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**SENT VIA ELECTRONIC MAIL AND U.S. POSTAL SERVICE**

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

Dear Ms. Smith:

This letter is in further response to your multiple letters to City of San Diego (City) officials regarding your "Demand to Meet and Confer re: 'Pension Reform' Ballot Initiative," on behalf of your client, the San Diego Municipal Employees' Association (MEA). You sent two letters to Mayor Jerry Sanders; the first dated, July 15, 2011, and the second dated, August 10, 2011. City Attorney Jan Goldsmith provided response, dated August 16, 2011. You sent a letter to Mr. Goldsmith, dated September 9, 2011. Mr. Goldsmith provided response, dated September 12, 2011. Mr. Goldsmith is now in receipt of your letter, dated September 16, 2011, in which you assert MEA's "continuing demand that Mayor Sanders initiate a good faith meet and confer process with MEA over *his* ballot initiative." (Italics in original letter.)

I refer to your four letters collectively as "the MEA Demands."

This letter assumes that the MEA Demands relate to the Comprehensive Pension Reform Initiative for San Diego (CPR Initiative), filed on April 4, 2011, with the Office of the City Clerk, by three San Diego residents: Catherine A. Boling, TJ Zane, and Stephen B. Williams. The CPR Initiative is a citizen initiative measure that seeks to amend the San Diego Charter (Charter). By letter dated April 4, 2011 to City Clerk Elizabeth Maland, the proponents of the CPR Initiative state their intent to circulate a petition within the City, seeking the requisite number of valid signatures to submit the proposed Charter amendment to voters on the June 2012 ballot.

As you are aware, a charter amendment may be proposed by initiative or by the governing body of a city. Cal. Const. art. 11, § 3(b). These are two distinct procedures.

When a charter amendment is proposed by initiative, the legislative body – here, the City Council – must comply with California Elections Code (Elections Code) section 9255. It provides that a charter amendment proposed by a petition signed by 15 percent of the registered

voters of a city must be placed on a ballot, as long as the additional procedural requirements set forth in the Elections Code are met. If a citizen initiative to amend the Charter qualifies for the ballot, there is no legal basis for the City Council to modify the proposed language. *See Save Stanislaus Area Farm Economy v. Board of Supervisors*, 13 Cal. App. 4th 141, 149 (1993).

This Office recognizes that there is a duty under the Meyers-Milias-Brown Act to provide notice to the City's recognized employee organizations and opportunity to meet and confer over the impacts of a Charter amendment proposed by citizen initiative and approved by voters, if the initiative relates to wages, hours, and other terms and conditions of employment. Further, before the City Council *proposes* a Charter amendment that affects matters within the scope of representation, it is required to meet and confer with a recognized employee organization. *People ex rel. Seal Beach Police Officers Association v. City of Seal Beach* (*Seal Beach*), 36 Cal. 3d 591, 602 (1984).

The CPR Initiative is a proposed Charter amendment by initiative, not by the City Council. In your September 9, 2011 letter, you state that Councilmembers DeMaio and Faulconer have been involved with the CPR Initiative. However, actions of individual Councilmembers do not constitute action of the City Council, as a body. San Diego Charter §§ 13, 15, 270.

You apparently contend that because Mayor Sanders has publicly spoken in support of the CPR Initiative and has taken other reported actions in furtherance of the CPR Initiative, the CPR Initiative is a proposal of the City's governing body, within the meaning of the California Constitution and applicable statutory and case law.

Your contention ignores the actual language of the CPR Initiative, submitted to the Office of the City Clerk, dated April 4, 2011. The CPR Initiative was submitted by three citizens; Jerry Sanders is not one of them. The CPR Initiative is, by its actual language, an "Initiative Measure to be Submitted Directly to Voters," pursuant to article XI, section 3, of the California Constitution and the California Government Code.

Because you have challenged this Office to review the present facts in light of prior opinions of this Office, I will address those opinions. You rely on the January 26, 2009, Memorandum of Law I authored related to the roles of the City Council, the Mayor, and others in labor negotiations. This Memorandum of Law did not address the duty of the City to meet and confer when the City is faced with a citizen initiative to amend the Charter. Therefore, it is not relevant to the specific issues presented here.

You also rely on analysis in a June 19, 2008, memorandum authored by City Attorney Michael Aguirre (Aguirre Memo). You fail to note the relevant discussion on page ten of the Aguirre Memo, which states:

> A Charter amendment proposal can be brought by citizens using the initiative process. San Diego City Charter sections 23 and 223; California Constitution article Xi, section 3. A voter-initiated Charter amendment can not be altered by the City. Since this is voter-initiated, rather than under the imprimatur of the City,

> Government Code sections 3500 et seq. (Myers [sic]-Milias-Brown-Act) is not applicable.
>
> . . . .
>
> A qualified citizen's initiative ballot measure can be placed on the ballot without alteration and is not subject to the meet-and-confer requirements of the Meyers-Milias-Brown Act.

Instead, you rely on analysis on page 9 of the Aguirre Memo, related to the duties of the Mayor in initiating or sponsoring a voter initiative. The Aguirre Memo was presented to the City Council when Mayor Sanders was requesting that the City Council propose a ballot measure to amend the Charter related to pension reform. There is nothing in the City Council record from the Rules Committee meeting on June 25, 2008, to indicate that the Mayor was contemplating a citizen initiative to amend the Charter. It was contemplated the Mayor's proposal would be submitted to voters as a City Council proposal, under the California Constitution and applicable Elections Code provisions.

