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## MEMORANDUM OF LAW

**DATE:** January 26, 2009

**TO:** Honorable Mayor and City Councilmembers

**FROM:** City Attorney

**SUBJECT:** Impasse Procedures under Strong Mayor Trial Form of Governance

### INTRODUCTION

This Memorandum of Law is presented in response to numerous questions that have arisen regarding the impasse procedures for resolution of disputes between the City of San Diego (hereinafter, "City") and its recognized employee organizations, in light of the recent decision of the California Public Employment Relations Board (hereinafter, "PERB") in the case, *AFSCME Local 127 & San Diego Municipal Employees Association v. City of San Diego*, PERB No. HO-U-946-M, 32 PERC 146, September 18, 2008.

In 2006, two of the City's employee associations filed unfair labor practice charges against the City with PERB related to the process followed by the City to implement Proposition B, regarding pension system reform, and Proposition C, regarding managed competition. The labor organizations alleged violations of the Meyers-Milias-Brown Act (hereinafter, "MMBA"), found at California Government Code section 3500 *et seq.* The MMBA governs labor relations in local government in California. Its purpose is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." Cal. Gov't Code §3500. Since 2001, PERB has exclusive jurisdiction over alleged violations of the MMBA, including allegations that a local agency has violated its local rules governing labor relations, or has adopted or enforced unreasonable local rules. Cal. Gov't Code §3509.

The labor organizations alleged that the City failed to bargain in good faith and failed to follow its impasse procedures, set forth in City Council (hereinafter, "Council" or "City Council") Policy 300-06. After conducting a hearing and reviewing the record, the PERB Administrative Law Judge (hereinafter, "ALJ") found that the City violated numerous provisions of the MMBA, by failing to bargain in good faith with the labor organizations and by failing to follow its impasse procedures with regard to approval of the implementing ordinances for Propositions B and C. The ALJ also found that the City violated the MMBA by failing to allow sufficient time for impasse procedures and unilaterally adopting its proposal before exhausting

its local impasse procedures. The ALJ's decision was issued on August 22, 2008. *AFSCME Local 127 & San Diego Municipal Employees Association v. City of San Diego*, PERB No. LA-CE-352-M, 32 PERC 127, August 22, 2008. The ALJ ordered the City to cease and desist from (1) failing to follow its own impasse procedures and (2) failing to bargain in good faith. No exceptions were filed from the ALJ's proposed determination, and PERB finalized the decision, stating it was binding on the parties. *AFSCME Local 127 & San Diego Municipal Employees Association v. City of San Diego*, PERB No. HO-U-946-M, 32 PERC 146, September 18, 2008 (hereinafter, "PERB decision").

The PERB decision underscores the importance of carefully following the City's existing impasse procedures, set forth in Council Policy 300-06, as well as the requirements of the San Diego City Charter (hereinafter, "Charter") and the MMBA. The PERB decision emphasizes that the City, as a public employer, must engage in collective bargaining with its represented employee organizations in good faith, as defined by state law. The respective roles of the Mayor and the Council in labor negotiations and impasse procedures are established by local rules, which must be applied before the City, as the employer, makes decisions regarding matters related to employment conditions and employer-employee relations, deemed by state law to be mandatory subjects of bargaining.

This Memorandum reviews the City's existing impasse procedure in relation to the Charter and state law provisions governing labor relations for California's cities and other local agencies. This Memorandum is intended to supersede any previous opinions of this Office in conflict with the legal conclusions set forth herein.<sup>1</sup>

### QUESTIONS PRESENTED

1. Are the impasse procedures set forth in Council Policy 300-06, which provide for resolution of impasses between the City and its recognized employee organizations by a determination of the Civil Service Commission or the City Council after a hearing on the merits of the dispute, in conflict with Article XV of the Charter regarding the strong mayor trial form of governance?
2. If the impasse procedures are not in conflict with the Charter, how should they be implemented to comply with the Charter and state labor relations laws?

### SHORT ANSWERS

1. No. The impasse procedures set forth in Council Policy 300-06 are not inconsistent, and must be harmonized with Article XV of the Charter, as well as state law provisions regarding

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<sup>1</sup> This Memorandum specifically supersedes a Memorandum of Law, dated September 18, 2008, regarding the effect of the PERB decision; a Memorandum to the Honorable Mayor and City Council, dated December 4, 2006, regarding impasse procedures; and any other memoranda or opinions in conflict with this opinion.

labor relations for local government. Further, any proposed or contemplated changes to the existing impasse procedures must be negotiated to completion with all recognized employee organizations in the City prior to implementation. Negotiated to completion means that agreement is reached and approved by the City and the represented employees, through the ratification process, or impasse procedures have been exhausted.

Article XV of the Charter was added by voters on November 2, 2004 and became effective January 1, 2006. The stated purpose of the Article is “to modify the existing form of governance for a trial period of time to test implementation of a new form of governance commonly known as a Strong Mayor form of government.” Charter, §250.

Under the strong mayor trial form of governance, the Mayor assumes all of the authority, power, and responsibilities formally conferred upon the City Manager, as described in Articles V, VII, and IX of the Charter. Charter, §§ 260(b), 265(b). The Mayor has additional authority and responsibilities, including serving as the chief executive officer of the City (Charter, §265); executing and enforcing all laws, ordinances, and policies of the City, including the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City (Charter, §265(b)(2)); recommending to the Council such measures and ordinances as he or she may deem necessary or expedient (Charter, §265(b)(3)); and making such other recommendations to the Council concerning the affairs of the City as the Mayor finds desirable (Charter, §265(b)(3)). Under this authority, the Mayor assumes the responsibility of labor negotiations, which is an administrative function of local government.

Under the City’s existing impasse procedures set forth in Council Policy 300-06, if agreement is not reached at an impasse meeting between the City’s negotiating team and a represented employee organization, the impasse shall be resolved by a determination of the Civil Service Commission or the City Council after a hearing on the merits of the dispute. Council Policy 300-06, §VII (B).

