

BILL NO. _____

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY OF FRESNO, CALIFORNIA, ADDING SECTION 3-570 TO CHAPTER 3, ARTICLE 5, OF THE FRESNO MUNICIPAL CODE, RELATING TO THE ESTABLISHMENT OF A QUALIFIED GOVERNMENTAL EXCESS BENEFIT ARRANGEMENT IN THE EMPLOYEES RETIREMENT SYSTEM.

THE COUNCIL OF THE CITY OF FRESNO DOES ORDAIN AS FOLLOWS:

SECTION 1. Section 3-570 is added to the Fresno Municipal Code to read:

SECTION 3-570 QUALIFIED EXCESS GOVERNMENTAL BENEFIT ARRANGEMENT.

(a) ESTABLISHMENT OF PLAN AND TRUST.

(1) Establishment Of Plan and Trust. The "City of Fresno Employees Retirement System Excess Benefit Plan and Trust" ("Plan") is hereby established, pursuant to Internal Revenue Code ("IRC") Section 415.

(2) Purpose. The purpose of this Plan is solely to provide the part of a Participant's Retirement Benefit that would otherwise have been payable under the City of Fresno Employees Retirement System ("Retirement System"), except for the limitations of IRC Section 415(b). This Plan is intended to be a "qualified governmental excess benefit arrangement" or "QEBA" within the meaning of IRC Section 415(m)(3) and must be interpreted and construed consistently with that intent.

This Plan is deemed a portion of the Retirement System solely to the extent required under, and within the meaning of, IRC Section 415(m)(3). This Plan is an "exempt governmental deferred compensation plan" described in IRC Section 3121(v)(3). IRC Sections 83, 402(b), 457(a) and 457(f)(1) do not apply to this Plan. With respect to IRC Section 457(a), the maximum amount that may be deferred under this Plan on behalf of any Participant for the taxable year may exceed both the amount in IRC Section 457(b)(2) (as adjusted for cost of living increases) and the percent of the Participant's includable compensation referred to in that IRC



Section. The City will not hold any assets or income under this Plan in trust for the exclusive benefit of Participants or their Beneficiaries.

(b) DEFINITIONS AND CONSTRUCTIONS

(1) Definitions. When the initial letter of a word or phrase is capitalized herein, it has the same meaning as defined below:

(i) "Administrator" means the City Manager or any entity or employee designated by the City Manager.

(ii) "Beneficiary" means an individual receiving a pension, an annuity, a retirement allowance, or other benefit provided under the Retirement System.

(iii) "Board" means the Employees Retirement Board acting as trustee of the Retirement System.

(iv) "City" means the City of Fresno.

(v) "Employer" means the City. Provided, however, that "Employer" as defined here is limited to entities which are the State, a political subdivision of the State, or an agency or instrumentality of the State. No employer which is not permitted to participate in a qualified governmental pension plan as defined in IRC Sections 401(a) and 414(d) shall be permitted to participate in the Plan.

(vi) "Excess Benefit" means the benefit determined in accordance with Section 4.01 of this Plan.

(vii) "IRC" means the Internal Revenue Code of 1986, as amended, or corresponding provisions of any subsequent federal income tax law, as applicable to a governmental plan.

(viii) "Member" means any person included in the membership of the Retirement System pursuant to Section 3-501(n) and Section 3-515 of the City of Fresno Municipal Code.

(ix) "Participant" means a Member, Retiree, or Beneficiary who is entitled to benefits in accordance with Section 4 of this Plan.

(x) "Plan" means the "City of Fresno Employees Retirement System Excess Benefit Plan and Trust" established by this Ordinance pursuant to IRC Section 415.

(xi) "Plan Year" means the calendar year for purposes of the Plan.

(xii) "QEBA" means a Qualified Governmental Excess Benefit Arrangement within the meaning of IRC Section 415(m).

(xiii) "Retiree" means a former Member who is receiving a Retirement Benefit from the City under the Retirement System.

(xiv) "Retirement Benefit" means the amount of retirement income payable to a Retiree of an Employer, or the benefit payable to a Beneficiary, without regard to any limitations on that retirement income or benefit under IRC Section 415(b).

(xv) "Retirement Fund" means the fund of the Retirement System established under Section 3-513 of the City of Fresno Municipal Code.

