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DELIVERED BY MESSENGER

Mayor Tom Barrett and
The Common Council of the
City of Milwaukee
200 East Wells Street
Milwaukee, WI 53202-3591

Dear Mayor Barrett and

Members of the Common Council: Re: Potential Change in Employee
Contributions to the Employees'
Retirement System of the City of
Milwaukee

The City of Milwaukee ("City") asked that we provide a legal opinion regarding the implications of the City's compliance with section 167 of the 2011 Wisconsin Act 10 (the "Act"), as codified in Wisconsin Statute section 62.623 ("Section 62.623"), as applicable to the Employees' Retirement System of the City of Milwaukee ("ERS"). Section 62.623 would require employees to pay all "employee required contributions" to ERS. Previously, the City Attorney's office prepared a legal opinion ("Opinion 1") on this issue, as did James Greer of Whyte Hirschboeck Dudek s.c. ("Opinion 2").¹

EXECUTIVE SUMMARY

Based on the ERS Ordinances, enabling legislation and existing case law, it is our opinion that the City is neither compelled to impose additional employee contributions on current ERS members beyond those in place on Section 62.623's July 1, 2011 effective date, nor may it unilaterally choose to do so, for the following reasons.

¹ We have been instructed not to opine on the Home Rule argument discussed in Opinion 1. Therefore, we offer no opinion on the merits or relevance of that argument.

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First, Section 62.623 mandates only that employees pay "all employee required contributions" to ERS. To the extent the ERS Ordinances currently require the City to pay contributions on behalf of employees, there are no "employee required contributions."

Second, if Section 62.623 is construed to require employees to fund the employee contribution funded by the City, the statute would violate the constitutionally protected contractual and vested benefit rights of ERS members. The ERS Ordinances contain expansive contractual protections for members' benefits. This contractual right covers all terms and conditions of the pension benefit at the member's hire date, plus any later enhancements of those rights. Wisconsin courts have consistently protected and upheld the contractual rights of public pension plan members, including cases involving ERS. The Global Pension Settlement between the City and ERS ("GPS"), discussed below, further supports this conclusion. The GPS was a negotiated settlement of ongoing litigation involving ERS in which the parties – and the court – acknowledged that the ERS Ordinances establish contract rights to benefits that may not be modified without employee consent.

Third, requiring employees to fund the employee contribution currently funded by the City would likely be held to be an unconstitutional taking of members' property rights. Wisconsin courts have established that government employees have a property right in their promised pensions. The ERS Ordinances provide that the City will pay the entire cost of providing ERS benefits for certain employees. Changing this arrangement would both reduce these employees' compensation by 5.5% and diminish the value of the pension that was contractually required to be funded solely by the City, without just compensation.

FACTS/BACKGROUND

The terms of Section 62.623 and applicable ERS Ordinances establish the foundation for analyzing the impact of Section 62.623.

1. Wisconsin Statutory Requirement. Section 62.623 requires certain employees in ERS to pay "employee required contributions" as follows:

62.623 Payment of contributions in an employee retirement system of a 1st class city. Beginning on

July 1, 2011, in any employee retirement system of a 1st class city, except as otherwise provided in a collective bargaining agreement entered into under such. IV of ch. 111 and except as provided in sub. (2), **employees shall pay all employee required contributions for funding benefits under the retirement system. The employer may not pay on behalf of an employee any of the employee's share of the required contributions.** (emphasis added)

2. ERS Ordinance Provisions. A number of ERS Ordinance sections are germane to the impact of Section 62.623 on ERS and City employees.

(a) Employee Contributions. As of June 30, 2011, ERS Ordinances provide that only certain employees pay employee contributions. Ordinance section 36-08 describes these contributions.

