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CITY OF SAN DIEGO

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**MEMORANDUM OF LAW**

**DATE:** July 16, 2012

**TO:** Darren Greenhalgh, Deputy Director, Public Works Department

**FROM:** City Attorney

**SUBJECT:** Charter Section 99 and the proposed Chilled Water Service Agreement

**INTRODUCTION**

The City Attorney's office has been asked by the Public Works Department to review the Chilled Water Service Agreement (Agreement) between JMIR-Chilled Water LLC (JMIR) and the City of San Diego, which will provide chilled water to cool the New Main Library (Library). The Agreement will be for a term of twenty years, with four options to extend, each option for an additional five years. It was anticipated in 2006 when the City granted JMIR a chilled water franchise agreement that they would provide chilled water to the Library once it was built. The Library is currently under construction and was designed to be cooled by chilled water. The infrastructure has been designed and constructed to connect to JMIR's system which is the only provider of chilled water in that area.

**QUESTIONS PRESENTED**

1. Is the proposed Agreement consistent with the debt limitation provisions of the California Constitution and San Diego Charter section 99?
2. Can the City Council approve the Agreement by resolution, rather than by ordinance under San Diego Charter section 99?

## SHORT ANSWERS

1. Yes. This Agreement to provide chilled water services does not violate the debt limitation provisions of either the California Constitution or San Diego Charter section 99.
2. Yes. The City Council can approve the Agreement by resolution.

## ANALYSIS

### I. CALIFORNIA CONSTITUTION DEBT LIMITATION PROVISION

Article XVI, section 18 of the California Constitution, Debt Limitation, provides:

(a) No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of the two-thirds of the voters of the public entity voting at an election to be held for that purpose.

The purpose of the debt limitation provision of the California Constitution is to prevent the imprudent creation of inordinate debt that might be charged against taxpayers, and to ensure that taxpayers have the opportunity to express their approval or disapproval of long term indebtedness. 48 Op. Cal. Att’y Gen. 110 (1966). This provision is intended to hold cities accountable for the debt that they incur; the purpose is to prevent current city leaders from burdening future city leaders and tax payers for the agreements they entered into a long time ago. *McBean v. City of Fresno*, 112 Cal. 159, 164 (1896). All the money required to meet a present liability must be within the year’s income, unless an exception to the debt limitation law exists. *City of Los Angeles v. Offner*, 19 Cal. 2d 483, 487 (1942).

#### A. Contingent Obligation Exception

Since the 1890’s the Courts have recognized certain exceptions to the debt limitation provision to allow cities to function. One exception is known as the “contingent obligation” exception. Courts have determined that a contingent obligation is not a debt for purposes of the debt limitation provision. 67 Op. Cal. Att’y Gen. 349, 352-353 (1984). “A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens.” *Id.* at 352, (citing *McBean v. City of Fresno*, 112 Cal. 159, 168 (1896)). This exception includes what is also commonly referred to as the lease exception. Courts have found long term leases are not debts, but rather contingent obligations, in which rental/lease payments are to be exchanged for contemporaneously received consideration. 67 Op. Cal. Att’y Gen. at 352-353; *See also Rider v. City of San Diego*, 18 Cal. 4th 1035, 1047 (1998).

It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered

into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision.

*City of Los Angeles v. Offner*, 19 Cal. 2d at 485-486.

The contingent obligation exception has been applied by the Courts to uphold multi-year contracts in which the local government agrees to pay in each successive year for land, goods, or services provided during that year. *Rider*, 18 Cal. 4th at 1047. This allows cities to negotiate lower prices, better terms and to avoid price volatility. *Id.* The key as the court stated in the sentinel lease exception case of *City of Los Angeles v. Offner*, is that the contract "creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year." *Offner*, 19 Cal. 2d at 486; *See also Rider*, 18 Cal 4th at 1048. The liability is confined to the specific performance of each party every month. The nature of the contract is such that neither party can fully perform nor is expected to fully perform upon execution of the contract, but rather their performance is tied to a specific time period. In the lease example the use and enjoyment of the space each month will trigger the payment obligation for that month.

