

ORDINANCE NUMBER O-18930 (NEW SERIES)

ADOPTED ON MARCH 19, 2001

AN ORDINANCE AMENDING CHAPTER II, ARTICLE 4, DIVISIONS 1 AND 10, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 24.0103 AND 24.1010; BY ADDING DIVISION 16 TITLED "PRESERVATION OF BENEFIT PLAN" BY ADDING SECTIONS 24.1601, 24.1602, 24.1603, 24.1604, 24.1605, 24.1606, 24.1607 AND 24.1608, ALL RELATING TO THE SAN DIEGO CITY EMPLOYEES' RETIREMENT SYSTEM.

WHEREAS, the San Diego City Employees' Retirement System ("Retirement system") is a tax qualified retirement plan that must meet the requirements of Section 415 of the Internal Revenue Code ("Code"); and

WHEREAS, in certain cases, Section 415 of the Code prevents the Retirement System from paying fully earned benefits to Retirement System members; and

WHEREAS, the Small Business Job Protection Act of 1996 permits the City of San Diego to adopt a "qualified governmental excess benefit arrangement" solely for the purpose of providing Retirement System members the full amount of benefits that would otherwise be paid by the Retirement System but for the limits of Section 415; and

WHEREAS, the Board of Administration for the Retirement System ("Board") has requested the Council of the City of San Diego to adopt a separate plan that meets the provisions of the Code and thereby preserve benefits which cannot be paid from the Retirement System due to the limitations of Section 415 of the Code; and

WHEREAS, the Board directed its General Counsel to draft a separate plan for this purpose; and

WHEREAS, the Preservation of Benefits Plan drafted by the Board's General Counsel has been reviewed by the Board's Tax consultant, the Auditor and the City Attorney; and

WHEREAS, it is now necessary and proper to amend the San Diego Municipal Code to add Division 16, Sections 24.1601 - 24.1608 to adopt and set forth the terms, conditions and benefits for the Preservation of Benefit Plan as well as amend other sections in other divisions to add a definition for the Internal Revenue Code and to provide further for a fiscal limitation year for Internal Revenue Code Section 415 testing purposes; and

WHEREAS, the Board has reviewed and approved the ordinance setting forth the Preservation of Benefit Plan and related amendments and recommends its approval by the City Council; and

WHEREAS, a vote of the Retirement System's membership is not required by Charter section 143.1, NOW, THEREFORE,

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That Chapter II, Article 4, Division 1, of the San Diego Municipal Code be and the same is hereby amended by adding the following definition, in the correct alphabetical order, to Section 24.0103 to read as follows:

SEC. 24.0103 Definitions

Unless otherwise stated, for purposes of this Article:

[No change in text of other definitions].

“Code” unless otherwise indicated means the Internal Revenue Code of 1986, as amended.

Section 2. That Chapter II, Article 4, of the San Diego Municipal Code be and the same is hereby amended by amending Section 24.1010 to read as follows:

SEC. 24.1010 Compliance with Certain Internal Revenue Code Provisions

(a) No Change.

(b)(1)-(5) No Change.

(b)(6) All references to Section 415 of the Internal Revenue Code are to the language in Section 415 in effect when this Municipal Code is adopted including any amendments thereafter. For purposes of Section 415 testing, the limitation year shall be based on a fiscal year beginning on July 1 and ending on June 30.

(b)(7) No Change in text.

Section 3. That Chapter II, Article 4, of the San Diego Municipal Code be and the same is hereby amended by adding Division 16, Titled “Preservation of Benefit Plan” and by adding Sections 24.1601, 24.1602, 24.1603, 24.1604, 24.1605, 24.1606, 24.1607 and 24.1608, to read as follows:

DIVISION 16

PRESERVATION OF BENEFIT PLAN

SEC. 24.1601 Creation

(a) A “Preservation of Benefit Plan” (“Plan”), separate and apart from any other plan administered by the Retirement Board, is established and adopted to preserve the benefits otherwise earned by Members of the Retirement System to the extent their benefits are reduced by the limitations on benefits imposed by Section 415 of the Internal Revenue Code (“Code”).