(xvi) "Retirement System" means the City of Fresno Employees Retirement System, a defined benefit retirement plan administered by the Board.

(xvii) "State" means the State of California.

(xviii) "Trust Fund" means the separate trust fund established pursuant to Section 7 of this Plan, which fund constitutes a valid trust under the law of the State.

(xix) "Trustees" mean the members of the Board.

(2) Construction.

(i) Words used in this Plan in the masculine gender include the feminine gender where appropriate, and words used in this Plan in the singular or plural include the plural or singular where appropriate.

(ii) Whenever any actuarial present value or

actuarial equivalency is to be determined under the Plan to establish a benefit, it will be based on reasonable actuarial assumptions approved by the Administrator in its sole discretion, and will be determined in a uniform manner for all similarly situated Participants.

(c) **PARTICIPATION.** All Members, Retirees, and Beneficiaries who were Members in the Retirement System on or before June 28, 1991, are eligible to and shall participate in this Plan if their Retirement Benefits from the Retirement System for a Plan Year would exceed the limitation imposed by IRC Section 415(b). The Administrator determines for each Plan Year which Members, Retirees, and Beneficiaries are eligible to participate in the Plan. Participation in the Plan begins each Plan Year once a Member, Retiree, or Beneficiary has an Excess Benefit in that Plan Year. Participation in the Plan ends for any Plan Year in which the Retirement Benefit of a Member, Retiree, or Beneficiary is not limited by IRC Section 415(b) or when all benefit obligations under the Plan to the Member, Retiree, or Beneficiary have been satisfied.

(d) **PAYMENT OF BENEFITS.**

(1) Benefit Amount. A Participant in the Plan will receive a benefit equal to the amount of retirement income that would have been payable to, or with respect to, a Participant by the City that could not be paid because of the application of the limitations on his or her retirement income under IRC Section 415(b). An Excess Benefit under the Plan will be paid only if and to the extent the Participant is receiving Retirement Benefits from the Retirement System.

(2) Time for Payment; Form of Benefit. The Administrator will compute and pay the Excess Benefit in the same form, at the same time, and to the same persons as such benefits would have otherwise been paid as a monthly pension under the Retirement System, except for the IRC Section 415 limitations. No election is provided at any time to the Participant, directly or indirectly, to defer compensation under this Plan.

(e) **CONTRIBUTIONS AND FUNDING.**

(1) Funding. The Plan is, and will remain, unfunded and the rights, if any, of any person to any benefits under the Plan are limited to those specified in the Plan. The Plan constitutes a mere unsecured promise by the Employer to make benefit payments in the future.

(2) Contributions.

(i) Based upon information provided by the Board or the Retirement System, the Administrator will determine the amount necessary to pay the Excess Benefit under the Plan for each Plan Year. The required contribution will be the aggregate of the Excess Benefits payable to all Participants for the Plan Year and an amount determined by the Administrator to be a necessary and reasonable expense of administering the Plan. Contributions will not be calculated in a manner designed to pay future Excess Benefits. Under no circumstances will Employer contributions to fund the Excess Benefits be credited to or commingled with contributions paid into and accumulated in the Retirement Fund. Any contributions not used to pay the Excess Benefit for a current Plan Year, together with any income accruing to the Trust Fund, will be used, as determined by the Administrator, to pay the administrative expenses of the Plan for the Plan Year. Any contributions not used to pay the Excess Benefit for the current Plan Year that remain after paying administrative expenses of the Plan for the Plan Year will be used to fund administrative expenses or benefits of Participants in future Plan Years.

(ii) The Administrator will account separately for the amounts necessary to provide the Excess Benefit under the Plan for each Participant. But, this separate accounting will not be deemed to set aside these amounts for the benefit of a Participant. Benefits under this Plan will be paid from the Trust Fund.

(iii) The consultants, independent auditors, attorneys, and actuaries performing services for the Administrator may also perform services for this Plan; but, any fees attributable to services performed with respect to this Plan will be payable solely by the Employer or from the Trust Fund.

(iv) As set forth in Section (f)(1) of this Plan, the assets of the Trust Fund shall not be comingled with the assets of the Retirement Fund. Notwithstanding, and to the extent otherwise permitted by applicable law, the Retirement System shall apply a credit toward or otherwise adjust the Employer's contributions to the Retirement Fund each year to reflect benefits that are paid from this Plan rather than the Retirement System due to limits imposed by IRC Section

415(b). The amount of the credit or adjustment will be determined by a methodology acceptable to the Retirement System's actuary and such credit or adjustment will be implemented in compliance with applicable law.