#### **B. San Diego Charter Section 99**

Charter section 99 was amended in 1968 to bring it into consistency with the debt limitation provision of the Constitution of the State of California. Prior to the 1968 amendment to the Charter, the City was having difficulty interpreting section 99 and its requirements.<sup>1</sup> The 1968 amendment was done to allow the City of San Diego to use the protections flowing from the long standing case law interpreting the debt limitation provision and all the court recognized exceptions to the debt limitation provision of the California Constitution. City Att'y MOL No. 98-14 (June 4, 1998). The debt limitation provision of Charter section 99 is interpreted no more restrictively than article XVI, section 18 of the California Constitution. *Rider*, 18 Cal. 4th at 1050. Charter section 99 says:

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California . . . .

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<sup>1</sup> See letter to Purchasing Agent from the City Attorney's Office in 1968 – detailing why Charter section 99 needs to be amended attached as A to this memorandum.

Charter section 99 is modeled on the debt limitation provision of article XVI, section 18 of the California Constitution. *See Ballot Measure for Proposition A, 1968.*<sup>2</sup> The amended section 99 allows the City to avail itself of the long standing case law exceptions to the debt limitation provisions, such as the contingent obligation exception. City Att'y MOL No. 98-14; (June 4, 1998).

The analysis under the Constitutional debt limitation provision and the San Diego Charter debt limitation provision is practically the same. The Service Agreement with JMIR is for a term of twenty years. The amounts due under this Agreement are specifically for the chilled water service provided by JMIR. This is similar to any other utility agreement or lease agreement. The City will owe JMIR each month for actual services provided by them in that month. There will be a constant and continuous exchange of consideration between JMIR and the City. Upon signing the Agreement the City will not owe a present and demandable debt to JMIR for the entire agreement amount. On the contrary, the City will owe JMIR a specific amount each month as long as JMIR provides chilled water services.

An acceleration clause or other provision making the aggregate immediately payable upon default could cause such a contract to violate the Constitutional debt limitation. 48 Op. Cal. Att'y Gen. 110 (1966). The Agreement does not contain any such acceleration clause. Either party can terminate the Agreement if the other party is not performing their duties under the Agreement. If the Agreement were to be terminated for default, the only amount potentially due would be for services already rendered prior to termination. Liability is restricted to monthly payments, therefore this Agreement would be considered a contingent obligation. Similarly Courts have held that lease agreements with a continued exchange of consideration are not debts and therefore not subject to the debt limitation provisions. *Id.* at 113.

The contingent obligation exception has been repeatedly used to uphold multiyear contracts for land, good and services, so long as liability is confined to actual present and contemporaneous exchange of consideration. *See Rider*, 18 Cal. 4th at 1047. The Agreement with JMIR would only create a contingent liability, contingent on each party performing each month. Therefore, the Agreement creates no immediate debt that would fall under the purview of the California Constitution or Charter section 99. *See Id.* at 1048.

## **II. ORDINANCES UNDER CHARTER SECTION 99**

Charter section 99 in its entirety provides:

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have

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<sup>2</sup> The ballot language is attached to this memo as attachment B. The legislative history of the current Section 99 will be addressed in more detail in the next section of this memo as well.

indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. *No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds' majority vote of the members elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.*" (emphasis added).

The current version of section 99 was added to the San Diego Charter by voter approval of Proposition A in 1968.

The primary goal in construing a voter-approved amendment to a city charter is to effectuate the voters' intent in approving the amendment. *People v Jones*, 5 Cal. 4th 1142, 1146 (1993). When interpreting laws we begin with the "plain meaning doctrine" in which they will infer the plain and ordinary meaning of words and terms. However, "the plain meaning rule does not compel rote application of the common meaning of words, without regard to the context in which they are used." *County of Sacramento v. Pacific Gas & Electric Co.*, 193 Cal. App. 3d 300, 309 (1987).

With that in mind, the final sentence of section 99 says "[n]o contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance." If given their plain meaning in isolation, the words would appear to apply the ordinance requirement to any contract, agreement or obligation with no other limiting language. Since we do not apply a "rote" application of this doctrine, but rather look at the context in which these words are used, we must look at the entire section.