(b) This Plan is intended to be a “qualified governmental excess benefit arrangement” within the meaning of Section 415(m) of the Code. It shall be deemed a

portion of the Retirement System solely to the extent required under, and within the meaning of, Section 415(m)(3) of the Code and Article IX of the San Diego City Charter.

(c) In accordance with section 415(m) of the Code, this Plan is established solely for the purpose of providing to participants and their beneficiaries that part of their annual benefit otherwise payable under the Retirement System that exceeds the limitations on benefits imposed by section 415 of the Code.

(d) This Plan is an “exempt governmental deferred compensation plan” described in section 3121(v)(3) of the Code. Sections 83, 402(b), 457(a) and 457(f)(1) of the Code shall not apply to this Plan. With respect to Code section 457(a), the maximum amount that may be deferred under this Plan on behalf of any Participant for the taxable year may exceed both the amount in Code section 457(b)(2) (as adjusted for cost of living increases) and the percent of the participant’s includable compensation in that Code section. The System will not hold any assets or income under this Plan in trust for the exclusive benefit of participants or their beneficiaries.

SEC. 24.1602 Eligibility

(a) Participation in this Plan is limited to those Members of the Retirement System whose benefits at the time of payment are reduced by Section 415 of the Code.

(b) Participation shall commence as of the first date on which benefits limited by section 415 of the Code are payable to the Member from the Retirement System.

(c) Participation in this Plan shall cease on the first date on which benefits payable from the Retirement System to the Member are no longer reduced by Section 415 of the Code.

(d) A Member's beneficiary shall receive benefits under this Plan on the first date on which the benefits payable to the beneficiary from the Retirement System are limited by section 415 of the Code. The benefits received under this Plan by a Member's Beneficiary shall cease on the first date on which the benefit is no longer reduced by Section 415 of the Code.

(e) No other Member or beneficiary of the Retirement System shall have any right to benefits under this Plan.

SEC. 24.1603 Benefit

(a) The benefit under this Plan shall be the difference between the benefit that would be payable to the Member under the Retirement System, if it were not reduced by Section 415 of the Code, and the benefit actually payable to the Member, as reduced by Section 415 of the Code.

(b) Appropriate adjustments in accordance with Section 415 of the Code and the regulations thereunder shall be made in determining the benefit both reduced and unreduced in regard to Section 415 of the Code, including but not limited to taking into account the form of the benefit payable.

(c) Any amount payable to a Member or beneficiary pursuant to this Plan shall be paid in the same form of benefit, at the same times and for the same period as benefits are paid to the Member or beneficiary under the Retirement System.

(d) The benefits for Deferred Option Retirement Plan ("DROP") participants are not impacted by the limits of Section 415 of the Code until the member terminates employment at the end of the member's DROP participation period. To the extent possible, and with respect to DROP benefits from set forth in Division 14 of the

San Diego Municipal Code, the Board shall arrange for any DROP benefits to be paid from the Retirement System and not from this Plan.

(e) The City and Unified Port District shall make appropriate arrangements to deduct from all amounts paid under this Plan any taxes required to be withheld with respect to this Plan by any government or governmental agency. To the extent any payroll taxes (including FICA taxes) are due on benefits paid under this Plan, the City and Unified Port District shall:

- (1) pay such taxes due, if any, from the employer;
- (2) collect such taxes due, if any, from the participant or beneficiary by withholding the taxes from payments otherwise due under this Plan; and
- (3) take all reasonable steps to reduce such taxes.

SEC. 24.1604 Exemption from Process; Assignments Prohibited

(a) The benefit under this Plan shall not be subject to execution, garnishment, attachment or any other process of any court with respect to a participant or beneficiary under this Plan except to the extent permitted by California Code of Civil Procedure Section 704.110.

(b) The benefit under this Plan shall not be subject to any anticipation, alienation, sale, assignment, pledge, encumbrance or charge by any person. Any attempt to anticipate, alienate, sell, assign, pledge, encumber or charge the benefit shall be void.

(c) The benefit under this Plan is not transferable by *inter vivos* gift or testamentary disposition.

SEC. 24.1605 Administration

(a) Administration of the Plan shall be under the exclusive management and control of the Board. In administering this Plan, the rights, duties and responsibilities of the Board shall be the same as for other plans administered by the Board under other divisions of the San Diego Municipal Code.