The City Council has ultimate authority to resolve impasses regarding wages and terms and conditions of employment, because the City Council has authority to set salaries and other terms and conditions of employment through the Council’s authority to approve the annual salary ordinance and to approve a memorandum of understanding between the City and the labor organizations that represent designated employees. This authority is subject to the veto power of the Mayor. The Council may override the mayoral veto.

Council Policy 300-06 is consistent with the respective roles of the Mayor and the Council in labor negotiations and labor relations as set forth in the Charter.

2. The MMBA requires the City to follow its locally adopted impasse procedures in a manner consistent with the requirements and purposes of state labor laws. The impasse procedures set forth in Council Policy 300-06 provide a two-step process for resolution of disputes between the City, as a public agency employer, and the City’s recognized employee organizations on mandatory subjects of bargaining, defined, generally, as those actions of a local agency that have a significant effect on the wages, hours, or working conditions of represented employees.

Pursuant to Council Policy 300-06, after either party files a declaration of impasse with the City Council, the Mayor shall promptly schedule an impasse meeting, which is the initiation of the impasse procedures. The purpose of the meeting is (1) to identify and specify in writing the issue or issues that remain in dispute; (2) to review the position of the parties in a final effort to resolve such disputed issue or issues; and (3) if the dispute is not resolved, to discuss arrangements for the utilization of the impasse procedures.

If agreement is not reached at the impasse meeting, impasses shall be resolved by a determination of the Civil Service Commission, if the dispute involves a decision within its purview, or by the City Council after a hearing on the merits.

The hearing contemplated in Council Policy 300-06 involves the presentation of facts and argument by the City's negotiating team, headed by the Mayor, and the representatives of the recognized employee organization at impasse with the City. In resolving the impasse, the Council has the authority to unilaterally implement the last, best, and final offer presented to the employee organization at the bargaining table. The Council also has the authority to present an alternative proposal to resolve the dispute. This authority is granted to the Council by Article III of the Charter, which provides the Council with nondelegable legislative power to approve wages, benefits, and other compensation of employees and to bind the City to memoranda of understanding with its represented employee organizations.

To resolve an impasse, the Council may not unilaterally implement an alternative proposal not presented at the bargaining table. However, the Council, by a vote of five members, may return the parties to the bargaining table for discussion of the Council's alternative proposal. The Council's alternative proposal breaks the impasse and revives the meet and confer process. If the Mayor is in disagreement with the Council over the alternative proposal, the Mayor may veto the Council's resolution, prior to a return to the bargaining table. This veto requires the Council to reconsider the resolution. The Council may override the veto. In exercising these powers, the Mayor and Council must use care so as to not abrogate the state law duty to bargain in good faith.

In resolving impasses on matters related to wages, benefits, and other compensation, the Council must be mindful of the Charter requirement, set forth in section 290, to present the salary ordinance fixing the salaries of all officers and employees of the City no later than April 15 of each year. The salary ordinance must be proposed by the Mayor for Council introduction in a form consistent with any existing memoranda of understanding with recognized labor organizations, or otherwise in conformance with procedures governed by the MMBA, which would include compliance with and exhaustion of impasse procedures on mandatory subjects of bargaining, where there is dispute.

## DISCUSSION

### I. Application of the Meyers-Milias-Brown Act (MMBA) to the City of San Diego as a Charter City

The MMBA defines the rights of public employees, including their right “to form, join, and participate in the activities of employee organizations . . . for the purpose of representation of all matters of employer-employee relations.” Cal. Gov’t Code §3502. It also requires public employers to meet and confer in good faith with employee representatives on all issues within the scope of representation. Cal. Gov’t Code §3505. *United Public Employees, Local 390/400, SEIU, AFL-CIO v. City and County of San Francisco*, 190 Cal. App. 3d 419, 423 (1987). The scope of representation is defined as “all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment.” Cal. Gov’t Code §3504.

The MMBA is applicable to “every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not.” Cal. Gov’t Code §3501(c). The MMBA is applicable to charter cities, including the City of San Diego. *Los Angeles County Civil Serv. Comm’n v. Superior Court (Los Angeles County Employees Union, Local 434, Serv. Employees Int’l Union, AFL-CIO)*, 23 Cal. 3d 55, 59 (1978) (holding that requiring charter county to meet and confer with employee unions before amending its civil service rules does not offend home-rule provisions of California Constitution); *People ex rel. Seal Beach Police Officers Ass’n v. City of Seal Beach*, 36 Cal. 3d 591, 597 (1984).

Statutory enactments such as the MMBA should be construed, if possible, to avoid conflict with city charters. *United Public Employees*, 190 Cal. App. 3d at 422-423 (citing *Building Material & Construction Teamsters’ Union, Local 216 v. Farrell*, 41 Cal. 3d 651, 665 (1986); *Seal Beach Police Officers Ass’n*, 36 Cal. 3d at 596-601). Government Code section 3500 specifically declares that the MMBA shall not supersede local charters, ordinances, and rules that establish civil service systems or other methods of administering employer-employee relations. However, the duty to bargain in good faith established by the MMBA is a matter of statewide concern and of overriding legislative policy, and nothing that is or is not in a city’s charter can supersede that duty. *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753*, 71 Cal. App. 4th 82, 100 (1999), *rev. denied* (July 21, 1999). California courts have held that the terms and conditions of employment are a local affair and not preempted by general law; however, the procedure by which terms and conditions are determined is subject to the provisions of the MMBA. *United Public Employees*, 190 Cal. App. 3d at 422-423. City charters and the MMBA should be construed to work together harmoniously. *Id.*

The MMBA, specifically Government Code section 3505, requires the governing bodies of local agencies or their properly designated representatives to meet and confer as to conditions of employment with representatives of employee organizations:

The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations...and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

“Meet and confer in good faith” means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

Cal. Gov’t Code §3505. The California Supreme Court has stated that the MMBA represented an evolution from the earlier George Brown Act, which provided only that management representatives should listen to and discuss the demands of the union. *Voters for Responsible Retirement v. Board of Supervisors of Trinity County*, 8 Cal. 4th 765, 780-781 (1994). The MMBA “mandates that the governing body undertake negotiations with employee representatives not merely to listen to their grievances, but also ‘with the objective of reaching agreement on matters within the scope of representation.’” *Id.* at 781. To summarize, under Government Code section 3505, it is the duty of the governing body of the public agency or such administrative officer or other representative as may be designated by law or by the governing body to meet and confer in good faith *prior to arriving at a determination of policy or course of action* regarding mandatory subjects of bargaining. (*Emphasis added*).

