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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CITY OF LOS ANGELES, Petitioner and Defendant, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, Respondent; ANN J. ROSENTHAL et al., Real Parties in Interest and Plaintiffs.	B256118 (Los Angeles County Super. Ct. No. BC500816)

ORIGINAL PROCEEDINGS in mandate. Elihu M. Berle, Judge. Petition granted.

Atkinson, Andelson, Loya, Ruud & Romo, Irma Rodriguez Moisa, Nate J. Kowalski, Paul G. Szumiak and Jennifer D. Cantrell for Petitioner and Defendant.

Gary A. Dordick; The Eisenberg Law Firm and Cara L. Eisenberg; The Law Offices of Robert J. Pulone and Robert J. Pulone for Real Parties in Interest and Plaintiffs.

Petitioner City of Los Angeles (City) negotiated a Letter of Agreement (LOA) with a number of its employee unions. The LOA provided for an increase in the amount of City employees' pension contributions, which would fund an early retirement program intended to reduce the workforce in an effort to avoid mandatory layoffs or furloughs. The LOA was approved by the City and the unions, and the increased pension contribution provision was put into effect. Plaintiffs and real parties in interest Ann Rosenthal, Paul Castro, Richard A. Schmidt, and Marsha C. Berkowitz brought a putative class action against the City, on behalf of all employee members of the unions which had approved the LOA, challenging the increase in their pension contributions as violative of the federal and state constitutional prohibitions on interference with contracts (contracts clauses). The City demurred to the operative complaint, arguing that, as the increase in the pension contributions was, in fact, agreed to by the unions, any contractual modification was consensual and did not violate the constitutional contracts clauses. The trial court overruled the demurrer, and the City sought relief by petition for writ of mandate. We issued an order to show cause and will now grant the writ petition. Any prior existing contractual rights to a lesser pension contribution amount were properly modified by the bilateral LOA. There is no contracts clause violation as a matter of law.

FACTUAL AND PROCEDURAL BACKGROUND

1. *City's Pension System*

Before we turn to the challenged modification to the pension system, a brief explanation of the City's pension system is helpful. The City is a charter city. The

pension system at issue is the Los Angeles City Employees' Retirement System, known as LACERS. (L.A. Admin. Code, § 4.1000.) LACERS is subject to several provisions of the City Charter (L.A. Charter, § 1102), as well as more specific provisions of the Administrative Code.[1] (L.A. Admin. Code, div. 4, ch. 10, art. 1.)[2]

LACERS is governed by a board of administration (Board). (L.A. Charter, § 1102(c).) The Board is granted sole and exclusive responsibility to administer LACERS, with the goals of providing benefits to system participants, minimizing City contributions, and defraying the reasonable expenses of administering the system. (L.A. Charter, § 1106(a).) The Board also has sole and exclusive fiduciary responsibility "over the assets of its system which are held in trust" for the purposes of providing benefits and defraying the reasonable expenses of the system. (L.A. Charter, § 1106(b).)

The LACERS trust fund, known as the retirement fund, is kept separate and apart from the other money of the City. (L.A. Charter, § 1152(f).) The retirement fund is used for the "payment of administration expense[s], retirement allowances and other benefits of the [s]ystem, which fund shall consist of all money paid into the fund . . . and

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[1] LACERS, at present, is a two-tier system. The second tier, Tier 2, is a relatively new tier, which applies to employees who began City employment on July 1, 2013 or later. This case concerns only Tier 1 members. As a result, when we refer to the provisions of the LACERS system, we refer only to LACERS Tier 1.

[2] This article was enacted anew in July 2013. (L.A. Ord. No. 182,629.) It renumbered several sections and modified others. In discussing the relevant provisions of LACERS, we cite to the current provisions. The substance of the current provisions is identical, in all relevant respects, to the provisions in effect when the challenged LOA went into effect.

earnings from investments." (L.A. Charter, § 1154.) The "money in [the LACERS retirement fund] shall be invested at the sole and exclusive direction" of the Board. (L.A. Charter, § 1110(d).)

