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October 5, 2011

Joan F. Dawson
Deputy City Attorney
1200 Third Avenue, Suite 1620
San Diego, CA 92101-4178

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

Dear Ms. Dawson:

I have reviewed and considered your letter dated September 19, 2011, in which you offer a response to MEA's continuing demand for meet and confer over Mayor Sanders' pension reform ballot initiative. Your letter refers to my prior four letters on this subject (dated July 15, August 10, September 9 and September 16, 2011) collectively as "the MEA Demands."

Notably, Mayor Sanders himself has *never* responded to "the MEA Demands" either directly or through customary labor relations channels. It appears that he has instead asked your office to respond on behalf of the City.

Regrettably, in repeating Mr. Goldsmith's prior rejection of "the MEA Demands" by his letters dated August 16th and September 12th, you have likewise placed a mistaken focus on the fact that the *City Council* is *not* proposing this ballot initiative and did not act "as a body" to authorize the Mayor to use the resources and power of his office to sponsor it. You argue that, as a result, the *City's* admitted MMBA obligations to meet and confer have never been triggered with regard to it and that the *City Council* will play a strictly ministerial role in placing Mayor Sanders' *legacy* pension reform initiative on the ballot if it otherwise satisfies the procedural requirements set forth in the Elections Code. Your office's passive acceptance of the sham which has occurred here means that the *City* continues to violate the important statewide labor policies embodied in the MMBA.

A proper legal analysis cannot begin and end with the fact that the *City Council* is *not* proposing this ballot initiative. This fact has never been in dispute. But the City Council is not empowered to act as the City's Chief Labor Negotiator under the Charter's Strong Mayor Form of Governance – the Mayor is; the City Council does not initiate the MMBA-mandated meet and confer process with this City's recognized employee organizations – the Mayor does; the City Council does not direct the activities of this City's Human Resources or Labor Relations Office – the Mayor does; the City Council does not employ outside labor counsel to conduct the required meet and confer

processes in accordance with law – the Mayor does. The City Council's ability to fulfill its proper role on behalf of all residents across eight Council districts when influencing the Mayor's bargaining positions and/or in resolving any impasse at the bargaining table between the Mayor and this City's unions *depends* upon the Mayor's good faith fulfillment of his Charter-mandated role as Chief Negotiator. Where he fails to do so – as occurred here – he undermines the proper balance of power and shared governance established by the City Charter.

Indeed, your office explained this proper balance in a Memorandum of Law issued on January 26, 2009. After noting that Mayor Sanders 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, your office cautioned that the *City* 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.

Once the blinders have been removed, it is readily apparent that Mayor Sanders made a deliberate decision to use the power, prestige and resources of his office to make "a determination of policy or course of action," within the meaning of the MMBA, on significant issues affecting wages, hours, benefits and other terms and conditions of employment for current and future employees of this City, *without* involving the City Council as a legislative body at all and *without* honoring the City's obligations to meet and confer with MEA as the exclusive bargaining representative for 4,000 City employees.

Acting in his capacity as the City's Chief Executive Officer and Chief Labor Negotiator, Mayor Sanders raised money to employ outside lawyers to write a ballot initiative to meet his specifications; with the assistance and support of Councilmember Faulconer, he "bargained" directly with Councilmember DeMaio and a small group of City residents to get an agreed-upon "citizens' initiative" written and submitted to the City Clerk – an initiative which he himself describes as his *legacy as Mayor* of this City.

While Mayor Sanders should have bargained with MEA and the City's other recognized employee organizations over proposed "pension reform" Charter amendments and brought the results to the *City Council* for action or for resolution of any impasse – just as was done with regard to Propositions B and C – he chose a more expedient albeit unlawful path.

As you undoubtedly know, Mayor Sanders has publicly lamented that the meet and confer process over these earlier ballot measures took too long and that the course of negotiations with the

unions *and* the proceedings before the City Council were both inconvenient and time-consuming. And, of course, there were additional delays and setbacks when PERB found that the City had committed unfair labor practices in connection with the meet and confer process over these ballot measures. In the wake of this experience, one can virtually hear the Mayor and his policy advisors inside and outside the City vowing: *"Never again."* Instead, Mayor Sanders chose the alternative (albeit unlawful) path of a sham "citizen's initiative" which ostensibly has permitted him to:

(1) sideline the City Council altogether – except for the two Councilmembers who unequivocally supported his objectives in advance – and thereby silence any potential opposition or different policy ideas or outcomes;

(2) avoid the MMBA obligation to "bargain" in good faith over proposed Charter amendments with recognized employee organizations *and* the obligation to participate in an *impasse hearing* before the City Council over the Mayor's "last, best and final" proposal under Council Policy 300-06;

(3) "bargain" the terms of the initiative with a small number of like-minded people and political supporters in order to assure that the Mayor's *legacy* pension reform plan got on the ballot before his term expires and without being diminished or altered by any true negotiations or compromise; and

(4) neutralize any potential challenge to his abuse of power by inducing the City Attorney (a) to become a conspicuous attendee at public events promoting his legacy initiative and (b) to proclaim publicly that this initiative achieves reform "within legal parameters."

In a nutshell, the Mayor's alternative path has meant (1) no unions to deal with; (2) no MMBA constraints to complicate the process; (3) no Councilmembers to oppose, challenge, modify or shape his objectives or the means for achieving them; and (4) no challenge to his power grab from the City Attorney's Office.