The MMBA defines mandatory subjects of bargaining as decisions by a local agency employer that have a significant effect on the wages, hours, and other terms and conditions of employment of represented employees. *Building Material & Construction Teamsters’ Union, Local 216 v. Farrell*, 41 Cal. 3d 651, 659 (1986).

In the meet-and-confer process, the parties must “endeavor to reach agreement on matters within the scope of representation.” Cal. Gov’t Code §3505. Meeting and conferring “in good faith” requires a genuine desire to reach agreement. *Claremont Police Officers Ass’n v. City of Claremont*, 39 Cal. 4th 623, 630 (2006). The agreement reached by the parties is to be reduced to a written memorandum of understanding and presented to the governing body “for determination.” Cal. Gov’t Code §3505.1. While a governing body has no duty to accept an agreement negotiated by its representatives, the MMBA reflects a “preference for negotiated employment terms.” *Valencia v. County of Sonoma*, 158 Cal. App. 4th 644, 649 (2007). An agreement reached during the negotiation process becomes binding on the public agency, when it is presented to and approved by the governing body of the agency or its statutory representative. Cal. Gov’t Code §3505.1; *United Public Employees*, 190 Cal. App. 3d at 423.

The MMBA does not prescribe the manner in which an agreement between a local government and an employee organization should be put into effect. The MMBA is silent as to what procedure should be followed after a nonbinding memorandum of understanding is submitted to the governing body “for determination.” *United Public Employees*, 190 Cal. App. 3d at 423. *See also Long Beach City Employees Ass’n, Inc. v. City of Long Beach*, 73 Cal. App. 3d 273, 277-278 (1977); *Lipow v. Regents of University of California*, 54 Cal. App. 3d 215, 227 (1975) (duty of union and employer to confer in good faith does not compel either side to make concessions or to yield any positions fairly maintained, but does require parties to bargain with open mind and sincere intention to reach agreement).

A local agency may adopt reasonable rules and regulations, after negotiating with recognized employee organizations, for the resolution of disputes related to mandatory subjects of collective bargaining. Cal. Gov’t Code §3507(a)(5). Any existing impasse procedures must be followed if negotiations on proposed changes to impasse rules reach impasse. Cal. Gov’t Code § 3507. *Public Employment Relations Bd. v. Modesto City Schools Dist.*, 136 Cal. App. 3d 881, 900 (1982) (following *National Labor Relations Bd. v. Katz*, 369 U.S. 736, 745 (1962)).

If a public agency negotiates to impasse, and has applicable impasse procedures, it must exhaust those procedures and it must allow adequate time for the procedures to resolve the impasse. Once any local impasse procedures have been exhausted, state law allows the local agency to unilaterally implement “its last, best, and final offer.” Government Code section 3505.4 provides:

If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency’s last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

It is an unfair labor practice for a public agency to deny to employee organizations rights guaranteed to them under the MMBA and to refuse or fail to meet and confer in good faith with the exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507. *See* PERB Reg. 32603; Cal. Gov’t Code §3507. It is also an unfair labor practice to fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code sections 3505 or 3505.2 or required by any local rule adopted pursuant to Government Code section 3507. PERB Reg. 32608. Council Policy 300-06 is a local rule adopted pursuant to the MMBA.

The MMBA grants PERB the jurisdiction to consider the reasonableness of local rules and to ensure that local rules are interpreted in a manner consistent with the MMBA. PERB also has the authority to enforce local rules. As the ALJ in the PERB decision wrote, “[I]f a public

agency adopts a local rule, including a rule on dispute resolution procedures, and then violates it, it commits an unfair practice within PERB's jurisdiction." 32 PERC 127, at 36 "[I]mpasse procedures were almost certainly included in state law to protect the public from the disruption of public employee strikes, by providing a method other than a work stoppage for resolving a deadlock in bargaining. Because the procedures were designed primarily for the benefit of the public, they could not be waived by employers and employee organizations." *Id.*

## II. Charter-Mandated Roles in Conducting Labor Relations Within the City

San Diego is a charter city. As such, "[i]t can make and enforce all ordinances and regulations regarding municipal affairs subject only to the restrictions and limitations imposed by the City Charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law." *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 37 (1979). A charter is to a city what the state Constitution is to the state. *Id.* "The charter operates not as a grant of power, but as an instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess; and the enumeration of powers does not constitute an exclusion or limitation." *Id.* at 38 (*citing City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-599 (1949)). Although a charter represents the supreme law of a charter city, it is subject to preemptive state law, *Howard Jarvis Taxpayers Ass'n v. City of San Diego*, 120 Cal. App. 4th 374, 387 (2004), including the MMBA, as explained above.

Fundamental rules of statutory construction and interpretation apply equally to interpretation of city charter provisions. *San Francisco Int'l Yachting Ctr. Dev. Group v. City and County of San Francisco*, 9 Cal. App. 4th 672, 681 (1992). "It is assumed that a city has existing laws and charter provisions in mind when it enacts or amends a charter." *Id.* "The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." *Id.* at 679. *See also Bohbot v. Santa Monica Rent Control Bd.*, 133 Cal. App. 4th 456, 462 (2005) (provisions within a charter provision must be construed together and harmonized) (*citing Giles v. Horn*, 100 Cal. App. 4th 206, 221 (2002)) "If the language of the provision is free of ambiguity, it must be given its plain meaning." *Castaneda v. Holcomb*, 114 Cal. App. 3d 939, 942 (1981). Further, where the words of a charter are clear, a reviewing court may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history. *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171-172 (1994).

