JAN I. GOLDSMITH, City Attorney
California State Bar No. 70988
DONALD R. WORLEY, Assistant City Attorney
California State Bar No. 48892
WILLIAM GERSTEN, Deputy City Attorney
California State Bar No. 150951
WALTER C. CHUNG, Deputy City Attorney
California State Bar No. 163097
JOAN F. DAWSON, Deputy City Attorney
California State Bar No. 178311
SANNA SINGER, Deputy City Attorney
California State Bar No. 228627
Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, California 92101-4178
Telephone: (619) 236-6220
Facsimile: (619) 236-7215
Attorneys for Respondent
CITY OF SAN DIEGO

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO MUNIPICAL EMPLOYEES ASSOCIATION, Charging Party, v. CITY OF SAN DIEGO, Respondent.	Case No. LA-CE-746-M **CITY OF SAN DIEGO'S CONSOLIDATED MOTION TO DISMISS COMPLAINTS**
DEPUTY CITY ATTORNEYS ASSOCIATION, Charging Party, v. CITY OF SAN DIEGO, Respondent.	Case No. LA-CE-752-M
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 127, Charging Party, v. CITY OF SAN DIEGO, Respondent.	Case No. LA-CE-755-M

SAN DIEGO CITY FIREFIGHTERS LOCAL 145, Charging Party, v. CITY OF SAN DIEGO, Respondent.	Case No. LA-CE-758-M

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES - Continued

Statutes

Other Authorities

TO THE HONORABLE DONN GINOZA, ADMINISTRATIVE LAW JUDGE, AND ALL PARTIES AND THEIR COUNSEL OF RECORD:

Respondent, City of San Diego (City), brings this motion, pursuant to PERB Rule No. 32190, to dismiss the Complaints in this case, filed by PERB General Counsel, on behalf of the Charging Parties named in the above-caption, for lack of any legal authority to support the Complaints.

INTRODUCTION

115,991 City registered voters signed an initiative petition to place a City Charter amendment on the balled, called the Comprehensive Pension Reform (CPR) Initiative. PERB General Counsel filed Complaints against the City, on behalf of each of the charging parties, alleging that City's placing the CPR Initiative on the ballot was an unfair practice, interfering with "meet and confer" rights, and representation rights of employees and their unions under the Meyers-Millias Brown Act (MMBA).

No California court has ever ruled someone from a city must meet and confer with employee unions under the MMBA before a city council performs its mandatory duty to place a citizens' initiative charter amendment on the ballot. No California court has ruled that PERB even has any jurisdiction to apply the MMBA to a citizens' initiative charter amendment (as opposed to non-initiative charter amendment placed on the ballot by a vote of a governing body). Even PERB has never, until this case, asserted such jurisdiction over a citizens' initiative. No California court has ruled that a Mayor's activities in support of any initiative renders it subject to meet and confer requirements just because the Mayor has a leading role in the meet and confer process when it occurs.

Moreover, Charging Parties seek relief that is contrary to the California Constitution and Elections Code, which mandates the City Council to place an initiative on the ballot without change. Consequently, the Complaints of charging parties lack any legal authority and, as a matter of law, the meet and confer requirements of MMBA do not apply to the CPR.

City requests that the Administrative Law Judge consider this motion as soon as practical before the commencement of the hearing currently set to begin July 17, 2012.

STATEMENT OF FACTS

On April 4, 2011, City Clerk Elizabeth Maland received a "Notice of Intent to Circulate – Request for Title and Summary," filed by three San Diego residents – Catherine A. Boling, TJ Zane, and Stephen B. Williams (Proponents). Ex. A. The Proponents thereby informed Ms. Maland of their intention to circulate a petition within the City of San Diego (City) for the purpose of amending the San Diego Charter (Charter), under the authority of article XI, section 3 of the California Constitution and applicable statutory law. *Id.* The Proponents attached the text of the petition entitled, "Comprehensive Pension Reform Initiative for San Diego." *Id.*

Page 1 of the Initiative states:

> We, the undersigned, registered and qualified voters of the State of California, residents of the City of San Diego, pursuant to Section 3 of Article XI of the California Constitution and Chapter 2 (commencing with Section 34450) of Part 1 of Division 2 of Title 4 of the Government Code, present to the City Council of the City of San Diego this petition and request that the following proposed amendment to the Charter of the City of San Diego be submitted to the registered and qualified voters of the City for their adoption or rejection at an election on a date to be determined by the City Council.

