

VENTURA
SUPERIOR COURT
FILED

DEC 13 2005

MICHAEL D. PLANET,
Executive Officer and Clerk

BY: _____ Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA**

GEORGE MATHEWS,

Plaintiff,

vs.

VENTURA COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION; and COUNTY OF
VENTURA

Defendants.

Case No: CIV220607

**TENTATIVE STATEMENT OF
DECISION**

This matter came on regularly for trial on June 14, 2005 in courtroom 41 of the above-entitled court, the Honorable Frederick H. Bysshe, Judge presiding. Plaintiff George Mathews was present by counsel Michael Conger and Richard Benes, defendants Ventura County Employees' Retirement Association were present by counsel Ashley Dunning, Harvey Leiderman and Jeffrey Reiger and intervener County of Ventura was present by John Polich, Robert Blum and Raymond Lynch. On September 13, 2005 the court was in receipt of all briefs and ordered the matter to stand submitted. The court now issues its ruling. This tentative decision shall be the statement of decision unless within ten (10) days a party specifies controverted issues or makes proposals not covered in this tentative decision. If a statement of decision is requested, VCERA is ordered to prepare the statement of decision.

INTRODUCTION

This is the first phase of a class action in which George Mathews (Mathews) in his representative

1 capacity, seeks a court determination that Ventura County Employees Association (VCERA)
2 mismanaged pension assets in such a way as to wrongfully "excuse" the County of Ventura (County)
3 from its obligation to make required employer contributions to the County's pension fund. VCERA and
4 the County have responded that while it was true that, for a relatively short time, the County made
5 reduced or no contributions to the pension fund it was not required so to do because during the period at
6 issue the pension fund was significantly over funded, and therefore, by sound and financially responsible
7 actuarial standards, such contributions were not required to maintain the integrity and solvency of the
8 pension fund. At stake is a sum estimated to be in excess of one hundred million dollars.

9 Procedurally and more specifically, Mathews, as plaintiff/petitioner, has brought a court certified
10 class action for declaratory relief and writ of mandate claiming that, during the period in question,
11 defendant VCERA's administration of pension fund assets violated Article XVI, Section 17 Subdivision
12 (b) of the California Constitution (hereafter 17b) by using "excess" earnings from the pension fund
13 assets to offset and reduce the employer contributions of defendant intervenor County of Ventura.
14 Mathews contends that such excess earnings should have been used for the benefit of members by
15 retaining such earnings in a contingency reserve and/or using such earnings to provide supplemental
16 health or cost of living benefits (STAR COLA) to retired members and not to excuse County
17 contributions. (STAR COLA is an acronym for "supplemental targeted adjustment for retiree's cost of
18 living adjustment" per §31874 and 31874.3 of the Government Code (all references to code sections
19 hereafter will be from the Govt. Code unless otherwise indicated).

20 Defendants VCERA and County have responded that VCERA's Board's determination that it
21 was not necessary for the County to contribute money in the years that the pension fund was over funded
22 was in accordance with the Constitution and based on sound actuarial principles.

23 SUMMARY OF RULINGS

24 After reviewing the entire record in this case and for the reasons stated below, the court makes
25 the following rulings on Mathews' two causes of actions.

26 **First Cause of Action for Declaratory Relief re Constitutionality:** The court rules that
27 VCERA's use of excess earnings to reduce or completely offset the County's duty to make contributions
28 to the County pension fund during the relevant time period of 1998 to 2004 did not violate Article XVI,

1 Section 17 subdivision (b) of the California Constitution as amended by the California Pension Act of
2 1992.

3 **Second Cause of Action for Writ of Mandate:** The court denies Mathews' petition for writ of
4 mandate to order the County to pay to VCERA's pension funds an amount equal to all excess earnings
5 previously used by VCERA to relieve the County of making its "normal" contributions to the pension
6 fund during the period of 1998 to 2004. The court's denial is based on its finding that VCERA's
7 decisions in allowing the County to make reduced or no contributions during the relevant time period
8 was not the result of arbitrary and capricious decisions which lacked evidentiary support.

