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Sent by U. S. Mail and E-mail jangoldsmith@sandiego.com

Jan I. Goldsmith
San Diego City Attorney
1200 Third Avenue, Suite 1620
San Diego, CA 92101-4178

Re: MEA's Demand to Meet and Confer Re "Pension Reform" Ballot Initiative

Dear Mr. Goldsmith:

Having reviewed and considered your recent response to my two letters directed to Mayor Sanders on July 15th and on August 10th, 2011, I renew MEA's demand that Mayor Sanders fulfill his duty under the MMBA by engaging in a good faith meet and confer process related to his "legacy" pension reform ballot initiative.

In rebuffing MEA's demand, your letter focused exclusively on what the "City Council" can and cannot do with regard to this initiative. But MEA's demand to meet and confer was not directed to the City Council; it was directed to Mayor Sanders who serves as the City's chief executive officer with the authority to give controlling direction to the administrative service of the City and to make recommendations to the City Council concerning the affairs of the City.

Yet your letter studiously avoids any reference to *Mayor Sanders'* undeniable and much-publicized activities related to the pension reform initiative he hopes will be "**his legacy as mayor.**" While ignoring this reality, you have offered a detailed but irrelevant analysis based on the pretense that the *City* has no role or responsibility in the matter of this "citizen" initiative filed with the Office of the City Clerk by *three San Diego residents* on April 4, 2011. Based solely on this fiction, you have declared that the *City Council* "has no authority within the meaning of the MMBA, specifically California Government Code section 3505, to make 'a determination of policy or course of action' when presented with a Charter amendment proposed by citizen initiative."

The facts establishing that Mayor Sanders is sponsoring this "pension reform" initiative permeate the public record. **Mayor Jerry Sanders formed a fund-raising Committee and used the funds raised to hire attorneys to research and write an initiative to meet his specifications and objectives in furtherance of the City's interests as he defines them.** While ignoring his

obligations under the MMBA, Mayor Sanders and his Republican ally on the City Council, Kevin Faulconer, thereafter *negotiated* with fellow Republican Councilmember Carl DeMaio, with the assistance and encouragement of “other Republicans” (including the three “citizens” who filed *his* initiative *for him*) to achieve a single “reform” initiative which has been consistently promoted and publicized by reference to Mayor Sanders – not “Jerry Sanders” acting as a private citizen but Mayor Jerry Sanders using the good graces, prestige and power of his public office as the City’s elected Mayor. Mayor Sanders has repeatedly and consistently used this *public office* to promote the initiative on City-paid *time*.

As you also know, Mayor Sanders has taken to the airwaves to decry the initiative’s opponents and has personally appealed for financial support and signatures by e-mailed correspondence. He is referred to as “Mayor” Jerry Sanders in all forms of communication and publicity related to this initiative – not as “Jerry Sanders.” Acting in his capacity as the City’s Mayor, at its expense, and under color of his authority as Mayor, he has conducted private meetings and attended events on the City Concourse and elsewhere during “normal work hours.” In fact, he also elicited and received *your* opinions as the elected *City* Attorney in support of his initiative. And you have openly acknowledged that you actively participated in influencing the text of the ballot initiative.

Mayor Sanders has clearly made a determination of policy *for this City* related to mandatory subjects of bargaining – and then promoted this determination using the power of his office as Mayor as well as its resources. He is universally acclaimed as one of the initiative’s “chief proponents.” He has repeatedly declared in oral and written statements to the public that “taxpayers simply can’t afford to keep paying the staggering pension costs of city workers year after year, decade after decade,” and that “this ballot measure will restore *us* to fiscal sanity, creating a system in which city workers receive retirement benefits no better and no worse than the average taxpayer footing the bill.” He has reinforced these comments with grandiose reassurances that this initiative is a “legally defensible” measure which “won’t just fix the pension system, but will transform it into a national model” while “permanently fixing the city’s budget woes.” And leaving no room for any doubt in the matter, Mayor Sanders has announced **that this initiative will be “his legacy as mayor”** – not the landmark agreements *negotiated with MEA under the MMBA* to substantially lower pension benefits for new hires in 2009 and to reform retiree health benefits in 2011.