On September 30, 2011, the Proponents filed their petition with the City Clerk. The Proponents attested that it *contained at least 94,346 signatures.* Ex. B. No documents filed by the Proponents with the City Clerk contain "Jerry Sanders, Mayor of San Diego," as having any connection with the CPR Initiative. Exs. A, B, and C.

After receiving verification of the signatures on the CPR Initiative from the County Registrar of Voters (Ex. D), the City Clerk presented the CPR Initiative to the City Council to submit the Initiative to the City's qualified voters, as California law requires the Council to do, and on December 5, 2011, the Council adopted a resolution, declaring its intent to submit the CPR Initiative to the voters, which the San Diego Municipal Code (SDMC) requires. San Diego Resolution R-307155 (Dec. 5, 2011) (Ex. E).

On January 30, 2012, the Council introduced and adopted an ordinance, calling a Municipal Special Election on Tuesday, June 5, 2012, to submit the CPR Initiative to the qualified voters of the City, and to consolidate the Municipal Special Election with the California

State Primary Election to be held on the same date. San Diego Ordinance O-20127 (Jan. 30, 2012) (Ex. F). The Council also directed the City Attorney to prepare an impartial analysis and retain outside counsel to assist in its preparation, and directed the Independent Budget Analyst and City Auditor, working with the Mayor, to prepare a fiscal impact analysis, related to the CPR Initiative. San Diego Resolution R-307249 (Jan. 30, 2012) (Ex. G). State elections law mandates all of these actions.

On various dates, Charging Parties filed with PERB Unfair Practice Charges (UPCs) alleging that the City violated its duty under the MMBA to meet and confer over the citizens' initiative petition, and PERB issued Complaints based on the UPCs.

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF MOTION TO DISMISS

I. NO CALIFORNIA COURT HAS EVER RULED THAT A CITIZENS' INITIATIVE MUST BE PRESENTED TO BARGAINING UNITS IN A MEET AND CONFER PROCESS BEFORE IT QUALIFIES FOR THE BALLOT.

A. Charging Parties Premise the UPCs on a Misinterpretation of a Supreme Court Decision.

Charging Parties contend the City must engage in the meet and confer process of the MMEBA and negotiate the CPR Initiative before it goes on the ballot. MEA suggested that the City must present the CPR Initiative to the affected employee organizations as an "opening proposal." (MEA UPC, Ex. 1A [Ann Smith letter dated July 15, 2011]).

Government Code section 3509(b) states: "The Board shall apply and interpret unfair labor practices consistent with existing judicial interpretation of this chapter [the MMBA]." PERB issued its complaint on behalf of each of the union charging parties without the support of any "existing judicial interpretations" of the MMBA.

No California decision supports application of the meet and confer process to a citizens' initiative. Charging Parties ask PERB to create new law which does not now exist by misinterpreting the holding of a Supreme Court decision. Also, the UPCs and Complaints fail to disclose the judicially noticeable fact that the CPR Initiative qualified for the ballot with

verification of *nearly 116,000 valid voter signatures*, which must be considered if this motion is to be treated similarly to a summary judgment motion.

The Charging Parties and PERB have misread and misrepresented the decision in *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach* (*Seal Beach*), 36 Cal. 3d 591, 602 (1984). The complaints depend entirely on this misinterpretation. However, the Supreme Court in *Seal Beach* identified the only issue as:

> [W]hether the *city council* of a charter city must comply with the Meyers-Milias-Brown Act's (MMBA) "meet-and-confer" requirement before *it* proposes an amendment to the city charter concerning the terms and conditions of public employment.

Seal Beach, 36 Cal. 3d at 594 (citations omitted) (emphasis added).

The Court explained:

> The simple question posed by this case is whether the unchallenged constitutional power of a charter city's *governing body* to propose charter amendments may be used to circumvent the legislatively designed methods of accomplishing the goals of MMBA.

Seal Beach, 36 Cal. 3d at 597 (emphasis added).