9 FINDINGS

10 The court makes the following findings pertaining to the relevant time periods of 1998 to 2004,
11 when placed in a historical context:

12 1. The VCERA was established by the County of Ventura in 1947. VCERA is administered
13 by the Board of Retirement (Board) and governed by the County Employees Retirement Law (Govt.
14 Code §31450 et. seq.) and applicable portions of the California Constitution. VCERA's main function is
15 and has been to provide service retirement, disability, death and survivor benefits for employees of the
16 County of Ventura. To achieve its purposes, VCERA has maintained and managed a fund which now
17 exceeds two billion dollars. The sources of this fund have been a combination of employer and
18 employee contributions as well as investment income.

19 2. VCERA administered a defined benefit plan in which a county employee upon retirement
20 was entitled to a fixed periodic payment and the County bore the entire investment risk.

21 3. In addition to paying out agreed upon pension benefits, VCERA has exercised its
22 discretion to provide supplemental benefits over the years to its retired members and their beneficiaries,
23 funded out of the same Undistributed Earnings Reserve that has consistently been treated as a valuation
24 assets, including: (1) a \$108.44 monthly supplemental retirement benefit; (2) a \$27.50 monthly
25 supplemental retirement benefit; (3) STAR COLA benefits, which were pre-funded for five years in
26 1997 and have been trued-up since that time when funds were available; (4) a \$5,000 lump sum
27 supplemental death benefit; and (5) a retirement allowance to the post-retirement eligible spouses, or, if
28 none, to the minor children of VCERA members who died after retirement for service or nonservice

1 connected disability.

2 4. VCERA's funds were managed in a sound actuarial manner.

3 5. Members of the County's retirement system had in the past always been fully and
4 promptly paid the amounts due, and there was no credible evidence that such full and prompt payments
5 would not continue in the future to be paid in like manner.

6 6. Over the past fifteen years the pension fund's average funding ratio has averaged 100%.

7 7. VCERA employed competent actuarial firms in their administration of the pension funds.

8 8. The actuarial methods used by VCERA's actuaries were within sound actuarial
9 guidelines and followed generally accepted actuarial principles, specifically including but not limited to,
10 its "actuarially smoothing" its investment gains and losses over five year time periods.

11 9. VCERA never transferred funds out of the pension fund to the County.

12 10. VCERA used funds in the retirement system exclusively for pension purposes.

13 11. The actuarial methods that plaintiffs challenge in this case—i.e., the counting of
14 undistributed earnings as "valuation assets" and the reduction or elimination of the employer "normal
15 contribution" when VCERA had an actuarial surplus—are appropriate and consistent with generally
16 accepted actuarial principles.

17 12. The VCERA retirement system has been managed in an actuarially sound manner. At all
18 relevant times its assets have been sufficient to pay all vested benefits.

19 13. The Board's decision-making process with respect to actuarial determinations, including,
20 but not limited to, the setting of employer contributions rates, was deliberative and well informed.
21 Those decisions were made and approved at public meetings, where members of the public, including
22 plaintiffs, could ask questions and make comments re VCERA's actuaries assumptions, actuarial
23 funding methods, asset valuation methods, actuarial cost methods, County's annual required
24 contribution, etc.

25 14. Treating undistributed earnings as "non-valuation assets"—as Mathews seeks to
26 require—is just one way, of many, to dampen the impact of market volatility on employer contributions,
27 and is not a required methodology from an actuarial standpoint. VCERA has applied other effective
28 methods to dampen the impact of market volatility on employer contributions.

15. The County is absolutely responsible for any shortfall in the funds administered by VCERA. Thus, any funds that plaintiffs claim should have been contributed to the system in the past ultimately will be paid by the County on an amortized basis (unless future investment returns again render a portion of those contributions unnecessary). For example, when in 1995, the actuarial funding ratio fell to 85.50%, the County issued pension obligation bonds and used the proceeds of these bonds in the amount of \$154,510,000 to make additional employer contributions to the retirement fund so as to bring the funding ratio in 1996 to 104.8%, and thereafter VCERA made wise investment decision with this bond money and the County has timely made debt service payments out of its general funds on these bond obligations in the following amounts:

