

I.

SUMMARY

Section 141 of the San Diego City Charter provides generally that no employee may receive a vested pension benefit unless they have 10 years of service and reached the age of 62:

No employee shall be retired before reaching the age of sixty-two years and before completing ten years of service for which payment has been made, except such employees may be given the option to retire at the age of fifty-five years after twenty years of service for which payment has been made with a proportionately reduced allowance.¹ [Emphasis added.]

The San Diego City Attorney's Office has concluded that the Legislative Officers' Retirement Plan [LORP] which was created by Ordinance No. 0-10479 (Jan. 12, 1971), was required to be submitted to a vote of the people of San Diego as an amendment to the City Charter rather than a Municipal Code enactment of the City Council. Because LORP permits council members, who are employees of the City, to receive vested benefits after only 4 years of service and to retire at 55, it directly violates City Charter section 141, which requires employees to work 10 years and reach the age of 62 before receiving a vested benefit.² Accordingly, there was no legal basis for the payment of pension benefits under LORP for elected employees who served fewer than 10 years or who retired before the age of 62.³

On 12 September 2000, the City Council adopted modifications to LORP that increased benefits for members who were in office on or after 12 September 2000, as follows: (1) change in the formula for calculating benefits to increase from "5% of the first \$500/month compensation plus 3% of any additional monthly compensation" to "3.5% of total monthly compensation"; and (2) a lowering of the age at which an elected member could draw retirement benefits from 60 to 55.⁴ These changes, like the LORP program itself, were apparently made in defiance of the City Charter mandate that requires employees to work for 10 years before receiving a vested pension benefit and to

¹ San Diego City Charter art. IX, §141.

² See City Att'y MOL No. 92-93 (Oct. 12, 1992) "Legislative Officers' Retirement Plan Vesting Requirements – San Diego Municipal Code Sections 24.0541, et seq.," which reached a conclusion opposite than the one set forth in this Report. City Att'y MOL 92-33 is hereby disapproved, and its conclusions are to have no further force or effect.

³ See Charter § 141 ("No employee shall be retired before reaching the age of sixty-two years of age and before completing ten years of continuous service.") (See footnote 1).

⁴ See City Manager's Report No. 01-258 (Nov. 20, 2001) "Modification of the Retirement Program for Former Elected Officers" [Manager's Report No. 01-258]; See also 6 November 2001, City Attorney memorandum to William Barber from Theresa C. McAteer re: "Retroactive Application of Changes to the Elected Officers Retirement Program; Query re: Mayor's Retirement Benefits Status."

reach the age of 62.⁵ Moreover, the Council provided no funding source to pay for the increased and retroactive benefits they granted themselves in direct violation of the expenditure control provisions of the City Charter.⁶

On 8 October 2001, the City Council made a further change to LORP by adopting Ordinance No. 0-18994 to include the City Attorney as a member of the retirement program.⁷ The program was renamed the Elected Officers Retirement Program [EORP].⁸ This change similarly defied the Charter's requirements by allowing the City Attorney to receive benefits after only four years of service and before age 62, and was made without a required vote of the people of San Diego. As stated, Charter section 141 requires city employees to work for 10 years before receiving a vested pension credit and to have reached the age of 62. Further, the California Constitution requires that any changes to the Charter be made through a vote of the people, and no vote occurred.⁹ Therefore, the October 2001 changes under Ordinance No. 0-18994 allowing the City Attorney to receive retirement benefits after 4 years and before reaching the age of 62 had no basis or justification under law. In addition, no funding source for these increased pension benefits was identified, in violation of the Charter's expenditure provisions.¹⁰

On 8 January 2002, the EORP was changed by the City Council's adoption of Ordinance No. 0-19022 to extend the retroactive benefit increases granted on 12 September 2000, to elected officers who were in office before 12 September 2000.¹¹ Thus, former elected officers who were in office before 12 September 2002, would be allowed to retire at 55 and would receive a retroactive increase in their accumulated benefits to 3.5% of total monthly compensation.¹² Again, under EORP these elected officers would be allowed to retire without 10 years of service. Moreover, the retroactive increase in pension benefits granted by the council on 8 January 2002 was, as the benefits above were, made without identifying a funding source.¹³

The City Attorney of San Diego has determined that there is no apparent Charter authority for allowing city employees who are elected to receive pension benefits before 10 years of service and before reaching age 62 through the LORP/EORP program. In

⁵ See Charter § 141 (*See* footnote 1).

