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# San Diego City Attorney **MICHAEL J. AGUIRRE**

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## **NEWS RELEASE**

**FOR IMMEDIATE RELEASE: February 28, 2008**

**Contact: Communications Division (619) 235-5725**

**CITY COUNCIL APPROVES RELEASE OF 2005  
CLOSED SESSION TRANSCRIPT PURSUANT TO  
PUBLIC RECORDS ACT REQUEST BY NEWS MEDIA**  
*Transcript Shows City Council Concurred in Pension  
Declaratory Relief Action*

**San Diego, CA**—In response to news media requests under the California Public Records Act, the San Diego City Council on Tuesday unanimously voted to release today the transcript of a 2005 closed-session meeting, which involved the direction given to the City Attorney in filing a counter-lawsuit against the San Diego City Employees' Retirement System (SDCERS).

“The transcript shows the City Council concurred with the City Attorney in moving forward with the declaratory relief action to test the legality of the benefits,” remarked Executive Assistant City Attorney Don McGrath.

In filing the case in Superior Court on September 30, 2005, the City Attorney alleged that he “is the duly elected San Diego City Attorney, authorized by the City Council to represent the City of San Diego in this action by ratifying vote taken on August 2, 2005.”

However, on January 12, 2006, Superior Court Judge Jeffrey B. Barton determined that the City was the “real party in interest.” The Complaint was amended to conform to the Judge’s ruling and the case proceeded to trial.

The transcript also shows that some Council members were concerned that the suit not be brought in their names or the name of the City Council. Their wishes were respected and the Council was not added as parties.

The City Attorney maintains that the City Attorney’s Office has independent authority to bring cases where there are alleged violations of law and City ordinances.

The following are pertinent excerpts from the transcript and Court record:

**City Attorney Authority to Bring Cross-Complaint  
Against San Diego City Employees' Retirement System  
Key Points**

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**August 2, 2005 Transcript of City Council Closed Session**

1. Councilmember Scott Peters: “I can support the declaratory relief parts but I can’t support the rest of it at this point.” [2 August 2005 Closed Session Transcript 13:23-25]
2. Councilmember Scott Peters: “And I think we should plead that it’s the City Attorney that takes that position, not the City Council.” [2 August 2005 Closed Session Transcript 14:11-12]
3. Executive Assistant City Attorney Don McGrath: “I could go along with that, if it’s legal to let Mike Aguirre, City Attorney of San Diego – you know, and then we do a resolution authorizing him to bring that action. He would be that party in the cross-complaint. Then we would merge the SDCERS case.” [2 August 2005 Closed Session Transcript 16:4-9]
4. Councilmember Scott Peters: “I’m willing to authorize the City Attorney to state that he believes it and to prosecute the action on that basis, which would result in – it would have the same result.” [2 August 2005 Closed Session Transcript 15:3-]
5. Councilmember Scott Peters: “I think that those people who want the issue litigated have been helped a lot by the fact that CERS has filed this complaint because now it’s joined. I think it takes away a lot of issues. I just don’t want us to be pleading that the City Council believes that these benefits are illegal, because I think then that could expose the City to a problem we don’t need now, especially since they filled (sic) this action.” [2 August 2005 Closed Session Transcript 17:4-12]
6. Councilmember Scott Peters: “Well, I just -- my own personal view -- and I’m interested in hearing everyone else’s -- is I’m not interested in spending City money on the fraud and intentional concealment and all that stuff. I just don’t think that that’s important to us. I think what we need is a resolution of whether the benefits are legal. And I just not interested in the rest of it.” [2 August 2005 Closed Session Transcript 19:3-10]
7. Councilmember Scott Peters: “Yeah. See, for me, I don’t know how much money we can recover from Ron Saathoff. He’s going to protect his house. He’s probably got a car. It’s not worth it for me to do that. To the extent that Mr. McGrath wants declaratory relief or wants to use those as a way to invalidate the benefits, I think that that can be done through declaratory relief.” [2 August 2005 Closed Session Transcript 21: 5-12]
8. Councilmember Scott Peters: “Just so you understand. The breach of trust, for instance, the fifth cause of action against Grissom, Chapin, Saathoff, and Lexin, and so forth, seems to be pled -- this is paragraph 80 -- As a direct and proximate result of the actions, the City suffered substantial loss of injury in the amount according to prove at trial. So that’s just my concern is that it looks like these are all pled as a way to validate the benefit, and it would just be cleaner to rely on the general allegations of invalidity rather than go into personal assets.”

Executive Assistant City Attorney Don McGrath: “It could be done.”

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Councilmember Scott Peters: "Okay. So with those clarifications that's acceptable." [2 August 2005 Closed Session Transcript 24:2-16]

9. Councilmember Scott Peters: "All right. I just want to say, to follow on Mr. Young, and I hate to take too much time, but it's a pretty significant thing we're doing here. I don't want-the reason I said I wanted it to be in the name of the City Attorney is that I don't want my name on anything that says that I think these benefits are illegal. I don't think they're illegal. So I just -- I just don't want to be pleading that I think I voted on something illegal. I don't think it was illegal." [2 August 2005 Closed Session Transcript 35:17-25; 36:1-2]
10. Councilmember Scott Peters: "And so I think it's a challenge, but let me just say that I think its also-it's a very real thing that people are out there in the public, you know, giving tremendous credence to this Third Interim Report. We've got to know the answer. So I think it was a blessing that the Retirement Board sued the City, and said they wanted declaratory relief. So let's find the answer. But let me say were I differ a little bit is I want the answer. I don't want to do -- I don't want to do a year litigation and spend half a million dollars, which could be a million dollars doing a bunch of depositions just to delay the answer. My goal would be that we actual (sic) try to get to the court pretty soon, and get a ruling because I want the answer." [2 August 2005 Closed Session Transcript 36:11-25; 37:1]
11. Executive Assistant City Attorney Don McGrath: "Yes, to be safe I'd like a resolution from the Council which authorizes the City Attorney to do it."