The conclusion is inescapable that Mayor Sanders made a deliberate decision to attempt to dodge the City’s obligations under the MMBA by using the pretense that this is a “citizens’ initiative” when it is, in fact, this *City’s* initiative acting by and through its chief executive officer and lead labor negotiator, Mayor Sanders. But his attempt fails under the law as the Office of the City Attorney has previously acknowledged on two separate occasions.

A Memorandum of Law issued by the Office of the City Attorney on January 26, 2009, cautions that the *City* itself is held to account when the Mayor violates the MMBA in connection with his distinct labor relations role under the Charter:

Notwithstanding any distinctions in the Charter's roles for the Council, the Mayor, the Civil Service Commission, and other City officials or representatives, the City is considered a single employer under the MMBA. Employees of the City are employees of the municipal corporation. See Charter § 1. The City itself is the public agency covered by the MMBA. In 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.

This opinion is consistent with a prior Memorandum issued by the Office of the City Attorney on June 19, 2008, warning that this precise type of *Mayoral*-sponsored "citizen initiative" may not lawfully be used to avoid the City's obligations or defeat MEA's legitimate rights under the MMBA as the recognized exclusive bargaining representative for 4,000 City employees. Your Office wrote:

While (the Mayor) does have the right to initiate or sponsor a voter petition drive (see Government Code section 3203), such sponsorship is legally considered as acting with apparent governmental authority, and will require the Mayor to meet-and-confer with the labor organizations over a voter initiative pension ballot measure that he sponsors. . . . The Mayor has ostensible or apparent authority to negotiate with the employee labor organizations over any ballot measure he sponsors or initiates, including a voter-initiative. The *City*, therefore, would have the same meet-and-confer obligations with its unions over a voter-initiative sponsored by the Mayor as with any City proposal implicating wages, hours, or other terms and conditions of employment.

Thus, a nagging question remains: why have you now responded to MEA's repeated demands to Mayor Sanders to begin the required meet and confer process over this pension reform initiative by turning a blind eye to this open and obvious violation of the MMBA? Indeed, it must be admitted that your letter does *more* than turn a blind eye – you are using the power of your office to defend the Mayor's misconduct to the detriment of the *City* and in contradiction of prior legal positions taken by the Office of the City Attorney.

One very troublesome answer to this nagging question is strongly suggested by what the public record also reveals: despite your role as elected *City* Attorney and your obligations (among others) to the City Council as a whole, you have personally participated with Mayor Sanders, Councilmembers Kevin Faulconer and Carl DeMaio and a small group of "**other**" **Republicans** – **to the exclusion of other elected City Councilmembers** and this City's recognized employee organizations, in developing and promoting this "pension reform" initiative. You have influenced the contents of this initiative; you have informed the public that "it does provide pension relief within legal parameters;" and you have appeared "front-and-center" at multiple press conferences promoting this initiative to the public.

In short, it appears that you have sacrificed your independence as the elected *City* Attorney in order to close ranks with fellow Republicans in promoting a pension reform initiative which not only denies MEA its lawful rights under the MMBA **but also disenfranchises those members of**

the City Council who happen to be Democrats. In derogation of the proper roles established under the Charter for governance of this City by its Mayor and *all* City Council members, you have given the aid of your office to a virtual “Republican coup” which denies the residents of San Diego the intended benefits of having all of their elected City Council members involved in the important policy and fiscal decision-making which will shape the future of this City.

Under the totality of the circumstances, including the legitimate conflict concerns raised by your response, MEA has authorized me to take the following actions:

By copy of this letter to Mayor Sanders, MEA makes its third request to the *City’s* chief executive officer to begin a good faith meet and confer process related to this pension reform initiative.

By copy of this letter to all elected members of the City Council, MEA urges the Council to seek independent legal advice related to the *City’s* obligations under the MMBA in the matter of Mayor Sanders’ “legacy” pension reform initiative *and* related to the duties and *rights* of the entire City Council in this policy-setting matter from which the Mayor has excluded them.

Sincerely,



Ann M. Smith

cc: Mayor Jerry Sanders
Council President Tony Young
Council President *Pro Tem* Kevin Faulconer
Councilmember David Alvarez
Councilmember Marti Emerald
Councilmember Lorie Zapf
Councilmember Carl DeMaio
Councilmember Todd Gloria
Councilmember Sherri Lightner
Jay Goldstone, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst
Scott Chadwick, Human Resources Director
Michael Zucchet, MEA General Manager
Tony Ruiz, MEA President