The *Seal Beach* case involved three charter amendments approved by voters that "had been put on the ballot by the city council pursuant to its constitutional power to propose charter amendments." *Id.* at 594-95 (citing Cal. Const. art. XI, § 3(b)). The Court concluded that the city council was required to meet and confer before *it proposes* charter amendments which affect matters within the scope of bargaining. *Id.* at 602. *The issue of a citizen initiative petition, seeking to amend a city's charter, was never before the Supreme Court in Seal Beach, nor has it ever been before any court in California. Therefore, Seal Beach is not precedent in this case, and does not control the legal analysis here.*

Indeed, a footnote to the Supreme Court decision makes this clear: "**Needless to say, this case does not involve the question whether the meet and confer requirement was intended to apply to charter amendments proposed by initiative.**" 36 Cal. 3d at 599 n.8.

///

///

B. A Charter Amendment May be Proposed *Only* By a Citizens' Initiative or By the Governing Body.

City charter amendments are a matter of statewide concern governed exclusively by state law. *Jarvis Taxpayers Ass'n v. City of San Diego*, 120 Cal. App. 4th 374, 387 (2004) (citing *District Election etc. Committee v. O'Connor*, 78 Cal. App. 3d 261, 266-67 (1978)). The California Constitution and California Elections Code (Elections Code) govern the charter amendment process. *District Election etc.*, 78 Cal. App. 3d at 274.

The California Constitution states:

> The governing body or charter commission of a county or city may propose a charter or revision. *Amendment or repeal may be proposed by initiative or by the governing body.* [Italics added.]

Cal. Const. art. I, § 3(b) (emphasis added).

Thus, *Charter amendments by initiative and those proposed by the governing body are two distinct procedures*. This case involves a citizens' initiative, not a Charter amendment proposed by the Council. In San Diego, the Council is the governing body, not the Mayor and not individual Councilmembers or any other elected or appointed officers or employees.

Despite PERB's and the Charging Parties' attempt to render the citizens' initiative into a "City-sponsored" initiative, because of the Mayor's support, the undisputed facts clearly demonstrate that the CPR Initiative was a duly qualified initiative petition brought to Council for mandatory placement on the ballot after having met all the procedural requirements for a citizens' initiative petition.

California law does not recognize a third category of charter amendment process. It does not recognize a "citizen-initiated, but Mayor supported, charter amendment." It does not recognize a "City-initiated" (as opposed to Council-proposed) charter change.

C. Citizens' Initiatives Enjoy Special Protections Under the State Constitution and Elections Code, and They Cannot Be Changed By Any Meet and Confer Process.

The California Constitution protects the authority of citizens to amend a city charter by initiative. *See* Cal. Const. art. I, § 3(a) (people have the right to petition government for redress); art. II, § 1 ("All political power is inherent in the people. . . . they have the right to alter or reform

it when the public good may require"), and article XI, section 3(b) quoted above. "California courts have long protected the right of the citizenry under the California Constitution to directly initiate change through initiative, referendum and recall." *MHC Financing Limited Partnership Two v. City of Santee*, 125 Cal. App. 4th 1372, 1381 (2005) (citing *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 907-08 (1979)). "The initiative and referendum are not rights 'granted the people, but . . . power[s] reserved by them.'" *Id.* (quoting *Rossi v. Brown*, 9 Cal. 4th 688, 695 (1995)).

The Elections Code, implementing the Constitutional right to initiative, also provides special protections. Section 9255(b)(2) requires that an charter amendment proposed by a petition signed by 15 percent of the registered voters of a city *must* be submitted to the voters. *If a citizens' initiative petition to amend the Charter qualifies for the ballot, there is no legal basis for the Council to modify the proposed language. See Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal. App. 4th 141, 149 (1993) ("A local government is not empowered to refuse to place a duly certified initiative on the ballot.")

Thus, under the California Election Code, the City Council has a ministerial duty to place the CPR Initiative on the ballot. Failure of the City to adhere to this duty subjects the City to liability to the 115,991 peopled who signed the initiative. PERB has no jurisdiction to prevent the City from performing this State law mandate.

PERB and charging parties contend that the City has a ministerial duty to meet and confer under the MMBA. That duty has no support in law, but, more importantly, PERB has no jurisdiction to demand that City perform PERB's and MEA's claimed ministerial duty in the face of the contrary duty imposed by the California Constitution and Elections Code.

D. California Courts Have Declined to Impose Procedural Prerequisites, Only Applicable to Governing Bodies, on Initiatives.

