ATTACHMENT C

RESPONDENT'S ARGUMENT

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Via Fax (916) 795-3972 and U.S Mail

California Public Employees' Retirement System
Board of Administration
c/o Cheree Swedendsky, Assistant to the Board
PO Box 942701
Sacramento, CA 94229-3972

Re: Respondent's Argument
In the Matter of the Calculation of Compensation
William M. McCormick, Respondent
Case No. 2013-0899
OAH No. 201311797

Dear Board of Administration:

I represent William M. McCormick, a respondent in the reference case brought by CalPERS' staff. The purpose of this letter is to briefly summarize why we believe the Proposed Decision, dated June 13, 2014 ("Proposed Decision"), should not be adopted by the Board of Administration. We urge the Board to instead either (1) remand this case for a further hearing or (2) decline to adopt the decision in favor of a decision that Mr. McCormick's payrate should be $5,671 per month.

Factual Background

For sake of brevity, we incorporate the Factual Findings 1 through 9 set forth in the Proposed Decision, pages 2 through 4, but offer the following comments:

Fact No. 2: Article III, Chapter 3.11 was not enacted until November 22, 2011.[1]

Fact Nos 3-6: Although the Proposed Decision cites to the correct resolutions, it

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[1] Please see Exhibit A, page 4, to the May 22, 2014 hearing. If copies of these exhibits are not provided to the Board by CalPERS' staff. We will be more than happy to provide them.

selectively quotes from those resolutions. *And in all cases the Proposed Decision overlooks the published salary scales for members of the City Council.*[2]

Also, the Proposed Decision overlooks the important fact that at all times the City of Vernon and Mr. McCormick (as well as all other members of the City Council), paid all of the employer and employee contributions to CalPERS to support Mr. McCormick's correct monthly payrate of $5,671.

Reasons Why the Proposed Decision Is Erroneous

The Proposed Decision is erroneous for several reasons, including, but not limited to, the following:

1. **The Proposed Decision erred by failing to determine that Mr. McCormick's monthly compensation was "payrate" as defined by the Public Employees Retirement Law ("PERL").**

As the Board is aware, CalPERS is a prefunded and defined benefit plan which fixes an employee's retirement benefit based upon the factors of retirement age, length of service, and final compensation. *City of Sacramento v. Public Employees Retirement System* (1991) 229 Cal.App.4th 1470,1478.) "Final compensation" is defined as "the highest average annual compensation earnable by a member." (Gov. Code, §§ 20037, 20042.) Thus, the proper calculation of Mr. McCormick's retirement benefit will depend on his highest average annual "compensation earnable" when he retires. "'Compensation earnable' by a member means the [1] payrate and [2] special compensation of the member . . . ." (Gov. Code, § 20636.)

"'Payrate' means the normal monthly rate of pay or base pay of the member paid in cash to similarly situated members of the same group or class of employment for services rendered on a full-time basis during normal working hours, *pursuant to publicly available pay schedules*. (Gov. Code, § 20636, subd. (b)(1), italics added.[3]) Section 20636, subdivision

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[2] See, e.g., Exhibit I, at Exhibit B (Resolution No. 9284); Exhibit K, at Exhibit D (Resolution No. 9362); Exhibit L, at Exhibit E (Resolution No. 9639): and Exhibit N, at Exhibit E (Resolution No. 2011-129).

[3] The statute was amended effective January 1, 2007, at CalPERS' behest, to add the words "pursuant to publicly available pay schedules" to the first sentence of section 20636, subdivision (b)(1).

(e)(1) states: "'group or class of employment' means a number of employees considered together because they share similar job duties, work location, . . . or other logical work related grouping."

Here, the uncontroverted evidence demonstrates that Mr. McCormick, a City Council member, received $5,671 per month, *the same as all other council members, pursuant to published salary schedules*. Thus, Mr. McCormick's monthly compensation falls squarely within the definition of "payrate," and no provision of the PERL (including those quoted at pages 4 to 9 of the Proposed Decision) provides otherwise.