(i) Employees Who Became Members Prior to January 1, 2000. Section 36-08-7-a1 of the City Ordinances provides that the City shall contribute to ERS 5.5% of certain employees' compensation:

Members who are not firemen, policemen or elected officials shall contribute or have contributed on their behalf, 5.5% of the member's earnable compensation. Except as provided in subd. 2, subsequent to and commencing with the first pay period of 1970, the city shall contribute on behalf of general city employees [sic, throughout] 5.5% of such member's earnable compensation. Members employed by city agencies participating in the system shall contribute 5.5% of their earnable compensation less any contribution made on their behalf as determined by the governing bodies of such agencies.

(ii) Employees Who Became Members on or after January 1, 2000 but before January 1, 2010. Section 36-08-7-m provides a temporary employee contribution for employees hired on or after January 1, 2000:

During the 8-year period immediately following their enrollment, general city employees who are enrolled as members on or after January 1, 2000 shall contribute to the combined fund a sum expressed as 1.60% of the member's pensionable earnings if they participate in the combined fund. If a member who makes contributions under this paragraph separates from service without a vested pension or withdraws his or her accumulated contributions, amounts contributed under this paragraph shall be returned to the contributor without interest. This subsection shall not apply to general city employees required to contribute 5.5% of their earnable compensation under subd. a-1 or 2.

Thus, since 1970, the City has paid the 5.5% employee contributions on behalf of City employees who became members prior to January 1, 2010. However, City employees who became members on or after January 1, 2000 (and before January 1, 2010 or other dates depending on union status) must make a 1.60% contribution ERS for the first eight years of enrollment.²

(iii) Employees Who Became Members On or After January 1, 2010. Section 36-08-7-a2 of the City Ordinances requires City employees hired after 2009 to pay an employee contribution to ERS equal to 5.5% of pay:

City employees hired on or after January 1, 2010, who are represented by Milwaukee District Council 48, AFSCME, AFL-CIO, the Technicians, Engineers and Architects of Milwaukee, the Association of Scientific Personnel, the Association of Municipal Attorneys, SEIU Healthcare District 1199 Wisconsin/Staff Nurses Council, Local 195, IBEW, AFL-CIO, Local 75, Journeyman Plumbers and Gasfitters Union, AFL-CIO,

² Members who are employees of City agencies have a different employee contribution structure than City employees. The manner in which City agency employees contribute exceeds the scope of this opinion, and, as such, we are not expressing an opinion with regard to City agency employees.

Local 494, IBEW, AFL-CIO, Machine Shop, District 10, IAMAW, AFL-CIO, Joint Bargaining Unit Local 139, IUOE, AFL-CIO/Milwaukee District Council 48, AFSCME, AFL-CIO, Public Employees' Union #61, LIUNA, AFL-CIO, CLC, management and nonmanagement/nonrepresented employees, city employees represented by Local 494, IBEW AFL- CIO, Electrical Group hired on or after June 1, 2010; city employees represented by Local 494, IBEW, AFL-CIO, Fire Equipment Dispatchers employees hired on or after June 15, 2010; city employees represented by Milwaukee Building and Construction Trades Council, AFL-CIO, hired on or after August 1, 2010; employees of Milwaukee public schools represented by Milwaukee Building and Construction Trades Council, AFL-CIO, hired on or after August 1, 2010; employees of Milwaukee public schools represented by, and clerical employees exempt from, Local 1053, AFL-CIO, District Council 48, hired on or after August 1, 2011, and employees of Milwaukee public schools represented by Local 1616, AFL-CIO, District Council 48, hired on or after July 1, 2011, shall contribute 5.5% of their earnable compensation.

Thus, employees hired on or after January 1, 2010 (or other dates listed above, depending on union status) contribute 5.5% of their compensation to ERS for their entire period of participation.

(iv) Elected Officials. Section 36-08-7-c of the City Ordinances provides that the City shall pay 7% of compensation to ERS with regard to elected officials:

Members who are elected officials shall contribute or have contributed on their behalf 7% of the member's earnable compensation, and in respect to such members subsequent to and commencing with the 1st pay period of

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1971 the city shall contribute 7% of earnable compensation.

Accordingly, the City pays 7% of compensation for elected officials, regardless of when the elected official became a member.

