# City Council Salaries and Benefits

**Thursday, September 22, 2011 General Session; 3:15 – 4:45 p.m.**

**Brian Libow, City Attorney, San Pablo**

Notes . . .

CITY ATTORNEY
*City of San Pablo*

CITY OF SAN PABLO
*City of New Directions*

# CITY COUNCIL SALARY AND BENEFITS

## LEAGUE OF CALIFORNIA CITIES
## CITY ATTORNEYS' DEPARTMENT

## ANNUAL CONFERENCE
## SEPTEMBER 22, 2011

Brian M. Libow
City Attorney
City of San Pablo

13831 San Pablo Avenue, Building 2 * San Pablo, CA 94806
*Main:* 510-215-3009 * *Fax*: 510-235-7059
BrianL@SanPabloCA.gov

# CITY COUNCIL SALARIES, REIMBURSEMENTS AND BENEFITS

In the wake of the City of Bell scandal, salaries and benefits provided to city council members have come under greater scrutiny. Particularly in the area of permissible health and welfare benefits, the various statutes that govern these matters form a nearly incomprehensible morass of ambiguous and seemingly contradictory provisions. The purpose of this paper is to try to make sense of these statutory provisions, dividing the analysis into three major categories: salary and reimbursements; health and welfare benefits that are available to current city council members; and benefits that are available to retired or former city council members.

An underlying principle behind the interpretation of these statutes is that, whether they concern salary, expense reimbursement, or benefits, they are to be *strictly construed in favor of the City and against the public officer. County of San Diego v. Milotz, 46 Cal.2d 761, 767 (1956); Madden v. Riley, 53 Cal.App.2d 814, 822 (1942); 65 Ops.Cal.Atty.Gen. 517, 520-21 (1982).*

On the other hand, the rule with respect to retirement benefits is that ambiguities must be resolved in favor of those receiving public pensions. See, e.g., *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1977) 16 Cal.4th 483, 490; *Hittle v. Santa Barbara County Employees' Retirement Assn.* (1985) 39 Cal.3d 374, 390; 90 Ops. Cal. Atty. Gen. 32 (2007).

## I. CITY COUNCIL SALARY

### A. Maximum Amounts; 5% Increases; Election

Government Code section 36516[1] authorizes a city to provide its city council members with an initial salary of between $300 and $1,000 per month, depending upon the city's population. Section 36516.5 also authorizes an increase in Council salaries in an amount not to exceed 5% for each calendar year from the operative date of the last adjustment. Thus, if the Council has not had a salary increase in the last twenty years, it can adopt an ordinance effectively doubling its salary: 20 x 5% = 100%. Of course, if the Council does not want to take action itself, it may place a salary measure on the ballot. (§36516(b)).

The Attorney General has ruled that the maximum 5% per year percentage increase must be applied only once, with no compounding. 89 Ops.Cal.Atty.Gen. 159 (2006). You can only calculate the increase based on what the actual salary was, not on what it could have been. In other words, the city may not apply the 5% to the currently received salary amount only for the first year, and then apply it to the newly calculated amount for the second year, and continue these separate calculations for each intervening year. For example, if six years have passed since the last salary increase,

1 All references are to the Government Code unless otherwise noted.

only one calculation – an increase of 30% - is to be made, not six separate calculations, one on top of the other.

A directly elected mayor may be provided with compensation in addition to that which he or she receives as a council member. (§36516.1). That additional compensation may be provided by an ordinance adopted by the city council or by a majority vote of the electors voting on the proposition at a municipal election. The Attorney General has also ruled that the prohibition against "mid-term" salary increases, applicable to council members pursuant to section 36516.5, *(see section B, infra),* does *not* apply to elected mayors. The additional compensation for performing mayoral duties is not received as "a councilperson." 89 Ops.Cal.Atty.Gen. 159 (2006)

For the same reason, it would seem that the 5% annual maximum, while applicable to salary received as a council member, would not apply to any additional compensation provided to elected mayors.

### B. No Increase May Take Effect Until The Beginning of New Terms of Office

Government Code section 36516.5 prohibits any change in compensation during the council member's term of office. This does not mean that Councilmember X, elected in 2008, must wait until her next term of office begins in 2012. Because city council members serve staggered terms, Councilmember X will be eligible for an increase following the next municipal election in 2010, when two or three of her compatriots must run for reelection, even though X is in the middle of her own term.

### C. No Automatic Increases

Section 36516(a)(4) provides, in pertinent part, that "no ordinance shall be enacted or amended to provide automatic future increases in salary." The council may grant city *employees* a three year MOU, with cost-of-living increases on July 1 of each year of the contract. But it may not do so for itself.

### D. How To Measure "Calendar Year"

Section 36516(a)(4) provides: "The salary of council members may be increased beyond the amount provided in this subdivision by an ordinance or by an amendment to an ordinance, but the amount of the increase shall not exceed an amount equal to 5 percent for each calendar year from the operative date of the last adjustment of the salary in effect when the ordinance or amendment is enacted…"

Suppose the operative date of the last salary increase immediately followed the municipal election in November of 2008. The next year, in June, 2009, can the City Council adopt another ordinance increasing its salary an additional 10%, to be effective

following the November, 2010 election? This would constitute 5% for each of the two calendar years between the effective dates of the increases. Or, would NO increase be justified, since not even one full calendar year had elapsed between the effective date of the last increase (November 2008) and the ordinance to increase the salaries an additional 10% (June, 2009)?

While the statute restricts the effective date for increases, it does not address the *timing* of the ordinance providing for such increases. There is no case law or Attorney General opinion on this issue. The statute does define when the "calendar year" count is supposed to *start*, but does not define when the count is supposed to *end* – the date the ordinance is introduced? Adopted? Takes effect? Or when the new salary goes into effect? In the absence of guidance from the courts or the Attorney General, the extremely conservative approach would be to calculate the permitted increase based on the number of *complete* years from the operative date of the last adjustment to the date of adoption of the ordinance granting the next salary adjustment.

But the most logical, consistent approach seems to be calculating increases from the *effective* date of the last increase to the *effective* date of the next increase. In this way we avoid the uncertainties and ambiguities in trying to figure out what to do with *partial* calendar years.