In November 2004, San Diego voters approved an amendment to the City Charter, which added Article XV, providing for a five-year trial period to test a Strong Mayor, or Mayor-Council form of government. Prior to the adoption of Article XV, the City had a Council-Manager form of government, in which the elected City Council, including the Mayor, governed and set policy for the City and a City Manager acted as the chief executive officer, running the day-to-day affairs.

Under the strong mayor trial form of governance, the Mayor assumes all authority, power, and responsibilities formally conferred on the City Manager, and serves as the City's "chief executive officer." Charter §265(b). "Chief executive officer" is not specifically defined;

however, the Charter sets forth that the Mayor is “[t]o execute and enforce all laws, ordinances, and policies of the City, including the right to promulgate and issue administrative regulations that give controlling direction to the administrative service of the City” Charter §265(b)(2). As a general rule, power is legislative in nature if it prescribes a new policy or plan; power is administrative in nature if it merely pursues a plan already adopted by the legislative body itself or some power superior to it. *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399-400 (2001), *rev. denied*, (April 25, 2001). “Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body.” *Id.* at 400. The duties of the City Manager, assumed by the Mayor under the strong mayor form of governance, are set forth in Charter Section 28, in relevant part:

It shall be the duty of the [Mayor] to supervise the administrative affairs of the City except as otherwise specifically provided in this Charter; to make such recommendations to the Council concerning the affairs of the City as may seem to him desirable; to keep the Council advised of the financial condition and future needs of the City; to prepare and submit to the Council the annual budget estimate and such reports as may be required by that body. . . . The [Mayor], as Chief Budget Officer of the City, shall be responsible for planning the activities of the City government and for adjusting such activities to the finances available. To this end he shall prepare annually a complete financial plan for the ensuing year and shall be responsible for the administration of such plan when adopted by the Council. He shall be charged with the bringing together of estimates covering the financial needs of the City, . . . with the preparation of the budget document and supporting schedules and with the presentation of the budget to the Council. . . . The [Mayor] may prescribe such general rules and regulations as he may deem necessary or expedient for the general conduct of the administrative Departments.

Charter §28. The Mayor has the authority to recommend salaries and wages, subject to the personnel classification determined by the Civil Service Commission, of officers and employees within the administrative service of the City and within the total amount contained in the annual appropriations ordinance, which is approved by the City Council. Charter §§70, 71. “All increases and decreases of salary or wages of officers and employees shall be determined at the time of the preparation and adoption of the budget.” Charter §70.

The Mayor does not vote on matters before the City Council, but shall “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.” Charter §265(b)(3).

Inherent within the authority of the Mayor as the elected head of the executive and administrative service is the responsibility of representing the City in labor negotiations with the City’s recognized employee organizations. However, it is a shared duty with the City Council. Under Government Code section 3505, “meet and confer” is defined as the mutual obligation of the public agency and its employee organizations to meet “to exchange freely information,

opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.” Cal. Gov’t Code §3505. It is the duty of the Mayor “to prepare and submit to the Council the annual budget estimate” and “to see that the ordinances of the City and the laws of the State are enforced.” Charter, §28. It is a duty of the Mayor to ensure that the City’s responsibilities under MMBA as they relate to communication with employees are met. *See* Cal. Gov’t Code §3500(a).<sup>2</sup> It is the opinion of the California Attorney General that a local agency’s designated bargaining representatives are not an advisory body to the legislative body; rather, the local agency’s bargaining team performs an administrative function:

[The bargaining committee] does not merely study a matter, or merely ascertain facts for presentation to a parent group with a possible recommendation as is the usual case with an advisory body. Though admittedly it cannot bind the local agency to a “labor contract,” its functions are more administrative in nature than advisory in nature. It has the duty to negotiate to the point of attempting to reach and reduce to writing a “memorandum of understanding” which will be submitted to the legislative body for consideration and possible adoption.

61 Ops. Cal. Atty Gen. 1, 6 (January 4, 1978). The administrative duties of the Mayor include the work of meeting and conferring with the City’s represented employee organizations.

The Council also plays a critical role in negotiations under the MMBA. Government Code section 3505.1 provides that the governing body may approve or disapprove any tentative agreement emerging from the meet and confer process. On the other hand, Government Code section 3505 “mandates that the same governing body conduct or supervise the meet and confer process leading up to the agreement.” *Voters for Responsible Retirement*, 8 Cal. 4th at 783. The California Supreme Court has explained: “The governing body’s role in collective bargaining negotiations is further reinforced by Government Code section 54957.6, which provides an exception to the open meeting provisions of the Brown Act when a governing body consults ‘with the local agency’s designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily-provided scope of representation.’” *Id* at 783, fn. 5. “This statute, by permitting the governing body to meet in secret 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*.

Further, under the Charter, the Mayor is not the only individual responsible for labor relations duties. The City’s Personnel Director is appointed by and serves under the direction of the City’s Civil Service Commission, which has the responsibility of recommending to the City Council “all rules and amendments thereto for the government, supervision and control of the classified service [of employees].” Charter §118. The classified service is defined in Charter

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<sup>2</sup> It is also a duty of the Council to ensure legislative decisions are made in compliance with all relevant law, including the MMBA and the Charter.

Section 117, and is generally all non-managerial employees. The City's classified employees are represented by four of the City's five labor organizations.<sup>3</sup> Ultimately, the City Council approves changes to the City's personnel rules. Charter §118.

Under rules of statutory construction, the strong mayor provisions of Article XV must be read to harmonize with Article III of the Charter, regarding the legislative power of the City Council. The legislative power vested in the City Council may not be delegated. Specifically the City Council has authority, subject to mayoral veto provisions, to adopt any ordinance or resolution which raises or spends public monies, including the City's annual budget ordinance and the annual ordinance setting compensation for City employees. Charter §11.1. The City Council also has authority, subject to mayoral veto provisions, to adopt any ordinance or resolution setting public policy. *Id.*

The City Council is mandated to adopt the annual salary ordinance "after considering all relevant evidence including but not limited to the needs of the citizens of the City of San Diego for municipal services, the ability of the citizens to pay for those services, local economic conditions and other relevant factors as the Council deems appropriate." Charter, Art. III, §11.1.