⁶ See Charter art. V, § 39 (Auditor and Comptroller must certify source of funds); *See also* Charter art. VII, §99 (no debt may be incurred without a vote of the people).

⁷ See 8 October 2001, Minutes of the San Diego City Council, Item 50, pp. 11-12.

⁸ See Manager's Report No. 01-258 (*See* footnote 4). Note that the present City Attorney has declined to participate in the EORP.

⁹ See Cal. Const. art. XI, §3(a).

¹⁰ See Charter §39; Charter §99 (*See* fn 6).

¹¹ See Ordinance No. 0-19022 (Jan. 8, 2002); January 8, 2002, City Council Minutes for Item 51 pp. 9-10.

¹² See City Manager's Report No. 01-258 (Nov. 20, 2001) (with attachments) (*See* footnote 4).

¹³ Charter §39; Charter §99 (*See* footnote 6).

addition, there is no authority for the subsequent retroactive increases in benefits under that program, and those retroactive increases are therefore void.

II.

BACKGROUND

A. **DESPITE UNSUCCESSFUL EFFORTS TO WEAKEN THE VESTING REQUIREMENT THE CITY CHARTER UNEQUIVOCALLY REQUIRES A TEN-YEAR VESTING PERIOD IN ORDER TO RECEIVE A PENSION**

Article IX, section 141 of the San Diego Charter, adopted in 1931, requires that an employee work ten years before becoming eligible to receive a pension from the City.¹⁴ The vesting requirements were originally set forth as follows: “[I]n no retirement system, so established shall an employee be retired before he reaches the age of sixty-two and before ten years of *continuous* service.”¹⁵ Later, in 1994, the Charter was amended so that the required ten years did not have to be continuous, but ten actual years of work were still required.¹⁶ The current and final version of Charter § 141 now reads: “No employee shall be retired before reaching the age of sixty-two years and before completing ten years of service. . . .”

In 2002, City officials attempted to shorten the ten-year vesting requirement by amending the City Charter through a Charter change called Proposition C. Proposition C proposed to amend the ten year vesting requirement of Charter section 141 so that only five years of actual service would be required. The voters rejected Proposition C, and the Charter was not amended. Thus, the ten year vesting requirement, originally established in 1931, remained in place and is the governing law of the City.

A final attempt to evade the requirements of the Charter and weaken the ten-year vesting requirement was made in 2002, when the City Council amended the San Diego Municipal Code [SDMC] to allow for purchase of service credit, also known as “air time,” to count towards the vesting period. The Council attempted to do this by amending SDMC section 24.1312, so that the clear prohibition against using “air time” for vesting was removed.¹⁷ SDMC section 24.1312 now reads, in part: “Any Member may purchase a maximum of five years of Creditable Service, in addition to any other Creditable Service the member is eligible to purchase.” The language deleted from the SDMC was: “[I]n no event shall the years purchased pursuant to this provision qualify to satisfy the ten year vesting requirements set forth in Section 141 of the San Diego City Charter.” [Emphasis added.]¹⁸ As the City Attorney’s Office has discussed more fully in

¹⁴ See Charter §141 (See footnote 1).

¹⁵ Original Charter art. IX, § 141 (as adopted in 1931) (emphasis added).

¹⁶ See generally City Att’y MOL 2005-9 (April 27, 2005) “Rescission of Ordinance O-19126, Re: Five Year Vesting Requirement” (exhibits omitted).

¹⁷ Compare SDMC §24.1312 (current) with SDMC §24.1312 (prior to 2002).

¹⁸ SDMC §24.1312 (prior to 2002) (See footnote 17).

a recent memorandum of law¹⁹, this action was beyond the Council's power and should be rescinded. Despite the concerted efforts of city officials to thwart the will of the people as expressed in the Charter, the ten year vesting period remains.

