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OPINION NUMBER 2002-1

DATE: February 11, 2002

SUBJECT: Ambac Assurance Corporation
Merrill Lynch, Pierce, Fenner & Smith, Inc.

REQUESTED BY: Public Facilities Financing Authority of the City of San Diego Lease
Revenue Bonds, Series 2002

PREPARED BY: City Attorney

INTRODUCTION

The City of San Diego [City] is considering consummating a transaction by which the Public Facilities Financing Authority of the City of San Diego [Authority] will issue and sell lease revenue bonds [Bonds] pursuant to an Indenture between the Authority and a corporate trustee to be named therein as trustee [Trustee]. The Indenture provides that the Bonds are issued for the purpose of financing a portion of the cost of building a baseball park, a public park to be located adjacent to the ballpark, and certain other related land acquisitions, improvements and infrastructure [Project].

Certain questions have arisen, currently being addressed in litigation pending in the courts of the State of California, concerning the validity of the agreements [Financing Agreements] between the City, Authority and Trustee facilitating the issuance and sale of the Bonds, which are structured as "lease revenue" bonds. The litigation also concerns other aspects of the Project which could affect the validity of the Bonds or the City's obligation to make certain payments pursuant to the Financing Agreements. The San Diego City Attorney, who acts not only as the City Attorney for the City but as General Counsel to the Authority and the Redevelopment Agency of the City of San Diego [Agency], has been asked to render an opinion

regarding the ability of the City to appropriate and expend, on an annual basis, funds for the purpose of making a payment for the benefit of bondholders, a bond insurance company, or others in the event a court of competent jurisdiction enters a final judgment invalidating the Financing Agreements or the Bonds for any reason.

QUESTION PRESENTED

May the City appropriate and expend funds on an annual basis for the purpose of making a payment for the benefit of holders of the Bonds, a bond insurance company which has insured the Bonds, or other interested parties to the Financing Agreements, under the following circumstances: 1) the Bonds have been issued and sold; and 2) a court of competent jurisdiction subsequently enters a final judgment invalidating the Financing Agreements or the Bonds for any reason, or holding that the City is not obligated to make payment under the Financing Agreements?

SHORT ANSWER

Yes. Valid public purposes are served by the appropriation and expenditure of funds for the stated purpose. Those purposes include the mitigation of harm to the City's general credit and financial standing, the mitigation of potential damages to the bondholders, and minimization of the potential for the City to lose any of its interest in the land included in the Project. Because there are valid public purposes for the expenditures, there is no "gift of public funds" in violation of the San Diego City Charter [Charter].

BACKGROUND

On November 3, 1998, the voters of the City of San Diego approved Proposition C, which adopted an ordinance that authorized and directed the City to enter into a Memorandum of Understanding [MOU] among the City, the San Diego Padres [Padres], the Agency, and the Centre City Development Corporation [CCDC] regarding the Project. Following execution of the MOU and subsequent actions of the City, numerous lawsuits were initiated concerning the Project.¹

After the passage of Proposition C and execution of the MOU, the City Council adopted numerous ordinances and resolutions, and Agency resolutions,² to implement the MOU and

¹ All but five of these lawsuits have been finally resolved, three of which are further described below. The other remaining two cases, both entitled *Furgatch v. San Diego Unified Port District*, Superior Court case nos. GIC 744288 and 775242, concerns a Project related transaction between the City and the Port District but does not address the validity of the Financing Agreements or the bonds.

² The City Council sits as the Agency's governing board and is the body that adopts all Agency resolutions.

related development plans involved in the Project. Among the actions taken by the City Council were certain ordinances and resolutions authorizing and approving the Financing Agreements and the Bonds. On January 31, 2000, the City Council adopted Ordinance No. 0-18747 and Resolution No. R-292697, which authorized the City to finance its portion of the Project through lease revenue bonds. Specifically, Resolution No R-292697 authorized the underwriting agreement related to the Bonds. Ordinance No. 0-18747 authorized the issuance by the Authority of up to \$299,000,000 in lease revenue bonds (i.e., the Bonds) and the four contracts necessary to issue the Bonds. These contracts include the Site Lease, by and between the City and the Authority; the Ballpark Facility Lease, by and between the City and the Authority; the Indenture; and the Assignment Agreement between the Authority and the Trustee.

