



555 12th Street, Suite 1500
Oakland, California 94607
tel (510) 808-2000
fax (510) 444-1108
www.meyersnave.com

Gina M. Roccanova
Attorney at Law
groccanova@meyersnave.com

February 3, 2017

The Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4712

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CLERK SUPREME COURT

**Re: *City of Palo Alto v. Public Employment Relations Board*
California Supreme Court, Case No. S239282
California Court of Appeal, Sixth Appellate District, Case No. H041407
Amicus Curiae Letter in Support of Petition for Review (Rule 8.500(g))**

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court, Rule 8.500(g), the League of California Cities (“League”), and California State Association of Counties (“CSAC”) respectfully submit this letter in support of the Petition for Review filed by the City of Palo Alto (“City”) seeking review of *City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, 2016 WL 6902091 (the “Opinion”), a published decision by the Sixth Appellate District of the Court of Appeal.

I. Interests of the League and CSAC

The League of California Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life of all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the State. The Legal Advocacy Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance.

The California State Association of Counties is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels’ Association of California and is overseen by the Association’s Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide.

The League and CSAC have identified this case as having statewide significance because, as discussed further below, it involves serious limitations on the authority of cities and counties to place matters of local governance on the ballot for consideration by the voters. In addition, the elimination of any meaningful distinction between the requirement to meet and confer under Government Code section 3505 and the requirement to “consult[] in good faith” under section 3507, and the application of the requirement to situations outside the scope of bargaining, creates significant confusion and burdens for League and CSAC members.

II. Background

A. Factual Background

For many years, the City’s charter provided that if the City and its police and fire unions could not reach agreement on wages, hours, and other terms and conditions of employment, the matter would be submitted to an arbitrator for determination – a process known as interest arbitration. In 2009, the City notified the International Association of Firefighters, Local 1319 (“Union”) via letter that a ballot measure repealing binding interest arbitration was under consideration for the November 2010 ballot. The letter set forth the City’s position that interest arbitration was “a permissive, not mandatory, subject of bargaining,” consistent with established legal authority. In response, the Union sent a letter to the City opposing repeal, and on August 2, 2010, the City Council declined to place the repeal of binding interest arbitration on the November 2010 ballot.

In 2011, the City began to again consider a ballot measure repealing binding interest arbitration. On May 3, 2011, the City sent a letter to the Union, notifying it that the City Council’s Policy and Services Committee would be considering the issue of binding interest arbitration in upcoming meetings. Between May 10, 2011 and July 18, 2011, the Union met with the City in seven different bargaining sessions on other topics, and the City gave the Union notice of six different City Council meetings where the repeal of binding interest arbitration was publicly agendized and debated. At no time during this period did the Union express its interest in consulting directly with the City regarding the potential repeal of binding interest arbitration.

On July 18, 2011, the City Council voted at a noticed public meeting to place the issue of repealing interest arbitration on the November 2011 ballot as Measure D. At that meeting, the Union notified the City for the first time that its representatives desired to engage in consultation under Government Code, section 3507.

B. The PERB Charge

On July 28, 2011, the Union filed an unfair practice charge with the Public Employment Relations Board (“PERB”). After an expedited evidentiary hearing, the administrative law judge issued a proposed decision holding that the City did not violate the MMBA by placing Measure D on the ballot. The ALJ concluded that the Union waived its right to consult because it had notice that the City intended to amend or repeal binding interest arbitration yet

never made a request to consult until the meeting at which the City Council acted to place the measure on the ballot.

Both the City and the Union filed exceptions to the proposed decision, and on August 6, 2014, PERB issued its final decision, reversing the ALJ. PERB acknowledged that the Union had not made an affirmative demand to meet and confer or consult over Measure D prior to the City Council vote. It nevertheless found that because the City was *aware* of the Union's desire to consult over the repeal measure, it had an obligation to consult with the Union under section 3507. The City filed a petition for writ of extraordinary relief in the Court of Appeal on September 3, 2014.

C. The Opinion of the Court of Appeal

In the Opinion, the Court of Appeal largely upheld PERB's decision. It rejected the City's argument that the consultation requirement in section 3507, as applied, violated the California Constitution's provisions giving charter cities the power to make and enforce ordinances and regulations regarding municipal affairs. (2016 WL 6902091, at *14-*15.) It also found that substantial evidence supported PERB's finding that the Union had requested to consult with the City regarding the proposed ordinance (citing the Union's letter in 2010 and its stated opposition at the July 18, 2011 City Council meeting), and therefore declined to upset PERB's ruling that the Union had not waived its rights to consult under section 3507. (2016 WL 6902091, at *18-*20.) On the issue of remedies, however, the Opinion found that PERB's order directing the City Council to rescind its resolution violated the separation of powers doctrine, and so it remanded the matter back to PERB with directions to strike that remedy. (2016 WL 6902091, at *23-27.)