It is also within the nondelegable authority of the City Council to enter into a memorandum of understanding with any recognized City employee organization concerning wages, hours, and other terms and conditions of employment if, in the prudent exercise of legislative discretion as provided in this Charter, the Council determines it is in the best interests of the City to do so. Charter, Art. III, §11.2. Approval of a memorandum of understanding for a single year is done by Council resolution that receives the affirmative vote of five members of the Council. Article XV, §270(c). Approval of a memorandum of understanding for multiple years requires a two-thirds vote of the entire Council. Charter, Art. III, §11.2. This Charter authority is consistent with the MMBA's requirement that any memorandum of agreement must be approved by the governing body of the public agency to be binding upon the agency. Cal. Gov't Code §3505.1.

Under the strong mayor form of governance, the Mayor is granted authority to veto most of the matters that the Council passes, specifically ordinances, resolutions, and changes to the budget. Charter §280. This veto power has the function of requiring the Council to reconsider its decisions. The Council may override the Mayor's veto with the same number of votes needed to initially approve the matter. Charter §285. Most matters require five votes of the eight Council members to pass, although some matters require six votes. *Id.* The Mayor's ability to veto the salary ordinance is considered a "special veto" and may be exercised following introduction of the salary ordinance to the Council by the Mayor, and prior to final adoption of the salary ordinance by the Council. Charter §290. The Mayor's veto power may not be used in

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<sup>3</sup> The four recognized employee organizations composed of classified employees are Local 127, American Federation of State, County, and Municipal Employees, District Council 36, AFL-CIO; Local 145, International Association of Fire Fighters, AFL-CIO; the San Diego Municipal Employees' Association; and the San Diego Police Officers Association. The Deputy City Attorney Association is composed of deputy city attorneys in the Office of the City Attorney, who, by Charter, are in the unclassified service. Charter §117.

violation of any duty imposed on the Mayor by the Constitution and the laws of the State of California. *See* Charter §1.

The City Council has the ultimate authority to set salaries and other terms and conditions of employment through the Council's authority to approve the salary ordinance and to approve memoranda of understanding between the City and its recognized employee organizations. This authority is subject to the veto power of the Mayor, which forces the Council to reconsider the decision. The Council may override the mayoral veto, by the same number of votes of the Council members required to approve the initial legislative action.

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.

### **III. Roles of the Mayor and Council in Labor Negotiations and Impasse Procedures**

Under the MMBA, the negotiations process between the local agency employer and represented employee organizations and any impasse procedures are generally left to local rules, regulations, or ordinances, or to the mutual consent of the parties. Cal. Gov't Code §§3505, 3505.2. *See also* PERB Decision, at 53. In San Diego, there has been much discussion regarding existing impasse procedures under the strong mayor trial form of governance. Impasse procedures are presently governed by Council Policy 300-06, which states in relevant part:

#### **VII. IMPASSE PROCEDURES:**

##### **A. Initiation of Impasse Procedures.**

If the meet and confer process has reached an impasse, either party may initiate the impasse procedures by filing with the City Council a written request for an impasse meeting, together with a statement of its position on all disputed issues. An impasse meeting shall then be scheduled promptly by the [Mayor].<sup>4</sup> The purpose of such meeting shall be:

- a. To identify and specify in writing the issue or issues that remain in dispute.
- b. To review the position of the parties in a final effort to resolve such disputed issue or issues; and
- c. If the dispute is not resolved, to discuss arrangements for the utilization of the impasse procedures provided herein.

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<sup>4</sup> Before the City adopted the strong mayor form of government, the impasse meeting was to be scheduled by the City Manager. Under the strong mayor form of government, the Mayor assumes the roles and functions of the City Manager.

B. Impasse Procedures.

If no agreement is reached at an impasse meeting, impasse shall then be resolved by a determination by the Civil Service Commission or the City Council after a hearing on the merits of the dispute. Determination of which of the above bodies shall resolve a particular impasse shall be dependent upon:

1. The subject matter of the impasse, and
2. The applicable provisions of the Charter and Municipal Code of the City of San Diego as interpreted by the City Attorney.

Council Policy 300-06 was adopted by resolution of the City Council, effective October 26, 1971, to implement the MMBA “by providing orderly procedures for the administration of employer-employee relations between the City and its employee organizations.” Council Policy 300-06, at 1. The Council Policy has been amended several times. The policy was last amended by the Council on November 14, 2005. That amendment did not alter or modify impasse procedures. Council Policy 300-06 states: “[N]othing contained herein shall be deemed to supersede the provisions of State law, City Charter, ordinances, resolutions and rules which establish and regulate the merit and civil service system, or which provide for other methods of administering employer-employee relations.” *Id.*

Pursuant to the plain language of Council Policy 300-06, an impasse meeting is mandatory, followed by an impasse hearing before the Council if resolution is not reached at the impasse meeting. Further, the City Council bears the responsibility of conducting the hearing to determine whether any part of the dispute can be resolved. The City’s policy specifically states if no agreement is reached at an impasse meeting, impasses shall then be resolved by a determination by the City Council after a hearing on the merits of the dispute.

It is the City Attorney’s legal conclusion set forth herein that Council Policy 300-06 is consistent with the powers of the City Council, set forth in Article III of the Charter, specifically the power of the City Council to establish, by ordinance, salaries for all City employees (Charter §11.1) and the power of the Council to enter into memoranda of understanding with recognized City employee organizations concerning wages, hours, and other terms and conditions of employment (Charter §11.2 and Cal. Gov’t Code 3505.1). Council Policy 300-06 is also consistent with the strong mayor provisions of Article XV and the MMBA, which mandates that an impasse procedure adopted by a governing body be followed. Cal. Gov’t Code §3505.

The question of who has the authority to determine the City’s last, best, and final offer is a matter of local, municipal concern. Previous memoranda of this Office have stated that the determination of the City’s last, best, and final offer rests solely with the Mayor. However, based on the plain language of the Charter, it is the Council that bears ultimate authority to set employee salaries and approve contracts with employee organizations that set forth the terms and conditions of employment. It is within the Mayor’s authority to make recommendations to the Council concerning labor relations matters; however, it is ultimately the legislative authority of the Council to set and approve policies, subject to the veto power of the Mayor and the ability to override that veto by the Council.