The lease revenue structure for the Bonds operates in the following manner. The City will own fee title to the land under the ballpark footprint [Project Properties]. By the Site Lease, the City will lease the land for a nominal rent to the Authority. By the Ballpark Facility Lease, the Authority will in turn lease the land to the City for an amount equal to the annual debt service on the bonds. By the Indenture and Assignment Agreement, this payment will be assigned to the Trustee for payment to bondholders.

Following the execution of the Financing Agreements, a member of the public filed a "validation action" pursuant to California Code of Civil Procedure 860 et seq. challenging the validity of the Financing Agreements on a variety of bases in the case *Currie v. City of San Diego, et al.*, Superior Court case no. GIC 743443. The City prevailed in the trial court and a judgment was entered validating the Financing Agreements. The plaintiff appealed that judgment to the Fourth District Court of Appeal, which, in an unpublished decision, upheld the judgment. *Currie v. City of San Diego, et al.*, Court of Appeal case no. D035891. The plaintiff sought review in the California Supreme Court, which was denied. *Currie v. City of San Diego, et al.*, Supreme Court case no. S096910.

Subsequent to the filing of the validation action, however, information became public suggesting that a member of the City Council [Council Member] had accepted certain gifts and favors from the majority owner of the Padres [Owner] during the period of time in which the City Council took numerous actions related to the Project, including the City Council's January 31, 2000 approval of the Bonds and the Financing Agreements. Based on this information, it was alleged by Project opponents that the Council Member possessed a disabling conflict of interest with regard to City Council actions taken in furtherance of the Project, and that as a result, all City Council actions, and the contracts authorized thereunder, including the Financing Agreements, were void as a matter of law. On January 29, 2001, the Council Member pled guilty to two misdemeanor violations of the Political Reform Act (California Government Code section 87100 et seq.)³ and resigned her seat on the City Council.⁴

On March 6, 2001, a newly constituted City Council⁵ adopted Ordinance No. 0-18927 and Resolution No. R-294638, and the Agency adopted Resolution No. R-03306 [Ratification Acts]. By the Ratification Acts, the City Council purported to validate, ratify and approve as of the date of their original making the MOU, all prior City Council and Agency ordinances and resolutions related to the Project, and all contracts and agreements previously authorized in furtherance of the Project, including the Financing Agreements. The Ratification Acts were adopted by unanimous vote of the City Council.

On March 7, 2001, the City and Agency filed a validation action [Litigation] specifically seeking to validate the Ratification Acts, and all prior City actions approved by the Ratification Acts including the Bonds and the Financing Agreements, against a challenge under Section 1090.⁶ In the validation action, the City sought to validate specific City actions and the contracts authorized thereunder “insofar as they are duly adopted and not subject to further challenge under Government Code section 1092.”⁷ The matters sought to be validated included, among others, the ordinances and resolutions adopted by the City Council, which authorized the Financing Agreements and the Bonds. The City asserted that regardless of any taint created by the Council Member's alleged conflict of interest on these and other prior City Council actions, the Ratification Acts served to validate the City's actions with regard to the Project and to validate and reaffirm all contracts and agreements previously authorized pursuant to those City actions.

Three members of the public [Defendants] appeared in the Litigation contending that the Ratification Acts and related contracts and agreements were invalid.⁸ One of the Defendants filed a cross complaint contending that the Ratification Acts and related contracts and agreements were invalid pursuant to Charter section 94, a conflict of interest provision similar to the

⁵ At the time of the approval of the Ratification Acts, there were two vacancies on the nine-member City Council, one occasioned by the Council Member's resignation, and the other occasioned by the election of a different council member to a state-wide office. Only two members of the seven sitting members of the City Council who approved the Ratification Acts were members of the City Council when the Council Member participated in and voted on matters related to the Project.