This latter outcome is evidenced by the three responses your office has made to "the MEA Demands" on August 16, September 12, and September 19, 2011 – making it clear that your office has the Mayor's "back" – not the *City's back* – on this one. Your blinders remain firmly in place.

First, you insist that this is a Joe Blow "citizen's initiative" and ignore the high profile role Mayor Sanders had and continues to have with regard to it. Even Mayor Sanders admits that this initiative represents *his legacy to this City as Mayor*. It is *Mayor Jerry Sanders* who has acted at every turn with regard to it – not "Jerry Sanders" separate and apart from his paid position and his office *as Mayor*. In fact, we can be assured that *all* of Mayor Sanders' actions and activities related to this "pension reform" ballot initiative were and continue to be undertaken for the *benefit of the City* because otherwise he would have been acting in violation of the City's Code of Conduct and Conflict of Interest policies and regulations applicable to all elected officials and City employees. As you know, these policies unequivocally prohibit the Mayor from engaging in any activity which results in using the prestige or influence of his City of San Diego office or the City's time, facilities,

equipment or supplies for his *private* advantage. Accordingly, it cannot be credibly argued that Mayor Sanders has acted as a *private citizen* with regard to his legacy initiative. His actions *as Mayor* with regard to it are in violation of the MMBA because he has failed and refused to engage in a good faith meet and confer process in response to "the MEA Demands." As your office acknowledged in its 1/26/09 Memorandum: "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."

Next, with the same blinders on, you have incorrectly *re*-characterized your office's prior Memorandum dated June 19, 2008, which responded to five separate scenarios relating to potential "pension reform" ballot measures – only one of which addressed the process for the Mayor to bring a ballot initiative proposal to the City Council after meeting and conferring with the unions under the MMBA. Another scenario, however, addressed the Mayor's right to initiate or sponsor a voter petition drive *without going through the City Council*. This is the relevant legal point I quoted in my letter dated September 16, 2011, where your office offered the following opinion after acknowledging that the Mayor has a constitutional right to initiate or sponsor a voter petition drive:

> However, such sponsorship would legally be considered as acting with apparent governmental authority because of his position as Mayor, and his right and responsibility under the Strong Mayor Charter provisions to represent the City regarding labor issues and negotiations, including employee pensions. As the Mayor is acting with apparent authority with regard to his sponsorship of a voter petition, the City would have the same meet and confer obligations with its unions as set forth in number two, above. ("Number two, above" referred to the process of bringing a ballot initiative proposal to the *City Council* for determination after the Mayor had met and conferred with the unions.)

Finally, after incorrectly asserting that *I misunderstood* what this prior 6/19/08 Memorandum was actually addressing, you go on to criticize your office's own legal analysis in this same Memorandum when interpreting and applying the *Inglewood Teachers Association* case. Of course, I didn't cite this case; your office did. Nevertheless, the legal point made in the *Inglewood* case emphasizing the need for a case-by-case analysis when determining issues of authority and agency is sound. And the result of the *fact* inquiry in *Inglewood* does not save the City from the consequences of Mayor Sanders' actions and activities *as Mayor* with regard to this initiative.

In contrast to the facts here demonstrating Mayor Sanders' abuse of his power as Chief Executive Officer and Chief Labor Negotiator – in defiance of this City's Charter-mandated governance structure – the school principal in the *Inglewood* case hired his own attorney and filed a lawsuit against nine teachers and their union without first discussing the lawsuit with the District Superintendent or the elected governing body of the school district and without getting their authority to file it. This school principal was acting on his own behalf, not on behalf of his District; he was acting in furtherance of his personal interests, not the District's interests. Under these unique factual circumstances, the actions of the school principal were not deemed to be the actions of the *District* for purposes of prosecuting an unfair labor practice charge *against the District* because the

principal was *not* acting as the District's agent or within the scope of his customary authority as a school principal. That is not this case.

The bottom line here is that, if left unchallenged, the Mayor's misconduct and your office's indifference will mean that the future of this City and its Charter will *not* be shaped as the Charter intended by a Mayor acting *within* the parameters of a City Council form of shared governance in accordance with statewide labor principles but rather by a Mayor acting outside of and to the exclusion of the elected City Council and in defiance of the MMBA.

But MEA does not intend to allow this open and obvious abuse of power to go unchallenged such that this *City* avoids its responsibility for the Mayor's legacy ballot initiative disguised as a sham "citizen's initiative." You have asked for a case citation related to the specific fact pattern at issue here. But you already know that, despite the storied history of the MMBA and the case law established under it, both in the courts and at PERB, there is no prior case *like this one* – presumably because no elected official has been willing to trifle with the letter or the spirit of the MMBA in the bold and unprecedented manner as has occurred here. Yet the entire body of MMBA statutory and case law supports the conclusion that the Mayor may not use the power of his position to defy the letter and spirit of the MMBA without the *City* becoming accountable for his wrongdoing. As your office correctly noted in January 2009, "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."

While all of MEA's prior requests have clearly fallen on deaf ears, this letter will serve as MEA's final, heartfelt demand that the *City* comply with the MMBA by engaging in a timely, good faith meet and confer process related to the Mayor's legacy pension reform ballot initiative and that the City Council fulfill its proper role under the Charter with regard to such meet and confer rather than being confined to the ministerial "rubber-stamping" role the Mayor has in mind for 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
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(All sent by electronic mail only)