The City's petition for review followed.

III. Why the Court Should Grant Review

The questions addressed in the Opinion of particular interest to the League and CSAC are (1) whether a city or county has an obligation to initiate consultation with a labor organization prior to placing a charter amendment on the ballot, where doing so would place significant burdens on the public entity's constitutionally-based authority to submit the matter to the voters; and (2) whether there remains any meaningful distinction between the "meet and confer" requirement of Government Code section 3505 and the "consultation in good faith" requirement of Government Code section 3507.

The Opinion answers the first question in the affirmative, for the first time, and leaves substantial ambiguity as to the second. As a result, the Opinion – if it stands – will have significant and unanticipated negative effects for cities and counties across the state. For example, it will create uncertainty for cities and counties on the additional steps they must take to place matters on the ballot while still complying with tight Elections Code deadlines and open meetings requirements under the Ralph M. Brown Act, and will in some circumstances hinder the ability of voters to decide these matters. It will also create uncertainty for cities and counties as to what circumstances trigger their new duty to consult

with labor organizations regarding ballot initiatives concerning core governmental functions, and what they must do to fulfill that duty. These are matters of statewide importance touching on “one of the most precious rights of our democratic process.” (*Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 591). As discussed more fully below, the League and CSAC respectfully submit that they require prompt resolution by this Court.

A. The Opinion Imposes an Unreasonable Burden on A City or County’s Public Deliberative Process

A charter city’s authority to place matters on the ballot involving public employees and their compensation is constitutionally enshrined. Article XI, section 5, subdivision (b) of the California Constitution delegates to city voters “plenary authority” to provide in their city charters for “the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks, and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.” In addition, a city council has the constitutional authority to present fundamental governance issues, such as binding interest arbitration, to the voters by way of a charter amendment. (Cal. Const., art. XI, §3 (b).)

Similarly, under article XI, section 7 of the California Constitution, a general law city has authority over local legislation and, under Elections Code section 9222, its city council may place matters on the ballot for consideration by the voters.

Counties are also granted plenary authority to provide for the compensation of their employees. Article XI, section 1, subdivision (b) provides that a county’s “governing body shall provide for the number, compensation, tenure, and appointment of employees.”

Since binding interest arbitration involves governance over employee matters and compensation, it is a local affair under the California Constitution. (*County of Riverside v. Super. Ct.* (2003) 30 Cal.4th 278, 290-95 [state statute requiring mandatory interest arbitration for county police officers and firefighters violated home rule provisions of article XI, section 1, subsection (b) and article XI, section 2, subsection (a)]; *Edgerly v. City of Oakland* (2012) 211 Cal.App.4th 1191, 1204 [“If salaries and wage levels are municipal affairs, then surely the manner in which a charter city enforces its own charter and local rules and ordinances constitutes a municipal affair and cannot be considered a statewide concern.”].)

In the Opinion, the Court of Appeal held that requiring the City to consult with the Union before placing the issue of binding interest arbitration on the ballot under section 3507 did not “curtail the City’s power to propose charter amendments.” The Opinion does not acknowledge, however, that the California Constitution grants counties, cities and city voters plenary authority in this area, and therefore labor organizations may not infringe on that authority.

Nor does the Opinion acknowledge the *degree* to which the powers of the City Council and its voters will be infringed by its holding. Cities and counties must already meet burdensome requirements before placing matters on a ballot – a process that can sometimes take months of tight planning. For example, under the Ralph M. Brown Act, Government Code section 54950, *et seq.*, all city council actions must be made at publicly noticed meetings of the city council or a council committee. Each publicly noticed meeting requires advance notice, a publicly posted agenda, and availability at the meeting of any document to be considered by the council. The Elections Code also includes stringent timelines that govern when a city council must make a decision to place a matter on the electoral ballot. Based on recent amendments to the Elections Code, a city council may place certain charter amendments on the ballot only once every two years, at the time of a statewide general election. (Elec. Code § 9255.) A city council must take a final vote on whether to place a matter on the ballot at least 88 days before the election. Complying with that deadline – being sure to have the public hearing process completed, a final draft available, and a quorum of city council members present to take a final vote – is itself a difficult scheduling task. Adding a new requirement that the city consult with its labor organizations beforehand – as the Court of Appeal has done in the Opinion – not only “curtails” the City’s power, it effectively gives labor organizations a veto over ballot measures before they reach the voters. Neither section 3507 nor any other authority gives them such power.