(b) ERS's Vested and Contractual Rights. ERS members have a contractual and vested right to their pension benefit under Ordinance section's 36-13-2-a, 2-b, and 2-c, which are codifications of Section 30 of ch. 441, Laws of 1947. These sections provide that members have a contract right in all terms and conditions of their benefit and state as follows:

The benefits of members, whether employees in service or retired as beneficiaries, and of beneficiaries of deceased members in the retirement system created by chapter 396, laws of 1937, as amended, shall be assured by benefit contracts as herein provided.

a. Every such member and beneficiary shall be deemed to have accepted the provisions of this act and shall thereby have a benefit contract in said retirement system of which he is such member or beneficiary as of July 30, 1947, unless, within period of 30 days thereafter, he files with the board administering the system a written notice electing that this subsection shall not apply to him. The annuities and all other benefits in the amounts and upon the terms and conditions and in all other respects as provided under this act and as amended shall be obligations of such benefit contract on the part of the city and of the board administering the system and each member and beneficiary having such a benefit contract shall have a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation or by any other means without his consent.

b. The board administering the system may issue to each member and beneficiary who shall have a benefit contract under this act a written or printed contract but the contract shall be in full force and effect whether or not any written or printed evidence thereof shall be so issued.

c. Any person who shall become a member of this retirement system after July 30, 1947... shall have a similar benefit contract and vested right in the annuities and all other benefits in the amounts and on the terms and conditions and in all other respects as provided in the law under which the retirement system as established as such law shall have been amended and be in effect at the date of commencement of his membership and as subsequently amended....

(c) GPS. The GPS was precipitated by a dispute regarding payment of ERS investment expenses out of ERS assets. Previously, the City had paid ERS investment and administrative expenses from City funds rather than ERS funds. The City sought to make these payments from pension assets because ERS had accumulated far more in assets than was needed to pay present and future liabilities. Lawsuits were filed to contest the City's right to use ERS assets for these purposes, including *Milwaukee Police Association v. City of Milwaukee*, 222 Wis.2d 259, 588 N.W.2d 626 (Ct. App. 1998), and the *Milwaukee Employees' Retirement System v. City of Milwaukee*, 2000 WI App. 2, 229 Wis. 2d 734, 600 N.W.2d 54 (unpublished). Based upon these cases, the City concluded that it could not unilaterally begin paying employer expenses with fund assets due to constitutional challenges involving the contracts clause and property takings issues. The City concluded it required members' consent and court approval to make such a change. Accordingly, the parties (City, agencies, unions, members and retirees) entered into the GPS and received court approval through a declaratory judgment.

The GPS included a memorandum of understanding ("MOU") in which the City, ERS, each of the unions and all other interested parties signed an agreement detailing the terms of the settlement. *See Memorandum of Understanding*;

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City of Milwaukee v. Milwaukee Employees' Retirement System and Annuity Pension Board, No. 00-CV-003439, Findings of Fact, paragraph 2. Under the GPS, members received certain enhanced benefits in exchange for consenting to payment of ERS expenses out of ERS assets and a number of other structural changes to ERS. As part of the GPS, ERS and the City sought individual consent from each of ERS's members to the terms of the settlement and to the modifications to the ERS Ordinances. Over 90% of the members consented to the settlement. Those members who did not consent had the ERS assets supporting their benefits segregated and retained in a separate fund, not subject to payment of expenses, and did not receive the enhanced benefits.

As noted above, the parties to the GPS also sought and received court approval of the GPS through a declaratory judgment action with the Milwaukee County Circuit Court. As part of its ruling, the court adopted specific Findings of Fact. Paragraph 35(a) of the Findings of Fact stated that the terms of the 1947 legislation, codified in Charter section 36-13-2 provide members "a contractual right to the annuities and other benefits conferred by the Employers' Retirement Act." Such finding was an express affirmation by the court that a contractual right existed and could only be modified with consent.