Both employees and the City are required to make contributions to the retirement system. Employees (also known as plan members) contribute by salary deduction. (L.A. Charter, § 1162.) The City must also contribute to the fund, in both a sum equal to a percentage of the members' salaries, and amounts sufficient to liquidate, over time, accrued unfunded liabilities of the system. (L.A. Charter, § 1160.)

By charter provision, the Board is required to "maintain an individual account of the contributions made by or for each [m]ember." (L.A. Charter, § 1162(b).) All of a member's contributions are required to be deposited in the member's individual account. (L.A. Admin. Code, § 4.1003(d).) "Regular interest shall be credited to the individual accounts as of the last day of each month equal to the yield of the five year Treasury note . . . . " (L.A. Charter, § 1162(b).) The total of the amounts paid by a member into the fund and the interest credited to the member's account is called the member's accumulated contributions. (L.A. Charter, § 1152(a); L.A. Admin. Code, § 4.1001(a).) Should the law governing LACERS be repealed, the members have a vested property right to the return of their accumulated contributions. (L.A. Charter, § 1162(d).)

A member who retires, after reaching a certain age and/or having sufficient years of service, is entitled to benefits calculated by a particular formula, discussed below.[3] If, however, the employee separates from City service prior to retirement, that employee is, upon written request, entitled to return of his or her accumulated contributions.[4] (L.A. Admin. Code, § 4.1004(a).) Similarly, if the employee dies prior to retirement, the employee's accumulated contributions shall be paid to the member's designated beneficiary. (L.A. Admin. Code, § 4.1010(a).) These rights, too, are vested property rights. (L.A. Charter, § 1162(d).)

We now turn to the formula for the calculation of a retirement allowance. (L.A. Admin. Code, § 4.1007.) The formula is a factor (0.0216) multiplied by the employee's number of years of service, multiplied by the employee's final compensation as of the time of retirement, with a possible reduction for the employee's age at the time of retirement. (*Ibid.*) Once the retirement allowance is calculated, it is allocated between two components: (1) an "annuity" which is the actuarial equivalent of the employee's accumulated contributions; and (2) a "pension" in the amount of the remaining balance. (L.A. Admin. Code, § 4.1007(a).) Thus, the higher an employee's accumulated contributions, the lower the obligation of the fund to make up the difference by means of a pension. In this case, we are concerned with a mandatory

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[3] The provisions in effect at the time of the LOA involved somewhat different retirement qualifications and formulas. (L.A. Admin. Code, fmr. §§ 4.1020, 4.1021, 4.1022.)

[4] A former employee with at least five years of service may leave the accumulated contributions in the fund and ultimately obtain a deferred retirement benefit. (L.A. Admin. Code, § 4.1006(a).)

increase in the amount of the employees' contributions. This will have the effect of increasing the balance of the employees' accumulated contributions, and therefore reducing the amount of the pension the fund will be required to pay in order to make up the entirety of each employee's benefits upon retirement.[5]

2. *Allegations of the Complaint*

We consider the facts as alleged in the operative complaint. Prior to 1983, member contributions to LACERS were calculated according to a table based on the age of the employee at the time the employee entered City employment. Thereafter, a new provision was enacted providing that any City employee who became a member after January 1, 1983 would be required to contribute a fixed rate of 6% of the member's salary to LACERS.[6] (L.A. Admin. Code, fmr. § 4.1031.2.)

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[5] Plaintiffs took the position that it would require the testimony of an expert economist to establish that they would be "paying more up front" for a retirement benefit of "the same amount" as before. We disagree. The provisions of the Administrative Code make it clear that increased accumulated contributions do not change the amount of the retirement allowance; they simply mean that the allocation of the retirement allowance between the annuity and the pension will be different. We here note that, at the time the LOA went into effect, this was not necessarily the case. At that time, under very limited circumstances, an increase in the accumulated contributions could, in fact, result in an increase in the retirement allowance. (L.A. Admin. Code, fmr. § 4.1022(a).) We assume, however, for the purposes of resolving the instant writ petition, that there is, in fact, no increase in the retirement allowance for plaintiffs as a result of the increased contribution.