### E. Salary Must Be Established By Ordinance

The establishment of city council salary must be by ordinance, not resolution. (§36516(a)(4)). What if a city council has not adopted the maximum 5% per year increase, but is receiving other monetary payments which, when added to the actual adopted salary, is still under the maximum limit? If the Council has provided for the receipt of such monetary payments by ordinance, as required by section 36516(a)(4), then those payments might rightfully be considered part of salary and, if under the maximum, should be permissible. If there is no authorizing ordinance, however, then whether or not this is lawful depends on whether these additional monetary payments are considered allowable expense reimbursements, or retirement or health and welfare benefits. Subsections (d) and (e) of section 36516 provide as follows:

> (d) Any amounts paid by a city for retirement, health and welfare, and federal social security benefits shall not be included for purposes of determining salary under this section, provided that the same benefits are available and paid by the city for its employees.
>
> (e) Any amounts paid by a city to reimburse a council member for actual and necessary expenses pursuant to Section 36514.5 shall not be included for purposes of determining salary pursuant to this section.

Under these sections, if payment to a council member is not a permissible retirement or health and welfare benefit, or is not a valid expense reimbursement, then necessarily it will be counted for purposes of determining salary. Take, for example, a city policy granting a monetary payment of 50% of the monthly medical premium "in-lieu of" medical coverage, where the employee would otherwise have dual coverage because of coverage by a spouse with another employer.

Let's say the ordinance provides that councilmembers receive $1,000 per month in compensation, but the compensation rate could have been $1,500 had the council taken all of the permissible annual increases, and those council members are also receiving $500 per month in lieu of health insurance benefits.

The Attorney General has ruled that such a payment is lawful if it is contributed to a deferred compensation account, because it can be characterized as a "retirement" benefit under subsection (d), and will therefore not count as salary. 89 Ops.Cal.Atty.Gen. 107 (2006). If paid in cash, however, the Attorney General has ruled that it is neither a retirement benefit nor can it be considered a health and welfare benefit, like direct payment of a medical premium.[2]

Thus, if the in-lieu payment is part of the city's deferred compensation "retirement" program, it will not count as salary and may be authorized by resolution. If the payment is made in cash, however, it should probably be considered part of salary and subject both to the maximum limit, and the requirement that salary must be established by city council ordinance. Just because the city council *could have* increased its salary over the years to $1,500, doesn't mean that its salary can be $1,500 without an ordinance that increases the salary to that amount. In the example, the Council is legally allowed to receive only $1,000 per month under law (their own ordinance). However, they are now effectively receiving $500 more in salary by virtue of receipt of the in-lieu payment.

May a council member participate in a city's flexible benefits plan, where the city, along with the employee, contributes pre-tax dollars to pay for medical or childcare expenses? The council member would then receive a cash payment after incurring the expense. In my opinion, this is a valid health and welfare benefit despite its form as a direct payment to the council member, as it is effectively a reimbursement for actual medical expenses. This should be allowable, and, as a health and welfare benefit received by all other city employees, may be authorized by resolution as well as by ordinance, as discussed below.

Permissible health and welfare benefits, and provisions for expense reimbursement, may of course be established by resolution; an ordinance is not necessary. What about payments such as cell phone stipends or other advance payments? So long as they are authorized by ordinance and, when added to normal salary, are under the maximum, such payments would be allowable. What about cities that provide cell

2 There is at least an argument that the AG erred in this analysis. See footnote 15, infra.

phones, computers, or fax lines to council members instead of reimbursing them for city-related costs? It is my opinion that non-monetary benefits do not impact salary and are therefore not subject to Government Code section 36516's limitations on salary. Of course, use of such property for non-public purposes has its own problems in terms of the laws prohibiting unlawful gifts of public funds and misuse of city facilities.

### F. Reduction In Salary

In 80 Ops.Cal.Atty.Gen. 119 (1997), the Attorney General concluded that a city council could not reduce its salary, the mayor's salary, or their own health and welfare benefits during their current terms of office. Reasoning that reduction in a council member's or mayor's compensation or health and welfare benefits during his or her term of office would impair the obligation of a contract (U.S. Const., art. I, §10; Cal. Const., art. I, §9) or deprive the council member of a vested property right (U.S. Const., 14th Amend.; Cal. Const., art. I, §7, subd.(a)), the opinion cites cases to the effect that the employment relationship between a city council member and the city is contractual, and the elements of compensation and benefits for such an office become contractually vested upon acceptance of employment. Interpreting the language of the statutes in light of these constitutional principles, the Attorney General found "that it forbids decreases in compensation during a council member's current term of office. Of course, as a practical matter, council members may contribute back to the city whatever portion of their salaries they wish. No statutory authorization is necessary for such voluntary action to take place."

As a result, Government Code section 36516(f) now provides that "a city council member may waive any or all of the compensation permitted by this section."

### G. Reimbursement of Expenses

Pursuant to Government Code section 36514.5, city council members may be reimbursed for actual and necessary expenses incurred in the performance of official duties. Any amounts paid by a city to reimburse a council member for actual and necessary expenses shall not be included for purposes of determining salary. (§36516(e)).

Reimbursement for expenses is subject to Government Code sections 53232.2 and 53232.3. Under these sections, the City must adopt a written policy which specifies the types of occurrences that qualify for reimbursement. The policy may also specify reasonable reimbursement rates. The Council must complete expense reports documenting that the expenses meet the existing policy. These reports must be submitted within a reasonable time, and must be accompanied by receipts. All such documentation is public record.

For example, council members may be reimbursed for lodging and transportation costs for attendance at meetings and conferences. Government Code section 53232.3

requires council members to report on their attendance at those meetings and conferences at the next council meeting. The statute does not provide any guidance as to how detailed the disclosures must be. In a brief, informal survey, all 15 responding cities (all but one located in the Bay Area) simply had council members disclose which meetings and conferences they had attended since the last council meeting. These reports did not include disclosure of the costs of such attendance or the amount of reimbursement, although these expense reports are public records and would be disclosed upon request.

**Spouses and Third Parties** Don't even *think* of having the city reimburse a councilmember for his or her spouse's expenses while accompanying the councilmember on official city business. 75 Ops. Cal. Atty. Gen. 20 (1992); *Albright v. City of South San Francisco* (1975) 44 Cal.App.3d 866 (unauthorized reimbursement is illegal gift of public funds). Additionally, city council members cannot be reimbursed for purchasing meals for third parties such as constituents, legislators, and private business owners. 85 Ops.Cal.Atty.Gen. 210 (2002) And, of course, if a councilmember gets a fine from the FPPC, she is on her own. 61 Ops. Cal. Atty. Gen. 342 (1978)

**Ethics Training** Note also that if a city does provide for reimbursement of expenses, then all council members must undergo mandatory ethics training on a regular basis. (§§53234-53235).