As part of the GPS, the court approved and the City enacted the following amendment to the ERS Ordinances which reaffirmed the vested contractual rights of members in ERS:

Every member, retired member, survivor and beneficiary who participates in the combined fund shall have a vested and contractual right to the benefits in the amount and on the terms and conditions as provided in the law on the date the combined fund is created.

ANALYSIS

1. Where City Pays Employee Contributions, There is No "Employee Required Contribution". Similar to the analysis in Opinion 2, we believe Section 62.623's effect on ERS hinges on the requirement that employees "pay all *employee required contributions*" and that the "employer may not pay on behalf of an employee any of the *employee's share of the required contributions*." (emphasis added). We believe that a straight-forward and plain language reading of Section 62.623 and the

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ERS Ordinances leads to a conclusion that all City employees have an employee contribution; however, for some of those employees, the employee required contribution is \$0.

The ERS Ordinances cited above describe an employee contribution for each classification of City employees. Notably, the employee contribution for pre-2000 members is paid by the City. Interpreting the Ordinances as not including an employee contribution from employees on whose behalf the City pays their employee contribution renders meaningless the portion of Ordinance section 36-08-7-a1 specifying an employee contribution of 5.5% for those individuals. Section 36-08-7-a1 does not provide that the City is making an employer contribution; rather, that section states that the City will contribute the employee contribution amount "on behalf of" those employees.

Accordingly, on July 1, 2011, the employee required contribution (emphasis added) for pre-2000 employees described in Ordinance section 36-08-7-a1 is \$0. These employees are simply not *required* to make any employee contribution. For City employees with a current employee required contribution of greater than \$0 (i.e. City employees hired on or after January 1, 2010, and City employees hired on or after January 1, 2000 still paying the 1.6% contribution), Section 62.623 mandates that these employees must continue to make their current "employee required" contribution and the City may not pay any share of that contribution after July 1, 2011.

In essence, this interpretation of Section 62.623 as applied to ERS Section 62.623 would maintain the status quo of the employee contribution structure as of July 1, 2011.

2. Constitutional Issues – Contractual Rights to Benefits. Should the City determine that Section 62.623 requires employees to contribute employee contributions currently paid by the City on behalf of employees, or should the City elect to require the same on its own, then significant constitutional issues arise based on the contract benefit and property rights of ERS members. These issues are discussed in this Section 2 and the following Section 3.

Similar to Opinion 1, we conclude that ERS members have a contractual right in the terms and conditions of their benefit as of the date they first become a member of ERS and that ERS members must individually consent to detrimental

changes to their benefits (such as a new, increased employee contribution). The following reviews the contractual and vested rights of ERS members.

(a) Vested Contract Right. As quoted in the background section above, City Ordinance section 36-13-2 codifies that ERS members have a contractual and vested right to their benefit "on the terms and conditions and in all other respects" as in place on the date the individual commences membership. Wisconsin courts have also held that members of public sector pension systems have a contractual right in their government plan benefit, with some cases examining the ERS Ordinances specifically.

In *Welter v. City of Milwaukee*, 214 Wis. 2d 485, 571 N.W. 2d 459 (1997), the Court of Appeals declared that the City could not "modify the annuities, benefits, or other rights of any persons who are members of the [retirement] system prior to the effective date of such amendment or alteration." The Court of Appeals reached a similar conclusion in *Rehrauer v. City of Milwaukee*, 246 Wis. 2d 863, 631 N.W. 2d 644 (Ct. of App. 2001), holding that firefighters acquired enhanced rights to disability benefits through the course of employment, and these enhanced disability benefits were vested contractual rights that could not be subsequently unilaterally changed. The court based its decision on the provisions of the City Ordinances stating that ERS members enjoyed contractual vested rights in the annuities, and all other benefits "in the amounts and on the terms and conditions" in effect at the time they commenced membership, "and as subsequently amended." These rights could not be taken away, either unilaterally by Ordinance amendment or by collective bargaining, without individual consent. The Court of Appeals in *Milwaukee Police Association v. City of Milwaukee*, 222 Wis.2d 259, 588 N.W.2d 626 (Ct. App. 1998), also recognized that City employees have a vested right in their benefits as of the day they become members of ERS.