The Supreme Court has explained that imposing certain "procedural prerequisites applicable to legislative bodies," such as compliance with the California Environmental Quality Act (CEQA), could impose "an impermissible burden on the electors' constitutional power to legislate by initiative." *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 189

(2001) (citing Cal. Const. art. II, §§ 8, 11). *See also DeVita v. County of Napa*, 9 Cal. 4th 763, 785-786 (1995) (citing cases involving initiatives which were upheld upon challenges for failure to comply with procedural prerequisites applicable to legislative bodies).

In *Friends of Sierra Madre*, the Court examined an earlier decision of the Court of Appeal, *Stein v. City of Santa Monica*, 110 Cal. App. 3d 458, 460-461 (1980), which refrained from imposing the California Environmental Quality Act (CEQA) on an initiative.

In *Stein*, a group of landlords, who opposed a charter amendment relating to urban rent control, sought a writ of prohibition or mandate, seeking to block enforcement and implementation on the basis that it did not comply with CEQA. *Id.* at 458-460. The charter amendment was placed on the ballot pursuant to a petition signed by 15 percent of the registered voters of the city in accordance with article XI, section 3 of the California Constitution and applicable statutory law. *Id.* at 460. The city did not take any steps to comply with CEQA in placing the initiative measure on the ballot. *Id.* at 458.

The *Stein* court explained that a proposal to amend a city charter by initiative is "an activity undertaken by the electorate and did not require the approval of the governing body. The acts placing the issue on the ballot and certifying the result as a charter amendment qualifies as a nondiscretionary ministerial act not contemplated by CEQA." 110 Cal. App. 3d at 461.

The opponents of the charter amendment argued that the electorate was exercising the city's legislative authority in approving the charter amendment, and, therefore, "the people were agents of the city in promulgating this charter amendment." *Id.* The Court of Appeal rejected that argument:

> The argument is unsupported by controlling authority and otherwise totally unacceptable. Presumably the initiative, Proposition "A," amending the charter to include rent control, was the result of its sponsors qualifying the measure by the filing of a legally sound petition and was properly certified to the electorate by the city. City had no discretion to do otherwise. Under the circumstances city was the agent for the sponsors rather than vice versa.

Id. at 461.

///

Just as there is no duty on the part of the City to comply with the procedural requirements of CEQA, when faced with the ministerial duty to place a duly qualified citizen initiative charter amendment petition on a city ballot, there is no duty to comply with the MMBA prior to placement of a voter initiative on the ballot. There is no "determination of policy or course of action" within the meaning of the MMBA, specifically California Government Code section 3505.

II. THE MAYOR'S ACTIVITIES IN SUPPORT OF THE CPR DO NOT, AS A MATTER OF LAW, SUBJECT THE CPR TO THE MEET AND CONFER PROCESS.

A. Under the MMBA the Governing Body Has the Central Role in Directing and Managing the "Meet and Confer" Process.

Under the City Charter and the strong mayor form of government, the Mayor may serve as lead negotiator of a team, and the City's ultimate position at the bargaining table is established by the Mayor, but only with approval of the City Council, the governing body, because the Council has ultimate authority to set salaries and approve memorandum of understanding between the City and the employee unions.

Any idea that the Mayor has such agency powers that he can finally determine policy in labor matters is contrary to the MMBA.

The Supreme Court in *Voters for Responsible Retirement v. Bd. of Supervisors of Trinity County*, 8 Cal. 4th 765 (1994), established the *centrality of the governing body* in labor negotiations:

> [T]he effectiveness of the collective bargaining process under the MMBA rests in large part upon the fact that the public body that approves the MOU under section 3505.1 - i.e., *the governing body - is the same entity that, under section 3505, is mandated to conduct or supervise the negotiations from which the MOU emerges.*

Id. at 782 (emphasis added).

> On the other hand section 3505 *mandates that the same governing body conduct or supervise the meet and confer process leading up to the agreement.*

Id. at 783 (emphasis added).

> The governing body's role in collective bargaining negotiations is further reinforced by section 54957.6 [exception in Brown Act for labor negotiations] . . . This statute, by permitting the governing body to meet in section with its negotiating team during collective bargaining, *underscores the Legislature's intent to assign the governing body the central role of directing the meet and confer process* so as to achieve binding labor-management agreements.

Id. at 783 (emphasis added).

The City Council is obviously the governing body of the City. There is no evidence that the City Council initiated the CPR Initiative or even supported it. There is no allegation or evidence that the City Council authorized the Mayor to support it.