Councilmember Scott Peters: "Okay." [2 August 2005 Closed Session Transcript 39:7-10]

### **August 9, 2005 City Council Open Session**

12. At the 9 August 2005 City Council meeting, acting in accordance with California Government Code section 54957.7(b), former Assistant City Attorney Leslie J. Girard reported that "Last week in closed session by a unanimous vote, the City Council authorized the City Attorney to pursue a modified cross-complaint in the action of SDCERS versus the City of San Diego and City Attorney Michael Aguirre." [9 August 2005 City Council Meeting]

### **September 30, 2005 Third Amended Cross-Complaint**

13. The San Diego City Attorney's Office filed the Third Amended Cross-Complaint in the name of MICHAEL J. AGUIRRE, City Attorney, as the duly authorized representative for the City of San Diego. The cross-complaint stated: "Cross-Complainant MICHAEL J. AGUIRRE ("Aguirre") is the duly elected San Diego City Attorney, authorized by the City Council to represent the City of San Diego in this action by ratifying vote taken on August 2, 2005. Aguirre's actions at all times herein are governed by Section 40 of the San Diego City Charter ("Charter"), and were taken in response to the crisis that ensued as a result of fraudulent, negligent and illegal acts of the SDCERS  
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Board.” [30 September 2005 Third Amended Cross-Complaint, 3:6-10]

**January 12, 2006 Judge Barton Tentative Ruling, p. 2**

14. In a 12 January 2006 San Diego Superior Court tentative ruling, Judge Jeffrey Barton ruled that the Cross-Complaint could not be sought in the name of the City Attorney. The ruling stated: “The City is the real party in interest, and although Aguirre alleges that he is bringing the suit on behalf of the City, the City is the real party in interest. Every case must be prosecuted in the name of the real party in interest, except as otherwise provided by statute. (Code Civ. Proc., § 367) The names of all parties must be set forth in the caption of the complaint. (4 *Witkin*, Cal. Proc. (4<sup>th</sup> Ed. 1997.) . . . For the purposes of this ruling, the City is considering the real party in interest, notwithstanding the procedural defect.”

**Fourth Amended Cross-Complaint**

15. Thereafter the City Attorney filed the Fourth Amended Cross-Complaint to bring the complaint into compliance with the 12 January 2006 order by Judge Jeffrey Barton. The Fourth Amended Cross-Complaint stated: “Cross-Complainant CITY OF SAN DIEGO (“City”) . . . Cross-Complaint City is a municipal corporation with all municipal powers, functions, rights, privileges and immunities authorized by the Constitution and laws of the State of California.” [Fourth Amended Cross-Complaint]

**May 2, 2006 Reporter’s Transcript**

16. At a 2 May 2006 ex parte motion Michael Aguirre informed the court that “the transcript from the August 2005 open meeting of the City Council, in which it was clearly stated that unanimously, the Council authorized the City Attorney – Not that I’m saying we needed that authorization, but the Council did authorize it.” [2 May 2006 Reporter’s Transcript, 4:4-8.] Moments later, Mr. Aguirre stated to the court that “[The City Council] authorized the City Attorney to bring the cross-complaint.” [2 May 2006 Reporter’s Transcript, 9:20-21]

**June 12, 2006 Declaration of Council President Scott Peters Filed by the City of San Diego**

17. As President of the Council, I have a strong interest in putting the pension funding crisis behind the City through a prompt judicial determination of the City’s rights and duties with respect to the San Diego City Employees’ Retirement System. Such a determination will assist the City in quantifying its obligations and providing adequate funding for the pension system, and to substantially decrease the amount of legal fees that are being expended on this matter. [12 June 2006 Declaration of Council President Scott Peters filed by the City of San Diego, para. 2]

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**June 23, 2006 Judge Barton Ruling on SDCERS Motion to Dismiss**

18. On 23 June 2006 Judge Jeffrey Barton issued a tentative ruling denying SDCERS motion to dismiss. The ruling stated that former Assistant City Attorney Les Girard's public announcement of the results of the 2 August 2005 closed session "complies with the procedure set forth in Government Code section 54957.1"
19. [T]he City Council has taken no public action to indicate there was no authority given the City Attorney to prosecute this cross-complaint, which has been discussed in numerous closed sessions for almost a year."
20. "The Court is concerned that there is a lack of City Council authority based upon the declaration of Council President Scott Peters. There is a clear desire the matter proceed on the part of Mayor Sanders. In essence, this motion consists of a party trying to remove its opponent's attorney. This has significant repercussions as such ruling would deny the City its lawyer on an action that has been pending a long time."
21. "Under these unusual and ambiguous circumstances the Court finds that SDCERS has failed to carry its burden of proof to dismiss. The evidence submitted shows Government Code § 54957.1 was complied with and the motion is therefore denied." [23 June 2006 Judge Barton Tentative Ruling, pp. 1-2]

To view the San Diego City Council's Closed Session Transcript of August 2, 2005, visit [www.sandiegocityattorney.org](http://www.sandiegocityattorney.org), click "Significant Reports and Legal Documents."

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