When the matter at impasse before the Council relates to wages and benefits or a matter in a proposed memorandum of understanding, the determination of the City's last, best, and final offer rests with the Council, and should be based upon recommendations made by the Mayor. In establishing the salaries, benefits, and other compensation for City employees, through approval of a memorandum of understanding or the salary ordinance, the Council is mandated to consider "all relevant evidence including but limited to the needs of the citizens of the City of San Diego for municipal services, the ability of the citizens to pay for those services, local economic conditions and other relevant factors as the Council deems appropriate." Charter §11.1. As to employment matters for which the Civil Service Commission is mandated by Charter to provide recommendation to the Council, the Council may consider that advice in establishing provisions for the government, supervision, and control of the classified employees. Charter §118. As a practical matter, decisions of the City, as an employer, that involve, impact, or affect a mandatory subject of bargaining, defined as wages, hours, and other terms and conditions of employment, for represented employees will ultimately rest with the Council because these decisions will involve approval of the City's budget, approval of a memorandum of understanding with a recognized employee organization, or approval of Civil Service rules.

#### **IV. State Law Requirements for Resolution of Labor-Management Disputes through the Collective Bargaining Process**

The roles of the Mayor and the City Council in following the existing impasse procedures must be performed within the parameters of California's state law requirements for resolution of labor-management disputes in the collective bargaining process between public agencies and their employees.

The MMBA includes explicit requirements for impasse. First, the negotiating parties must allow adequate time for resolution of impasse where procedures are in place. Cal. Gov't Code §3505. Second, a public agency may not unilaterally implement its last, best, and final offer without exhausting impasse procedures. Cal. Gov't Code §3505.4. Third, the MMBA refers to the last, best, and final offer for purposes of unilateral implementation of being the offer by the public agency as employer:

If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

Cal. Gov't Code §3505.4.

In addition to these explicit impasse requirements, any impasse procedures adopted by local agencies must be reasonable and comport with the requirements and overall purpose of the MMBA as interpreted by PERB and the courts, including reference to and application of federal labor relations law when applicable. *Fire Fighters Union, Local 1186, Int'l Ass'n of Fire Fighters, AFL-CIO v. City of Vallejo*, 12 Cal. 3d 608, 615-616 (1974).

The MMBA allows for the City, as a public employer, to make unilateral changes to wages, hours, or working conditions of its employees following exhaustion of impasse procedures so long as those changes are consistent with proposals offered to and negotiated with the exclusive representative of the employees at the bargaining table. *Modesto City Schools v. Modesto Teachers Association*, Case No. S-CO-48, PERB Decision No. 291, March 8, 1983.

The core principle of the decisional law related to the MMBA is the duty to bargain in good faith. An employer fails to bargain in good faith by changing matters within the scope of representation without first giving the exclusive representative notice and opportunity to bargain to impasse. Included within the duty to give notice and opportunity is the duty to provide the exclusive representative with notice of any proposed change to the employer's proposed package. *Public Employment Relations Bd., v. Modesto City Sch. Dist.*, 136 Cal. App. 3d 881, 900 (1982) (following *NLRB v. Katz*, 369 U.S. 736, 745 (1962)). This opportunity to negotiate allows employee organizations the ability to consider proposed changes to terms and conditions of employment as a package, rather than piecemeal. "An employer cannot change matters within the scope of representation without first providing the exclusive representative notice and opportunity to negotiate." *Modesto City Sch. Dist.*, 136 Cal. App. 3d at 900. This opportunity to negotiate allows employee organizations the ability to consider proposed changes to terms and conditions of employment together, rather than piecemeal.

An employer cannot change matters within the scope of representation without first providing the exclusive representative notice and opportunity to negotiate. Unilateral change in these areas prior to impasse is seen as a violation of the duty to negotiate in good faith because it is tantamount to a refusal to bargain. However, once impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected. The employer need not implement changes absolutely identical with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the pre-impasse proposals. While the employer has no license to grant a wage increase greater than any offered the union at the bargaining table, the employer may institute a wage increase identical to a proposal rejected by the union as too low.

*Id.* at 900-901.

In addition to the basic principle of good faith bargaining, the series of decisions involving the *Modesto City School District*, cited herein, establish four other key requirements of collective bargaining that the City must follow in implementing Council Policy 300-06:

1. Revival Of Duty To Bargain When Impasse Broken By Concessions

Although there is no duty to bargain during impasse, an impasse can be broken, and the duty to bargain can be revived by changed circumstances, particularly when one party makes or offers to make concessions that once again make bargaining potentially fruitful. The California Court of Appeal, in the *Modesto City School District*, explained:

[I]t is well settled in the private sector that a legal impasse can be terminated by nearly any change in bargaining-related circumstances. “An impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. In such a case, the parties are obligated to resume negotiations and the employer is no longer free to implement changes in the working conditions without bargaining.”

136 Cal. App. 3d at 899. Similarly, in *Modesto City Schools*, PERB Dec. No. 291, at 35 (1983), PERB looked to the National Labor Relations Act, and concluded,

[I]mpasse suspends the bargaining obligation only until “changed circumstances” indicate an agreement may be possible. “Changed circumstances” are those movements or conditions which have a significant impact on the bargaining equation. Among the circumstances which will restore the obligations to negotiate is a concession or series of concessions by one of the parties. These concessions “need only indicate that further face-to-face bargaining might be fruitful.”

Stated alternatively, “a legal impasse can be terminated by nearly any change in bargaining-related circumstances.” *Modesto City Sch. Dist.*, 136 Cal. App. 3d at 899. “[A]n impasse will be broken when one party announces a retreat from some of its negotiating demands.” *Id.* The duty to bargain is revived when impasse is broken.