1996 - \$5,425,000

1997 - \$6,520,000

1998 - \$7,720,000

1999 - \$9,040,000

2000 - \$10,505,000

2001 - \$12,115,000

2002 - \$13,880,000

2003 - \$15,830,000

2004 - \$17,970,000

DISCUSSION

A. Declaratory Relief re Constitutionality

1. California Protection Act of 1992

Since 1992, the VCERA has been required to discharge its duties in administering the pension fund in compliance with a voter approved initiative (Prop 162) entitled "The California Pension Protection Act of 1992". The act amended a portion of Sec. 17 of Article XVI of the California Constitution, in relevant part this amended section provided:

Notwithstanding any other provisions of law or this Constitution to the contrary, the retirement board of a public pension or retirement system shall have plenary authority and fiduciary responsibility for investment of moneys and administration of the system, subject to all of the following:

(a) The retirement board of a public pension or retirement system shall

1 have the sole and exclusive fiduciary responsibility over the assets of the
 2 public pension or retirement system. The retirement board shall also have
 3 sole and exclusive responsibility to administer the system in a manner that
 4 will assure prompt delivery of benefits and related services to the
 5 participants and their beneficiaries. The assets of a public pension or
 6 retirement system are trust funds and shall be held for the exclusive
 7 purposes of providing benefits to participants in the pension or retirement
 8 system and their beneficiaries and defraying reasonable expenses of
 9 administering the system; (b) **The members of the retirement board of a
 10 public pension or retirement system shall discharge their duties with
 11 respect to the retirement system solely in the interest of, and for the
 12 exclusive purposes of providing benefits to participants and their
 13 beneficiaries, minimizing employer contributions thereto, and
 14 defraying reasonable expenses of administering the system. A
 15 retirement board's duty to its participants and their beneficiaries
 16 shall take precedence over any other duty (emphasis added); (c) The
 17 members of the retirement board of a public pension or retirement system
 18 shall discharge their duties with respect to the system with the care, skill,
 19 prudence, and diligence under the circumstances then prevailing that a
 20 prudent person acting in a like capacity and familiar with these matters
 21 would use in the conduct of an enterprise of a like character and with like
 22 aims; (d) The members of the retirement board of a public pension or
 23 retirement system shall diversify the investments of the system so as to
 24 minimize the risk of loss and to maximize the rate of return, unless under
 25 the circumstances it is clearly not prudent to do so; (e) The retirement
 26 board of a public pension or retirement system, consistent with the
 27 exclusive power to provide for actuarial services in order to assure the
 28 competency of the assets of the public pension or retirement system.**

2. Constitutionality of VCERA'S Treatment of its Undistributed Reserve (Except Earnings)

20 The court declares as a matter of law that VCERA's not requiring the County to pay either no or
 21 reduced employer contributions, as a result of VCERA's treatment of its Undistributed Reserve as
 22 valuation assets rather than as non-valuation assets and amortizing the system's actuarial surplus over
 23 five years, did not violate Section 17(b) of Article 16 of the California Constitution. The court has
 24 reached this conclusion for the following reasons:

25 Prop 162 did not change the County's historic defined benefit plan to a **defined contribution**
 26 **plan** which would have created a vested, enforceable right to a continuous annual contribution whatever
 27 the investment performances of the fund may be. With a defined contribution plan, as a trade off to the
 28 guaranteed employer contribution, the beneficiary assumes the risk that the contribution will be adequate

1 to provide the expected benefit and the employer must make no more or less than his defined
2 contribution.

3 In a **defined benefit plan**, such as in this case, the beneficiary is guaranteed to receive a
4 specified benefit and it is the employer that bears the burden of the investment risk. The benefit that
5 runs with this employer's risk is that the employer may reduce or eliminate its contribution for so long
6 as the actuarial soundness of the fund justifies such action. On the other hand, employer may have to
7 pay increased contributions if needed to maintain the actuarial solvency of the fund.

8 Turning to the language of Prop 162, the court finds that there is nothing in the language of Prop
9 162 which would require the County of Ventura to make a defined contribution at designated periods,
10 but only affirms the Board's duty to administer the system in a manner that will assure prompt delivery
11 of the defined benefits based on sound actuarial principles.

12 In reaching this conclusion, the court first notes that Prop 162 was known as "The California
13 Pension Protection Act (emphasis added) and not "the California Pension Enhancement Act."

14 Second subdivision (e) of section 17 of Article XVI of the Constitution specifically states:

15 "The retirement board of a public pension or retirement system, consistent
16 with the exclusive fiduciary responsibilities vested in it, shall have the sole
17 and exclusive power to provide for actuarial services in order to assure the
competency of the assets of the public pension or retirement system."