**Car Allowance/Other Monthly Stipends** Government Code section 1223 permits city council members to contract directly with the city for a vehicle allowance when the council members' travel expenses are allowed by law.

Following the passage of Assembly Bill 1234 in 2005, which enacted Government Code sections 53202.3 and 53202.2, many city attorneys advised that the payment of predetermined monthly car allowances was legally questionable. After all, the statutes require *receipts for expenses,* a requirement that a car allowance is designed to make unnecessary. And, these "reimbursement statutes" were enacted *after* section 1223 and should therefore take precedence.

In light of the above, may a city council still receive a monthly, pre-determined car allowance, rather than reimbursement for actual vehicle expenses? The Attorney General ruled in 2010 that such a practice is still permissible, because a car allowance is not, strictly speaking, a "reimbursement" for expenses since it is a fixed amount paid periodically, and likely in advance, pursuant to section 1223. 93 Ops.Cal.Atty. Gen. 9 (2010).[3]

3 The courts, too, have taken an expansive view of section 1223. In *Citizen Advocates, Inc. v. Board of Supervisors* (1983) 146 Cal.App.3d 171, the court upheld, as allowable under section 1223, a county policy that authorized payment to certain designated county officials of an auto allowance of $100 per month in addition to payment of mileage at a fixed rate. The court interpreted the disjunctive "or" in the statute to mean the conjunctive "and."

***Caveat***: What about other monthly stipends? For example, instead of providing cell phones for employees, what if a city has a policy of paying its employees a monthly stipend for using their personal cell phones for city business? While an invoiced reimbursement for official phone calls would clearly be permissible, a stipend is not a "reimbursement" under the AG's analysis. While permissible for other city employees, the payment of such stipends to council members would seem to constitute monetary compensation that is authorized neither by the ordinance establishing their salaries, nor by a statutory provision such as Section 1223 regarding car allowances.

## H. Payments for Service on Other Boards or Commissions

Unless specifically authorized by state law, a city council may not pay itself more money for serving on other boards and commissions. This is one case where an ordinance will definitely not count as a statute.[4] If the other statute that authorizes the compensation does not specify the amount of compensation, the maximum amount is one hundred fifty dollars ($150) per month for each commission, committee, board, authority, or similar body. (Government Code §36516(c).)

One common example is service on the Board of Directors of a Redevelopment Agency. A maximum stipend of $30 per meeting attended, not to exceed four meetings per month, is authorized by Health and Safety Code section 33114.5.

***Practice Tip***: Because Redevelopment Agency actions are often accompanied by City Council action, some cities have found it convenient to combine the agendas of the two entities into one agenda, so that it is not necessary to adjourn one meeting and then convene the other. This means that, when action on redevelopment matters is necessary, the City Council meeting is denominated as a "joint" meeting with the Redevelopment Agency. The City Clerk may inadvertently label a council meeting as a joint meeting even where no specific Agency action will take place. No payments should be made to council members for Agency meetings unless the joint meeting actually has items of business for the Agency contained therein. 83 Ops. Cal. Atty. Gen. 215 (2000).

***New Legislation:*** Note that new Assembly Bill 23, creating a new section 54952.3, will, as of January 1, 2012, require local agencies conducting simultaneous or serial meetings of multiple boards or commissions to publicly, orally announce any compensation received by the local legislative body for such additional meeting(s), in

---

4 For an Attorney General opinion discussing the circumstances under which a municipal ordinance will not count as a "statute," see 81 Ops.Cal.Atty.Gen. 75 (1998), concluding that the appointment power of an elected mayor of a general law city extends to appointments that a city ordinance requires to be made by the city council despite Government Code §40605's mayoral appointment directive. (The AG reputed this conclusion in 2006, concluding that §40605 addresses *membership* on the commission (e.g. how many members; should the members be residents; should the members have different skills such as design or architecture, etc.) and does not address the appointment *process)*.

excess of or in addition to statutorily established amounts.

## I. Conflict of Interest/Government Code Section 1090

Under Government Code section 53208, there will be no section 1090 violation when council members approve salary or health benefits for themselves.

As far as the Political Reform Act is concerned, council members may ordinarily vote for the ordinance increasing their salary. However, if any particular vote will only affect *some* council members, but not *others,* then a conflict may be deemed to exist.

Section 87100 of the Political Reform Act prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest.

A public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests.[5] (§87103; 2 CCR §18700(a).)

As relevant here, section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or on any of the official's economic interests. A city council member would have two economic interests in his or her salary:

- An economic interest in a source of income, including promised income, which aggregates to $500 or more within 12 months prior to the decision. (§87103(c); Regulation 18703.3.)

- An economic interest in his or her personal finances, including those of his or her immediate family. (§87103; Regulation 18703.5.)

City Council salary does not constitute an "economic interest in a source of income," because the Act's definition of *income* expressly excludes salary and reimbursement for

5 The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision. To determine whether a given individual has a disqualifying conflict of interest under the Act, officials apply the following eight criteria: (1) Determine whether the individual is a public official; (2) Determine whether the public official will be making, participating in making, or using or attempting to use his/her official position to influence a government decision; (3) Identify the public official's economic interests; (4) For each of the official's economic interests, determine whether that interest is directly or indirectly involved in the decision; (5) Determine the applicable materiality standard; (6) Determine whether it is reasonably foreseeable that the decision will have a material financial effect on each economic interest; (7) Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally; and (8) Determine if the public official's participation is legally required.

expenses and per diem received from a state, local, or federal government agency.[6]

Nonetheless, FPPC advice letters make clear that an effect on an official's governmental salary may still be disqualifying under limited circumstances as a "material and foreseeable financial effect on the official's personal finances." See, *Scott Howard Advice Letter, A-07-182, and Robert Hoffman Advice Letter, I-11-005*.

Under Regulation 18705.5(a), a financial effect of a decision on an official's personal finances is material if it is at least $250 in any 12-month period. Certainly almost any salary increase would exceed this amount. However, Regulation 18705.5(b) also includes an exception to the personal financial effects rule for certain governmental decisions that affect only the salary, per diem, or reimbursement of the public official:

> "The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official or a member of his or her immediate family, *or to set a salary for the official or a member of his or her immediate family which is different from salaries paid to other employees of the government agency in the same job classification or position."* (Emphasis added)

Thus, the FPPC has advised that generally an official is not disqualified from taking part in salary and benefit decisions that will affect his or her income as an employee of the agency. However, the Act would prohibit the official from taking part in salary and benefit decisions that will set a salary or benefits for the official different from other employees in the same job classification or position.