In the *Modesto City School District* case, PERB applied the meet and confer statute for school district impasse procedures that includes mediation and non-binding fact finding. PERB explained that if the fact finders’ report provides a “basis for settlement or movements towards settlement,” the impasse is broken and the parties are obligated to resume negotiations until they reach agreement or again reach impasse. PERB Dec. No. 291, at 40. Similarly, under Council Policy 300-06, the Council has the authority to break the impasse by approving an alternative proposal for the bargaining table.

2. Duty To Participate In Good Faith In Impasse Proceedings

A concession sufficient to break an impasse is one that marks a retreat from some negotiating demands or makes a significant shift in negotiating posture. By PERB regulation, it is an unfair practice not to exercise good faith while participating in an impasse proceeding. Cal. Code Regs., Title 8, §32603(e). In the *Modesto City School District* case, PERB concluded that negotiating parties are required to participate in good faith in impasse procedures, and that in the school district context, “the statutory impasse procedures are exhausted only when the factfinder’s report has been considered in good faith, and then only if it fails to change the

circumstances and provides no basis for settlement or movement that could lead to settlement.” PERB, Dec. No. 291, at 33. Only after the impasse procedures are exhausted may the employer refuse to negotiate further, and unilaterally implement its last, best, and final offer.

### 3. Duty To Negotiate After Impasse Does Not Continue Indefinitely

There is an end point to impasse procedures. If the parties reach impasse, and impasse is broken, but the parties again become deadlocked in the resumed negotiations process, the parties are not required to repeat the impasse procedures. In other words, public employers need not get stuck in an infinite impasse loop. PERB has clarified that the duty to bargain after an impasse is broken only continues until agreement is reached, or until the parties reach a second impasse. If there are changed circumstances and bargaining is subsequently resumed but again deadlocks, PERB cannot recertify impasse or reimpose the already exhausted impasse procedures. *Id.*, at 40-42.

Under this law, it is important that the City implement its impasse procedures in a way that allows the parties to clearly exhaust the procedures. Under Council Policy 300-06, the procedure will be exhausted only when the Council “resolves” the impasse by making a “determination” after the hearing. If negotiations were to resume after that point, and another deadlock occurred, the City would not be required to start the impasse procedure anew. The City could implement its last, best, and final offer through legislative action after receiving a report of the outcome of the revived negotiations.

### 4. Unilateral Implementation After Impasse Must Be Last, Best And Final Offer

Unilateral implementation of a public agency’s last, best, and final offer is permitted under the MMBA by the provisions of Government Code section 3505.4. Unilateral implementation must be preceded by exhaustion of impasse procedures.

Unilateral change in [wages, hours, and working conditions] prior to impasse is seen as a violation of the duty to negotiate in good faith because it is tantamount to a refusal to bargain. However, once impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected. The employer need not implement changes *absolutely identical* with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the pre-impasse proposals. While the employer has no license to grant a wage increase *greater* than any offered the union at the bargaining table, the employer may institute a wage increase identical with one which the union has rejected as too low.

*Id.* (citations omitted, emphasis added). Consistent with Government Code section 3505.4, any unilateral implementation by an employer after impasse procedures are exhausted must be “reasonably comprehended within previous offers made and negotiated between the parties” at the bargaining table. *Modesto City Sch. District*, PERB Dec. No. 291, at 35. If no agreement is reached and the last, best, and final offer is not unilaterally imposed, the “status quo” must be maintained, which is defined as the “last uncontested status which preceded the pending

controversy.” *Modesto City Sch. Dist.*, 136 Cal. App. 3d at 902. PERB has described the limitations of unilateral implementation as follows:

This freedom, which the employer has after, but not before, impasse, springs from the fact that, having bargained in good faith, it has satisfied its statutory duty (citation omitted). However, the freedom to unilaterally implement policies pertains only to those issues which the District has actually had on the table and has previously bargained in good faith.

Thus, matters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the table. Without offering proposals or bargaining at the table, an employer provides no notice that it is contemplating changes or positions less than the status quo. Implementation of such unilateral changes, therefore, constitutes a refusal to negotiate and circumvents the bargaining process, as much as does a first refusal to negotiate..

*Modesto City Schools v. Modesto Teachers Association*, Case No. S-CO-48, PERB Decision No. 291 (March 8, 1983)(citations and quotation omitted). “While the employer has no license to grant a wage increase greater than any offered the union at the bargaining table, the employer may institute a wage increase identical with one which the union has rejected as too low.” *Modesto City Sch. Dist.*, 136 Cal. App. 3d at 900-901.

## **V. Application of the Charter and State Law to Council Policy 300-06**

Under the City Charter, the City Council and Mayor both perform roles in labor negotiations. To enter into a memorandum of understanding with the City, represented employee organizations must receive approval of both the Mayor and the City Council. If the Mayor vetoes a resolution to determine a labor dispute or approve a labor agreement, the City Council has the final ability to authorize the action through reconsideration and an override of the mayoral veto.

Under the strong mayor form of governance, the City’s position at the bargaining table should be established by the Mayor, with approval by the City Council, because the Council has ultimate authority to set salaries and to approve a memorandum of understanding between the City and the labor organizations that represent designated employees. The Mayor serves as the City’s chief executive officer and has the authority to give controlling direction to the administrative service of the City and to make recommendations to the Council concerning the affairs of the City. The Council has ultimate authority to approve the salary ordinance and a memorandum of understanding.

The Mayor retains the authority to veto actions of the City Council regarding resolution of an impasse, approval of a memorandum of understanding, and introduction of the salary ordinance. The Mayor’s veto may be overridden by the City Council. Both the Council and the Mayor have a duty to comply with state law principles of good faith bargaining in exercising these powers.