Charter section 99 consists of one paragraph with only three sentences. The first two sentences of this paragraph deal with incurring any indebtedness or liability. Because the subject of the final sentence seem so broad and the subject of the first two sentences seems more narrow, it is necessary to look at some grammatical rules in getting to the plain meaning in context of the entire section.

In interpreting a section of the California Vehicle Code, the court in *Addison v Department of Motor Vehicles*, 69 Cal. App. 3d 486, applied a common rule of grammatical construction to effectuate plain meaning in context, stating that “the second sentence of a paragraph ordinarily pertains to the same subject matter as the first.” *Addison*, 69 Cal. App. 3d at 496. In normal rules of written communication we group like things in a single paragraph. When we wish to discuss a different idea, topic or conclusion we begin a separate paragraph. The court in *Addison* went on to find that the second sentence of the paragraph applied to the limited subject as outlined by the first sentence of the paragraph, if the legislature had intended a broader reading then “[i]t would have placed the last sentence in a separate paragraph, or included it as part of the proceeding paragraphs, or noted it in some other section of the Vehicle Code.” *Id. See also Terry York Imports, Inc. v Department of Motor Vehicles*, 197 Cal. App. 3d 307 (1987).<sup>3</sup>

In this situation it is reasonable to see that the third sentence of this paragraph when read in context of the limited subject matter of the first two sentences, would relate to incurring indebtedness or liability. Under the *Addison* analysis, if the legislature intended a broader reading of the final sentence they should have put it in a separate paragraph or place it somewhere else in the Charter. *Id.*

Another factor in looking at the plain meaning of a statute in context is to look at the words used throughout the paragraph to harmonize the section with itself. Similar to the *Addison* approach of looking at the entire paragraph, we need to also look at any limiting words and where they are placed. The first sentence deals with “[t]he City shall not incur indebtedness or liability” and the second sentence deals with “. . . when two or more propositions for incurring indebtedness or liability”. These two sentences that begin the paragraph have limiting words of indebtedness and liability. Under the *Ejusdem Generis* doctrine “where general words follow specific words in a statutory enumeration, general words are construed to comprise only objects similar in nature . . .” *Carriere v Cominco Alaska, Inc.*, 823 F. Supp. 680, 689 (1993). While normally this rule of construct is useful in interpreting lists of things, it is not confined to lists, it is also used to restrict general phrases used to objects that are similar to specific phrases already used in the statute. *Id.* at 690. With this in mind the first two sentences limit the provision to the context of indebtedness or liability. Thus, it would logically flow that the final sentence in the paragraph, while using the general terms “no contract, agreement or obligation” would be restricted to the objects within the limiting phrases already used, dealing with indebtedness or liability. The second sentence then would be restricted to contracts, agreements or obligations creating indebtedness or liability, consistent with this Office’s 1998 opinion.

It is arguable that the plain meaning, even in context of section 99, is open to different interpretations. In this situation the context helps clarify this disputed phrase, but does not entirely eliminate any ambiguity. Therefore, the next step in the analysis is to look at the legislative intent of the Charter amendment. *The People v. Terry Eugene Birkett*, 21 Cal 4th 226, 231-232 (1999).

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<sup>3</sup> *Terry York Imports, Inc. v Department of Motor Vehicles*, 197 Cal. App. 3d 307 (1987). In this case the Terry court was looking at the same vehicle code section that was at issue in the *Addison v. Department of Motor Vehicles* case. The Terry court agreed with the statutory interpretation done by the Addison Court and agreed with their reading of the statute. *Id.* at 316.

Legislative history is especially persuasive in determining the meaning of a given word or phrase. “In ascertaining the Legislature’s intent, we turn first to the language of the statute.” *Id.* at 231. In this situation there are several indicia of legislative intent in the actual language of Section 99 itself. The first sentence states that this is “required by the Constitution of the State of California.” This shows the intent to mirror the California Constitutional debt limitation provision. There is also the use of specific words in Section 99 that reinforce the desire to create a debt limitation provision. The terms “indebtedness” and “liability” are used six different times in the first two sentences (the entire section is only three sentences long) of the section. In 1968 the City asked voters to amend Charter sections 80 and 99 in Proposition A. The ballot language of Proposition A provided: “Shall the Charter be amended to include a *debt limitation provision* consistent with the Constitution of the State of California, and to remove certain inconsistent provisions now contained in Section 80 and Section 99.” (*See* Ballot measure for Proposition A 1968 (emphasis added)).