Importantly, the Proposed Decision correctly states that "[i]t is true that the City Council has the exclusive right to set its members' salaries." (Proposed Decision, p. 10.) Yet the decision failed to follow this rule, reasoning that "the Council's determination of members' compensation is at variance with the [PERL]." (*Ibid.*) However, because Mr. McCormick's compensation, as set forth in published salary scales, falls squarely within the definition of "payrate," there is no "variance with the [PERL]."

2. Alternatively, the Proposed Decision erred by failing to determine that Mr. McCormick's monthly compensation was "special compensation."

The Proposed Decision, without any factual support, states that Mr. McCormick's compensation paid pursuant to published salary scales since 2007 was simply an attempt to "disguise" what had previously been referred to as an "attendance allowance." However, the original resolution adopted on April 2, 2007, clearly indicates no intent to "disguise" anything. Rather, the justification for the newly-published salary scales for council members was expressly stated as an effort to simplify the compensation package for council members. (Exhibit I, p. 1.) But even if the "disguise" motivation is accepted, the pre-2007 attendance allowance is properly included in "compensation earnable" because it is "special compensation."

As stated above, "compensation earnable" can also be established by demonstrating that compensation is "special compensation." "Special compensation of a member includes any payment received for special skills, knowledge, abilities, *work assignment*, workdays or hours, or other work conditions." (Gov. Code, § 20636, subd. (c)(1), italics added.) "Special compensation shall be limited to that which is received by a member pursuant to a labor policy or agreement or as otherwise required by state or federal law, *to similarly situated members of a group or class of employment* that is in addition to payrate." (Gov. Code, § 20636, subd. (c)(2), italics added.) Moreover, if viewed as "special compensation," the attendance allowance paid to council members before 2007 is in conformance with the

requirements of the California Code of Regulations, tit. 2, § 571, subd. (b).

Again, the uncontroverted evidence demonstrates that Mr. McCormick, a City Council member, received $5,671 per month, *the same as all other council members*. Thus, even if the facts of the 2007 resolution are ignored and Mr. McCormick's monthly compensation (as published repeatedly in salary schedules) is determined to include "attendance allowance," that compensation also falls squarely within the definition of "special compensation," and no provision of the PERL (including those quoted at pages 4 to 9 of the Proposed Decision) provides otherwise.

3. The Proposed Decision erred by concluding that the 2011 City Charter provision restricted the City's ability to set Council salaries in 2007.

The Proposed Decision erroneously asserts that Article III, Chapter 3.11[4] effects resolutions adopted years earlier. This provision was not enacted until November 22, 2011. (Exhibit A, p. 4.) Any such retroactive interpretation of section 3.11 would violate the vested benefits doctrine because it would retroactively affect Mr. McCormick's pension after his public service began.

In *Kern v. City of Long Beach* ("*Kern*") (1947) 29 Cal.2d 848, 851-852, the Supreme Court explained: "where . . . services are rendered under . . . a pension statute, the pension provisions become part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself." Later, the Court stated: "Although there may be no right to tenure, public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned. Since a pension right is 'an integral portion of such contemplated compensation' [citation], it cannot be destroyed, once it has vested, without impairing a contractual obligation." (*Id.* at p. 802.) Finally, the Court held: "the right to a pension vest[s] upon acceptance of employment." (*Id.* at p. 801.)[5]

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[4] On page 2 of the Proposed Decision Article III, Chapter 3.11 is referred to as an ordinance, and on page 10 it is referred to as part of the City Charter.

[5] That principle was established in *Dryden v. Board of Pension Commrs.* (1936) 6 Cal.2d 575, 579. "The Dryden case concerned the rights of a policeman in a pension fund to which he had made contributions while he was on active duty. It was held that by the provisions of the city charter, under which that fund was created and maintained, the right to a pension was an integral part of the contract of employment and became a vested right *at the time the employment began.*" (*French v. French* (1941) 17 Cal.2d 775, 777, italics added.)

In *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864, the Supreme Court declared that "[a] long line of California decisions has settled the principles applicable to the problems here presented":

(1) "A public employee's pension constitutes an element of compensation, and *a vested contractual right to pension benefits accrues upon acceptance of employment.* Such a pension right *may not be destroyed*, once vested, without impairing a contractual obligation of the employing public entity." (*Id.* at p. 863, italics added.)