Pursuant to Council Policy 300-06, if one party – either the City’s negotiating team or the represented employees’ bargaining team – believes the negotiations have reached an impasse, that party must declare impasse and provide written notice of the impasse to the City Council. The Mayor must then schedule an impasse meeting between the parties. The purpose of this meeting is the final attempt of the parties to discuss contested issues and determine whether agreement can be reached on the contested issues. If resolution is not reached, an impasse hearing must be held and conducted by the Council as follows:

1. Pursuant to Charter Section 265, the Mayor presents to the Council the Mayor’s position regarding the City’s “last, best, and final offer.”
2. The recognized City employee organization presents its position to the Council. If the employee organization offers new proposals or concessions at the hearing on impasse, those proposals or concessions would result in a lifting of the impasse, requiring a return to the bargaining table.
3. If there is no movement articulated by the employee organization at the impasse hearing, pursuant to Council Policy 300-06 and Government Code section 3505.4, the Council has the authority to resolve the impasse by imposing the City’s last, best, and final offer presented at the bargaining table.

The Council also has the authority to resolve the impasse by proposing alternative recommendations to present to the employee organization. In making alternative proposals regarding wages, benefits, or other compensation, the Council is mandated by Charter section 11.1 to consider all relevant evidence including but not limited to the needs of the citizens of San Diego for municipal services, the ability of the citizens to pay for those services, local economic conditions and other relevant factors as the Council deems appropriate.

The Council cannot unilaterally impose an alternative proposal upon the employee organization if the proposal was not “reasonably comprehended within” the City’s last, best, and final offer. The Council’s approval of an alternative proposal would break the impasse and revive the duty to meet and confer. The Council should memorialize its determination in a resolution. *See* Charter §270(c) (“All substantive actions of the Council shall be passed by adoption of an ordinance or resolution.”). The resolution would be subject to the Mayor’s veto, and the Council’s override. However, the Mayor and the Council must use caution in exercising the veto and override so as to not abrogate the duty to bargain under the MMBA. If there is a legitimate ability to resolve the dispute through the Council’s alternative proposal, the City has a duty to return to the bargaining table, because the duty to bargain in good faith would be revived. The Council’s alternative proposal has the effect of changing the City’s last, best, and final offer.

4. Following a discussion at the bargaining table, the Mayor, under the provision of Charter section 32.1, should return to the Council with information on the

outcome of the revived negotiations. If the negotiations resulted in agreement between the parties, the agreement must be presented to the Council for final determination. If the revived negotiations once again result in a deadlock, the parties would return to the Council, where the Council has the ability to impose the City's last, best, and final offer, provided it is within the initial direction made known to the parties at the Council impasse resolution hearing or at the subsequent meet and confer session.

In resolving impasses on disputes dealing with salaries, benefits, or other compensation, the Council must be mindful of the Charter-mandated deadline of April 15 of each year for introduction by the Council of the salary ordinance, which fixes the salaries of all officers and employees of the City for the following fiscal year. The salary ordinance is proposed by the Mayor for Council introduction in a form consistent with any existing memoranda of understanding with the City's recognized employee organizations, or otherwise in conformance with procedures governed by the MMBA or any other legal requirements governing labor relations that are binding on the City. Charter §285. However, the Charter-mandated deadlines do not supercede the state law duties to meet and confer in good faith, and exhaust all impasse procedures prior to unilateral implementation of terms and conditions of employment. *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753*, 71 Cal. App. 4th 82, 100 (1999), *rev. denied* (July 21, 1999) (stating the duty to bargain in good faith established by the MMBA is a matter of statewide concern and of overriding legislative policy, and nothing that is or is not in a city's charter can supersede that duty).

Any agreement reached between the parties and approved by the Council or the Council's unilateral implementation action is subject to the Mayor's veto and Council's override. Any increase to salaries is subject to the Mayor's special veto set forth in the salary ordinance. Any change to salaries through the adoption of the salary ordinance must be contemplated within the City's last, best, and final offer presented at the negotiating table.

### **CONCLUSION**

For the reasons stated in this Memorandum, it is the opinion of the City Attorney that Council Policy 300-06 must be harmonized with the Charter provisions regarding the strong mayor trial form of governance and the MMBA.

The MMBA requires the City to comply with its local rules and to exhaust its impasse procedures before unilaterally adopting any matters within the scope of bargaining. PERB has initial jurisdiction over the application of local rules. Council Policy 300-06 is a negotiated local rule that requires the Council to "resolve" impasses by "determination." The Council's ability to act in making this determination is circumscribed by the other requirements of the MMBA regarding its duty to negotiate in good faith and to participate in the impasse proceedings in good faith. Any change to the existing impasse procedures would require meet and confer with the recognized employee organizations.

The City Council and Mayor both perform roles in labor negotiations. Under the strong mayor trial form of governance, the City's position at the bargaining table should be established

by the Mayor, with approval by the City Council, because the Council has ultimate authority to set salaries and to approve memoranda of understanding between the City and the labor organizations that represent designated employees. The Mayor serves as the City's chief executive officer and has the authority to give controlling direction to the administrative service of the City and to make recommendations to the Council concerning the affairs of the City. The Council has ultimate authority to approve the salary ordinance and a memorandum of understanding.

The Mayor retains the authority to veto actions of the City Council regarding resolution of an impasse, and approval of a memorandum of understanding. This veto power requires the Council to reconsider its legislative decisions. The Council may override the veto by the same number of votes needed for the initial legislative action. The Mayor also has a special veto of the salary ordinance, which must be used after introduction of the salary ordinance and prior to the ordinance's final adoption. The Mayor's veto power and the Council's legislative actions must be exercised in compliance with the state law duties and principles of good faith bargaining.

The City's "last, best, and final offer" should be recommended to the City Council by the Mayor, in his role as the chief executive officer of the City (Charter, Art. XV, §265(b)(1)), the person responsible for promulgating and issuing administrative regulations that give controlling direction to the administrative services of the City (Charter, Art. XV, §265(b)(2)), and making recommendations to the City Council concerning the affairs of the City (Charter, Art. XV, §265(b)(3)); however, the City Council has the authority to amend the offer and return the parties to the bargaining table, if the Council believes that there is the ability to break the impasse. If the Council exercises this authority, the Council changes the City's last, best, and final offer and revives the bargaining process. The bargaining process will be completed when agreement between the parties is approved by the Mayor and the Council, through the legislative decision and veto process, or when the City unilaterally implements its last, best, and final offer in compliance with the requirements of the MMBA.

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