18 "Actuarial services" include not only the determination of the necessary amounts of
19 contributions but also the scheduling of the payments when a required contribution rate is amortized in
20 order to guarantee the sufficiency of the system's assets over a period of time. The Constitution does
21 not require that a board of retirement adhere to a specified amortization schedule in providing its
22 actuarial services.

23 In resolving statutory ambiguities or reconciling potentially conflicting statutory provisions,
24 courts often look to the legislative history of a statute. The meaning of and reasons behind propositions
25 passed by the voters, however, are often difficult to decipher. In this era of "30 second sound bites" and
26 overly simplistic and sometimes deceptive political advertising, it is much more difficult to reconcile
27 facially conflicting provisions buried in the "small print" of a proposition. The courts have developed
28 approaches to discerning the purpose, meaning, and reasons behind the enactment of propositions by

1 looking to the ballot arguments.

2 In *Singh v. Board Retirement* (1996) 41 al.App.4th 1180, the court analyzed the reasons the
3 electorate adopted the "actuarial services" provision of the Constitution. It looked to Senate Publication
4 No. 643-S, "Analysis of November 1992 Ballot Propositions," prepared by California Senate Office of
5 Research, to determine the voters' intent in giving boards of retirement "sole and exclusive power to
6 provide for actuarial services" when the voters approved this constitutional language at the November 3,
7 1992 General Election:

8 "In the election on November 3, 1992, the voters of the state of California
9 enacted Proposition 162, known as 'The California Pension Protection Act
10 of 1992.' The enactment amended the second paragraph of section 17 of
11 article XVI of the California Constitution to state: 'Notwithstanding any
12 other provisions of law or this Constitution to the contrary the retirement
13 board of a public pension or retirement system shall have plenary
14 authority and fiduciary responsibility for investment of moneys and
15 administration of the system, subject to . . .the following:'

16 "....."

17 "Briefly the proposition in question was in response to a bill which
18 had permitted the Legislature and the Governor to use reserve funds in a
19 retirement system (in this case, the state Public Employees' Retirement
20 System, or PERS) 'to substitute for normal state payments required to
21 fund the system, thereby freeing money to help close the budget shortfall.'
22 (Analysis at p. 18.) (Assembly Bill No. 702 also transferred PERS
23 actuarial functions to the Governor by giving him the power to appoint the
24 PERS actuary.

25 "The substitution of reserve account funds for state payments and the
26 transfer of actuarial oversight powers away from PERS were 'viewed by
27 opponents as unwise and unfair, and many called it one more 'raid' on the
28 pension system.' (Analysis at p.18) Proposition 162 was thus intended by
its proponents to insulate the administration of retirement systems from
oversight and control by legislative and executive authorities, and also
return control of the actuarial function to the retirement boards
themselves. This 'increased level of independence would make the
[retirement] systems less of a target for local and state officials looking for
a way to balance a budget.' (Analysis at p. 20)" (*Id.* At pp. 1183, 1191,
1192.)

1 More recently, in *Westly v. Board of Administration* (2003) 105 Cal.App.4th 1095, the court
2 looked at the ballot pamphlet for the November 3, 1992 General Election to determine the voters' intent
3 in giving boards of retirement "sole and exclusive power to provide for actuarial services":

4 "The Legislative Analyst gives...attention to the issue of a retirement
5 board's administrative authority under Article XVI, section 17. It
6 recognizes that prior to Article XVI, section 17, the Constitution specified
7 the general authority of the Board over public pension systems and that
8 within these limits the Legislature could change the administrative
9 functions of public pension systems. Two examples which are given are
10 legislation removing the actuarial function from the Board and placing it
11 under a state actuary appointed by the Governor and confirmed by the
12 Legislature, and legislation allowing the use of CalPERS assets to offset
13 employer contribution costs....

14 "The analyst also states that Article XVI, section 17 would give 'the board
15 of each public pension system complete authority for administration of the
16 system's assets and for the actuarial function.' (Ballot Pamp., Gen. Elec.,
17 *supra*, Analysis by the Legislative Analyst, p. 37, italics added.) . . .