The Wisconsin Supreme Court has also analyzed contractual rights to benefits, but in the context of retiree health plans. *Roth v. City of Glendale* 2000 WI 100, 237 Wis. 2d 173, 614 N.W.2d 467; *Loth v. City of Milwaukee*, 2008 WI 129; 315 Wis.2d 35, 758 N.W.2d 766. The Court's decision in *Roth* supports the conclusion that, if a contract right exists, an employer cannot unilaterally take it away. In *Loth*, the Court held that a change in payment for retiree health benefits was

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permissible and did not violate a member's contract rights because the member had not met all of the qualifications for retirement necessary to implicate his contract rights.

(b) City Payment of the Employee Contribution is a Contract Right and Vested Benefit. Ordinance section 36-13 guarantees ERS members a "benefit contract and vested right in the annuities and all other benefits in the amounts and on the terms and conditions and in all other respects as provided in the law." Court decisions affirm that the benefit afforded to members of public pension funds are contract rights. In particular, courts have specifically reviewed Ordinance section 36-13 and held that ERS members maintain a contractual right to their benefits on the day they become members.

One question that may arise is whether the City's payment of an employee's contributions to ERS qualifies as a "term and condition" of receiving the benefit. We believe that a court would likely determine that payment of employee contributions constitutes a term or condition of receiving a benefit. The employee contribution provision is included in the ERS Ordinances and affects the value to the member of the pension benefit. Altering the amount of the employee contribution would result in ERS imposing a significant cost on members, where the Ordinance had in the past provided a no-cost, City-funded benefit.

(c) Shifting a Contribution to the Employee is Likely an Unconstitutional Impairment of Contractual Rights. The government may not impair established contractual and vested benefit rights through statutory or other action. Here, current City employees have established contractual rights not to make employee contributions to ERS, as a condition of their benefit contract. If Section 62.623 impairs City employees' contractual benefit rights, we believe a court would uphold a challenge by employees to the statute.

As discussed in Opinion 2, "there is a strong presumption that a legislative enactment is constitutional." *Chappy v. Labor and Industry Review Commission*, 136 N.W.2d 568, 575 (Wis. 1987). To make a constitutional challenge to state action on the grounds of impairment of contract, the challenging party must establish that: (i) the legislation impairs an existing contractual relationship; (ii) the impairment is substantial; and, (iii) the purpose of the state legislation does not justify the impairment. *Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 244-45, 98 S.Ct. 2716, 57 L.Ed. 2d 727 (1978) cited in *Reserve Life Insurance Company v.*

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LaFollette, 108 Wis. 2d 637, 323 N.W.2d 173 (Ct. App. 1982). Based on these criteria, it appears that a unilateral change to the funding of the employee contribution would be held to be an unconstitutional impairment of the ERS members' contract and vested rights.

(i) Impairment of Contract. As discussed above, the ERS Ordinances, court cases and the GPS grant ERS members contract rights to the terms and conditions of their ERS benefits. Payment of employee contributions would likely be considered a term or condition of this contract. Requiring employees to begin paying such contributions would impair these rights.

(ii) Substantial Impairment. As noted above, courts review the severity of the impact in determining whether a contractual impairment is unconstitutional. In determining the severity of the impairment, courts look to the reasonableness of the parties' reliance upon the contract affected. *Chappy v. Labor and Industry Review Commission*, 136 Wis. 2d 172, 186, 401 N.W.2d 568, 574 (1987). As part of this review, courts consider whether the industry affected has been regulated in the past, whether the legislation nullified a basic term of the contract and whether liability results from the challenged legislation.