[6] Plaintiffs allege that employees who were already members of the system prior to 1983 were not immediately converted to the fixed 6% contribution rate. Although their contribution rate was different from the 6% rate of the employees who joined LACERS after 1983, their complaint in this case is the same as that of the other employees. (Indeed, plaintiffs allege no subclass of pre-1983 employees.) Thus, in the interests of simplicity, we consider the preexisting contribution rate to have been 6%.

In 2007, six City employee labor unions formed a coalition for the purposes of collective bargaining. All named plaintiffs, and the class they seek to represent, were members of unions either directly in, or affiliated with unions in, the coalition. As a result of collective bargaining, the City reached memoranda of understanding (MOUs) with the unions.[7] In early 2009, the City declared a fiscal emergency, stating that it was facing a historic budgetary deficit,[8] and requested additional negotiations with the coalition. The coalition met with the City and negotiated the LOA which is at issue in this case. The LOA modified various terms of the then-existing MOUs with the coalition unions. Among other provisions, the LOA agreed to the establishment of an Early Retirement Incentive Program (ERIP), with the goal of incentivizing 2400 employees to retire early. To offset the costs of ERIP, the parties to the LOA agreed that active City employees would be required to increase their contribution to

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[7] The MOUs did not discuss retirement benefits in any great detail, although they acknowledged the then existing retirement formula and 6% contribution rate. It also set forth a procedure for negotiating modifications of benefits: "Proposals for major retirement benefit modifications will be negotiated in joint meetings with the certified employee organizations whose memberships will be directly affected. Agreements reached between Management and organizations whereby a majority of the members in [LACERS] are affected shall be recommended to the City Council by the City Administrative Officer as affecting the membership of all employees in [LACERS]. Such modifications need not be included in the [MOU] in order to be considered appropriately negotiated." There is no allegation in this case that the City failed to follow this procedure for negotiating the challenged LOA.

[8] Plaintiffs allege "that no such fiscal crisis actually existed at the time." Whether a fiscal crisis existed is not relevant to our disposition of the instant writ petition.

LACERS from 6% of their salary to 7% of their salary.[9] Members of the coalition voted on the LOA; it was approved.[10] Thereafter, the City enacted an ordinance putting into effect the increased retirement contribution and the ERIP.[11] (L.A. Admin. Code, § 4.1033.)

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[9] The complaint alleges that, as part of the negotiation of the LOA, the parties agreed that the additional 1% pension contributions "would then be diverted by the City to establish the ERIP for other employees. In this way, the City could avoid paying for the ERIP itself, instead using its employees' vested pension deposits to pay for that benefit." As we shall discuss, plaintiffs argue that this "diver[sion]" of their increased pension contributions to fund the ERIP was improper. It is important to note, however, that plaintiffs allege that this diversion *was part of the LOA as negotiated*. In other words, plaintiffs do not allege that LACERS is diverting funds in any way not agreed to by the unions. Plaintiffs conceded this point at oral argument.

[10] The operative complaint is the fourth amended complaint. It does not allege that the LOA was approved. Instead, it alleges as follows: "Members of the [c]oalition . . . were required to vote on October 22, 2009, on several proposed changes to their MOU. Members were not allowed to vote on the increase to the 1% pension contribution rate (to subsidize the ERIP) separately from the other amendments to the MOUs. Plaintiffs herein voted against the 1% compulsory deposit to the pension fund." There are two flaws with this allegation. First, to the extent it implies that the LOA was not approved, it is undermined by allegations in prior complaints. The third amended complaint alleged that the LOA was ratified by majority votes of the union members. (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1281 [trial court may disregard amendments that omit harmful allegations in the original complaint].) Second, to the extent plaintiffs allege that they "voted against" approval of the LOA, the allegation is irrelevant. While it may be true that the *named plaintiffs* voted against ratification of the LOA, plaintiffs seek to represent a class of *all coalition employees* whose wages were reduced pursuant to the LOA – a class which *necessarily* includes members who voted to approve the LOA. That some members of the class voted against ratifying the LOA is of no consequence. Plaintiffs are not bringing a challenge on behalf of all class members who voted against ratification, arguing that the ratification process was somehow invalid and therefore the LOA should not be given effect. Instead, plaintiffs' challenge is that the provisions of the LOA are themselves substantively invalid.