Only the City Council can place a Charter amendment on the ballot *on behalf of the City*. Where the City Council did not authorize the CPR Initiative, or the Mayor's support of it, it is legally impossible for the CPR to have been "City-sponsored."

Looking at the situation from a different perspective, if the City Council supervises and directs the "meet and confer" process, how can the Mayor's independent actions force anyone at the City to meet and confer over an initiative the City Council never authorized and does not support?

B. The CPR Initiative is Not a Council-proposed Initiative or a "City-sponsored" Initiative, and the Council Had No Discretion Within the Meaning of the MMBA to Make a Determination of "Policy or Course of Action" Regarding the CPR Initiative.

The MMBA requires that the City's governing body – the Council – or those administrative officers or other representatives designated by law or the governing body, must meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of the City's recognized employee organizations before arriving at "a determination of policy or course of action." Cal. Gov't Code § 3505. This provision assumes that the *governing body* is making a determination of policy or course of action. *If there is no Council determination of policy or course of action, there is no duty to meet and confer*. There is no evidence that the CPR Initiative reflects the City Council's policy, or that the Council ever supported it.

///

Furthermore, California Government Code section 3504 states that *the scope of representation does not include consideration of the necessity of any activity provided by law.* As discussed above, the process for placing a qualified citizen initiative petition on the ballot is an "activity provided by law." The Council has a legal, ministerial duty to place a qualified citizen initiative on the ballot. The Council has no discretion in this regard. Therefore, there is no basis to meet and confer prior to placement of the initiative on the ballot. There is nothing to negotiate before the proposed Charter amendment is put before voters.

C. The Mayor, as a Public Officer, Does Not Have Legal Authority to Propose a Charter Amendment On Behalf of the Council or the City Without Specific Direction and Authorization of the Council, Which Did Not Occur in this Case.

The Charter provides: "All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State." San Diego Charter § 11 (Ex. H).

Moreover, the Council may not delegate its legislative power or responsibility to set public policy to the Mayor or anyone else. San Diego Charter § 11.1 (Ex. H). Among the nondelegable powers are: adopting ordinances or resolutions that raise or spend public money (*Id.*), adopting the annual ordinance setting compensation for City employees (*Id.*), *and entering into agreements between the City and its recognized employee organizations concerning wages, hours, and other terms and conditions of employment, including multi-year agreements.* San Diego Charter § 11.2 (Ex. H). The Council must act *as a body. See also Glendale City Employees' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 334-335 (1975).

The Mayor serves as "chief executive officer of the City" and the Mayor has "the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City." San Diego Charter § 265(b) (Ex. I).

Under the Charter the Mayor may "recommend to the Council such measures and ordinances as he or she may deem necessary or expedient, and to make such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable."

San Diego Charter § 265(b)(3) (Ex. I). The Mayor has authority to veto resolutions and ordinances adopted by the Council, with certain exceptions, including ordinances calling or relating to elections. San Diego Charter §§ 275(c) and 280(a)(1) (Ex. I) (providing that the Mayor's veto power "shall not extend to matters that are exclusively within the purview of Council").

D. No Case Has Ever Held That, Because a Mayor Has a Role in the Meet and Confer Process, Under the Ultimate Control of the City Council, His Support of a Citizens' Initiative Subjects the Initiative to the Meet and Confer Process.

The Complaints of the Charging Parties state that Mayor Sanders, as agent of the City, has "co-authored, developed, sponsored, promoted, funded and implemented ..." the CPR Initiative.[1] The problem with this allegation is that it has no support in law and is not based on "existing judicial interpretation" of the MMBA.

True, in some situations, the Mayor can be treated as an agent for the City in order to find a violation of the MMBA. A Mayor cannot with impunity intimidate public employees in violation of their rights to belong to and be represented by employee unions. The PERB decision in *Laborers Local No. 270 v. City of Monterey*, PERB Decision No. 1766-M (2005) and *Chula Vista Elementary Education Association, CTA/NEA v. Chula Vista Elementary School District*, PERB Decision No. 1647 (2004) establish that certain officials will be treated as agents when they directly engage in activities prohibited by the MMBA or related statutes. Hence, the City Attorney opined in January 24, 2009, that "[i]n determining whether or not the City has committed an unfair labor practice in violation of the MMBA, PERB will consider the actions of all officials and representatives acting on behalf of the City."