The Opinion acknowledges dryly that “the procedures through which cities may amend their charters do not provide for a particularly expedient process” and that “a requirement that cities must also consult in good faith with recognized employee organizations under section 3507 adds an additional hurdle.” (2016 WL 6902091, at *16.) It dismisses these concerns by noting simply that the requirements it imposes do not “render it impossible for cities to propose charter amendments.” (*Id.*) However, the California Constitution does not allow for such an infringement on the plenary rights of cities and city voters over matters of local governance. Moreover, especially where proposed ballot measures are intended to address severe and sudden challenges, such as the potentially disastrous budgetary shortfalls that were at issue here, allowing labor organizations to delay them for years can be the difference between preserving and losing essential city services.

B. The Opinion Blurs the Difference Between “Consultation” and “Meet and Confer”

Prior to this case, no PERB or judicial decision had suggested that cities or counties have an obligation to consult with labor organizations regarding proposed charter amendments regarding interest arbitration under section 3507. To support its decision that such an obligation exists, PERB looked to authority interpreting whether cities have an obligation to *meet and confer* with respect to interest arbitration under *section 3505*, rather than section 3507. But that authority unambiguously holds that interest arbitration clauses are a *permissive*, not mandatory, subject of bargaining. (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 257 (quotations omitted) [county’s negotiation proposal that unions not support a ballot initiative calling for binding interest arbitration was a “permissive” but not

“mandatory” subject of bargaining because the effect of interest arbitration “on terms and conditions of employment during the contract period is at best remote.”].)

Both PERB and the Court of Appeal acknowledged that the duty to consult in good faith under section 3507 was not the same as the duty to meet and confer under section 3505, but nevertheless determined that the two processes were “similar.” (See 2016 WL 6902091, at *13.) On that basis, both PERB and the Court of Appeal determined that the actions the City must take in order to “consult” with the Union were effectively indistinguishable from what it would have had to do to “meet and confer” with the Union.

PERB’s decision violates its obligation to base its decision on existing law. (Gov’t Code § 3509(b) and § 3510(a) [requiring PERB to “apply and interpret unfair practices consistent with existing judicial interpretations of this chapter.”].) Specifically, PERB had held in interpreting the same language in another statute (the Educational Employment Relations Act) that the duty to consult was less onerous than the duty to meet and confer. (See *San Dieguito Union High School Dist.* (1977) EERB Decision No. 22 [noting that “the duty to consult on specified educational-policy matters begins where the duty to meet and negotiate terminates.”].) Its decision in this case – as affirmed by the Court of Appeal – is directly at odds with that precedent.

Where PERB’s construction of the MMBA is inconsistent with prior precedent, deference to PERB is not required. (*United Public Employees v. Public Employment Relations Board* (1989) 213 Cal.App.3d 1119, 1125-27.) However, the Court of Appeal’s decision deferred to PERB on this issue, creating an atmosphere of uncertainty regarding cities’ and counties’ obligations with respect to ballot measures, which threatens to chill their willingness to place measures on the ballot at all. Review by this Court would provide needed guidance on what is now, thanks to the Opinion, an unsettled area of the law.

IV. Conclusion

For all the foregoing reasons, the League and CSAC respectfully request that this Honorable Court accept the petition by the City of Palo Alto for review.

Best regards,



Gina M. Roccanova
GMR:bwh
2767912.3

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On February 3, 2017, I served true copies of the following document(s) described as ***City of Palo Alto v. Public Employment Relations Board, California Supreme Court, Case No. S239282, California Court of Appeal, Sixth Appellate District, Case No. H041407, Amicus Curiae Letter in Support of Petition for Review (Rule 8.500(g))*** on the interested parties in this action as follows:

David E. Mastagni
Isaac S. Stevens
Jeffrey R. A. Edwards
Mastagni Holstedt APC
1912 I Street
Sacramento, CA 95811-3151
Ph. (877) 212-6907
Fx. (916) 447-4614
*Attorneys for Real Party in Interest International
Association of Firefighters, Local 1319, AFL-CIO*

Eugene Huguenin
Administrative Law Judge
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

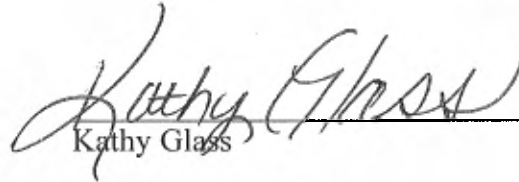
J. Felix De La Torre, General Counsel
fdelatorre@perb.ca.gov
Wendi L. Ross, Deputy General Counsel
wross@perb.ca.gov
Daniel M. Trump, Regional Attorney
dtrump@perb.ca.gov
PUBLIC EMPLOYMENT RELATIONS
BOARD
1031 — 18th Street
Sacramento, CA 95811-4124
Attorneys for Respondent
PUBLIC EMPLOYMENT RELATIONS
BOARD

Clerk of the Court
California Court of Appeals
Sixth Appellate District
333 W. Santa Clara Street, #1060
San Jose, CA 9511

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 3, 2017, at Oakland, California.


Kathy Glass