[11] The ERIP was enacted as a part of LACERS. (L.A. Admin. Code, § 4.1033.) The ERIP allowed a 45-day window in which LACERS members who were nearly

On July 1, 2011, pursuant to the terms of the LOA, the City began withholding the additional 1% from plaintiffs' pay. Plaintiffs take the position that this constituted an impermissible unilateral increase in their pension contribution rate, in violation of their vested pension rights.

Plaintiffs brought the instant action against the City, challenging the collection of the additional 1% pension contribution. They allege five causes of action: (1) violation of the contracts clause of the California Constitution; (2) violation of the contracts clause of the U.S. Constitution; (3) injunctive relief; (4) declaratory relief; and (5) peremptory writ of mandate. Plaintiffs concede that the latter three causes of action are derivative of the first two. Therefore, we are concerned solely with whether plaintiffs have stated causes of action for violation of the contracts clauses in the state and/or federal constitutions.

3. *Demurrers and Writ Petition*

Although the operative complaint is the fourth amended complaint, we briefly discuss the allegations of the third amended complaint. In that complaint, plaintiffs alleged a contracts clause violation on the basis that the ordinance enacting the ERIP violated their vested contractual rights to a pension contribution rate of 6%. Plaintiffs did not allege the contractual right to such a pension contribution rate vested because of

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eligible for full retirement (or were actually eligible for it) would be given certain additional benefits if they elected to retire. The costs of the ERIP were considered a cost obligation of the LACERS members. (L.A. Admin. Code, § 4.1033(a)(9).) This amount was preliminarily calculated to be $271 million. (*Ibid.*) It was to be paid by the LACERS members by means of increasing their pension contribution from 6% of salary to 7% of salary, for either 15 years or until the ERIP cost was fully paid. (L.A. Admin. Code, § 4.1033(a)(9)(i).)

its inclusion in the MOUs.[12] Instead, they argued that their right to a 6% pension contribution rate was set forth in the ordinances at the time they began employment (e.g., L.A. Admin. Code, fmr. § 4.1031.2), which purportedly acquired the status of *vested contractual rights* at the time they began employment with the City.[13]

The City demurred, arguing that there was no vested contractual right to the 6% contribution rate. While the City acknowledged the existence of the provisions of the Administrative Code setting forth the 6% contribution rate, the City brought to the trial court's attention a provision of the City Charter, providing that each member "shall contribute to the [s]ystem by salary deduction *at the rate of contribution established by ordinance*." (L.A. Charter, § 1162(a), italics added.) The City therefore argued that the employees could have no *vested* right to a particular contribution rate, as the Charter provided for modification of the contribution rate by ordinance.

Faced with this argument, plaintiffs then argued that a provision of the *prior* charter (superseded on July 1, 2000 (L.A. Charter, § 109)) provided employees[14] with a vested contractual right – not to a contribution rate of 6%, but to a contribution rate

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[12] They could not have done so; the LOA clearly modified the MOUs.

[13] As we shall discuss, under California law, "[a] public employee's pension constitutes an element of compensation, and a vested contractual right to pension benefits accrues upon acceptance of employment." (*Betts v. Board of Administration* (1978) 21 Cal.3d 859, 863.) An employee's contractual pension expectations are measured by benefits which are in effect when employment commences. (*California Assn. of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 383.)

[14] As to employees who commenced employment after July 1, 2000, plaintiffs fail to explain how the prior charter provision could have become an implied term of their employment.

that would not be increased except as the result of an actuarial study.[15] (L.A. Charter, fmr. § 505.) The plaintiffs also argued, for the first time, that the LOA violated a provision of the current charter, which provides that LACERS benefits are not assignable. (L.A. Charter, § 1170.)