The ballot goes on to show the changes being made to Section 80 Money Required to be in Treasury and Section 99 Continuing Contracts. Section 80 begins with “No contract, agreement or other obligation, involving the expenditure of money out of appropriations made by the Council, *in any one fiscal year* . . . ” (the new language to be added to Section 80 was *in any one fiscal year*). This section was amended at the same time as Section 99. The beginning of the third sentence of Section 99 mirrors the beginning of the first sentence of Section 80 with “[n]o contract, agreement or obligation . . . ” In looking at the argument for Proposition A we can clearly see the intent of the legislature “[a]s changed this section [80] will then be in line with Section 99 and both sections, if the amendments are adopted, will bring our Charter into conformity with the protections afforded by the State Constitution.” Section 80 deals exclusively with the requirement that the Comptroller shall certify that funds are available prior to the execution of any contract, agreement or obligation. The two sections are closely linked by the desire to deal with the expenditure of funds in the City. The overall goal of amending both sections was to afford the City all the legal certainty from the court cases interpreting the debt limitation provision of the California Constitution. The previous language of Section 99 did not mirror the debt limitation provision of the California Constitution and thus “as presently written their ambiguities complicate City proposals for financing municipal improvements and they differ from similar provisions of the State Constitution.” (Argument for Proposition A, 1968). The City was seeking to benefit from the numerous court interpretations of the debt limitation provision of the State Constitution, and needed to bring Section 99 into conformity with the State Constitution Debt limitation provision.

The argument in favor of Proposition A goes on to say “[t]he amendments to section 99, if adopted, will require that any contract or agreement of more than five years can only be authorized, after a public hearing, by a two-thirds’ vote of the Council, whose action then will be subject to the referendum. This addition will enable the taxpayer to protest long-term projects not otherwise subject to a vote of the people.”

Section 99 prior to the 1968 amendment provided:

No contract or obligation involving the payment of money out of the appropriations of more than one year, except bonded indebtedness provided for in Section 90 of this Article, shall be entered into unless there shall first have been notice published in the official newspaper of the City at least two weeks before final action of the Council thereon. Such a contract shall require the approval of not less than five members of the Council. If the contract is to be for a period of more than five years it must also first be submitted to the electors of the City at a regular or special election and be approved by a two-thirds majority of those voting thereon. Any contract entered into violation of the requirements of this section shall be invalid, and no rights, indebtedness, liability or obligations shall arise thereunder or be created thereby.”

The version of Section 99 prior to the 1968 amendment required that if the contract is for longer than five years it would have to go to a vote of the people in a general or special election. The amended Section 99 was to bring the section into conformity with the debt limitation provision of the State Constitution which only allows for the electorate to vote if the expenditure exceeds the City’s revenue for the year. (*See* Ballot measure for Proposition A 1968). The electorate would not have the chance to otherwise contest long term projects or expenditures that do not rise to the level mentioned above. By adding the final sentence in Section 99, the City was trying to allow the citizens of the City of San Diego the opportunity to protest expenditures on long term projects that, but for that final sentence, they would not be allowed to protest. (*See* Argument for Proposition A, 1968). By adding that sentence, the City would approve those contracts, agreements or obligations incurring indebtedness in excess of five years by Ordinance allowing the electorate the ability to protest through the referendum process<sup>4</sup> rather than through a formal election.

The final sentence of the argument in favor of Proposition A reads: “These amendments are most essential to the orderly and economic functioning of your City government.” The third sentence of the pre-1968 amended Section 99, “the contract” requiring a vote of the people at a special election was intended to refer back to the first sentence of the section “contract or obligation involving the payment of money.” Nothing in the 1968 amendment indicates an attempt to expand the number of contracts coming within the scope of Section 99. (*See* Argument for Proposition A, 1968). The ballot language in fact describes an effort to create a more efficient process when looking to finance municipal improvements. If we read the final sentence of Section 99 to apply to ALL contracts, agreements or obligations and not just those that create fiscal indebtedness, we would be adding to the workload and expense of the City process. (*See* Argument for Proposition A, 1969). This would require contracts that were not previously required to go to City Council, to now go to Council, with two readings, a publication

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<sup>4</sup> Under Charter section 23 “referendum may be exercised on any ordinance passed by the Council except an ordinance which by the provisions of this Charter take effect immediately upon its passage.”



in the official newspaper of the City and a thirty day referendum period. This would be additional expense and processing time, inconsistent with the ballot argument of creating a more orderly and economic functioning government.

