



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Jennifer Schembri

**SUBJECT:** SEE BELOW

**DATE:** February 1, 2021

Approved:

Date:

2/11/2021

**SUBJECT: PROPOSED AMENDMENTS TO THE VOLUNTARY DEFERRED  
COMPENSATION PLAN AND PTC PLAN**

## **RECOMMENDATION**

- (a) Approve an ordinance to amend Chapter 3.48 of Title 3 of the San José Municipal Code relating to the administration and provisions of the Deferred Compensation Plan.
- (b) Adopt a resolution to approve the Basic Plan Document for the Deferred Compensation Plan effective the date of the amended ordinance.
- (c) Approve an ordinance to amend Chapter 3.50 of Title 3 of the San José Municipal Code relating to the administration and provisions of the PTC Plan.
- (d) Adopt a resolution to approve the Basic Plan Document for the PTC Plan effective the date of the amended ordinance.

## **OUTCOME**

Approval of the recommendation will implement the City Auditor's recommendations for the Plans and ensure that the Plans comply with applicable tax laws and align with the City's practices.

## **BACKGROUND**

The City of San José's Deferred Compensation Program consists of two plans: the voluntary Deferred Compensation Plan and the PTC Plan. The voluntary Deferred Compensation Plan is governmental deferred compensation plan defined by Section 457(b) of the Internal Revenue Code. It provides a convenient way for City employees to save money for retirement with pre-tax or post-tax earnings. This voluntary plan allows employees to supplement any existing retirement or pension benefits. The PTC Plan is for part-time, temporary and contract employees not covered by one of the City of San José's Retirement Systems and councilmembers that choose the PTC Plan over CalPERS. The PTC Plan requires its participants to contribute 3.75% of gross earnings for each pay period worked. The City of San José also contributes a matching amount of 3.75% for

employees and 6.55% for councilmembers into the PTC Plan. The Plans are currently administered by the Deferred Compensation Advisory Committee (DCAC).

On April 9, 2013, the City Council accepted the City Auditor’s recommendations relating to the Deferred Compensation Program. The City Auditor made the following recommendation relating to the voluntary Deferred Compensation Plan, as set forth in Chapter 3.48 of the San José Municipal Code and PTC Plan, as set forth in Chapter 3.50 of the San José Municipal Code (collectively, “Plans”):

The City Attorney’s Office and Human Resources should review the Deferred Compensation Plans and draft amendments to the Municipal Code as follows:

- (a) Assign responsibility for administering the Plans to the City Manager or designee, including the operation and interpretation of the Plans in accordance with their terms and contractual authority to enter into contracts for the administration of the Plans.
- (b) Clarify the oversight role and responsibilities of the Deferred Compensation Advisory Committee (DCAC), including reviewing and advising on annual budgets and proposed changes to the Plan document, the Investment Policy, and the investment menu, and reduce the Committee’s required meeting frequency to a semiannual or as-needed basis.
- (c) Leave the basic provisions of the Deferred Compensation Plans in the Municipal Code (Name, Purpose, Establishment of Trust, Definitions, Deferral of Compensation, Participation in the Plan, and Administration of the Plan, etc.), and remove the specifics of the Plans so that they can be put in stand-alone Plan documents.

In addition to the City Auditor’s recommendations, staff took the opportunity to review the Plans and have outside tax counsel update them to ensure compliance with applicable tax laws and alignment with the City’s practices, as discussed in more detail below.

## **ANALYSIS**

### **A. City Auditor’s Accepted Recommendations**

Pursuant to the City Auditor’s accepted recommendations, here are the proposed amendments to the Plans:

<b>Current language in Chapter 3.48.060 (457 Plan) and Chapter 3.50.060 - Administration of the Plan</b>	<b>Proposed Amendments to Chapter 3.48.060 (Deferred Compensation Plan) and Chapter 3.50.060 (PTC Plan)-Administration of the Plan</b>
A. The plan and the trust established by this chapter shall be administered by the DCAC which shall be the sole authority to enforce the plan and the trust.	A. The Plan and the Trust established by this Chapter shall be administered by the City Manager which shall be the sole authority to enforce the Plan and the Trust. To the extent reasonably necessary to effectively administer the Plan in accordance with the requirements of the Internal Revenue Code and any other applicable laws, regulations, or pronouncements, the City Manager may

	adopt amendments to the Basic Plan Document, provided such amendments do not conflict with any provisions of the San José Municipal Code.
B. The DCAC shall be responsible for the operation of the plan in accordance with its terms, and shall determine all the questions arising out of the administration, interpretation, and application of the plan and the trust, including making decisions on behalf of the city as to the choice and nature of investments to be available under the plan. All such determinations shall be conclusive and binding on all persons.	B. The City Manager shall be responsible for the operation of the Plan in accordance with its terms, and shall determine all the questions arising out of the administration, interpretation, and application of the Plan and the Trust. All such determinations shall be conclusive and binding on all persons.
C. The DCAC shall have the authority to enter into agreements on behalf of the city for the administration of the plan, for custodial agreements for funds, and for investments under the plan where the fees to be paid under such an agreement are to be paid by the participants or where there is no amount to be paid by the city under the agreement.	C. The City Manager shall have the authority to enter into agreements on behalf of the City for the administration of the Plan, for custodial agreements for funds, and for investments selected by the DCAC under the Plan where the fees under such an agreement are to be paid by the participants of the Plan or where there is no amount to be paid by the City under the agreement.
	D. The DCAC shall have the authority to make decisions on behalf of the City as to the investment policy, the choice and nature of investments to be available under the Plan, and enter into agreements on behalf of the City for investment advice under the Plan where the fees to be paid under such an agreement are to be paid by participants of the Plan or where there is no amount to be paid by the City under the agreement. The DCAC shall have the authority to review and advise the City Manager on annual budgets and proposed changes to the Plan.