⁶ Section 1090 provides: “Members of the Legislature, state, county, district, judicial district, and city officers and employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

⁷ Section 1092 provides, in pertinent part: “Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein.” The case law provides that contracts made in violation of Section 1090 are void, not merely voidable. *See Thompson v. Call*, 38 Cal. 3d 633, 646 n. 15 (1985). Thus, with proof that the Council Member in fact possessed a prohibited financial interest under Section 1090, the Financing Agreements would have been void.

⁸ One defendant made a procedural challenge only and did not pursue the matter on the merits, although that person's right to pursue such a challenge may be preserved through an appeal of the procedural ruling. The other two defendants pursued the matter on the merits.

provisions of Sections 1090 and 1092. On June 29, 2001, the Superior Court entered judgment in favor of the City and Agency holding that the Ratification Acts, and all contracts and agreements ratified thereunder, including the Financing Agreements, were valid as against a challenge pursuant to Sections 1090 and 1092. On August 9, 2001, the Superior Court entered judgment in favor of the City and Agency holding that the Ratification Acts, and all contracts and agreements ratified thereunder including the Financing Agreements were valid as against a challenge pursuant to Charter section 94. Notices of Appeal have been filed from each of these judgments.

On November 20, 2001, the City Council adopted a number of resolutions providing for a number of things regarding the Project including the following: 1) accepting a revised plan of finance for the Ballpark Project containing a variety of changes that had occurred since approval of the MOU, and approving the Offering Document; 2) approving a continuing disclosure agreement, in which the City agreed to file certain information regarding the City and the Bonds with nationally recognized municipal securities information repositories; 3) authorizing the City Manager to enter into a contract of purchase with the Underwriter under which the Underwriter is purchasing the Bonds from the Authority and to take all action necessary to consummate the lawful issuance of the Bonds and disbursement of proceeds; 4) approving an agreement which among other things, authorized the release by the City of its lien on the Padres' Major League Baseball Franchise, so that Major League Baseball [MLB] could be provided with such a lien to secure any advances by it under a guaranty by MLB of the deposit by the Padres by April 1, 2002, of not less than \$47.6 million into the Design and Construction Fund; authorizing the acceptance of a guaranty from the parent company of the Padres in return for the Padres being able to assign certain of its rights under the Joint Use and Management Agreement so as to accommodate financing by the Padres of its share of the Ballpark Project and part of the ancillary development; and authorizing acceptance of the TOT Guaranty; 5) authorizing an expenditure on the Ballpark Project of proceeds from the repayment of a loan by the City to the Agency, which loan was initially made by the City from a variety of sources including gasoline tax revenues; and 6) authorizing the City Manager and City Auditor & Comptroller to appropriate and expend funds from sources identified at their discretion (subject, in the case of the City, to not exceeding the \$225 million limit on Ballpark Project expenditures) to acquire land and construct certain surface parking lots commonly known as Tailgate Park if the San Diego Unified Port District were unable to do so, and modifying the scope of the program for such improvements if the total available funds are less than \$21.0 million (the current expected cost of such program). Finally, the Authority adopted a resolution in November of 2001 approving the Offering Document, the contract of purchase with the Underwriter referenced above and the continuing disclosure agreement referenced above. Collectively, the resolutions adopted by the City Council and the Authority in November 2001 are referred to as the "November Resolutions."

At about the same time, facts came to light suggesting that a member of the Board of Directors of CCDC [Director] had a business relationship with the Padres pursuant to which the Director purchased at wholesale various items of Padres' merchandise for resale in the Director's retail business. The business relationship apparently existed during the period of time in which CCDC was involved in planning and development of the Project, approved execution of the MOU and approved extensions of the MOU. The Director was a CCDC director from May 1993 to 1999 and again from December 2000 to present, and his current term expires in May 2003. Based on these facts, the issue arose as to whether the Director possessed a disabling conflict of interest with regard to actions taken in furtherance of the MOU and that as a result the MOU and the Ballpark Project-related agreements were potentially void or voidable.