[1] The AFSCME Local 127 Complaint differs from those of the other charging parties. The Local 127 Complaint (¶3) names Mayor Sanders and Councilmembers Kevin Faulconer and Carl DeMaio as City agents. The other charging parties focus exclusively on the activities of the Mayor. Councilmembers Faulconer and DeMaio are not labor negotiators, and do not represent the Council or the City. Local 127 cannot seriously maintain that meet and confer requirements attach to any of their activities. No law establishes that an individual Council member is an agent for the City in supporting a citizens' initiative.

However, PERB must do so "consistent with existing judicial interpretation." No such "existing judicial interpretation" renders an initiative subject to meet and confer just because a Mayor, who in another setting acts as a negotiator in the meet and confer process, actively supports it.

Yes, the Mayor can violate MMBA if he fails to bargain in good faith *when he is engaged in the meet and confer process*, which is when he is formulating City's position for presentation to, and ultimate approval by the City Council. That does not provide support for the proposition that the "meet and confer" requirement is somehow portable, something which the Mayor carries on his back, and attaches when he is acting totally outside his role as labor negotiator and is supporting a citizens' initiative.

He is clearly not acting as agent of the City Council, and it is irrelevant if he is acting on behalf of the City, when no controlling authority establishes that any initiative he actually supports becomes a "City-sponsored" initiative subject to the MMBA. The law does not recognize "City-sponsored" charter changes, except as proposed by a vote of the majority of the Council. The decision in *Seal Beach* certainly did not, and it cast doubt that the meet and confer requirement ever attached to citizens' initiatives.

E. The Mayor Has a First Amendment Right to Comment On Matters of Public Concern.

Charging parties and PERB focus on actions of the Mayor in an unsuccessful attempt to render the citizens' initiative into a Council-adopted or "City-sponsored" charter amendment, but then ignore the fact that, apart from their official duties, the Mayor and the Councilmembers *may act privately and have a fundamental First Amendment right to express their views on "matters of public concern." Pickering v. Board of Ed. of Tp. High School Dist.*, 391 U.S. 563, 574 (1968); *Connick v. Myer*s, 461 U.S. 138, 145-46 (1983). The CPR Initiative falls squarely within this category of "matters of public concern." When they assumed their duties as elected officials, neither the Mayor nor the Councilmembers relinquished their First Amendment rights to address the merits of pending ballot measures. Public officials do not leave their First Amendment rights "at the door" when they assume public office. "There are some rights and freedoms so

fundamental to liberty that they cannot be bargained away in a contract for public employment." *Borough of Duryea, Penn. v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011). In the First Amendment context, this is especially true with respect to the right of public officials to express themselves on matters affecting the general public. As the court stated in *Connick*:

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. [S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, the Court has frequently reaffirmed that speech on public issues occupies "the highest rung of the hierarchy of First Amendment values," and is entitled to special protection.

Connick, 461 U.S. 138 at 145 (citations omitted).

Whether or not to amend the City Charter to reform the City's pension systems is textbook example of a "matter of public concern." The Mayor and individual members of the Council have a right to weigh in on this issue, just as any other citizen. Indeed, they may have a duty to inform the public of their views. Their actions did not transform the citizens' initiative into a Council-adopted or City-sponsored proposition, because they had no authority, actual or ostensible, to act in such a matter on behalf of the Council or the City. All argument of the Mayor's "agency" is irrelevant to any issue in this case.

III. THE MEET AND CONFER REQUIREMENTS IS INCOMPATIBLE WITH AN INITIATIVE.

None of the Charging Parties have offered a convincing scenario of how the Mayor's meeting and conferring on the CPR Initiative would lead to any result that is compatible with the citizens' right to exercise direct democracy through initiative.

MEA treated the ballot initiative, as written (it was presented to the City Clerk on April 4, 2011), as City's "opening proposal on the covered subject matter." (Ex. 1A to MEA's UPC).

The meet and confer process can only have one of two results: agreement or impasse with appropriate impasse resolution. If Mayor Sanders, as labor negotiator, met and conferred with the four Charging Parties and agreed on a change to the ballot proposition, how would that change be documented? Surely not in an MOU, because that can only be approve by Council. The fundamental purpose of a citizens' initiative is to by-pass the governing body (Council). How

can the Council approve a change to a citizens' initiative? What if the citizens do not agree? Do they not have constitutional right to proceed with the initiative process, regardless of the Mayor's support activities? If they get enough signatures (and in this case they did), do they have a Constitutional right to have their measure go to the ballot unchanged? Of course, they do. To say otherwise would set aside nearly 100 years of law on initiatives.