18 "Thus, the voter intent, evidenced by the published ballot materials, is that
19 Article XVI, section 17 would give the Board the authority to administer
20 the investments, payments, and other services of CalPERS. . . ." (*Id.* At
21 pp. 1111-1112.)

22 The principles of construction to be applied in interpreting a constitutional provision are well
23 settled. As stated by the court in *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 122:
24 "In interpreting a constitution's provision, our paramount task is to ascertain the intent of those who
25 enacted it. [Citation.]" In determining the voters' intent, we "look first to the language of the
26 constitutional text, giving the words their ordinary meaning." (*Leone v. Medical Board* (2000) 22
27 Cal.4th 660, 665.) "[T]he words used should be accorded the ordinary and usual meaning given them
28 among people by whose vote they were adopted [citation] . . ." (*Flood v. Riggs* (1978) 80 Cal.App.4d
138, 152.) Where a term is not further defined in the constitutional provision, "it can be assumed to
refer not to any special term of art, but rather to a meaning that would be commonly understood by the
electorate." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 392.) If the language is
clear, there is no need for construction. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.)
However, "when . . .the enactment follows voter approval, the ballot summary and arguments and

1 analysis presented to the electorate in connection with a particular measure may be helpful in
2 determining the probable meaning of uncertain language.” (*Amador Valley Joint Union High School*
3 *District v. State Bd. Of Equalization* (1978) 22 Cal.3d 208, 245-246; accord, (*People v. Birkett* (1999) 21
4 Cal.4th 226, 243.) *People ex rel. Lungren v. Superior Court, supra*, 14 Cal.4th at p. 306)

5 In utilizing these tools of construction and interpretation, the court first finds that the
6 Constitution during the relevant time period gives to a board of retirement of a public pension system
7 “sole and exclusive power to provide for actuarial services.” The meaning is clear from the language
8 used. As indicated in *Singh v. Board of Retirement, supra*, 41 Cal.App.4th 1180, and *Westly v. Board of*
9 *Administration, supra* 105 Cal.App.4th 1095, the purposes to be served in adopting the language fully
10 support the plain meaning of “sole and exclusive.” The actuarial services provided by a board of
11 retirement with respect to using certain amortization schedules cannot be subject to manipulation,
12 directive, or control by the County. There was no evidence in the record that the County controlled or
13 influenced the actuaries used by VCERA. Instead, the evidence presented in this case was that
14 VCERA’s actuaries were competent, independent and only used accepted actuarial methodologies in
15 determining when and how much, if any, the County was required to contribute to the retirement fund.

16 Once established, a public pension system operates essentially as a trust, to which current
17 employee members and the pension plan sponsor (here the County) make annual contributions.
18 Contributions are made in amounts actuarially calculated to maintain the trust fund at a level sufficient
19 to pay the benefits that have been promised to past and present employee members.

20 “Any pension or retirement system adopted shall be on a sound actuarial
21 basis and provide for contributions by both the city and the employee
22 members of the system which shall be based on percentages of pay roll to
23 be changed only by adjustments on account of experience under the
24 system.”

24 “Contributions shall be in amounts which will accumulate at retirement a
25 fund sufficient to carry out the promise to pay benefits to the individual on
26 account of his service as a member of the system, without further
27 contributions from any source.”

27 In practice, the actuarial valuation of a fund is an ongoing endeavor, requiring complex
28 assumptions about a number of variables, as well as regular corrections based on actual experience.
(See, e.g., *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 457-460.) In this case it was unrebutted

1 that the amortization periods used by VCERA's actuaries were actuarially sound and did not place the
2 retirement fund at the risk of not paying promised benefits.

3 Finally, the court finds that in amending subsection (b) by only adding the sentence, "A
4 retirement board's duty to its participants and their beneficiaries shall take precedence over any other
5 duty", but leaving in without any change the existing language which states: "The members of the
6 retirement board of a public pension or retirement system shall discharge their duties with respect to the
7 retirement system solely in the interest of, and for the exclusive purposes of providing benefits to
8 participants and their beneficiaries, **minimizing employer contributions thereto**, and defraying
9 reasonable expenses of administering the system", the court cannot construe that VCERA was stripped
10 of discretion and mandated, as Mathews contends, to treat the excess funds either as 1) contingency
11 reserve funds (not treated as valuation assets) or 2) additional ancillary health and/or STAR COLA
12 benefits for specified members.