In December 2001, the Director and the Padres exchanged letters [Letter Exchange] pursuant to which the Director terminated the business relationship with the Padres and the Padres agreed not to enter into any further business relationship with the Director. Also in December 2001, each of the governing bodies of the City, the Agency, the Authority and CCDC adopted resolutions reaffirming their commitment to the implementation of the MOU and reaffirmed so as to ratify their efficacy as of the date of their original making, and continuing through the present and thereafter, all prior City, Agency, CCDC, Authority and Padres' actions taken under, in furtherance or effectuation of, and reliance on the MOU pursuant to any agreement, or amendment to any agreement, between two or more Parties to the MOU. In addition, each of the City, the Agency, CCDC and the Padres entered into a Reaffirmation Agreement dated as of December 1, 2001, pursuant to which each entity reaffirmed its continuing intent to be bound by the MOU and agreements executed and delivered in furtherance or effectuation thereof or in reliance thereon and declared its intent that all rights and duties thereunder should extend from the respective effective times of the MOU and each such agreement, and run thereafter since that time until the present, and hereafter. Collectively, the Reaffirmation Agreement and the adoption of the foregoing resolutions are referred to as the "Restoration and Ratification Events."

On December 6, 2001, an action was brought entitled *Simmons v. City of San Diego, et al.*, San Diego County Superior Court (Case No. GIC 779299) [Action]. The title of the Action as described in the Complaint is "Complaint To Invalidate Public Action; To Prevent The Unlawful Expenditure Of Public Funds; For Injunction And Declaratory Relief." The Action was brought as another validation action (pursuant to California Code of Civil Procedure section 860 et seq.), and alternatively as a taxpayer action pursuant to California Code of Civil Procedure section 526a.

The original complaint filed in the Action was amended on December 24, 2001, by a First Amended Complaint which added causes of action relating to the matter relating to the CCDC Director, described above. The First Amended Complaint is hereinafter referred to as the

“Complaint.” The Complaint alleges that, as a result of the November Resolutions, a number of changes to the rights and duties of the parties to the MOU were made which were required by the MOU to have been submitted to the voters of the City for consideration but were not; and as a result of the relationship between the Director and the Padres, the Superior Court; 1) declare the November Resolutions, all the contracts and agreements referred to therein and all proceedings incident thereto taken or made for or in any way connected with the November Resolutions, invalid, null and void; 2) declare that any expenditure of funds, as authorized by the November Resolutions, is illegal and, to the extent made, should be repaid; 3) issue a temporary restraining order, preliminary injunction and permanent injunction, enjoining the City, the City Manager, the Authority and others from any and all acts in furtherance of the November Resolutions, including, without limitation, the sale of the Bonds and the disbursement of the proceeds of such sale; and 4) declare that the November Resolutions are, due to their illegality, invalid, null and void.

Finally in January 2002, another person appeared and alleged that due to the changes in the ancillary development obligations of the Padres as set forth in the MOU, additional compliance by the City was needed with respect to the California Environmental Quality Act [CEQA] before the adoption of the November Resolutions, the actions authorized under the November Resolutions required voter approval under the MOU, and that by virtue of the insurance policy of the Bond Insurer the City is somehow obligated to independently repay the Bond Insurer should the Bonds be declared invalid, in violation of the MOU.

On January 28, 2002, a trial was held on the merits. After the trial court denied the plaintiff's motion for a continuance, the plaintiff and his counsel left the courtroom and the City elected to proceed with the case to a judgment on the merits subject to “proving up” its position. After a trial, the trial court concluded, and entered a judgment on January 30, 2002, that there was substantial evidence to support findings by the City Council that none of the actions complained of which constituted changes to the MOU which required voter approval, that there was no evidence presented as to alleged previously unknown modifications to the MOU, and that the ballot question for Proposition C did not limit the City's source of funds for its contribution to the Project.

With respect to the CCDC Director matter, the trial court found that the complaint failed to state violations of the Government Code conflicts provisions and Charter section 94 in that either the alleged conflicts were too remote to be such a conflict or the Restoration and Ratification Events cured any possible violations.