The demurrer was sustained with leave to amend. The plaintiffs then filed their fourth amended complaint, basing their contracts clause arguments exclusively on the provision of the former charter, and also arguing that the LOA was invalid as it provided for the assignment of unassignable benefits.[16]

The City demurred to the fourth amended complaint, arguing, among other things, that plaintiffs could not challenge as violative of the contracts clauses a bilateral mutually agreed-upon contract. Plaintiffs opposed the demurrer, arguing that the case was not ripe for demurrer, in that numerous disputed issues of fact existed, including

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[15] The former charter provided that the Board shall, every five years, "cause to be made an actuarial investigation into the mortality, service, and compensation experience of the members and beneficiaries, and shall further cause to be made an actuarial valuation of the assets and liabilities of said retirement fund." (L.A. Charter, fmr. § 505.) "Upon the basis of such investigation and valuation, the said Board . . . shall: [¶] (1) Adopt for said retirement system such interest rate and such mortality, service and other tables as shall be deemed necessary by said Board; [and] [¶] (2) Revise or change the rates of contribution by members, on the basis of such mortality, service, and other tables." (*Ibid.*) Plaintiffs argue that this provision contained the implicit vested contractual right that the rates of contribution could not be changed, except by the Board, on the basis of tables adopted following the actuarial investigation.

[16] Plaintiffs did not add a cause of action seeking to invalidate the LOA and the ERIP ordinance as violative of the charter's prohibition on unassignability of benefits. Plaintiffs incorporated this argument into their existing contracts clause causes of action.

whether the increased contribution effectively decreased plaintiffs' pension rights and whether the method of the ERIP rollout effectuated an improper diversion of funds.

The trial court overruled the demurrer without prejudice to the City pursuing a motion for summary judgment. The City challenged this ruling by petition for writ of mandate. We issued an order to show cause.

ISSUES BEFORE THE COURT

The sole issues before the court surround whether plaintiffs' fourth amended complaint states a cause of action for violation of the contracts clauses of the state and/or federal constitution. While it is undisputed that public employees enjoy some level of vested contractual pension rights, protected by the contracts clauses, the parties dispute whether plaintiffs' vested rights include the right to have the employees' contribution limited to 6% of their salaries, in the absence of an actuarial study. We conclude that we need not reach the issue, as there is a more fundamental bar to plaintiffs' causes of action: there can be no violation of the contracts clauses by a bilateral, mutually agreed-upon contract, as long as the contract is otherwise enforceable. To the extent plaintiffs argue that the LOA in this case is not enforceable as its provisions were otherwise illegal, we disagree.

DISCUSSION

1. *Standard of Review*

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.

[Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"We review questions of law de novo." (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127.) The construction of a statute presents a question of law subject to independent review. (*Teachers' Retirement Bd. v. Genest* (2007) 154 Cal.App.4th 1012, 1028.)

2. *Contracts Clauses*

"Under the California Constitution, a 'law impairing the obligation of contracts may not be passed.' (Cal. Const., art. I, § 9.) Similarly, under the federal Constitution, 'No state shall . . . pass any . . . law impairing the obligation of contracts . . . . ' (U.S. Const., art I, § 10, cl. 1.)" (*San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1222.) Thus, the contracts clauses limit the power of public entities to, by enacting a law, unilaterally modify their own contracts with other parties.

Preliminarily, we note that plaintiffs' contracts clause theory is not the traditional contracts clause cause of action. A contracts clause cause of action requires a preexisting contract which is allegedly interfered with by a subsequent legislative enactment. Plaintiffs allege the preexisting contract is the provision of the prior charter which purportedly became an implied part of their contracts of employment, and the

subsequent legislative enactment is the ERIP ordinance which enacted the provisions of the LOA. In the absence of the contracts clause, plaintiffs would, in effect, be arguing that a contract (the LOA) and the ordinance enacting its terms (the ERIP ordinance) violated a provision of the *prior* charter. Obviously, such a claim would have no merit. Plaintiffs therefore can only succeed if they can properly recharacterize their claim to fit under the rubric of the contracts clauses. As we shall discuss, they *may* be able to find vested contract rights in the prior charter provision, but they cannot find an interfering legislative enactment in an ordinance putting into effect a valid, mutually-agreed upon contract.