13 Regarding the issues in this case, the court finds that the overriding mandate in Prop 162, when
14 read as a whole, is to require VCERA to administer the pension funds in a sound actuarial manner so
15 that the benefits promised to County employees during their work life will be paid in full and in a timely
16 manner after they retire. Once such an actuarial goal is met, VCERA may still administer its funds to
17 minimize the County's contribution.

18 B. Writ of Mandate

19 1. Standard of Review

20 In *California Earth Corps v. California State Lands Commission*, the Court of Appeals for the
21 Third District distinguished quasi-legislative acts of agencies from quasi-judicial acts. 128 Cal.App.4th
22 756, 772 (2005).

23 The *California Earth Corps*, court approvingly quoted *Strumsky v. San Diego County Employees*
24 *Retirement Assn.*: "Generally speaking, a legislative action is the formulation of a rule to be applied to
25 all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set
26 of existing facts." *California Earth Corps*, 128 Cal.App.4th at 772, quoting 11 Cal.3d 28, 35 n.2 (1974).
27 But, the *California Earth Corps* Court noted, "[L]egislative acts are not limited to rulemaking. And the
28 fact that the agency acts after proceedings that bear some indicia of quasi-judicial action does not affect

1 the legislative character of the act.” 128 Cal.App.4th at 772.

2 According to *California Earth Corps*, when an agency “is empowered by statute to make policy
3 choices that would otherwise be made by the Legislature” and “has the discretion to define the public
4 interest in the Legislature’s stead,” it acts in a quasi-legislative fashion. Even if the legislature
5 circumscribes the agency’s authority with decisional criteria or fact-finding requirements, the act is still
6 legislative in character. In contrast, an agency acts in a quasi-judicial capacity when it is “duty bound to
7 apply policies established by the Legislature as expressed in applicable statutes.” The court can easily
8 enforce an agency’s quasi-judicial duty by mandate.

9 *California Earth Corps* held that, “Of all the activities undertaken by an administrative agency,
10 quasi-legislative acts are accorded the most deferential level of scrutiny.” 128 Cal.App.4th at 771.
11 According to *California Earth Corps*, quasi-legislative acts are examined only to determine if the
12 agency’s action was “arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has
13 failed to follow the procedure and give the notices required by law.” In quasi-legislative acts, “[j]udicial
14 review ... is extremely deferential as it would be had the policy judgment been made by the legislature
15 directly.” *Id.* at 772.

16 In a quasi-judicial action that impacts fundamental vested rights, the court’s review is much less
17 deferential: the standard of “independent judgment” applies. *Id.* At 769-770. The trial court “not only
18 examines the administrative record for errors of law but also exercises its independent judgment upon
19 the evidence disclosed in a limited trial *de novo*.” *Bixby v. Pierno*, 4 Cal.3d 130, 143 (1971). *California*
20 *Earth Corps* indicates, however, that if “fundamental vested rights” are not at stake in a quasi-
21 adjudicatory action, the trial court should use an abuse of discretion standard. 128 Cal.App.4th at 771.
22 Still, this is not as deferential a standard as required for a quasi-legislative act.

23 There is no indication in VCERA’s Designated Record for Trial that it was engaged in any
24 rulemaking. While the board did pass some resolutions that effectively have regulatory force, these
25 resolutions functioned to adopt portions of the California Employees Retirement Law (CERL)
26 wholesale, in accordance with procedures defined by that law. (See Govt. Code § 31691.1; see e.g., DR
27 VILT5L7490). The legislature did not designate a “jurisdiction” of the law in which VCERA could
28 promulgate regulations like a typical regulatory agency. Rather, CERL, and Amendment XVI, Sec. 17

1 of the California Constitution entrust the VCERA with administering and overseeing the county's
2 retirement fund, providing its actuarial services, and setting its policies. Statutes also provide the
3 retirement boards with broad authority. (See §§ 31492.4, 31588, 31592.2, 31681.8, 31871, 31874,
4 31874.3, and 31789(d) grant the board discretion in a number of matters; most of these sections provide
5 the board authority to issue certain benefits if it chooses to do so.