B. LORP AND THE ADDITIONAL RETROACTIVE BENEFITS APPARENTLY VIOLATE THE CITY CHARTER AND ALL RETROACTIVE BENEFITS ARE VOID

LORP was established pursuant to Ordinance No. O-10479 N.S. (Jan. 12, 1971). This new plan set forth the vesting requirements:

[A] legislative officer who is a member of this system shall be retired and thereafter shall receive for life the service retirement allowance if the member a) is 60 or more years of age and has 4 or more years of creditable service at retirement, or b) has 20 or more years of creditable service at retirement or c) has 15 or more years of creditable service at an age less than 60 with the retirement allowance reduced by 2% for each year and fractional year under 60.²⁰

Note that the vesting requirements in parts "b" and "c" above, 20 years and 15 years, respectively, would not in themselves violate the Charter. It is the 4 year requirement in part "a" that, on its face, appears to offend the Charter's vesting rules.²¹

As originally enacted, San Diego Municipal Code § 24.0546 set forth LORP's benefit schedule as:

The service retirement allowance payable to eligible members shall be equal [to] 5% of his final compensation not in excess of \$500 per month for each year of creditable service and 3% of his final compensation in excess of \$500 per month for each year of creditable service.²²

By way of explanation, therefore, LORP's final yearly contribution rate would be a small amount over 3%, ranging from 3.17% for a legislative officer whose final salary was \$70,000 per year, to 3.12% for a legislative officer whose final salary was \$100,000 per year, assuming in this example that the officer in question served for ten years.²³

¹⁹ See City Att'y MOL 2005-9 (See footnote 16).

²⁰ Prior SDMC §24.0545 (Jan. 12, 1971).

²¹ In addition to relaxing the rules to allow four year vesting, in 1995 the City Council made a specific *three year* vesting requirement for officers elected in 1995 who had three-year terms. See prior SDMC §24.0545(b) (Oct. 30, 1995).

²² Prior SDMC §24.0546 (Jan. 12, 1971).

²³ To calculate these percentages: Assume a legislative officer serves 10 years and has a final salary of \$70,000. Under the original LORP plan, the first \$500 per month of salary would contribute a 5% benefit to the member's retirement. That would be ($\$500 * .05 * 10$ years) or \$250 per month. On a yearly accounting, that would be a \$3000 per year

On 12 September 2000, the City Council increased this yearly contribution rate, retroactively, to 3.5% for all elected officers under the program.²⁴ No funding source was identified for this retroactive increase. The new SDMC section granting this benefit, section 24.1706, reads as follows: “The service retirement allowance payable to eligible Members shall equal 3.5% of his or her final monthly compensation for each year of creditable service.”²⁵ As discussed above, the earlier benefit had been approximately 3.1%, depending upon the exact salary and length of service. In addition, in 2001, the City Attorney, who had not previously received benefits under this system, received a specifically-tailored benefit under Ordinance O-18994.²⁶ This benefit gave the same 3.5% per year benefit that had been granted to others on 12 September 2000. Furthermore, the amendments in 2000 included a new SDMC section 24.1705, which decreased the retirement age from 60 years to 55.²⁷ No funding source was identified for this easing of the Charter-mandated requirement.

The City Council did not stop at these retroactive increases in benefits, but saw fit, in 2002, to grant further retroactive increases to elected officers who had previously retired. Ordinance O-19022, passed on 8 January 2002, granted increases to prior officers according to the table set forth below, with the average increase totaling 15.7%²⁸:

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benefit for the first \$6000 of the member’s salary. The remaining \$64,000 of the member’s salary would contribute $(\$64,000 * .03 * 10 \text{ years})$ or \$19,200 per year. In total, the member’s yearly retirement would be $(\$19,200 + \$3000)$, or \$22,200. If one divides the yearly benefit by the final salary $(\$22,200 / \$70,000)$, equaling 0.317, and then divides by 10 years, the final blended retirement factor is obtained, which in this case is 3.17%. If the above calculation is repeated for a member whose final salary is \$100,000, the final blended retirement factor is $((\$3000 + (\$94,000 * .03 * 10 \text{ years})) / \$100,000)$ or $((\$3000 + \$28,200) / \$100,000)$ or 3.12% for ten years’ service.

²⁴ See Manager’s Report No. 01-258 (See footnote 4).

²⁵ See SDMC §24.1706.

²⁶ See Ordinance O-18994 (Oct. 8, 2001).

²⁷ See SDMC §24.1705 (showing new retirement age of 55).

²⁸ See Manager’s Report No. 01-258 (chart attachment to Report) (see footnote 4) (percentage calculations performed by the City Attorney’s Office).