Our office in 2004 also issued a Memorandum of Law, City Att'y MOL No. 2004-12 (July 15, 2004), discussing Section 99 in relation to a Joint Use Agreement and whether it could be approved by Council by resolution rather than ordinance. In that memorandum our office concluded that Joint Use Agreements fell under the "contingent obligation" exception to the debt limitation provision of both the California Constitution and Charter section 99. Because the Joint Use Agreements fit as an exception to the debt limitation provision, then they were not considered a debt and could be approved by Council by resolution. *Id.* at 5. That is, because the agreement did not create a debt, the ordinance requirement of Section 99 did not apply. As discussed above, agreements with expenditures contingent on a future event are not debt and do not come under the purview of a debt limitation provision. *McBean v. City of Fresno*, 112 Cal. 159, 168 (1896).

The proposed agreement with JMIR is a contingent obligation akin to the lease exception; it is contingent upon services being rendered each and every month and a mutual exchange of consideration each month. JMIR cannot fully perform its obligations under the contract upon signing the agreement. It is a physical impossibility. JMIR can only perform on a monthly basis. The City is only required to pay JMIR if services are rendered and then for the value of the services rendered each month. Under the contingent obligation exception the agreement with JMIR is not a debt and therefore, Charter section 99 does not apply.

### CONCLUSION

After considering the plain meaning of the statute, in context of Section 99, there was some guidance as to its full extent and meaning. With some room remaining for ambiguity, the rules of statutory interpretation required a closer look at the legislative intent and legislative history of Section 99 to ascertain more indications of its meaning and intent. With all these pieces of information and indicia of intent, this Office concludes that all three sentences of Section 99 were intended to apply only to fiscal indebtedness, not to all contracts regardless of fiscal impacts.

The proposed Agreement with JMIR falls within the contingent obligation exception to the debt limitation provision of the California Constitution and Charter section 99. This Agreement is for the mutual exchange of consideration tied to the services rendered in each year, or more particularly each month. Charter section 99 was amended in 1968 to mirror the Constitutional debt limitation provision so the legal analysis under both restrictions is the same.

Because the ordinance requirement of Charter section 99 only applies to debts, as defined in the California Constitution, this Agreement can be approved by City Council by resolution.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Christina L. Rae

Christina L. Rae  
Deputy City Attorney

CLR:cla:cw

Attachment A: City Charter Section 99—Continuing Contracts

Attachment B: Proposition A

ML-2012-8

Doc. No. 400970\_2

**Attachment A**

**(City Charter Section 99—Continuing Contracts)**



THE CITY OF  
SAN DIEGO

OFFICE OF CITY ATTORNEY—CITY ADMINISTRATION BUILDING • SAN DIEGO, CALIFORNIA  
Telephone 23

EDWARD T. BUTLER  
CITY ATTORNEY

March 18, 1968

Mr. John A. Mattis  
Purchasing Agent  
The City of San Diego  
San Diego, California

Dear Mr. Mattis:

City Charter Section 99--  
Continuing Contracts

We have received your memorandum dated March 8, 1968, relating to a proposed Charter amendment to Section 99 which now relates to continuing contracts. You ask our advice concerning the effect the proposed amendment, if adopted, will have on your purchase of five-year insurance policies when 1) the premium is fully paid in advance, and 2) when the premium is paid in annual installments. You also seek our advice concerning requirements contracts extending for a period longer than one year when money is appropriated only for the first year's requirements.

We are of the opinion that the proposed amendment to Section 99 will not preclude your purchase of five-year insurance policies whether or not the premium is paid in full in advance. We are also of the opinion that the City may validly enter into requirements contracts extending for a period longer than one year when an appropriation is made only for the first year's annual requirements.