6 Arguably, VCERA was "interpreting" these statutes as it decided what to do with excess
7 earnings, but such an argument misses the point. VCERA's function is not to make, interpret, or enforce
8 rules. Its function is to oversee the county retirement fund and make actuarial decisions.

9 Because VCERA was delegated *policy-making* power, rather than rulemaking power, its conduct
10 must be reviewed by the court under the standard of *California Earth Corps*. When judged on this
11 spectrum, its actions fall on the quasi-legislative end of the spectrum.

12 In addition, the California Constitution grants retirement boards like VCERA very broad
13 discretion. Article XVI, Section 17 states that retirement boards "have plenary authority and fiduciary
14 responsibility for investment of moneys and administration of the system..." Specifically, the boards
15 have the "sole and exclusive fiduciary responsibility" over assets in the system, and "sole and exclusive
16 fiduciary responsibility to ... [deliver] benefits and related services to the participants and their
17 beneficiaries." §17(a). The boards also "have the sole and exclusive" power to provide for actuarial
18 services...." §17(e). These areas of "sole and exclusive" power indicate that these areas of
19 policymaking are delegated to the boards.

20 Under *California Earth Corps*, "an agency acts in a legislative capacity when it is empowered by
21 statute to make policy choices that would otherwise be made by the legislature." 128 Cal.App.4th at 772.
22 The actuarial decision delegated to retirement boards by the California Constitution form the basis for
23 setting employer contribution rates. Government Code §§ 31453-314.54.5. VCERA's actions in
24 maintaining a contingency reserve, making actuarial determination, and setting employer contribution
25 rates are analogous to a budgetary process, which, under *California Teachers Association v. Ingwerson*,
26 is a squarely quasi-legislative act. 46 Cal.App.4th 860, 866 (1996). VCERA makes policy decisions that
27 would otherwise be vested in the legislature, so, under *California Earth Corps*, it is acting in a quasi-
28 legislative fashion.

1 The court also notes that Mathews has admitted at various times in this case that VCERA's
2 actions were quasi-legislative (See his Notice of Motion and Motion to Exclude Extra-Record Evidence
3 and for Protective Order, filed on November 12, 2004, and his Points and Authorities in Support of this
4 Motion).

5 Therefore, because the court finds that VCERA was acting in a quasi-legislative fashion in
6 administering the pension funds, the standard of review is whether VCERA's actions were "arbitrary,
7 capricious, or entirely lacking in evidentiary support." *California Earth Corps*, 128 Cal.App.4th at 771,
8 the court finds that Mathews has not established that VCERA's actions were arbitrary and capricious or
9 that they lacked proper evidentiary support, therefore the court denies Mathews' petition for a writ of
10 mandate.

11 **CONCLUSION**

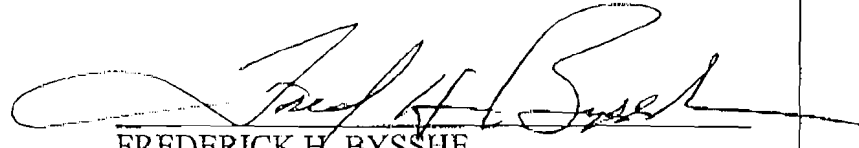
12 In deciding that Mathews is not entitled to the relief requested, the court trusts that the parties
13 understand that the court does not mean to infer or imply that the actions of public pension boards are
14 immune from judicial scrutiny.

15 The era of "rubber stamp" boards composed of members who accept and approve staff and
16 consultant's proposals and recommendations without carefully evaluating and considering them is over.
17 In evaluating the record in this case, the court found no dereliction of duties by VCERA's board
18 members. But this case should remind us all that board members, particularly those who are members
19 of public pension boards, who are called on to apply complex and sophisticated actuarial methodologies,
20 have a serious and awesome fiduciary duty in administering large amounts of public money, in a volatile
21 investment market to ensure that such funds remain actuarial solvent to meet all current and future
22 promised pension benefits. Failure to perform these critical fiduciary responsibilities by public pension
23 board members, with such actions causing serious jeopardy to the actuarial soundness of the funds they

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1 administer, will, upon proper request, result in appropriate judicial action, in order to protect both public
2 employees and taxpayers.

3 Dated: DEC. 13, 2005

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7 FREDERICK H. BYSSHE
8 Judge of the Superior Court

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