(b) With respect to the administration of this Plan, the Board shall act separately and apart from its duties with respect to any other plan administered by the Board. No costs or expenses of administering this Plan shall be paid directly or indirectly by the Retirement System. The costs of administering this Plan shall be the responsibility of the City and the Unified Port District, in proportion to the benefits being paid under this Plan to their former employees.

(c) The Board shall determine all issues relating to the rights of participants, beneficiaries and their legal representatives under the terms of the Plan, including eligibility, the amount and time of payment of the benefit (if any) and the calculation of the benefit under this Plan.

(d) The Board shall compile and maintain all records necessary or appropriate for the administration of this Plan, including but not limited to the making of requisite calculations under this Plan.

(e) The Board shall obtain such information from the City or Unified Port District with respect to Members of the Retirement System as shall be necessary and appropriate to determine the rights and benefits of participants and beneficiaries under this Plan.

(f) The Board shall furnish to the City and the Unified Port District, upon request, reports concerning the administration of this Plan.

(g) The Board shall determine any factual questions arising in connection with this Plan's operation or administration after such investigation or hearing as the Board deems necessary and appropriate.

SEC. 24.1606 Source of Benefits Funding and Contributions

(a) The Plan shall be unfunded within the meaning of the federal tax laws.

(b) No employee contributions or deferrals shall be made or allowed under the Plan.

(c) Benefits due under this Plan as determined by the Board, on the advice of its actuary, shall be paid for by the City and Unified Port District.

(d) City and Unified Port District contributions to the Retirement System for any fiscal year shall be reduced by an amount determined by the Board, on advice of its actuary, as necessary to meet the requirement for benefits under this Plan.

(e) The City and Unified Port District assets used to provide benefits under this Plan may not be commingled with the monies of any other Plan in the Retirement System or any other qualified plans, nor may this Plan ever receive any transfer of assets from the Trust Fund established for any other plan in the Retirement System.

(f) The City or Unified Port District shall retain title to the beneficial ownership of any assets, including cash or other investments, which the City or Unified Port District may earmark to pay any amount under the Plan. No one entitled to benefits under this Plan shall have any property interest whatsoever in any specific assets of the City or Unified Port District.

(g) The obligation of the City and Unified Port District to make payments pursuant to the Plan is contractual only. No one entitled to benefits hereunder shall have a preferred claim or lien on any assets of the City or Unified Port District.

SEC. 24.1607 Process for Determination of Plan Benefits and Contributions

(a) By February 1 of each year the Retirement Administrator shall identify those retirees and beneficiaries whose benefit exceeds the limits of Section 415 of the Code.

(b) The Retirement Administrator shall determine the amount of the benefit to be paid to these retirees or beneficiaries under this Plan in accordance with Section 24.1603.

(c) The Retirement Administrator shall notify the City and Unified Port District of those retirees and beneficiaries whose benefit exceeds the limits of Section 415 of the Code as well as the amounts due those retirees and beneficiaries under this Plan.

(d) The City and Unified Port District, respectively, shall fund an amount equivalent to the benefits that exceed the limits of Section 415 of the Code.

(e) The City and Unified Port District contributions to the Retirement System shall be reduced by an amount equal to the benefits identified by the Retirement Administrator which exceed the limits of Section 415 of the Code based upon the Board's approval of the contribution rates recommended by its actuary.

SEC. 24.1608 Amendment or Termination of Plan

(a) The Board shall have the right to amend this Plan at any time to preserve the tax qualified status of the Retirement System or comply with federal or state laws.

(b) The City shall have the right to amend the Plan to the extent it deems advisable or to terminate the Plan. No amendment or termination shall deprive any participant or beneficiary under this Plan of any benefits to which he or she is entitled to under the Plan as of the date of amendment or termination.

Section 4. The City Auditor and Comptroller is hereby authorized to create a Special Fund to receive and disburse funds in accordance with this ordinance. Any funds deemed to be excess will be transferred back to the contributing funds.

Section 5. A full reading of this ordinance is dispensed with prior to its final passage, a written or printed copy having been available to the City Council and the public a day prior to its final passage.

Section 6. This ordinance shall take effect and be in force on the thirtieth day from and after its passage.

APPROVED: CASEY GWINN, City Attorney

By _____
Theresa C. McAteer
Deputy City Attorney

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