For example, where the Council is voting on whether to provide itself with a particular retirement benefit (such as the monetary contribution to deferred compensation "in-lieu of" city payment of the council members' medical premiums, discussed *supra,* and only two of five council members were eligible to receive the in-lieu payment, those council members must abstain. See, e.g. *Scott Howard Advice Letter, A-07-182* (Council member, who is nominated to be mayor, may not participate in the debate and vote to appoint a Mayor where the appointed Mayor will receive an additional $150 a month in his automobile allowance).

---

[6] Government Code Section 82030(b)(2) provides that "income" does not include:

"Salary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency and reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code."

***Practice Tip:*** Look carefully at how a council vote may impact different council members differently. Although nominally broad in application, if the real life impacts of the ordinance will affect some council members but not others, a conflict of interest is deemed to exist.

### J. Charter Cities

There are no cases explicitly addressing whether charter cities are subject to the strictures of section 36516 et seq. regarding Council salaries. But the proposition is well-established that the compensation paid to officers and employees of charter cities is a municipal affair subject to the city charter. See, e.g., *Bishop v. San Jose (1969) 1 Cal.3d 56, 64 (wages of city employees not subject to prevailing wage requirements); Sonoma County Organization of Public Employees v. Sonoma (1979) 23 Cal.3d 296, 317 (determination of wages paid to employees).*

However, the Legislature has declared, via Government Code section 53208.5, that the area of *health benefits* provided to city council members is a matter of statewide concern and not a municipal affair.

## II. HEALTH AND WELFARE BENEFITS FOR CURRENTLY SERVING COUNCIL MEMBERS

Several provisions in the Government Code allow the City to provide benefits for current employees and council members, subject to certain restrictions.

### PEMHCA Coverage

Many cities are members of California Public Employee's Retirement System (PERS). The Public Employees' Medical and Hospital Care Act ("PEMHCA" - Gov. Code, §§22750-22948) allows public agencies to provide medical benefits to their employees and "annuitants" (retirees) under specified circumstances. PEMHCA is administered by PERS. A local "contracting agency," such as the city, and "each employee or annuitant" must contribute to the cost of health plan coverage provided under a plan approved by PERS. (§22890(a)). (89 Ops.Cal.Atty.Gen. 232 (2006)).

While there is no case law making this distinction, the Attorney General has held that PEMHCA authorizes an alternative method for local agencies to provide health benefits. An agency can operate under the PERS-PEMHCA scheme for medical coverage, and also provide other health and welfare benefits that are not subject to PEMHCA. 76 Ops.Cal.Atty.Gen. 91 (1993). When an agency contracts for its own health insurance coverage for elected officials (e.g. dental, vision, life, or possibly additional medical coverage beyond that afforded in the City's PERS resolution), the legality of that coverage is subject to Government Code sections 53200-53210. Those sections are not applicable to PEMHCA coverage. See, 90 Ops. Cal. Atty. Gen. 32 (2007) (County

may contribute towards the cost of health care coverage provided under PEMHCA for a retired board member "who is a CALPERS member and is otherwise eligible for such health care coverage" even though the retired member does not meet the criteria set forth in Government Code section 53201).

***Caveat:*** City council members are automatically excluded from PERS membership unless they file an election in writing to become a member pursuant to Government Code section 20322. Why a councilmember would choose not to be enrolled in PERS is beyond me, but if she is not enrolled, it is questionable as to whether she is entitled to receive medical coverage under PEMHCA. Government Code section 22772, subsection (a)(2) includes elected officials of contracting agencies in the definition of "employee" under PEMHCA, only *if* the elected official participates in "the retirement system provided by the employer." This phrase is not defined in the PERS statutes. Use of the word "the," as opposed to "a," might mean that only the PERS retirement system is contemplated. But it is conceivable that the statute could be interpreted to apply to more than one retirement system offered by the City – a deferred compensation or annuity program, for example. Government Code section 22920 might lend credence to this position. It sets forth criteria for entities to become subject to PEMHCA. First, an agency that contracts with PERS is eligible for PEMHCA. But an agency that is not subject to PERS and that "provides a retirement system for its employees funded wholly or in part by public funds…" is also eligible.

I think the better view is that entities which do not contract with PERS but have their own retirement system in lieu of PERS are still eligible for PEMHCA coverage. But it seems reasonable to conclude that, once a city does contract with PERS, PERS becomes "the retirement system" referred to in the statute. This approach would require all council members to enroll in PERS in order to receive medical coverage under the PERS system.

**Non-PEMHCA Coverage: Government Code Section 53200 et seq**.

Government Code section 53205[7], in conjunction with section 53201(a)[8], makes clear

7 "From funds under its jurisdiction, the legislative body may authorize payment of all, or such portion as it may elect, of the premiums, dues, or other charges for health and welfare benefits of officers, employees, retired employees, former elective members specified in subdivision (b) of Section 53201, and retired members of the legislative body subject to its jurisdiction. Those expenditures are charges against the funds…." "Officers and employees" is defined by Government Code §53200(e) to include current members of the city council. (Emphasis added)

8 "(a) The legislative body of a local agency, subject to conditions as may be established by it, may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body, as provided in subdivision (b), who elect to accept the benefits and who authorize the local agency to deduct the premiums, dues, or other charges from their compensation, to the extent that the charges are not covered by payments from funds under the jurisdiction of the local agency as permitted by Section 53205." (Emphasis added)

that the City may pay for all, or such portion as it elects, of the health and welfare benefits offered to the Council and to city employees. Government Code Section 53205.1, read in conjunction with section 53200(e),[9] also authorizes the provision of health benefits for spouses and dependents of council members. See, 76 Ops.Cal.Atty.Gen. 91 (2003).

Further, section 53201 provides, in subsection (a), that the city council may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body who elect to accept the benefits and who authorize the local agency to deduct the premiums from their compensation, *to the extent that the charges are not covered* by payments from funds under the jurisdiction of the local agency as permitted by section 53205. Section 53208 confirms that any member of a legislative body may participate in any plan of health and welfare benefits permitted by law.

Three other statutes place constraints on the amount and level of benefits the city council (and employees) may receive:

1. The benefits provided for council members must be the "same benefits" that the City pays for "its employees" (§36516(d));

2. The "medical plan" must provide benefits for "large number of employees" (§53202.3);

3. Where different benefit structures are provided for different sets of employees, the maximum benefits received by the Council can be no greater than the most generous "schedule of benefits" provided to any category of *non-safety* employees (§53208.5).