With regard to the remaining allegations, the trial court found that the alleged requirement to comply with CEQA was incorrect in that the November Resolutions and the documents approved therein involved financial transactions that had no direct or indirect environmental impact and that nothing contained in the November Resolutions or the agreements

approved by the November Resolutions made a commitment to a specific project within the ancillary development that would currently require environmental review. Finally, the trial court found that there was no evidence in the record that the City Council had entered into or intends to enter into any agreement with the Bond Insurer imposing any independent obligation on the part of the City to make payments if the Bonds are declared invalid. An appeal is expected from the judgment of the trial court.

While the City, Agency and Authority expect to prevail on the appeals from all the above described litigation, the City Attorney has been asked to render this opinion on the assumption that one or all of the cases is reversed on appeal; one or more judgments are entered holding the Financing Agreements invalid pursuant to Sections 1090 and 1092, Charter section 94, or for any other reason; the Bonds are otherwise held invalid for any reason; or that it is otherwise found that the City has no legal obligation to make payments as called for in the Financing Agreements.

ANALYSIS

I

GENERAL CITY REQUIREMENTS REGARDING THE EXPENDITURE OF FUNDS

San Diego is a charter city. *Mira Development Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1214 (1988). City charters, adopted pursuant to the authority of article XI, section 5 of the California Constitution [Constitution], are not grants of power but act as limitations, and a charter city may exercise all powers in regards to municipal affairs unless specifically and explicitly limited by its charter. *See Taylor v. Crane*, 24 Cal. 3d 442, 450 (1979); *City of Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 598-599 (1949). The determination of fiscal policies and procedures is a municipal affair. *Cramer v. City of San Diego*, 164 Cal. App. 2d 168, 171 (1958). The exercise of power by a charter city is favored against any limitation or restriction on that exercise “which is not expressly stated in the charter . . . So guided, reason dictates that the full exercise of the power is permitted except as clearly and explicitly curtailed. Thus in construing the city's charter a restriction on the exercise of municipal power may not be implied.” *City of Grass Valley*, 34 Cal. 2d at 599. Accordingly, the Charter provides the authority for, and limitations upon, the manner in which the City may appropriate and expend funds on an annual basis.

The Charter's requirements for the appropriation and expenditure of funds are contained in Article VII, beginning with Section 68. Generally, and in relevant part, the Charter provides

that the City Council shall annually adopt a budget and an “appropriation ordinance” which provides the basis for the expenditure of funds by the City for that fiscal year. Charter § 71.⁰⁹ Once the budget and appropriation ordinance are adopted, the City Auditor and Comptroller may, upon authority and direction by the City Council, make any payment provided that the Auditor and Comptroller first certifies that there are sufficient funds in the treasury to make such a payment, and that such expenditure has been included in the appropriation ordinance, including any amendments thereto. Charter §§ 80 and 84. Thus, provided that an appropriation has been made, and funds exist in the treasury for that purpose, an expenditure by the City may generally be made.

II

THE CITY MAY MAKE AN EXPENDITURE FOR VALID PUBLIC PURPOSES

Several limitations exist in the Charter regarding the City's ability to expend funds. For example, the City may not incur indebtedness beyond its fiscal year without a vote of the electorate⁰⁰ nor enter into contracts for more than five years without a two-thirds vote of the City Council. Charter § 99. These limitations are not applicable to the question presented here. Charter section 93, however, sets forth the relevant limitation that may apply. It provides, in pertinent part: “The credit of the City shall not be given or loaned to or in aid of any individual, association or corporation; except that suitable provision may be made for the aid and support of the poor.” The City Attorney has previously opined that this provision is similar to article XVI, section 6 of the Constitution, and the cases interpreting that constitutional provision are relevant in interpreting the Charter provision.⁰¹ See 1979 Op. City Att'y 8; 1979 City Att'y MOL 168; 1952

⁰⁹ Mid-year appropriations are also permissible pursuant to the Charter. The Fourth District Court of Appeal addressed this issue in an unpublished opinion in one of the Ballpark related lawsuits, *Mailhot v. City of San Diego*, D03427, holding that a mid-year appropriation was lawful under the City's Charter.

