majority vote of all active SPSP participants actually voting on the issue rather than all active participants in the plan. Additionally, both state and local government election rules contain language that require a majority of all votes actually cast in an election. The San Diego City Charter section 10, Elections uses the language "majority of votes cast." Similarly, California Elections Code section 10705, indicates the candidate receiving majority of votes to be declared elected ("majority of all votes cast"). There is no clear indication that an interpretation contrary to the requirements of both state and local rules was intended under Section 11.01. Accordingly, a vote to approve an amendment to the SPSP requires a majority vote of all participants voting on the issue.

CONCLUSION

Election law consistently holds that a "majority vote" means a majority of the actual votes cast. To interpret "majority vote" as a majority of all voters who are eligible to vote would invalidate many elections where voter turn-out is low. Democracy, as we know it, would thus come to a halt. Similarly, amendments to the SPSP must be determined by a majority of the votes cast. Current case law compels the conclusion that the current voting policy for the SPSP, which deems a majority to be a majority of votes actually cast, results in a valid election result.

JOHN W. WITT, City Attorney

By Sharon A. Marshall
Sharon A. Marshall
Deputy City Attorney

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