The proposed amendment to Section 99 simply paraphrases the provisions of Section 18, Article 11, of the Constitution of the State of California. Our recommendation for the amendment to Section 99 was prompted by a continuing difficulty with the interpretation of Section 99 as it presently stands. To the extent that it authorizes obligations involving the payment of money out of the appropriations of more than one year but less than five years without the approval of a two-thirds' majority of the electorate,

we believe it to be unconstitutional. The underlying philosophy of Section 99 in its current form is to prevent City officials from mortgaging future revenues for present benefits. That objective is also reached by Section 18 of Article 11 of the Constitution. The advantage we see in the proposed amendment is its similarity to the constitutional provision which has been subjected to considerable litigation. As a result, lawyers are able to give a more consistent interpretation to the constitutional language.

While insurance contracts for a period of five years may require the expenditure of moneys not presently available, we are of the opinion that the purchase of such policies is not forbidden by the constitutional provision and therefore would be permitted under the proposed amendment to Section 99 of our Charter. Our theory is that the consideration furnished by the insurance company in providing protection to the City is a benefit accorded on an annual basis and is contingent upon payment by the City of annual premiums. Thus, it is not unlike a lease for a period of years where the consideration is (assuming a month-to-month tenancy) furnished by the lessor each month and the obligation of the lessee to pay rent arises on a monthly basis, so long as the lessor continues to permit quiet enjoyment of the premises. In considering the validity of a long-term lease by the City of Los Angeles with a private contractor who was to furnish a rubbish incinerator for a period of ten years, the court in City of Los Angeles v. Offner (1942) 19 Cal.2d 483 [122 P.2d 14], said at pages 485 and 486:

"It has been held generally in the numerous cases that have come before this court involving leases and agreements containing options to purchase that if the lease or other agreement is entered into in good faith and creates no immediate indebtedness for the aggregate installments therein provided for but, on the contrary, confines liability to each installment as it falls due and each year's payment is for the consideration actually furnished that year, no violence is done to the constitutional provision."

If, of course, there are sufficient funds available to prepay the premiums in full, there will be no indebtedness

March 18, 1968

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incurred exceeding the income and revenue for that year and therefore no violation of either Section 18 of Article 11 of the Constitution or the proposed amendment to Section 99 of the Charter.

In the case of a requirements contract extending for a period longer than one year, we are of the opinion that no obligation is incurred under Section 18 of Article 11 of the Constitution until the requirement for the product or services in question arises. We believe that under the proposed amendment to Section 99 of the Charter a sum payable upon a contingency is not a "debt" until the contingency has occurred. See City of Oakland v. Williams (1940) 15 Cal.2d 542 [103 P.2d 168]. Such a contract is similar to contracts which require, in effect, payments to be made from time to time as work progresses. (We do not here refer to contracts such as those for the construction of a building under which the City's obligation to pay arises at the time a contract is let and where the payment schedule is related to a percentage of completion of the construction.) In Wyckoff v. Force (1923) 61 Cal.App.246 [214 P. 489], the court reviewed a contract with an architect who was to design and supervise construction of a school building. He was to be paid over a period of years as work under the contract was accomplished. The court there said at page 250 that the architect's contract

"called for his services until the building was completed, payments to be made from time to time as the work progressed. It does not appear that any installment coming due in any year during the life of the contract was in excess of the income and revenue [of the public agency] of that year. The contract is not, therefore, within the inhibitions of Section 18 of Article 11 of the constitution."

In summation, we believe that the proposed amendment will not necessarily alter your present practice with respect to the two types of contracts you mention.

Very truly yours,

EDWARD T. BUTLER, City Attorney

By Brian J. Newman-Crawford  
Brian J. Newman-Crawford, Deputy

BJM-C:K

APPROVED:

Edward T. Butler  
City Attorney

**Attachment B**  
**(Proposition A)**

JUN - 4 1968

PROPOSITION A

(THIS PROPOSITION WILL APPEAR ON THE BALLOT IN THE FOLLOWING FORM)

PROPOSITION A. CITY OF SAN DIEGO CHARTER AMENDMENT: AMEND SECTION 80 AND SECTION 99 OF THE CHARTER OF THE CITY OF SAN DIEGO. Shall the Charter be amended to include a debt limitation provision consistent with the Constitution of the State of California, and to remove certain inconsistent provisions now contained in Section 80 and Section 99?	YES	
	NO	

This proposition amends Section 80 and Section 99 of the Charter of The City of San Diego by deleting certain provisions and by adding new provisions. -The portions to be deleted are printed in STRIKE-OUT TYPE and the portions to be added are underlined.