A. *Contracts Clauses Protect Vested Pension Rights*

The terms and conditions of public employment are generally established by statute or ordinance, rather than contract. However, "with regard to at least certain terms or conditions of employment that are created by statute, an employee who performs services while such a statutory provision is in effect obtains a right, *protected by the contract[s] clause*, to require the public employer to comply with the prescribed condition." (*White v. Davis* (2003) 30 Cal.4th 528, 564-565.) California law treats a pension as an element of compensation which is a vested contractual right. (*Valdes v. Cory* (1983) 139 Cal.App.3d 773, 783.) " 'By entering public service an employee obtains a vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer.' [Citation.]" (*California Assn. of Professional Scientists v. Schwarzenegger*, *supra*, 137 Cal.App.4th at p. 383.)

That, upon accepting public employment, an employee obtains a vested contractual right to earn a pension does not mean that all terms governing the pension system then in effect become vested contractual rights of the employee. "[A]n employee may acquire a vested contractual right to a pension but . . . this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension. There is no inconsistency therefore in holding that he has a vested right to a pension but that the amount, terms and conditions of the benefits may be altered."[17] (*Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 855.)

Plaintiffs' theory of the case is that the prior City charter established vested contractual rights to an employee pension contribution that would not be increased unless based on a prior actuarial study, which was not done in this case. (L.A. Charter, fmr. § 505.) We need not consider, however, whether there was, in fact, a vested

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[17] Even when it has been established that the employee has a vested contractual right to a specific right related to the pension system, there are still circumstances in which the governmental entity may unilaterally modify the right without running afoul of the contracts clauses. " '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. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.* [Citations.] . . . ' [Citation, italics added.]" (*Betts v. Board of Administration, supra,* 21 Cal.3d at p. 864.)

contractual right to a pension contribution which would not be increased except as provided in the prior charter provision.[18] Instead, we conclude that there is no contracts clause violation as a matter of law, because the parties agreed to the modification by means of union approval of the LOA.

B. *A Mutually Agreed-Upon LOA Does Not Violate Prior Contracts, Barring Illegality*

The contracts clauses are, by their terms, directed at the evil of a governmental body passing a law which impairs existing contracts. In this case, plaintiffs charge that the purported impairing law is the ordinance which enacted the ERIP, pursuant to the terms of the LOA. They fail to recognize, however, that they are, in effect, arguing that the current contract (the LOA) impaired the terms of the prior contract. But there is no constitutional prohibition against bilateral modification of existing government contracts.[19] There can be no impairment of a contract by a change thereof effected with consent. (*San Bernardino Public Employees Assn. v. City of Fontana*, *supra*, 67 Cal.App.4th at p. 1223.)

Plaintiffs take the position that this is incorrect, and that even a mutually agreed-upon MOU "is still subject to the 'constitutional constraints on impairment of contracts.' [Citation.]" Plaintiffs rely on *Valencia v. County of Sonoma* (2007) 158 Cal.App.4th 644, 649 for this proposition. Plaintiffs' interpretation of the *Valencia*

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[18] Nor need we determine whether the 1% increase was nonetheless reasonable.

[19] Indeed, the process of government contracting would grind to a halt if mutually agreed-upon change orders were considered unconstitutional impairments of prior contracts.

case is mistaken. That case held that once an MOU is signed, it "cannot be abrogated by public referendum [citation] and is subject to the constitutional constraints on impairment of contracts. [Citation.]" (*Ibid.*) In other words, the case did not hold that an MOU cannot impair a prior contract, it held that an MOU is a contract which is itself *protected against subsequent legislative impairment*.[20] In short, we conclude that a valid[21] bilateral government contract, which modifies an earlier contract, does not constitute an impairment of the first contract within the meaning of the contracts clauses.

It is well-established that approved MOUs are binding on all parties. The Meyers-Milias-Brown Act (MMBA), which provides for collective bargaining and the creation of MOUs, provides that its purpose is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations."[22] (Gov. Code, § 3500,

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[20] In fact, if the ERIP ordinance in this case had *contradicted* terms of the LOA, the ordinance would have violated the contracts clause.