How these quoted phrases are ultimately defined and harmonized by the courts will determine the legality of benefits offered to city councils. There is practically no guidance on these issues from the Attorney General's office, let alone the judiciary.

---

9 Section 53205.1(a)provides: "From funds under its jurisdiction, the legislative body may authorize payment of all or any portion as it may elect of the premiums, dues, or other charges for health and welfare benefits on the spouse and dependent children under the age of 21, dependent children under the age of 25 who are full-time students at a college or university, and dependent children regardless of age who are physically or mentally incapacitated, of those officers and employees, including retired officers and employees, subject to the jurisdiction and for whom those health and welfare benefits have been provided."

Section 53200(e): "Employees" or "officers and employees" mean all employees and officers, including members of the legislative body, who are eligible under the terms of any plan of health and welfare benefits adopted by a local agency pursuant to this article."

### A. "Same Benefits" For Council As For "Its Employees" (§36516(d))

As stated, the benefits provided for council members must be the "same benefits" that the City pays for "its employees" (§36516(d)). Is this section violated if the Council gets much better benefits than most city employees? The question turns on how to define "its employees." Does this mean that the City must pay exactly the same amount, and no greater, for the city council and *all or most city employees, or just some employees*?

The question is answered by interpreting and harmonizing this requirement in a manner consistent with another provision in the statutory scheme – section 53208.5, which makes clear that where different benefit structures are provided for different sets of employees, the maximum benefits received by the Council can be no greater than the most generous "schedule of benefits" provided to any category of non-safety employees. Since this specific statutory provision allows city council members to receive greater benefits than most categories of city employees, Section 36516(d) ought to be interpreted in the same way. Code of Civil Procedure section 1859 expresses the canon of statutory interpretation that when a general and particular provision is inconsistent, the latter is paramount to the former. Thus, so long as *some non-safety* employee groups get the same coverage as the council, the statutes allow the council to receive those same benefits even though they may be higher than for most employees.

### B. The Health Care "Plan" Must Provide "Benefits" For "Large Numbers of Employees"

Government Code section 53202.3 provides in relevant part that "all plans, policies or other documents used to effectuate the purposes of this article shall provide benefits for large numbers of employees…."

The same question presents itself: whether exactly the same coverage, on the same terms, must be provided to large numbers of employees, or whether there may be differences in coverage so long as the health plan itself offers some coverage to large numbers of employees. For example, a city might have several bargaining groups or other recognized employee units. While the City would offer health insurance to all groups, the City might pick up different degrees of the monthly premiums, depending on the unit.

The plain language of the statute speaks in terms of the plan offering benefits to large numbers of employees. On its face, it does not require that the same benefit package be offered to all employees. The "statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent."[10] Further, the court's primary objective is to determine the legislative intent

10 *See* White v. Ultramar, Inc., 21 Cal. 4th 563, 572 (1999), *quoting* Kobzoff v. Los Angeles County Harbor/UCLA Medical Center, 19 Cal.4th 851, 861 (1998).

behind the enactment of the statute.[11]

Again, by harmonizing this statute with others, we see that the Legislature contemplated that cities would offer different benefit packages to different groups of employees. This is explicitly stated in Government Code section 53208.5's reference to "agencies with different benefit structures…." The one appellate case to discuss this issue has interpreted the statutes to contain no limit on the amount or kinds of benefits that a city may provide its legislative body except that those benefits must not exceed the level of benefits given to any non-safety group. In *Sturgeon v. County of Los Angeles,* 167 Cal.App.4th 630, 654-55 (2008)[12], the court considered the validity of granting benefits to superior court judges. Though focused on other statutes, the opinion considers the application of Section 53201, which authorizes local agencies to provide "any health and welfare benefits for the benefit of its officers, employees, *retired employees*, *and retired members of the legislative body,*" and the Section 53208.5 limitation of such benefits to the most generous benefits offered to non-safety employees. The court indicates that there is "no limitation on the amount or kinds of benefits a local agency may provide its employees or any requirement the benefits be provided on a uniform basis to all classes and categories of employees, except that the benefits provided to members of an agency's legislative body are limited to "the most generous schedule of benefits being received by any category of nonsafety employees."[13] (Emphasis added) This language is shadowed in at least one Attorney General opinion, recognizing that benefits "must be part of *a plan* for large numbers of employees." 80 Ops. Cal. Atty. Gen. 119 (1997)(emphasis added). The wording implies that the level of benefits offered to different groups need not be identical, so long as the plan itself offers some coverage to large numbers of employees.

Thus, so long as a large number of employees receive some level of benefits under the medical plan, section 53202.3 should not be an issue. What constitutes a "large number?" There is virtually no guidance on this issue. In 83 Ops. Cal. Atty. Gen. 45 (2000), the Attorney General examined certain annuities offered by a county office of education, concluding that they were not "health and welfare" benefits under Government Code sections 53200-53210. In so concluding, the AG noted the requirement that any plan "shall provide benefits for large numbers of employees . . . ."

11 *See* White v. Ultramar, Inc., 21 Cal. 4th 563, 572 (1999), *quoting* Dyna-Med, Inc. v. Fair Employment & Housing Com., 43 Cal.3d 1379, 1386 (1987).

12 Note: overturned on unrelated constitutional grounds

13 "In the context of the wide range of benefits allowed by section 53201, section 53200.3 only requires that each county provide its judges the same or similar health and employee benefits it provides "its employees." Because, as section 53208.5 expressly recognizes, the benefits permitted under section 53201 may vary substantially between classes and categories of employees and may be subject to abuse, the reference to benefits provided "employees" in section 53200.3 does not contain a readily discernible standard or safeguard." Sturgeon v. County of Los Angeles, 167 Cal.App.4th 630, 654-55 (2008) Section 53200.3 limits superior court judges "to the same or similar employee benefits as are now required or granted to employees of the county," a standard just as ambiguous as that contained in Sections 53202.3 and 36516(d).

and observed that the "plan was offered to 58 out of 1,410 employees of the county office." Based on the tenor of this observation, it is predictable that the AG would have found that this percentage did not constitute "large numbers of employees."

