

## MEMORANDUM OF LAW

**DATE:** June 4, 1998  
**NAME:** Mike Uberuaga, City Manager  
**FROM:** City Attorney  
**SUBJECT:** Charter Section 99 - Agreements for a Term in Excess of Five Years

### **QUESTION PRESENTED**

Does the requirement in San Diego City Charter section 99 [Section 99], that any “contract, agreement or obligation extending for a period of more than five years” be authorized by ordinance approved by a two-thirds vote of the members of the City Council after two public hearings, apply to *any* contract or agreement, or only to contracts or agreements for the expenditure of funds by the City?

### **SHORT ANSWER**

Notwithstanding previous advice by the City Attorney’s Office, it is our opinion that the cited provision of Section 99 applies only to contracts or agreements for the expenditure of funds by the City with a term in excess of five years.

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### **BACKGROUND**

Approximately three years ago, in response to a question presented concerning a proposed ten-year agreement between the City and a joint venture for the construction of a landfill, the City Attorney’s Office reached a tentative conclusion that any agreement or contract with a term in excess of five years must be approved by ordinance as specified in the last sentence of Section 99. *See* Attachment 1. That sentence reads as follows: “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.”

A memorandum prepared at that time reviewed the question of whether the referenced ten-year agreement was subject to the ordinance procedure contained in Section 99. *Id.* The memorandum correctly concluded that the ten-year agreement, which involved a City obligation for the expenditure of funds, was subject to the Section 99 ordinance requirements. The memorandum, however, contained some broader language concluding that *all* contracts and agreements of more than five years must be authorized by ordinance after a duly noticed public hearing.

This Office has been asked on a number of occasions to reassess the conclusion expressed in 1993 because of the constraints placed on City operations as a result of complying with the broad interpretation of the ordinance procedure. For example, if the City proposes to lease a parcel of property for a period in excess of five years, that lease must be approved by ordinance after hearing, a process that takes at least 45 days. The prospective lessee may have time constraints that require a lease to be executed more quickly. Such constraints may result in lost revenue opportunities for the City. *See, e.g.*, Attachment 2. This memorandum undertakes the requested reassessment.

## ANALYSIS

We believe that Section 99 is ambiguous on the question of whether the last sentence applies to *any* contract or agreement, or applies only to contracts or agreements for the expenditure of funds. Because of this ambiguity, resort to the legislative history of Section 99 may be had to answer the question. We believe that the legislative history of Section 99 shows that it was intended to apply only to contracts or agreements that involve a financial obligation on the part of the City for more than a five-year period.

More recent research on the question concludes that Section 99, for a variety of reasons, but most importantly its legislative history, applies solely and exclusively to long-term contracts involving financial obligations of the City. *See* Attachment 3. The most compelling analysis behind that conclusion may be summarized as follows.

Article VII of the Charter, Sections 68 through 114, deal with “finance” issues. Section 99, a part of Article VII, was amended in 1941 to read as follows:

Section 99. Continuing Contracts. (As amended April 22, 1941. Effective May 8, 1941.) 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 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 [emphasis added].

You will note that the 1941 version of Section 99 dealt exclusively with contracts or obligations “involving the payment of money.”

An opinion of the City Attorney’s Office, dated March 18, 1968, described how an amendment to Section 99 was necessary because the 1941 version was inconsistent with the State Constitution and case law dealing with continuing contracts involving the expenditure of City funds. *See* Attachment 4. Changes were therefore proposed to Section 99 to “simply paraphrase the provisions of Section 18, Article 2 of the Constitution of the State of California.” The amendment was adopted and as a result, Section 99 now reads:

Section 99. Continuing Contracts. 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 any 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.

The 1968 ballot question for the proposed amendment read as follows:

**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?

The above language clearly indicates that the purpose of the amendment was to bring Section 99 into consistency with the constitutional debt limitation provision. The argument in favor of the proposition described the inconsistency in the context of allowing taxpayers to protect “long-term projects not otherwise subject to a vote of the people.” Such long-term projects are identified in that argument as “proposals for financing municipal improvements.” The argument further identifies the proposition as dealing with “public financing limitations under the

Constitution.” *See* Attachment 5.

We believe that the intended result of the 1968 amendment to Section 99 was to require the City to adopt a referable ordinance any time the City proposed to enter into an agreement extending for more than five years and involving an obligation to expend City funds. That result would be consistent with the constitutional debt limitations discussed as a justification for the amendment. A position that Charter Section 99 applies not only to those types of agreements but to any agreement or contract is, we believe, beyond the scope and intent of Section 99, and would lead to needless handicaps on City business not applicable to other charter or general law cities.

### **CONCLUSION**

In summary, a review of the changes to Section 99 over time indicates that the section is intended to deal solely and exclusively with financial obligations of the City. The section, as amended in 1968, requires the City to adopt an ordinance any time it proposes to enter into an

agreement which calls for City expenditures for a period in excess of five years. Other long-term agreements and contracts, where the City receives funds, or, where the City is not required to pay out funds, were not intended to be subject to the provisions of Section 99.

CASEY GWINN, City Attorney

By

Leslie J. Girard  
Assistant City Attorney

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Attachments 1-5

cc: Mayor & City Council

City Auditor & Comptroller

City Clerk

ML-98-14