[21] This presumes that the bilateral contract must, in fact, be valid. We consider below plaintiffs' arguments that the LOA in this case is unenforceable because it is illegal.

[22] The MMBA also provides, "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations." (Gov. Code, § 3500, subd. (a).) Plaintiffs argue from the assumption that this provision means that the MMBA does not supersede specific charter provisions governing the administration of pensions. We disagree. By its plain language, the provision is meant to protect

subd. (a).) An agreement entered into pursuant to the MMBA "once approved by the governing board of the local entities, binds the public employer and the public employee organization." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 332.) "Once a local government approves an MOU, it becomes a binding and enforceable contract that neither side may change unilaterally. [Citations.]" (*City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1092-1093.) "It . . . is a fundamental principle that a member of an employee bargaining unit is bound by the terms of a valid collective bargaining agreement, though he is not formally a party to it and may not even belong to the union which negotiated it. [Citation.]" (*Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875, 882.) As the California Supreme Court explained, "The Legislature designed the [MMBA] . . . for the purpose of resolving labor disputes. [Citation.] But a statute which encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede effective bargaining. Any concession by a party from a previously held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word." (*Glendale City Employees' Assn., Inc. v. City of Glendale, supra,* 15 Cal.3d at p. 336.)

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existing provisions "which provide for other methods of administering employer-employee relations"; that is, methods other than collective bargaining under the MMBA. In short, the statute protects alternative *procedures*; it does not prevent an MOU from modifying existing substantive rights.

Thus, the LOA, having been approved by the coalition unions and the City, was an enforceable contract. It was a consensual modification of a prior contract (even one impliedly arising from a prior charter provision) governing pension terms, and, therefore, did not violate the contracts clauses.

C. *The Illegality Exception Does Not Apply*

Plaintiffs argue, however, that the LOA is not enforceable because its provisions are illegal. To be sure, if the agreement is itself illegal, it is not enforceable. Parties cannot include in their MOUs provisions which contravene constitutional provisions.[23] (*Consulting Engineers & Land Surveyors of California, Inc. v. Professional Engineers in California Government* (2007) 42 Cal.4th 578, 588.) Moreover, "a collective bargaining agreement may not waive statutory rights which arise from an extraordinarily strong and explicit state policy." (*Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503, 1506.) If a right is unwaivable, it cannot be waived under an MOU. (*Id*. at pp. 1505-1507.) "On the one hand, it is a basic principle of a collective bargaining system . . . that a member of a bargaining unit is bound by the terms of a valid collective bargaining agreement, though he is not formally a party to it and may not even belong to the union which negotiated it. [Citation.] The courts will relax this rule only when the enforcement of a collective bargaining provision would contravene an extraordinarily strong and explicit state policy. [Citation.] Thus, members of the

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[23] Again, we stress, however, that when we state that an MOU cannot include a provision which violates the constitution, we are speaking of constitutional rights *other than* the contracts clauses. A party to an agreement, which modifies a prior agreement, cannot be heard to argue that the current agreement is unconstitutional because it results in an impairment of the prior contract.

bargaining unit have been held bound by a provision in a collective bargaining agreement which conflicted with a provision of the Labor Code. [Citation.] [¶] On the other hand, collective bargaining agreements may not contain provisions abrogating employees' fundamental constitutional rights [citations] or their rights under a federal statute. [Citations.]" (*Phillips v. State Personnel Bd.* (1986) 184 Cal.App.3d 651, 659-660, disapproved on another ground in *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1123, fn. 8.)

Plaintiffs argue the LOA is illegal, and therefore unenforceable, in two respects. First, they again argue that it violates the prior charter's purported limitation on the City's right to increase the members' contributions. Second, they argue that it provides for an improper diversion of pension benefits.

To the extent plaintiffs argue that the right to an employee contribution which cannot be raised unless based on a five-year actuarial study (L.A. Charter, fmr. § 505) is a fundamental, unwaivable right, we disagree. Such a purported right does not find its origin in the federal or state constitutions, a federal statute, or even a state statute – it was instead found in a prior, superseded, charter provision. Nor does such a right arise from extraordinarily strong and explicit state policy; if the right existed at all, it was simply a charter provision governing the precise details of retirement plan administration. As such, it was clearly waivable.