Further, regarding your reliance on the Aguirre Memo, it is this Office's view that the Aguirre Memo is overly broad and incomplete in its analysis, where it relies on the *Inglewood Teachers Association v. Public Employment Relations Board* (*Inglewood*), 227 Cal. App. 3d 767 (1991), to conclude that the Mayor's "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."

In *Inglewood*, the court of appeal reviewed the issue of "the appropriate legal standard for imputing the conduct of a supervisory or managerial employee to a public school employer." *Id.* at 772. The conclusion set forth in the Aguirre Memo ignores the need to conduct a case-by-case analysis when determining issues of authority and agency, as explained by the *Inglewood* court:

> The law indulges in no presumption that an agency exists but instead presumes that a person is acting for himself and not as agent for another. Generally, the existence of an agency relationship and the extent of the authority of an agent are questions of fact, and the burden of proving agency, as well as the scope of the agent's authority, rests upon the party asserting the existence of the agency and seeking to charge the principal with the representation of the agent.

*Id.* at 780 (citations and quotation marks omitted).

In *Inglewood*, a high school principal brought a lawsuit, seeking damages for libel and slander, intentional infliction of emotional distress, fraud, interference with contract, and conspiracy, against nine teachers, who were union members, two union staff members, the union – Inglewood Teachers Association – and the California Teachers Association. *Id.* at 772. The principal was the only named plaintiff. *Id.* The principal hired his own attorney to file the lawsuit, and the principal did not discuss the lawsuit with the school district superintendent or the governing body of the school district prior to filing the lawsuit, or at any time afterward. *Id.* Neither the governing body of the school district nor the superintendent requested or authorized the principal to file the lawsuit. *Id.*

In response to the principal's lawsuit, the union filed an unfair practice charge, with the California Public Employment Relations Board (PERB), against the school district, alleging, in pertinent part, that the school district violated California public sector collective bargaining laws, specifically the Educational Employment Relations Act (EERA), by retaliating against union members, engaged in protected activities. *Id.* at 774. The union argued that the principal was acting as an agent of the district in bringing his lawsuit against the teachers. *Id.* The school district denied that the principal was acting as the district's agent in filing the lawsuit. *Id.* PERB agreed with the school district, concluding that the principal was *not* acting as the school district's agent when he filed his lawsuit. *Id.* at 775.

The union appealed to the court of appeal, which reviewed whether PERB applied the appropriate standard for determining when a public school employer is responsible for the acts of its supervisors under EERA and whether PERB's factual findings were supported by substantial evidence. *Id.* The appellate court affirmed PERB's decision. *Id.* at 783.

In analyzing the issue of agency, the *Inglewood* court cited the California Civil Code, as follows:

> Actual authority is that which "a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.) Ostensible or apparent authority is that which "a principal, intentionally or by want or ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code § 2317.)

*Id.* at 781.

The *Inglewood* court agreed with the analysis and findings of PERB, that the principal was not acting as an agent or within the scope of his authority when he filed the lawsuit. *Id.* at 781. The court noted that the district did not expressly or actually authorize the principal to file the lawsuit. *Id.* The principal retained an attorney on his own, and did not discuss the lawsuit with either the superintendent or the governing board of the district before or after filing it. *Id.* Further, there was no indication of past instances in which the principal pursued legal action on behalf of the district from which his authority to pursue the action against the teachers and the union might be implied. *Id.* The court concluded that PERB's finding "that the teachers could not reasonably believe that [the principal] was acting as an agent of the District in filing the lawsuit" was supported by the facts presented. *Id.* at 782. The court wrote:

> PERB also found that the evidence did not justify a finding that [the principal] had ostensible or apparent authority to file the lawsuit. Since such authority must be established through the acts of the principal, apparent authority requires a showing that the District represented that it authorized the lawsuit and that the teachers' had a reasonable perception that such representation was true.

*Id.* at 781.

Just as there was no evidence presented by the union in the *Inglewood* case to demonstrate that the principal was acting under the authority of the school district in filing his lawsuit, there is no evidence here that the City Council is proposing the CPR Initiative, or authorizing the Mayor to propose or sponsor it. In your September 9, 2011, letter, you state that the Mayor formed a fundraising committee and used the funds to hire an attorney, and he talked with two Councilmembers. You present no evidence that the Mayor has gone to the City Council, as a body, to place the CPR Initiative on the ballot.

Further, you cite no case law in support of your contention that the City has a present duty to engage in meet and confer. It continues to be this Office's view that there is no legal basis upon which the City Council can modify the CPR Initiative, if it qualifies for the ballot. Therefore, there is no duty to meet and confer over the CPR Initiative at this point in the process. The Elections Code process as it relates to citizen initiatives is the applicable, controlling law here. If the CPR Initiative qualifies for the ballot and is approved by voters, the City must engage in meet and confer over any impacts identified by the City's recognized employee organizations.

If you have legal authorities in support of your contention that the City has a present duty to meet and confer with MEA on the CPR Initiative, please provide us with those authorities for our consideration. Thank you.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm
cc: *Sent via Electronic Mail only*
Jerry Sanders, Mayor
Tony Young, Council President
Kevin Faulconer, Council President *Pro Tem*
Sherri Lightner, Councilmember
Todd Gloria, Councilmember
Carl DeMaio, Councilmember
Lorie Zapf, Councilmember
Marti Emerald, Councilmember
David Alvarez, Councilmember
Jay Goldstone, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst
Scott Chadwick, Human Resources Director
Michael Zucchet, MEA General Manager
Tony Ruiz, MEA President
Andrew Jones, Executive Assistant City Attorney
Mary Jo Lanzafame, Assistant City Attorney