Under the foregoing analysis, a court would likely deem the impairment in this instance as substantial. Historically, the State has not regulated ERS. Rather, the State has delegated authority over ERS to the City, and the City has maintained all oversight. Further, modifying the funding for the employee contributions would arguably nullify a basic term of the contract. Finally, the financial impact related to the funding change is significant and imposes a liability on the affected members. As discussed in Opinion 1, changing employee contribution methods would equate to a loss of over 14 days of pay for each individual. Cases cited in Opinion 1 support the conclusion that such a loss would be substantial.³

³ *University of Hawaii Professional Assembly v. Cayetano*, 183 F.3d 1096 (9th Cir. 1999); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 940 F.2d 766 (2nd Cir. 1991); *Fraternal Order of Police v. Price George's County*, 645 F.Supp.2d 492 (D.Md. 2009); *Association of Surrogates and Supreme Court Reporters v. State of New York*, 79 N.Y.2d 39, 588 N.E.2d 51 (N.Y. 1992); *Baltimore City Lodge No. 3 v. Mayor and City Council of Baltimore*, 801 F.Supp 1506 (D.Md. 1992); *Massachusetts Community College v. Commonwealth of Massachusetts*, 420 Mass. 126, 649 N.E.2d 708 (Mass. 1995).

(iii) Justified Impairment. If a court decides the impairment is substantial, the court then examines the purpose of the state legislation to determine whether the impairment is justified. The United States Supreme Court has repeatedly held that the contract clause must accommodate the state's police power, and this police power is paramount to any right of individuals under contracts. *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 410, 103 S.Ct. 697, 703, 74 L.Ed.2d 569 (1983); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 190, 103 S.Ct. 2296, 2305, 76 L.Ed.2d 497 (1983). However, the Court also recognized that the contract clause imposes limits on a state's police power to interfere with existing contractual relations.

Under Wisconsin case law, courts will uphold laws impairing contracts when the law exercises the police power of the state to preserve and protect the public welfare. In *State ex rel. Cannon v. Moran*, the Wisconsin Supreme Court considered a case involving an alleged unconstitutional impairment of contractual rights of judicial members of Milwaukee County's retirement system. 331 N.W.2d 369 (Wis. 1983). In that case, the Court cited to U.S. Supreme Court precedent and stated that whether a law unconstitutionally impairs a contract depends on whether the statute is reasonable and of "a character appropriate to the public purpose justifying its adoption." *Id.* at 378. In *Moran*, the Court held that a law reducing the judges' salaries by the amount of the pension benefits they received from the County retirement system did not reasonably apply to the plaintiffs or appropriately safeguard a vital interest of the people. Accordingly, the Court held the law was unconstitutional.⁴

We believe the State would have difficulty demonstrating a public purpose necessary to justify impairing the contract rights of ERS members in this case. The State would derive no financial benefit in forcing a shift in funding

⁴ See also *Chicago & Northwestern RR Co v. LaFollette*, 169 N.W.2d 441 (Wis. 1969) (The court held that a statute requiring additional train crew members above what the railroads believed was necessary was an exercise of the police power because safety of the public and of the railroad crew are legitimate concerns of the legislature in the exercise of police power); *State ex rel. Building Owners & Managers Assn. of Milwaukee v. Adamany*, 219 N.W.2d 274 (Wis. 1974) (The court held that because a new law limited the substantive value of a previously negotiated contract, evidence was necessary to prove that such law requiring landlords to collect less rent than the leases obligated renters to pay was necessary for the vital interest of the people of the state).

employee contributions. Arguably, the State might claim that if the City contributes a smaller amount to ERS, the State might benefit from the City's financial health, allowing the State to better balance its budget. However, the State's revenue payments to the City are based on numerous factors, none of which relate to the amount the City must contribute to ERS, either as employer or employee contributions. *See County and Municipal Aid (State Shared Revenues)*, available at <http://www.revenue.wi.gov/ra/10munico.pdf>. The State's nexus to any financial benefit gained from ERS employee contributions is simply too tenuous. Moreover, Opinion 1 points out that Wisconsin courts have held that reasons unrelated to the financial stability of a pension fund do not justify the abrogation of vested rights accruing to the fund's members. *See Association of State Prosecutors v. Milwaukee County*, 199 Wis.2d 549, 544 N.W.2d 888 (1996); *Milwaukee Police Association v. City of Milwaukee*, 222 Wis.2d 259, 588 N.W.2d 626 (Ct. App. 1998).

