



CITY ATTORNEY UPDATE

EXPLAINING “SUBSTANTIALLY EQUAL”

By City Attorney Jan Goldsmith

Lately, there’s been quite a bit of news coverage on a lawsuit that we refer to as the “substantially equal” case. It’s an important case because it will affect the City’s ability to bring its pension costs under control.

The following Q&A is meant to explain the basic facts of the case:

1. **What is this case about?**

This case is about enforcing the City Charter. Since 1954, the Charter has stated that the City and its employees are to make substantially equal contributions to the pension plan to cover the anticipated cost of the promised pension benefits. But for a variety of reasons, the City has been paying a significantly greater share than employees.

The Pension Reform Commission first raised the issue in 2004, but the San Diego City Employees Retirement System (SDCERS) has refused to change the way it figures contributions into the fund.

The City sued SDCERS in 2010 to compel it to change the way it figures contributions so that the City and its employees pay substantially equal portions, as the Charter requires.

2. **Was this lawsuit properly authorized?**

Yes, the City Council voted unanimously in 2010 to file the lawsuit.

3. **What is the status of the lawsuit?**

The lawsuit is set to go to trial July 9. Much of the delay was caused by SDCERS, which fought unsuccessfully to move the trial to Los Angeles.

4. **What does the City Charter actually say about this?**

The Charter states: “The City shall contribute annually an amount **substantially equal** [emphasis added] to that required of the employees for normal retirement allowances, as certified by the actuary, but shall not be required to contribute in excess of that amount except in the case of financial liabilities accruing under any new retirement plan or revised retirement plan because of past service of employees.”

This stems from a 1954 Charter Amendment adopted by City voters. An Assistant City Attorney wrote an opinion in 1954 explaining how it is supposed to work:

“For instance, if the interest paid on investment of the trust fund increases, the contributions of the City and the employees can be either decreased or proper credit given to those accounts. If the rate of interest is decreased the ordinance gives the Board of Administration, upon recommendation of the actuary, the authority to require the employees and the City to contribute more, so that the result contemplated by the formula of the retirement plan will be secured.”

5. Will a court direct SDCERS to follow the City Charter?

Of course, that is up to the court. But, our office has won every pension case since I took office in 2008 by simply enforcing what the City Charter states. The court has repeatedly reversed decisions by SDCERS because it failed to follow the City Charter.

6. How does SDCERS determine contribution amounts?

As I've said, the City Charter states that the City and its employees are to make substantially equal contributions to the pension plan. Each year, an actuary makes assumptions about things such as the pension plan's investment returns and other factors. Then, the actuary calculates the contributions based on those assumptions. If those assumptions later turn out to be inaccurate, the actuary changes future contributions to account for those inaccuracies. But, the pension board has told the actuary to shift all those changes to the City, and leave the employees' contributions unchanged.

So, for example, the actuary assumes a 7.5 percent rate of return on investing the pension plan's trust fund. When the real investment return is determined, the actuary needs to adjust contributions if the 7.5 percent return turns out to be too high or too low. Under the City Charter, both the City's and employees' contributions are supposed to be adjusted to reflect the real returns so that the pension plan remains properly funded. But, the pension board has only adjusted the City's contributions.

7. There is much focus on investment losses. Would employees benefit from investment gains?

Yes. There is risk and reward. That's what the lawyer who drafted the provision stated in 1954 and that's how it is written.

8. If the City wins, will the employees and/or the City get a large bill? Would it affect retirees?

The contributions in question apply only to employees and the City. Retirees do not contribute to the plan. As for employees, our petition only asked for prospective enforcement. We believe retroactive enforcement would be barred as not timely and would be beyond the scope of the City's petition. The effect of the three-year trial delay would need to be addressed by the judge or by agreement of the parties.

9. Has the City received any outside legal opinions on this?

Before we filed the lawsuit in 2010, we obtained an outside legal opinion from an attorney who is a nationally respected expert in the field. That opinion concluded that the

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pension board was not following the City Charter formula. His opinion was consistent with a 1983 California Supreme Court case which confirmed that the cost of pension benefits under the San Diego City Charter are to be split substantially equally between the City and employees.

10. Can the City Council decide to dismiss or settle the lawsuit?

Yes. However, Proposition B, the pension reform measure passed by City voters in June 2012, reaffirms the “substantially equal” requirement and allows settlement that does not enforce that requirement only with a six-vote City Council super-majority and approval of the court. I have always encouraged settlement discussions.

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