**Caveat**: There are Attorney General opinions implying, without explicitly ruling, that the "same" level of benefits must be received by large numbers of employees. [14] But I think it would be fair to conclude that, to the extent the City participates in a health care "plan" such as Kaiser or Blue Cross, the statute is satisfied if the basic coverage is the same for everybody even though the City might pay a higher share of the premiums for some employee groups as opposed to others. On the other hand, where the City provides certain benefits that are not part of a "plan," per se, then it *might be* reasonable to conclude that such a benefit constitutes its own "plan" and the same benefit must be provided to large numbers of employees. For example, in 73 Ops.Cal.Atty.Gen. 296 (1990), the AG ruled that the city council of a general law city may provide for its members during their current terms of office a prepaid whole life insurance policy which would provide a member upon resignation or termination a direct and immediate cash benefit, provided that such benefits are available to a large number of the city's employees.

In the wake of the Bell scandal, there can be no guarantees that a court will apply these principles of statutory construction in the same manner. A trial or appellate court might easily fall into the trap of focusing on the exact benefit being offered, as opposed to entire "plan" or "policy," of which the one benefit is just a component.[15] Again, there are

14 These AG opinions mentioning §53202.3 seem to assume that the actual benefits provided to council members are the same as provided to large numbers of employees. The Attorney General has ruled that a school board may grant fully paid health and welfare benefits to age 65 to its former elective members who have served at least 12 years on the board after January 1, 1981, if such benefits are a continuation of a grant made or in effect during the members' respective terms of office and the benefits are provided to large numbers of the school district's employees. 77 Ops. Cal. Atty. Gen. 50 (1994). In that opinion, and one other, 73 Ops. Cal. Atty. Gen. 296 (1990), the AG seemed to imply, without discussing directly, that the exact benefits provided to council members must be the same as provided to large numbers of employees.

15 In fact, the Attorney General did just this in its opinion on the legality of the "in-lieu" pay, 89 Ops.Cal.Atty.Gen. 107 (2006), discussed in Section 1.F, supra. The AG ruled that "in-lieu" pay was not part of the health and welfare plan offered to employees, because it was a cash payment as opposed to a payment directly for health and welfare coverage. A good argument can be made that the AG erred in focusing its analysis on the *benefit received,* as opposed to the "*plan."* The provision of in-lieu benefits to city officials and employees can be argued to be part and parcel of the city's medical "plan;" since council members "may participate in *any plan* of health and welfare benefits," such a benefit should be allowable. Such a reading gives a more expansive interpretation to the term "plan of health and welfare benefits," reasoning that the plan's allowance of in-lieu pay when dual medical coverage would otherwise occur results in a saving of city funds, and is in furtherance of the city's ability and obligation to pay for medical coverage of all city employees. Because the AG fell into the seductive trap of concentrating on the exact benefit as opposed to the "plan" in its entirety, it would not be shocking to see a court follow the same mindset.

no Attorney General opinions directly on point, and even the holding in the *Sturgeon* case is not directly on point. In light of the Sturgeon case, however, it should be safe to assume that a city need not pay the same amount for all employees, and that council members are not restricted to exactly the same city payments as "most" other employees.

## III. MEDICAL BENEFITS FOR COUNCIL MEMBERS WHO LEAVE OFFICE

Cities may provide post-service health benefits by two different means: 1) through a PERS retirement contribution; and 2) in addition to, or in place of, PERS benefits. Consequently, in reviewing the legality of this benefit, it is necessary to analyze two different statutory schemes as set forth below:

PERS Contribution: The Public Employees' Medical and Hospital Care Act ("PEMHCA" - Gov. Code, §§ 22750-22948) permits public agencies to provide health care benefits to their employees and "annuitants" (retirees) under specified circumstances. PEMHCA is administered by PERS. A local "contracting agency," such as the city, and "each employee or annuitant" must contribute to the cost of health plan coverage provided under a plan approved by PERS. (§22890(a)). (89 Ops.Cal.Atty.Gen. 232 (2006).)

Non-PEMHCA Coverage: While there is no case law making this distinction, the Attorney General has held that PEMHCA authorizes an alternative method for local agencies to provide health benefits. One agency can operate under the PERS-PEMHCA scheme for medical coverage, and also provide other health and welfare benefits that are not subject to PEMHCA. 76 Ops.Cal.Atty.Gen. 91 (1993). When an agency contracts for its own health insurance coverage for elected officials (e.g. dental, vision, legal, life), the legality of that coverage is subject to Government Code sections 53200-53210.

### A. Retiree Medical Coverage Under PEMHCA

Under Government Code sections 22890 and 22892, both the city and employees/annuitants are to contribute towards the cost of the medical premiums. The amount of the city contribution is set by city council resolution to be filed with PERS. That amount shall be equal for both employees and annuitants, and cannot be less than $97 per month as of 1998, adjusted each year by PERS to reflect CPI.[16] Notwithstanding this equal contribution requirement, the city is allowed to establish a lesser monthly city contribution for annuitants than employees, provided that the city contribution for annuitants is annually increased by a specified formula until the contributions are equal. The annual adjustment requirement only applies to cities which become subject to it after January 1, 1986. Thus, the statute anticipates that, eventually, the City will contribute an equal amount to medical coverage for both current employees *and* retirees.

16 The current amount: $285 for family coverage; $220 for two-party coverage; $108 for single coverage.

Following negotiations with represented employees, a city could choose to prospectively amend its resolution, or adopt a resolution under Government Code section 22893, which authorizes the City to contribute to retiree medical coverage in specified percentages, such as 50% after 10 years of service, up to 100% after 20 years of service. Certain other provisions in the statute govern the calculations.

When PERS issues its monthly retirement checks, it will deduct the entire cost of medical insurance from the retiree's check, backfilled by the amount that the City contributes pursuant to its resolution which established the amounts contributed for employees and annuitants.[17] The same benefit is provided to all employees, elected officials, and retirees, and thus would be in full compliance with Government Code section 53200 et seq., if a court were to rule that coverage under PEMHCA was also subject to the limitations and restrictions set forth in this other statutory scheme.

### B. Non-PEMHCA Continuation of Health Coverage

If a city supplements medical coverage payments to former council members beyond the amount set forth in its PEMHCA resolution, or offers additional health and welfare coverages, the supplement must be analyzed as a "health and welfare" benefit under Government Code section 53201 et seq.

The applicable statute here is Government Code section 53201, repeated in its entirety, with emphasis added, in the footnote.[18]

---

17 2 C.C.R. §599.504(f)

18 (a) The legislative body of a local agency, subject to conditions as may be established by it, may provide for any health and welfare benefits for the benefit of its officers, employees, retired employees, and retired members of the legislative body, as provided in subdivision (b), who elect to accept the benefits and who authorize the local agency to deduct the premiums, dues, or other charges from their compensation, to the extent that the charges are not covered by payments from funds under the jurisdiction of the local agency as permitted by Section 53205.