Percentage Increase in Retired Member Benefits

RETIRED MEMBER	PRE-2000 ANNUAL BENEFIT	POST-2000 ANNUAL BENEFIT	ANNUAL DIFFERENCE	PERCENTAGE INCREASE
John T. Hartley	\$6,228.36	\$6,975.76	\$747.40	12.0%
Lucy L. Killea	\$4,398.72	\$4,926.57	\$527.85	12.0%
Robert T. Martinet	\$3,404.16	\$3,812.66	\$408.50	12.0%
Gloria D. McColl	\$12,319.92	\$13,798.31	\$1,478.39	12.0%
William J. Mitchell	\$5,365.20	\$6,009.02	\$643.82	12.0%
Floyd L. Morrow	\$7,575.84	\$8,484.94	\$909.10	12.0%
Maureen O'Connor	\$25,169.88	\$28,190.27	\$3,020.39	12.0%
Michael J. Schaefer	\$1,554.12	\$1,740.61	\$186.49	12.0%
Edward J. Struiksma	\$19,359.84	\$21,683.02	\$2,323.18	12.0%
Leon L. Williams	\$15,201.84	\$17,026.06	\$1,824.22	12.0%
Barbara G. Warden	\$15,673.56	\$17,554.39	\$1,880.83	12.0%
Judith H. McCarty	\$39,628.44	\$44,383.85	\$4,755.41	12.0%
Bob Filner	\$6,408.84	\$7,600.68	\$1,191.84	18.6%
Mike Gotch	\$9,982.20	\$14,829.24	\$4,847.04	48.6%
Bruce Henderson	\$6,247.80	\$7,401.96	\$1,154.16	18.5%
William Jones	\$5,776.08	\$6,684.12	\$908.04	15.7%
Wes Pratt	\$6,247.80	\$7,401.96	\$1,154.16	18.5%
Ron Roberts	\$11,247.60	\$13,345.20	\$2,097.60	18.6%
Average %				15.7%

As can be seen above, the average increase in retroactive benefits is approximately 15.7%. Such retroactive increases in benefits are unprecedented. Even during the “quid pro quo” of 1996 and 2002, with the attendant “side-deals” such as the increase in the retirement factor from 2.25% to 2.5% for general members, no retroactive increases were ever made for members who were *already retired*.

LORP itself, and the retroactive benefits granted in 2000, 2001, and 2002 (to the current legislative officers, the City Attorney, and the retired legislators, respectively), all apparently violated the City Charter as they reduced the time required for vesting per

Charter section 141, and were made without using the financial accounting procedures in the Charter (sections 39 and 99, also described below). Considering Charter section 141, all the benefits under LORP/EORP began with the decision despite the Charter's mandate, in 1971, to grant benefits to a class of city employees (elected officials) without holding them to the vesting requirements. Each modification and decision thereafter has perpetuated and extended this granting of benefits.

In addition to the above-mentioned ongoing apparent violation of Charter section 141, Charter sections 39 and 99 were also not followed by the City's failure to provide funding sources for the benefits granted during the years 2000 to 2002, and the failure to hold a vote to authorize these benefits. First, City Charter section 39 was not followed, which provides: "No contract, agreement, or other obligation for the expenditure of public funds shall be entered into by any officer of the City and no such contract shall be valid unless the Auditor and Comptroller shall certify in writing that there has been made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof." By approving the LORP/EORP and increasing benefits, the City acted in violation of the requirements provided in section 39 in that no written certification was made regarding the appropriations for the costs to the City of the program.

Second, San Diego City Charter section 99 was not followed, which gives additional guidance regarding the disbursement of public funds. In the context of the underfunding of the pension fund, which began in 1996 and continues through the present day, a vote of the people would be necessary in order to incur the "real debt" that underfunding has produced (currently at approximately \$1.4 to \$1.7 billion, depending upon which actuarial assumptions are used). The modifications to LORP/EORP added to this deficit. City Charter section 99 mirrors the language of California Constitution article XVI, section 18²⁹, regarding public finance. City Charter section 99 provides:

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same.

City Charter Section 99 further states:

No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds'

²⁹ See Cal. Const. art. XVI, §18.

majority vote of the members elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.

