

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: July 29, 2014

TO: Mary Lewis, Chief Financial Officer

FROM: City Attorney

SUBJECT: Commercial Paper and Charter Restrictions Related to Comptroller Certificates

You have asked the City Attorney's office whether the City of San Diego (City) has the legal capacity to issue commercial paper and, if so, whether the proceeds of a commercial paper program could be used to satisfy your San Diego Charter (Charter) obligations with respect to certifying to the City Council the availability and appropriation of funds prior to City Council authorization of a contract or agreement. This memorandum discusses the potential for the City to use the Public Facilities Financing Authority (PFFA) to create a commercial paper program and the appropriation of the proceeds of such commercial paper to satisfy your certification requirement under Charter section 80.

Issuance of Commercial Paper by the Public Facilities Financing Authority

Commercial paper notes are typically unsecured short term notes payable from a specified source of funds. Generally, the City is prohibited from pledging the credit of the City for the repayment of debt by Charter section 90 absent a public vote. The City can, however, cause the issuance of commercial paper by a joint powers authority, such as the Public Facilities Financing Authority.

The Marks-Roos Local Bond Pooling Act of 1985 (Marks-Roos) allows for a joint powers authority to issue a variety of debt instruments, including commercial paper where there is a finding of significant public benefit. Cal. Gov't Code §§ 6584, 6585(c)(3). The powers conferred under Marks-Roos are included in the powers of the PFFA pursuant to its Third Amended and Restated Joint Exercise of Powers Agreement (JPA Agreement). JPA Agreement § 4. PFFA's power to issue commercial paper, in this instance, derives exclusively from Marks-Roos, not from the powers of the City, and PFFA is not bound by any restrictions contained in the City Charter or the California Constitution with respect to debt limitations and related voter approval requirements. *See Rider v. City of San Diego*, 18 Cal. 4th 1035, 1051 (1998) (“[W]hen the Financing Authority issues bonds, it does so independently of any common power delegated

in the joint powers agreement, and therefore it is not subject to the limitations that would apply to the City, including the two-thirds vote requirements in the Constitution and the City's charter."); *see also*, City Att'y Report 2012-8 (Mar. 8, 2012, p. 3).

The City could enter into a lease structure whereby the City leases property to PFFA and PFFA leases that property back to the City for fair market rental value. PFFA would enter into a trust agreement pledging the lease payments received from the City to repay commercial paper notes issued by PFFA. In this situation, the City would enter into a lease and the City's rental payments would be subject to future appropriation. The City's obligation to pay rent would be contingent on the City's continued use and possession of the leased asset in future years, and such lease obligations are not subject to the debt limitations in the California Constitution or the City Charter. *Rider*, 18 Cal. 4th at 1040-50.

Certification of Availability and Appropriation of Funds by the Chief Financial Officer

Charter section 80 requires the Chief Financial Officer¹ to certify to the City Council that there are sufficient funds available in the treasury to pay the costs of a particular contract, in any fiscal year, before that contract is entered into, and that an appropriation has been made. The City is not authorized to enter into a contract nor are any expenditures related to such contract valid unless the Chief Financial Officer certifies that funds are available for the contract and that an appropriation has been made to pay the obligation. Charter section 80 reads, in pertinent part, as follows:

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 *All unencumbered moneys actually in the treasury to the credit of the appropriation from which 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.*

(Emphasis added.)

¹ Charter section 80 refers to the Auditor-Comptroller, however, the authority, power and responsibilities of the Auditor-Comptroller were transferred to the Chief Financial Officer effective July 8, 2008.

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Charter section 80 is in the nature of debt limitation provisions contained in Article XVI, section 18 of the California Constitution and in City Charter section 99. *See* City Attorney Letter dated September 1, 1961. “The underlying purpose of these debt limits is to force government to operate within its means.” *Taxpayers for Improving Public Safety v. Schwarzenegger*, 172 Cal. App. 4th 749, 761 (2009). In a sense, debt limitation provisions are like balanced budget requirements. *See Rider*, 18 Cal. 4th at 1045. Charter section 80, which is very similar to section 14 of the City’s 1889 City Charter, requires the certification of the City officer most knowledgeable of the fiscal affairs of the City before an agreement can be validly entered into and in that sense is a limitation on the legislative authority of the City Council. *See Higgins v. City of San Diego*, 118 Cal. 524, 551 (1896).

The certification of funds required by Charter section 80 is a judgment at the discretion of the Chief Financial Officer. As this office has previously opined, based on the plain language of Charter section 80, the funds required for a contract need not actually be in the treasury as long as the Chief Financial Officer believes that funds will come into the treasury to the credit of a particular obligation before that obligation matures. 1990 City Att’y MOL 294 (90-32; Mar. 2, 1990). Specifically, this office opined that the Auditor-Comptroller could certify the availability of funds under Charter section 80 where the City Council had authorized the issuance of certificates of participation (securities similar to lease-revenue bonds) but those certificates had not yet been issued or sold. 1990 City Att’y MOL 83 (90-2; Jan. 9, 1990). *See also, Pooled Money Investment Board v. Unruh*, 153 Cal. App. 3d 155, 162 (1984) (“It is well settled in this state that revenues may be appropriated in anticipation of their receipt just as effectually as when such revenues are physically in the treasury.”) Similarly, the Chief Financial Officer could certify the availability of the proceeds of commercial paper that is authorized but not yet issued.

In this situation, the Chief Financial Officer could reasonably anticipate that the proceeds of the issuance of commercial paper by the PFFA would come into the City treasury and is therefore available for appropriation. Substantively, this is no different than the City appropriating funds in the annual appropriation ordinance at the beginning of a particular fiscal year even though such funds will not be received by the City until later in that fiscal year.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By /s/ Brant C. Will
Brant C. Will
Deputy City Attorney

BCW:jdf
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