Alternatively, if the unions and Mayor reached impasse, who would resolve it? The Council? How can the Council determine the final form of a citizens' initiative?

These are all rhetorical questions, because of the absence of any law on those matters. However, the obvious answers show that the meet and confer process is totally incompatible with a citizens' initiative process. The MMBA cannot be interpreted to intend a process that is meaningless and cannot possibly work in the context of a citizens' initiative. Charging Parties have utterly failed to show how it could possibly work. That factor is an additional reason why the Complaints and associated UPCs fail as a matter of law.

CONCLUSION

For all of the foregoing reasons, the MMBA does not trump the constitutional right of the CPR Initiative Proponents and the approximately 116,000 petition signers to have had their initiative placed on the ballot without change, which occurred on June 5, 2012. The voters overwhelmingly approved the CPR. No amount of evidence of the Mayor's involvement can change that.

Dated: July 6, 2012

JAN I. GOLDSMITH, City Attorney

By _____
Donald R. Worley
Assistant City Attorney

Attorneys for Respondent
CITY OF SAN DIEGO

I, as agent and attorney for Respondent City of San Diego, declare under penalty of perjury that this Answer is true and complete to the best of my knowledge and belief, and this declaration was executed on July 6, 2012, at San Diego, California.

By _____
Donald R. Worley
Assistant City Attorney

PROOF OF SERVICE

San Diego Municipal Employees' Association v. COSD
(PERB Case No. LA-CE-746-M)
Deputy City Attorneys Association of San Diego v. COSD
(PERB Case No. LA-CE-752-M)
AFSCME, AFL-CIO Local 127 v. COSD
(PERB Case No. LA-CE-755-M)
San Diego City Firefighters Local 145 v. COSD
(PERB Case No. LA-CE-758-M)

I declare that I am a resident of or employed in the County of San Diego, State of California. I am over the age of eighteen years and not a party to the below-entitled action. The name and address of my residence or business is Office of the City Attorney, Civil Division, 1200 Third Avenue, Suite 1620, San Diego, CA 92101.

On **Friday, July 6, 2012**, I served the **CITY OF SAN DIEGO'S CONSOLIDATED MOTION TO DISMISS COMPLAINTS** on the parties listed below:

- ☐ Placing a true copy of the above-named document in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;
- ☐ Personal delivery;
- ☐ Facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).
- ☐ Electronic transmission in accordance with the requirements of PERB Regulation 32135.

Donn Ginoza
Administrative Law Judge
Public Employment Relations Board
San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Tel: (510) 622-1024
Fax: (510) 622-1027
Via Facsimile and Overnight Mail

Fern M. Steiner, Esq.
Tosdal, Smith, Steiner & Wax
401 West 'A' Street, Suite 320
San Diego, CA 92101
Tel: (619) 239-7200
Fax: (619) 239-6048
Email: FSteiner@tosdalsmith.com
Via Electronic Mail

Ann Smith, Esq.
Tosdal, Smith, Steiner & Wax
401 West 'A' Street, Suite 320
San Diego, CA 92101
Tel: (619) 239-7200
Fax: (619) 239-6048
Email: ASmith@tosdalsmith.com
Via Electronic Mail

Timothy Yeung, Esq.
Renne Sloan Holtzman Sakai, LLP
428 J Street, Suite 400
Sacramento, CA 95814
Tel: (916) 273-1710
Fax: (916) 273-1711
Email: TYeung@rshslaw.com
Via Electronic Mail

Adam Chaikin, Esq.
Olins Riviere Coates and Bagula
2214 Second Avenue
San Diego, CA 92101
Tel: (619) 272-4235
Fax: (619) 272-4305
Email: chaikin@orcblawfirm.com
Via Electronic Mail

Constance Hsiao, Esq.
Rothner, Segall & Greenstone
510 South Marengo Avenue
Pasadena, CA 91101
Tel: (626) 796-7555
Fax: (626) 577-0124
Email: chsiao@rsglabor.com
Via Electronic Mail

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on **Friday, July 06, 2012**, at San Diego, California.

Shelley Carter
Print Name

Signature