The City Auditor also recommended that the Plans be amended in the San José Municipal Code to leave the basic provisions of the Plans in the Municipal Code and remove the specifics of the Plans so that they can be put in stand-alone Plan documents. Based on this recommendation, the basic provisions have been left in the Municipal Code and a stand-alone Basic Plan Document has been created for each Plan.

## **B. Other Proposed Amendments to the Plans**

Staff also proposes modifications to the Plans to address some of the issues that have arisen through the course of time. For example, problems have been encountered when a participant does not designate a beneficiary. The Plans have been modified to provide that a beneficiary is not only someone designated by the participant but is also the participant's estate if no beneficiary has been designated. As another example, the voluntary Deferred Compensation Plan requires execution of a written participant agreement by a participant. Over time, the City has moved away from written agreements and towards online electronic documents. The voluntary Deferred Compensation Plan has been modified to reflect this practice. As to the PTC Plan, it has been modified to reflect that PTC employees become automatic participants of the Plan.

The Plans have also been updated to ensure compliance with tax laws and align with the City's practices. The definition of includible compensation in the voluntary Deferred Compensation Plan has been updated to be the safe harbor definition provided under the tax laws for purposes of the annual deferral limit and the determination of deferral amounts. The definition of compensation in the PTC Plan has been modified to include the types of compensation appropriate for purposes of deferral amounts. In reviewing the PTC Accumulator, which is used for purposes of calculating contributions, it was found that there were some types of pay that should be removed from the calculation of contributions. The removal of the following types of pay will align the PTC Plan with other defined contribution and defined benefit plans within the City: bilingual pay; auto allowances; taxable cellular phone and data stipends; medical and dental in lieu payments; higher class pay; retention payments; management performance program bonuses; premium-related payments; severance pay; vacation balance payoffs; compensatory time payoffs; sick leave payoffs; reimbursements; allowances for equipment; safety purchases; moving expenses; professional development; education reimbursement; and overtime. On October 15, 2019, the Office of Employee Relations notified the bargaining units of this proposed change to the definition of compensation in the PTC Plan and received no comments or concerns from the bargaining units for this modification.

Finally, it is recommended that the Condition of the Plan (SJMC 3.48.110 and SJMC 3.50.100) and Nonassignability (SJMC 3.48.150 and SJMC 3.50.170) sections in both Plans be repealed. The Condition of the Plan sections provide that participants should look to the general assets of the City for the payment of any benefit to which a participant or participant's beneficiary is entitled under the Plans. These sections should be removed because they are outdated and inconsistent with the fact that there is a trust that funds the benefits under each of the Plans. Effective November 10, 1998, both Plans were amended to create trusts to hold each Plan's assets and income based on the Small Business Job Protection Act of 1996, which amended Section 457 of the Internal Revenue Code to require that eligible defined contribution plans maintained by governmental employers hold all plan assets and income in a trust. (*See* City of San José Ordinance No. 25707) The Nonassignability sections are also outdated because the "contractual obligation" language is inconsistent with the fact that a trust is funding the benefits. New Nonassignability language has been proposed to reside in the Basic Plan Document for each Plan and provides that the interest of a participant in a plan shall not be assignable in whole or in part, directly or by operation of law or otherwise, in any manner.

Staff presented the draft ordinances with the proposed amendments to the Plans and the corresponding draft Basic Plan Documents to the DCAC on December 14, 2020 for review and comment. The DCAC had no comments or objections the proposed amendments and Basic Plan Documents.

On January 6, 2021, the Office of Employee Relations sent the draft ordinances with the proposed amendments to the Plans and the corresponding draft Basic Plan Documents to the bargaining units for review and requested comments by January 20, 2021. The Office of Employees Relations did not receive any objections to the proposed amendments and Basic Plan Documents from the bargaining units.

### **CONCLUSION**

This recommendation will complete the City Auditor's recommendations and update the Plans to ensure they are in line with current practices and comply with applicable tax laws.

### **EVALUATION AND FOLLOW-UP**

The approval of the ordinances and Basic Plan Documents will allow Staff to complete the work associated with the City Auditor's recommendation and ensuring the Plans comply with City practices and applicable tax laws.

### **CLIMATE SMART SAN JOSE**

The recommendation in this memo has no effect on Climate Smart San José energy, water, or mobility goals.

### **PUBLIC OUTREACH**

This recommendation was discussed during the December 14, 2020 DCAC meeting and no public comment was presented/heard. The agenda and associated memo and proposed ordinance were posted and made available for public review as of Friday, December 4, 2020.

### **COORDINATION**

This memo has been coordinated with the City Attorney's Office.

HONORABLE MAYOR AND CITY COUNCIL

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**COMMISSION RECOMMENDATION/INPUT**

At their meeting on December 14, 2020, the DCAC unanimously supported staff's recommendation to amend the Plans as set forth in the proposed ordinances and draft Basic Plan Documents.

**CEQA**

Not a Project, File No. PP17-008, General Procedure or Policy Making resulting in no changes to the physical environment.



Jennifer Schembri

Director of Human Resources and  
Employee Relations

For questions, please contact Emily Hendon, Division Manager, at [Emily.Hendon@sanjoseca.gov](mailto:Emily.Hendon@sanjoseca.gov).