If the City adopted Ordinance amendments requiring the funding shift, the same impairment analysis would apply. In such a situation, the first two prongs of the test would still be satisfied, as discussed above. Regarding the third prong, the City would need to demonstrate that balancing its budget qualified as a legitimate public purpose to impair existing contractual rights. However, factually, the City has many ways to balance its budget. Moreover, as noted above, Wisconsin courts have ruled that general budgetary constraints are not a justification for abrogating contract rights of members in a public sector plan. ERS receives the same amount of funding regardless of whether the employee or the City makes the employee contribution. Thus, the financial stability of the pension fund is not at risk.

3. Constitutional Issues - Unconstitutional Taking of Property. Apart from the contractual impairment issue, a unilateral requirement to shift the funding of employee contributions would face a challenge under the takings clause of the Wisconsin Constitution. This clause provides that "[t]he property of no person shall be taken for public use without just compensation therefor." Wis. Const. art. I, § 13. The Wisconsin Supreme Court has set forth a two part analysis for an alleged taking: (1) does a property right exist; and (2) if so, has the property been taken without just compensation. *Wisconsin Professional Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, 243 Wis.2d 512, 627 N.W.2d 807 (2001).

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Courts have held that members of public pension plans have a protected property interest in the fund. *State Teachers' Ret. Bd. v. Giessel*, 12 Wis. 2d 5, 10, 106 N.W.2d 301 (1960). Whether a taking of that property right occurs generally depends upon whether government action results in use or transfer of pension funds or assets or merely changes plan administration. For example, the Wisconsin Supreme Court has held that members have protectable property interests in the whole of the retirement trust funds and in their annuity or individual account, and that a taking can occur when the government transfers assets between different retirement system accounts. See *Association of State Prosecutors v. Milwaukee County*, 199 Wis. 2d 549, 552, 544 N.W.2d 888 (1996); *Wisconsin Retired Teachers Association v. Employe Trust Funds Board*, 207 Wis. 2d 1, 558 N.W.2d 83 (1997); *Wisconsin Professional Police Ass'n, Inc. v. Lightbourn*, 2001 WI 59, 243 Wis.2d 512, 627 N.W.2d 807 (2001). In contrast, other courts have held that a taking of property does not occur when the government uses pension fund assets to pay administrative expenses or for benefit enhancements. See *Bilda v. County of Milwaukee*, 2006 WI App 57, ¶ 4, 292 Wis. 2d 212, 713 N.W.2d 661 ("*Bilda I*"); *Bilda v. Milwaukee County*, 2006 WI App 159, ¶ 1, 295 Wis. 2d 673, 722 N.W.2d 116 ("*Bilda II*").

Based on this case law, we believe that a court would hold that ERS members have a property interest in a City-funded pension benefit, fulfilling the first prong of the test in *Lightbourn*. Each ERS member has a property interest in his or her annuity benefit and in not having that benefit reduced. A benefit that is paid entirely by the City is of greater value to the member than a benefit that is partially funded by the member. It could be argued that because City-paid employee contributions are part of funding ERS, a property interest does not exist, as some cases have held that property rights do not extend to govern how a retirement system is funded and administered. See *Bilda I* and *Bilda II*. However, in those cases, the employer funded the entire benefit both before and after the contested change; consequently, there was no direct impairment to or diminution of a specific benefit. As noted in Opinion 1, a shift in funding of the employee contribution would result in a reduction in the value of the specific benefit for affected members, illustrated by equating the change to 14 days of pay.

Assuming a protected property interest exists, the second part of the takings test considers whether a taking occurred without just compensation. Section 62.623 does not provide for any compensation or trade-off for employees who would

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begin to contribute towards their pension benefit. Accordingly, we believe that a court would hold that the members have not been justly compensated for the loss of a City-funded pension benefit.

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cc Grant F. Langley, Esq.