(b) The legislative body of a local agency may also provide for the continuation of any health and welfare benefits for the benefit of former elective members of the legislative body who (1) served in office after January 1, 1981, and whose total service at the time of termination is not less than 12 years, or (2) have completed one or more terms of office, but less than 12 years, and who agree to and do pay the full costs of the health and welfare benefits.

(c) (1) Notwithstanding any other provision of law, a legislative body of a local agency that provided benefits pursuant to subdivision (b) to former elective members of the legislative body January 1, 1995, shall not provide those benefits to any person first elected to a term of office that begins on or after January 1, 1995, unless the recipient participates on a self-pay basis, as provided in subdivision (b).

(2) A legislative body of a local agency that did not provide benefits pursuant to subdivision (b) to former elective members of the legislative body before January 1, 1994, shall not provide those benefits to former elective members of the legislative body after January 1, 1994, unless the recipients participate on a self-pay basis.

(3) A legislative body of a local agency that provided benefits pursuant to subdivision (b) to former elective members of the legislative body before January 1, 1994, may continue to provide those benefits to those members who received those benefits before January 1, 1994.

In interpreting this statute, the first key is realizing that there is a difference between "retired" members of the legislative body, and "former" members of the legislative body. Government Code section 53201, subdivisions (b) and (c) prohibit continued medical coverage only for "former" council members, as opposed to council members "retired" under PERS and subject to PEMHCA. A "former" council member is someone who has served on the council but does not retire upon leaving office.[19] The Attorney General has ruled that there is no contradiction between this statutory scheme and PEMHCA, because the prohibitions and restrictions of section 53201 regarding "former members" have no application to annuitants enrolled under PEMHCA. 90 Ops. Cal. Atty. Gen. 32 (2007).

In a PERS jurisdiction, a one-term council member would be a former member, because he or she would not have served for the five years necessary to vest under PERS. For these council members who leave office without having officially "retired," the statute seemingly provides as follows:

First, a council could provide for "former" council members serving after 1981 to receive continued coverage if they have served at least 12 years. If less than 12 years, the former member could participate in the health plan on a self-pay basis. As of 1995, however, this broad authorization for city-paid coverage after 12 years, set forth in subsection (b) was terminated by subsection (c). See 83 Ops. Cal. Atty. Gen. 14 (2000) (city could provide for continued health coverage for former councilmember who has served 12 years, but not for former councilmember who has served 5 years.)

Second, where a city did provide these benefits to former council members as of January 1, 1995, those council members would be grandfathered in when they leave office, but the city could not offer the same coverage to council members first elected after January 1, 1995. If the City did not provide "former" council members with medical coverage before that date, it cannot thereafter provide it to council members unless it is on a self-pay basis, even though the council members may have been on the council prior to the cut-off date.

---

(d) The legislative body of a local agency that is a local hospital district may provide for any health and welfare benefits for the benefit of (1) members of its medical staff, employees of the medical staff members, and the dependents of both groups on a self-pay basis; and (2) employees of any entity owned, managed, controlled, or similarly affiliated with, the legislative body of the local hospital district, and their dependents, on a self-pay basis.

(e) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

19 Under PERS, this means not only that the official serve at least five years, but that he or she file retirement papers within 120 days of separation of service. (Gov't Code §22760(c)) In other words, a councilmember who served well over the five year minimum, but left office when he was only 35 years old, could not receive city-paid PEMHCA continued health care coverage because he would not be eligible to retire until the age of 50.

**Summary**: In the modern era, any council member in a PERS city who serves less than five years, or is not yet 50 years old at the time he leaves the Council, will not be entitled to PEMHCA medical coverage, or city-paid health and welfare coverage unless it is on a self-pay basis. No city may, at this point, provide for city-paid health and welfare coverage for "former" council members where it had not done so before 1994.

### C. Non-PEMHCA Coverage For "Retired" Council Members

Are "retired" members subject to the same constraints as "former" members, as set forth in subsections (b) and (c)? As to the City's payments to PERS for coverage under PEMHCA, the answer is no. The AG has ruled that a county may contribute toward the costs of health care coverage provided under PEMHCA for a retired member of the board of supervisors who is a PERS member and is otherwise eligible for such health care coverage, even though the supervisor did not meet the criteria in subdivisions (b) and (c): subdivisions (b) and (c) are not applicable to PEMHCA annuitants (council members who retire under the PERS system), as those provisions would conflict with the mandate of Government Code section 22890(a), that contracting agencies must contribute to the health care coverage of their annuitants (retirees). 90 Ops. Cal. Atty. Gen. 32 (2007).

If the Attorney General is correct in its interpretation of the statute, [20] and its opinion is applied at face value, the 12 years of service requirement for a former council member to receive continued, city-paid health and welfare benefits, and other restrictions in the section 53200 series, does not apply where a council member has retired.[21]

The unanswered question: if indeed a councilmember has attained "retired" status, are the section 53201 restrictions on health and welfare benefits inapplicable even as to benefits that are above and beyond the city's PEMCHA contribution? For example, may a city provide continued dental coverage to retired council members even though they did not serve for 12 years? Even though such coverage was not provided before 1995? Assuming that the City's PERS resolution does not provide full medical coverage for retirees, can the City "supplement" its contribution so that the entire premium is paid by the City, instead of just the portion set forth in the section 22890 resolution?

Government Code section 53205 expressly provides that the council may authorize payment of all, or such portion as it may elect, of the premiums, dues, or other charges for health and welfare benefits of "officers, employees, retired employees, former elective members specified in subdivision (b) of section 53201, and *retired* members of the legislative body subject to its jurisdiction." This explicit reference to retired members of the legislative body in the same sentence as "former" members provides support for

20 While AG opinions are treated with "great respect," they are not binding upon a court. Thorning v. Hollister School Dist. (1993) 11 Cal.App.4th 1598, 1604.

21 90 Ops. Cal. Atty. Gen. 32 (2007).

the position that a city may provide for retired council members both a supplement to its PEMHCA contribution (so long as provided to other non-safety employees), as well as any other health and welfare benefits not covered by PEMHCA, such as dental or life insurance.

On the other hand, the AG opinion, 90 Ops. Cal. Atty. Gen. 32 (2007), rests on the conclusion that applying the section 53201 restrictions to PEMHCA payments would conflict with the PEMHCA statutory scheme. It did not discuss whether, once retired under PEMHCA, a council member is restricted to the benefits offered by that system. If the City is picking up payments in addition to, and not required by PEMHCA, the underlying rationale for exempting "retired" as opposed to "former" council members from section 53201 may be lost.