(f) TRUST FUND

(1) Establishment of Trust Fund. The Trust Fund is established as a valid trust under the laws of the State, separate from the Retirement Fund, to hold contributions of the Employer. Contributions to this Trust Fund will be held separate and apart from the funds comprising the Retirement Fund and will not be commingled with assets of the Retirement Fund, and must be accounted for separately.

(2) Trust Fund Purpose. The Trust Fund is maintained solely to provide benefits under a qualified governmental excess benefit arrangement within the meaning of IRC Section 415(m), and pay administrative expenses of this arrangement.

(3) Trust Fund Assets. All assets held by the Trust Fund to assist in meeting the Employer's obligations under the Plan, including all amounts of Employer contributions made under the Plan, all property and rights acquired or purchased with these amounts and all income attributable to these amounts, will be held separate and apart from other funds of the Employer and will be used exclusively for the uses and purposes of Participants and general creditors as set forth in this Plan. Participants have no preferred claim on, or any beneficial interest in, any assets of the Trust Fund. Any rights created under the Plan are unsecured contractual rights of Participants against the Employer. Any assets held by the Trust Fund are subject to the claims of the Employer's general creditors under federal and state law in the event of insolvency.

(4) Grantor Trust. The Trust Fund is intended to be a grantor trust, of which the Employer is the grantor, within the meaning of subpart E, part I, subchapter J, chapter 1, subtitle A of the Code, and will be construed accordingly. This provision will not be construed to create an irrevocable trust of any kind.

(5) Trust Fund Income. Income accruing to the Trust Fund under the Plan constitutes income derived from the exercise of an essential governmental function upon which the Trust is exempt from tax under IRC Section 115, as well as IRC Section 415(m)(1).

(g) ADMINISTRATION

(1) Administrative Authority. The City has the exclusive authority to control and manage the operation and administration of this Plan.

(i) The City has the power and authority (including discretion with respect to the exercise of that power and authority) necessary, advisable, desirable or convenient to enable it:

to establish procedures to administer the Plan not inconsistent with the Plan and the Code, and to amend or rescind these procedures;

to determine, consistent with the Plan, applicable law, rules or regulations, all questions of law or fact that may arise as to eligibility for participation in the Plan and eligibility for distribution of benefits from the Plan, and the status of any person claiming benefits under the Plan;

to make payments from the Trust Fund to Participants pursuant to Section 5 of this Plan;

to contract with a third party to perform designated administrative services under this Plan; and

to construe and interpret the Plan as to administrative issues and to correct any defect, supply any omission or reconcile any inconsistency in this Plan with respect to same, subject to and consistent with the IRC.

(i) Any action by the City that is not found to be an abuse of discretion will be final, conclusive and binding on all individuals affected thereby. The City may take any such action in such manner and to such extent as the City in its sole discretion may deem expedient, and the City will be the sole and final judge of such expediency.

(ii) The City will seek appropriate rulings from the Internal Revenue Service with regard to the status of the

Plan under the IRC.

(2) Advice. The City may employ one or more persons to render advice with regard to its responsibilities under the Plan.

(3) Payment of Benefits. If in doubt concerning the correctness of its action in making a payment of a benefit, the City may suspend payment until satisfied as to the correctness of the payment or the person to receive the payment.

(4) Delegation by Administrator. The Administrator will handle the day-to-day operation of the Plan and may delegate certain functions to a third party.

(h) **PLAN AMENDMENTS**. The City from time to time may amend, suspend, or terminate any or all of the provisions of this Plan as may be necessary to comply with IRC Section 415(m) and to maintain the Plan's or the Retirement System's qualified status under the IRC.

(i) **NONASSIGNABILITY AND EXEMPTION FROM TAXATION AND EXECUTION**. The interests of Participants under this Plan are exempt from any state, county, municipal or local tax, and are not subject to execution, garnishment, attachment, or any other process of law whatsoever, and are unassignable and nontransferable, except as otherwise provided by Section (f) or otherwise as in the same manner as a Retirement Benefit under the Retirement System.