This proposition requires a majority vote.

Section 80. MONEY REQUIRED TO BE IN TREASURY.

No contract, agreement, or other obligation, involving the expenditure of money out of appropriations made by the Council, in any one fiscal year shall be entered into, nor shall any order for such expenditure be valid unless the Auditor and Comptroller shall first certify to the Council that the money required for such contract, agreement or obligation for such year is in the treasury to the credit of the appropriation from which it is to be drawn and that it is otherwise unencumbered. The certificate of the Auditor and Comptroller shall be filed and made a matter of record in his office and the sum so certified as being in the treasury shall not thereafter be considered unencumbered until the City is discharged from the contract, agreement or obligation. All unencumbered moneys actually in the treasury to the credit of the appropriation from which ~~an~~ a contract, agreement or obligation is to be paid, and all moneys applicable to its payment which before the maturity thereof, are anticipated to come into the treasury to the credit of such appropriation shall, for the purpose of such certificate, be deemed in the treasury to the credit of the appropriation from which the contract, agreement or obligation is to be paid. ~~The Council may approve a contract subject to a vote of two thirds of the electors, extending over a period of years for additions to the real estate, water plant, harbor, or other revenue producing utilities, in excess of the estimated revenue of the year, if in the opinion of the Auditor and Comptroller and the Council there will be money available to meet the payments on the contract as they come due. Provided, however, that nothing herein contained shall be construed as authorizing the incurring of indebtedness in excess of that limited by Section 76 of this Article.~~

Section 99. CONTINUING CONTRACTS.

~~No contract or obligation involving the payment of money out of the appropriations of more than one year, except bonded indebtedness provided for in Section 90 of this Article, shall be~~



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~~entered into unless there shall first have been notice published in the official newspaper of the City at least two weeks before final action of the Council thereon. Such a contract shall require the approval of not less than five members of the Council. If the contract is to be for a period of more than five years it must also first be submitted to the electors of the City at a regular or special election and be approved by a two-thirds majority of those voting thereon. Any contract entered into in violation of the requirements of this section shall be invalid, and no rights, indebtedness, liabilities or obligations shall arise thereunder or be created thereby.~~

The City shall not incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year unless the qualified electors of the City, voting at an election to be held for that purpose, have indicated their assent as then required by the Constitution of the State of California, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax, sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the same; provided, however, anything to the contrary herein notwithstanding, when two or more propositions for incurring any indebtedness or liability are submitted at the same election, the votes cast for and against each proposition shall be counted separately, and when the qualified electors of the City, voting at an election for that purpose have indicated their assent as then required by the Constitution of the State of California, such proposition shall be deemed adopted. No contract, agreement or obligation extending for a period of more than five years may be authorized except by ordinance adopted by a two-thirds' majority vote of the members elected to the Council after holding a public hearing which has been duly noticed in the official City newspaper at least ten days in advance.

ARGUMENT FOR PROPOSITION A

Sections 80 and 99 are the "dry as dust" provisions of our City Charter. As presently written, their ambiguities complicate City proposals for financing municipal improvements and they differ from similar provisions in the State Constitution. While our courts in a long series of decisions have set forth public financing limitations under the Constitution, the City does not have the benefit of these decisions in interpreting Sections 80 and 99 of our Charter. Needless expense, delays and prolonged litigation are the results. The amendments to Section 99, if adopted, will require that any contract or agreement of more than five years can only be authorized, after a public hearing, by a two-thirds' vote of the Council, whose action then will be subject to the referendum. This addition will enable the taxpayer to protest long-term projects not otherwise subject to a vote of the people. Section 80 is proposed to be amended by removing certain provisions inconsistent with other Charter sections. As changed, this section will then be in line with Section 99 and both sections; if the amendments are adopted, will bring our Charter