It can thus easily be argued that council members retired under PERS are exempt from those restrictions only to the extent that they receive PERS-authorized and mandated continued medical coverage as set forth in each city's resolution under Government Code sections 22890 and 22892. In light of the statutory intent of the entire statutory scheme[22] there is a risk that a court would rule that a supplement beyond the resolution's amount would violate section 53201(b).

However, the fact is that both the statutory scheme and the AG opinions do draw a clear line between status of "former" council member, and the status of "retired" council member. Cities that choose to take that division at face value certainly have a good faith argument in their favor. In fact, good policy reasons for this division can be articulated: the requirement to be "retired," at least in a PERS jurisdiction, means that no council member who has left service is entitled to any city-paid benefits unless he or she is at least fifty years old, has served 5 years, and files retirement papers right after separation from service. So, anyone who serves on a council at a young age, and leaves the council prior to age 50, does not qualify under PERS rules for PEMHCA coverage because of the necessary lapse in time between separation from service and the retirement date. Similarly, he or she does not qualify for "continued" benefits under Section 53201 because he or she will not be retired until long after leaving office, even if he or she has served 12 years, and thus will not be receiving PEMHCA coverage when

22 Government Code section 53208.5 provides, in relevant part: "(a) It is the intent of the Legislature in enacting this section, to provide a uniform limit on the health and welfare benefits for the members of the legislative bodies of all political subdivisions of the state, including charter cities and charter counties. The Legislature finds and declares that uneven, conflicting, and inconsistent health and welfare benefits for legislative bodies distort the statewide system of intergovernmental finance. The Legislature further finds and declares that the inequities caused by these problems extend beyond the boundaries of individual public agencies. Therefore, the Legislature finds and declares that these problems are not merely municipal affairs or matters of local interest and that they are truly matters of statewide concern that require the direct attention of the state government. In providing a uniform limit on the health and welfare benefits for the legislative bodies of all political subdivisions of the state, the Legislature has provided a solution to a statewide problem that is greater than local in its effect."

he or she does finally file with PERS for retirement.

If, in fact, the statute's restrictions are completely inapplicable to any kind of health and welfare benefit offered to "retired" members, and that a city therefore has decided to supplement its payments for PEMHCA medical coverage beyond the amounts set forth in its section 22890 resolution, one more issue presents itself: Does payment of the remaining cost of medical insurance premiums directly to the council member qualify under section 53200(d) as an allowable "health and welfare benefit?" That section defines the term to mean "any one or more of the following: hospital, medical, surgical, disability, legal expense or related benefits including, but not limited to, medical, dental, life, legal expense, and income protection insurance or benefits, whether provided on an insurance or a service basis, and includes group life insurance." (Emphasis added).

In 83 Ops. Cal. Atty. Gen. 124 (2000), the Attorney General considered the meaning of the words "provided on an insurance or a service basis." The AG determined that a "service" plan is distinguished from an "insurance" plan in that the latter features indemnity paid to the "insured." It reimburses for all or part of an obligation which was incurred. The principal feature of a "service" plan, on the other hand, is that the physician has agreed to look exclusively to the plan for payment. The member owes nothing. Regardless of whether the plan is an insurance plan or a service plan, the AG held that the school district was authorized to pay all or a part of the cost of such benefits.

The Attorney General then concluded that the school district could allow its governing board members to choose their own service or insurance plans and be reimbursed for such costs. "If the school district chooses to grant such approval, we see no impediment to the district paying for the benefit by way of reimbursement to its officers or employees instead of making direct payment to the insurer or health care provider." The AG did rule that a school district may not make cash payments to members of its governing board in lieu of providing them with health insurance benefits.

**Summary:** The Attorney General in 90 Ops. Cal. Atty. Gen. 32 (2007) held that the section 53201 restrictions will not apply to retired council members, and thus cities which have provided such supplemental benefits have at least a good faith basis to conclude that direct reimbursement to retired council members for the cost of their medical premiums is a permissible health insurance benefit under the Government Code, provided that it satisfies the other requirements set forth in Government Code section 53200 et seq. However, logically, an argument can be made that the AG's analysis should be limited to medical benefits provided under PEMHCA. Moreover, it has never been blessed by a court, and there are substantial arguments that could lead a court to conclude otherwise.

## IV. OTHER RETIREMENT BENEFITS

Government Code section 53060.1 declares that the extent of retirement benefits for legislative bodies, including city councils, is a matter of statewide concern and is not a municipal affair. The statute places similar constraints on the receipt of retirement benefits as the section 53200 series does on health and welfare benefits. Specifically, the statute provides that council retirement benefits "shall be no greater than that received by nonsafety employees" of the city, and that "in the case of agencies with different benefit structures, the benefits of members of the legislative body shall not be greater than the most generous schedule of benefits being received by any category of nonsafety employees." The section is applicable to any member of a legislative body whose first service commences on and after January 1, 1995.

One other statutory scheme deserves mention. Government Code section 45300 et seq. provides that "any city may establish a retirement system for its officers and employees and provide for the payment of retirement allowances, pensions, disability payments, and death benefits…" (§45301). The city cannot adopt an ordinance establishing such a system unless the employees first approve it in a secret ballot election. The ordinance requires a 2/3 vote of the Council or a majority vote of the electorate, and only the electorate can repeal it. Under the statute, this city retirement system can establish reciprocity with PERS.

## V. Conclusion

Each city council faced with the question of determining its own salary and benefits must confront an ethical dilemma and must make a value judgment as to salary and benefits. It is likely that some of the electorate in your city, in the wake of the Bell scandal, now feels that all public servants, including council members, are overpaid. Many may feel that, since members of boards of directors of local non-profit corporations receive no salary for their charitable endeavors, so, too, councilmembers should also receive no salary or benefits since they are engaged in a public, charitable endeavor for the good of the community. On the other hand, it can also be fairly stated that council members can and do put in long hours and have sometimes weighty responsibilities, worthy of recompense.

In determining that any salary (and benefits) should be paid, or that existing salaries should be increased, a city council must weigh and balance these two competing theories, and try to minimize the inherent self-interest involved in voting on such items.

This paper has attempted to answer some of the questions involved in these decisions. It does NOT cover IRS /tax implications where a city pays for medical or retirement expenses, and, given the uncertainty of the law in these areas, it certainly does not purport to offer definitive answers and unassailable conclusions. The author will be happy to discuss any issues, however, with inquiring minds.