(2) "An employee's contractual pension expectations are measured by benefits which are in effect not only when employment commences, but which are thereafter conferred during the employee's subsequent tenure." (*Id.* at p. 866.)

(3) "'An employee's vested contractual pension rights may be modified prior to retirement for the purpose of keeping a pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. [Citations.] Such modifications must be *reasonable*, and it is for the courts to determine upon the facts of each case what constitutes a permissible change." (*Id.* at p. 864, italics added.)

(4) "To be sustained as reasonable, alterations of employees' pension rights must [A] bear some material relation to the theory of a pension system and its successful operation, *and* [B] *changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.*' [Citations.]" (*Id.* at p. 864, italics original; accord, *Maffei v. Sacramento County Employees Retirement System* (2002) 103 Cal.App.4th 993, 999-1000; *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1132-1133; *Valdes v. Cory* (1983) 139 Cal.App.3d 773, 783-784.)

Here, there is no evidence that the 2011 adoption of Article III, Section 3.11—interpreted by the Proposed Decision to impact Mr. McCormick's pension rights established in 2007 and thereafter—was accompanied by any "comparable new advantage." Therefore, the decision was also erroneous in this regard.

4. The Proposed Decision erred by failing to recognize that pension laws are to be liberally construed in favor the pensioner.

"[C]ourts have repeatedly declared that pension laws are to be liberally construed and if any doubt remains in regard to the proper construction of a pension statute, that doubt must be resolved in favor of the person claiming the right to the pension." (*In re Retirement*

Cases (2003) 110 Cal.App.4th 426, 473 ["pension provisions shall be liberally construed and we resolve all ambiguities in favor of the pensioner"]; *Snyder v. City of Alameda* (1943) 58 Cal.App.2d 517, 519.) The Supreme Court has repeatedly admonished "'that courts must be vigilant in protecting the rights of the pensioner against powerful . . . administrators.'" (*Hittle v. Santa Barbara County Employees Retirement Assn.*, (1985) 39 Cal.3d 374, at p. 393, quoting *Symington v. City of Albany* (1971) 5 Cal.3d 23, 33.)

Thus, any doubts should have been resolved in Mr. McCormick's favor.

5. The Proposed Decision relies on a distinguishable case.

The Proposed decision improperly relies on the *Woods* precedential decision 12-01 (p. 9). In that distinguishable case, the employee had his, *and only his*, contract changed *in the final year before retirement* to include his $800 per month automobile allowance in his hourly rate of pay. (*Woods* at p. 10, ¶ 13.) *Woods* is distinguishable because (1) the pre-2007 "attendance allowance" never was an expense reimbursement like the automobile allowance in *Woods*, (2) Mr. Wood's special compensation package for his final employment period was not paid to all members of a group or class, and (3) there was no increase in compensation earnable in the final year of employment, or "final settlement pay" (i.e., "spiking"). (Cal. Admin. Code, tit. 2, § 571, subd. (b)(2), (6), (7), and (8).) Here, there is no evidence whatsoever that the City of Vernon's decision in 2007 to simplify the compensation package to council members was an effort to spike any person's pension. Mr. McCormick has not yet retired, and the 2007 resolution was *several years before retirement*. Thus, there can be no credible inference of "spiking" because there is no evidence of it.

Relief Requested

We urge the Board to either (1) remand this case for a further hearing to determine whether the adoption of Article III, Chapter 3.11 was accompanied by any comparable advantages, or (2) decline to adopt the decision in favor of a decision that Mr. McCormick's payrate should be $5,671 per month.

Very truly yours,

Michael A. Conger

MAC/pbm

cc: Cynthia A. Rodriguez, Esq. (via e-mail:cynthia.rodriguez@calpers.ca.gov)
William M. McCormick

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Received
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To: California Public Employees' Retirement System
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From: Michael A. Conger, Esquire

Re: **Respondent's Argument**
In the Matter of the Calculation of Compensation
William M. McCormick, Respondent
Case No. 2013-0899
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Date: August 8, 2014

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