Plaintiffs next argue that the LOA was illegal as it effectuated an improper diversion of pension funds, in violation of a current charter provision. That provision provides, "[t]he right of every [m]ember and of every [b]eneficiary to receive and be

paid any money under any of the provisions of the LACERS is a right personal to the [m]ember or [b]eneficiary which cannot be assigned to any other person, in any manner or for any purpose, the intent being that payments in all cases be made directly to the [m]ember or [b]eneficiary." (L.A. Charter, § 1170.) Plaintiffs argue that the additional 1% pension contribution they are required to make under the ERIP is being diverted in violation of this provision. Regardless of whether this charter provision establishes a non-waivable right, plaintiffs' argument fails because the ERIP does not, as a matter of law, violate this provision.

Under the ERIP, as established pursuant to the LOA, employees' pension contributions are increased from 6% to 7%. The additional 1% is credited to the employees' individual accounts, and is considered part of the employees' accumulated contributions. Interest will be credited to the accumulated contributions on the extra 1%, just as it is on all other contributions. If the employee is ultimately entitled to return of his or her accumulated contributions (or the employee's beneficiary is entitled to that return, in the event of the employee's death before retirement), the employee (or beneficiary) will receive the entirety of the accumulated contributions, including the additional 1%. If the employee retires, the employee's retirement allowance is calculated by the same formula based on the employee's years of service and age. In short, there is no adverse impact on the right of any employee or beneficiary "to receive and be paid any money under any of the provisions of the LACERS" – the right to the return of accumulated contributions and the right to a full retirement allowance are wholly unaffected by the ERIP.

Plaintiffs' argument to the contrary is based on the premise that their additional 1% contributions are being diverted to pay the early retirement benefits under the ERIP. This is an oversimplification. In fact, their additional contributions are made to the retirement fund, and invested by the Board, as are all contributions. Moreover, the City is making all ERIP payments. The arrangement is financially neutral to the City only in the fact that, by increasing the employees' monthly contributions, *without increasing the employees' retirement allowances*, additional funds will pour into the retirement fund, enabling the fund to recoup the costs of the ERIP. To be sure, this does mean that the City employees are contributing additional funds but will not receive increased retirement allowances. However, this is not, in any way, a diversion of the right to benefits. An increase in the cost of a benefit does not constitute an assignment of the right to receive it. Thus, the LOA does not violate the charter provision against assignability of benefits. It is therefore not unenforceable.

3. *Conclusion*

We reject plaintiffs' arguments that the ordinance enacting the ERIP constitutes a violation of the contracts clauses, given that the ERIP was enacted pursuant to an agreement reached between the City and its employee unions. We further reject plaintiffs' arguments that the LOA itself contained unenforceable provisions.

There have been many cases in which a governmental entity attempted to modify pension terms *without* the consent of the affected employees. (E.g., *Kern v. City of Long Beach, supra*, 29 Cal.2d at p. 850; *Betts v. Board of Administration, supra,* 21 Cal.3d at p. 862; *San Diego City Firefighters, Local 145 v. Board of Administration*

etc. (2012) 206 Cal.App.4th 594, 599-600; *Board of Administration v. Wilson, supra,* 52 Cal.App.4th at p. 1117; *Valdes v. Cory, supra,* 139 Cal.App.3d at p. 776.) In this case, the City chose, in accordance with the policy set forth in the MMBA, to negotiate with its employee unions and obtain agreement to the pension plan modifications. That the City obtained agreement to the modifications (and the modifications are not otherwise unenforceable) shields it from a contracts clause lawsuit.

DISPOSITION

The City's petition for writ of mandate is granted. Let a writ of mandate issue directing the trial court to: (1) vacate its order overruling City's demurrer to plaintiffs' fourth amended complaint; and (2) enter a new and different order sustaining the demurrer without leave to amend. The City shall recover its costs in connection with this writ proceeding.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, J.*

WE CONCUR:

KITCHING, Acting P. J.

ALDRICH, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.