(j) **MISCELLANEOUS**.

(1) Federal and State Taxes. The Employer, Administrator, Board, Trustees and the Retirement System, do not guarantee that any particular Federal or State income, payroll, or other tax consequence will occur because of participation in this Plan.

(2) Investment. The Administrator may hold a portion of the assets of the Plan uninvested as it deems advisable for making distributions under the Plan, or may invest assets of the Plan pending the Excess Benefit payments in short-term investment grade instruments as otherwise permitted by law.

(3) Conflicts. In resolving any conflict between provisions of the Plan, and in resolving any other uncertainty as to the meaning or intention of any provision of the Plan, the prevailing interpretation will be the one that (i) causes the Plan to constitute a qualified governmental excess benefit arrangement under the

provisions of IRC Section 415(m) and the Trust Fund to be exempt from tax under IRC Sections 115 and 415(m), (ii) causes the Plan and the Administrator to comply with all applicable requirements of the IRC, (iii) causes the Plan and the Administrator to comply with all applicable State laws, and (iv) causes the Trust Fund to constitute a grantor trust under the IRC.

(4) Limitation on Rights. Neither the establishment or maintenance of the Plan, nor any amendment to the Plan, nor any act or omission under the Plan (or resulting from the operation of the Plan) may be construed:

(i) as conferring upon any Participant or any other person a right or claim against the Employer, Administrator, Board, Trustees or the Retirement System, if any, except to the extent that the right or claim is specifically expressed and provided in the Plan;

(ii) as creating any responsibility or liability of the Employer for the validity or effect of the Plan;

(iii) as a contract between the Employer and any Participant or other person;

(iv) as being consideration for, or an inducement or condition of, employment of any Participant or other person, or as affecting or restricting in any manner or to any extent whatsoever the rights or obligations of the Employer or any Participant or other person to continue or terminate the employment relationship at any time; or

(v) as giving any Participant the right to be retained in the Employer's service or to interfere with the Employer's right to discharge any Participant or other person at any time.

(5) Erroneous Payments. Any benefit payment that should not have been made, according to the terms of the Plan and the benefits provided hereunder, may be recovered as provided by law.

(6) Release. Any payment to any Participant will, to the extent thereof, be in full satisfaction of the Participant's claim being paid thereby, and the Administrator may condition the payment on the delivery by the Participant of the duly executed receipt and release in a form determined by the Administrator.

(7) Liability. The City or Administrator, if any, will not incur any liability in acting upon any paper or document or electronic transmission believed by the City or Administrator to be genuine or to be executed or sent by an authorized person.

(8) Governing Laws. The City of Fresno Municipal Code and the laws of the State apply in determining the construction and validity of this Plan.

(9) Necessary Parties to Disputes. The only party necessary to any accounting, litigation or other proceedings relating to the Plan is the Administrator. The settlement or judgment in any case in which the Administrator is duly served will be binding upon all affected Participants in the Plan, their beneficiaries, estates and upon all persons claiming by, through or under them.

(10) QEBA Funds Unsecured. Nothing in this Ordinance shall be construed as providing for assets to be held in trust or escrow or any form of asset segregation from members, retired members, or beneficiaries except as specifically set forth in this Ordinance. To the extent any person acquires the right to receive benefits under this Plan, the right shall be no greater than the right of any unsecured general creditor of the City of Fresno, State of California.

(11) Severability. If any provision of the Plan is held by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions of the Plan will continue to be fully effective.

SECTION 2. This ordinance shall become effective and in full force and effect at 12:01 a.m. on the thirty-first day after its final passage.

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.
CITY OF FRESNO)

I, YVONNE SPENCE, City Clerk of the City of Fresno, certify that the foregoing ordinance was adopted by the Council of the City of Fresno, at a regular meeting held on the _____ day of _____, 2015.

AYES :
NOES :
ABSENT :
ABSTAIN :

Mayor Approval: _____, 2015
Mayor Approval/No Return: _____, 2015
Mayor Veto: _____, 2015
Council Override Vote: _____, 2015

YVONNE SPENCE, CMC
City Clerk

By: _____
Deputy

APPROVED AS TO FORM:
DOUGLAS T. SLOAN,
City Attorney

By: _____
Tina R. Griffin
Supervising Deputy City Attorney

KBD:ns [68302ns/ord] 6/24/15