As discussed previously in the City Attorney's Interim Report No. 3,³⁰ the adoption of MPI and MPIO in 1996 and 2002 by the City Council underfunded the City's Retirement system and created a long-term indebtedness for the City that exceeded the income and revenue necessary to sustain that debt. The addition of the LORP/EORP program benefit enhancements during that time period increased that indebtedness. Without the requisite vote, by incurring a real debt through underfunding and LORP/EORP the City did not follow Charter section 99. As such, the retroactive increases in benefits granted through LORP/EORP from 2000 to 2002 in violation of the City Charter as well. By doing what the Charter expressly prohibits, the City took *ultra vires* action which exceeded its power and was therefore void as a matter of law.

A contrary opinion has been put forth that City Charter section 146 allows the City Council to make, essentially, whatever modifications it wishes to the retirement system, regardless of the ten year vesting requirement. It is true that Charter section 146 empowers the San Diego City Council to "enact any and all ordinances necessary, in addition to the ordinance authorized in Section 141 of this Article [establishing a retirement system], to carry into effect the provisions of this Article."³¹ It further provides that "any and all ordinances so enacted shall have equal force and effect with th[at] Article and shall be construed to be a part thereof as fully if drawn herein."³² However, while the City Council is empowered to enact retirement ordinances, it is not empowered to enact retirement ordinances that conflict with the Charter.

Thus, the language in Charter section 146 that "any and all ordinances so enacted shall have equal force and effect" with the Charter does not authorize the City Council to enact ordinances that conflict, modify, or amend the Charter. Otherwise, it would violate article XI, section 3(a) of the California Constitution, which requires that charter amendments be approved by a majority of voters.³³ More recently, in *Grimm v. City of San Diego*, 94 Cal. App. 3d 33 (1979), the court reaffirmed that Charter §146 only "gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority to pass any enactments that conflict with the charter provisions."³⁴

³⁰ See San Diego City Attorney's Office Interim Report No. 3 "Regarding Violations of State and Local Laws Related to the SDCERS Pension Fund,"(2005), pp.18.-20 (exhibits omitted). All four prior interim reports are available on the City Attorney's website.

³¹ San Diego City Charter art. IX, §146.

³² *Id.*

³³ *Montgomery v. Board of Administration*, 34 Cal. App. 2d 514, 520 (1939); See also Cal. Const. art. XI, section 3(a), (See footnote 9).

³⁴ *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 39 (1979).

Finally, it has been firmly established by California case law that a City Charter represents the “supreme law of the City, subject only to . . . the federal and state Constitutions and preemptive state law.”³⁵ The Charter operates as an “instrument of limitation and restriction on the exercise of power over all municipal affairs which the city is assumed to possess.”³⁶ The California Supreme Court has held in the recent case of *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161 (1994), that a charter city may not act in conflict with its charter and that *any act* that is not in compliance with the city charter is void.³⁷ Thus, the City Attorney’s Office concludes that the LORP/EORP measures which attempt to circumvent three separate vesting and financial accounting provisions of the Charter may have been enacted improperly, and the retroactive benefits granted between 2000 and 2002 are void.

III.

CONCLUSION

The San Diego City Charter requires, through Charter § 141, a ten-year vesting period in order to be eligible to receive a pension from the City of San Diego. An attempt to reduce this period to five years in 2002 through an amendment to the Charter was rejected by the voters. In allowing elected officers to receive pensions earlier, the LORP (and later, the EORP) program did not follow the governing law of the City. The City Council has compounded this error in several ways: (1) granting an increase in the retirement factor to 3.5% in 2000, and allowing early retirement at 55; (2) adding the City Attorney to the EORP program in 2001, with retroactive benefits; and (3) granting retroactive benefits in 2002 to elected officials who were already retired. These benefits were granted without following the financial control provisions of the City Charter, namely sections 39 and 99, and came at a time when the Retirement Fund was suffering severe underfunding through MPI, MPIL, and the related side deals. Accordingly, as the City Attorney’s Office has serious questions as to whether the implementation of LORP/EORP program violated the law, the City Attorney’s Office suggests that the program be rescinded and the unlawful retroactive benefits no longer given out. The City Attorney’s Office will follow this report with a legal opinion outlining the proper steps for the City Council to take on this matter.

By _____
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³⁵ *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 170 (1994).

³⁶ *Id.*

³⁷ *Id.* at 171.