⁰⁰ Financing leases, such as those to be used in the financing of the Project, do not create prohibited debt pursuant to either the Charter or State Constitution. *Rider v. City of San Diego*, 18 Cal. 4th 1035, 1047-50 (1998).

⁰¹ Article XVI, section 6 provides: “The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State, or of any county, city and county, city, township or other political corporation or subdivision of the State now existing, or that may be hereafter established, in aid of or to any person, association, or corporation, whether municipal or otherwise, or to pledge the credit thereof, in any manner whatever, for the payment of the liabilities of any individual, association, municipal or other corporation whatever; nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever,” However, because of a charter city's control over its fiscal affairs, which, as discussed above, are considered solely “municipal affairs,” the courts have held that Article XVI, section 6 is not applicable to charter cities. *Tevis v. City and County of San Francisco*, 43 Cal. 2d 190, 196-197 (1954); *Mullins v. Henderson*, 75 Cal. App. 2d 117, 132-133 (1946); *Los Angeles Gas & Electric v. City of Los Angeles*, 188 Cal. 307, 317 (1922).

Op. City Att'y 23.

Article XVI, section 6, generally prohibits a “gift of public funds.” *See, e.g., California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 582-583 (1976); *County of Alameda v. Carleson*, 5 Cal. 3d 730, 745 (1971). An exception to this prohibition exists if a “public purpose” is served by the expenditure. “[M]oney spent for public purposes is not a gift” *Community Memorial Hospital v. County of Ventura*, 50 Cal. App. 4th 199, 201 (1996). *See also White v. State of California*, 88 Cal. App. 4th 298, 311 (2001). “The benefit to the state from an expenditure for a public purpose is in the nature of consideration and the funds expended are therefore not a gift even though private persons are benefited therefrom. [Citations.] The determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis.” *County of Alameda*, 5 Cal. 3d at 745-746.

Numerous cases exist describing valid public purposes for which expenditures may be made, or for which there is not a prohibited “gift.” For example, in *California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575 (1976), the Supreme Court found a valid public purpose in contributions to low and moderate income housing by a redevelopment agency. In *San Bernardino County Flood Control District v. Grabowski*, 205 Cal. App. 3d 885 (1988), an interest rate “floor” of 10% in eminent domain actions was upheld as a valid public purpose when the state exercises the power of condemnation. In *City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95 (1988), a law authorizing the sale of property for only 90% of its fair market value was found not to be a prohibited gift. *See also County of Alameda*, 5 Cal. 3d at 746 (and cases cited therein).

The case most on point here is *White v. State of California*, 88 Cal. App. 4th 298. That case concerned the bankruptcy filing by Orange County in 1994, and state legislation designed to assist the county recover from the effects of its fiscal situation. *Id.* at 302-304. To aid the county the Legislature passed four bills that reallocated certain property tax revenue, authorized modifications to certain sales tax allocations, and reallocated certain gas tax funds. *Id.* These bills were challenged on numerous grounds, but in relevant part were challenged as violative of Article XVI, section 6, on the ground that the reallocation of state funds to the county from certain other governmental agencies was a prohibited gift. *Id.* at 311.

The appellate court found that the Legislature made the necessary findings regarding valid public purposes for the legislation, and found there to be a reasonable basis for those findings. The stated purposes included: 1) enabling the county to emerge from its financial crisis; 2) improving the credit standing of the county and other state public debt issuers; and 3) preserving and protecting the health, safety, and welfare of county and state residents. *Id.* at 312, 313.

Applying these principles to Charter section 93, we conclude that the Charter does not prohibit a payment where private persons or entities benefit if valid public purposes are served by such a payment, the City Council so finds, and a reasonable basis exists to support the findings. Accordingly, if the City Council were to find that purposes similar to those found in *White* were served in making a payment for the benefit of bondholders, bond insurance companies, or others in a situation where the Financing Agreements or the Bonds were held to be invalid, the City could make such expenditure pursuant to its Charter.

III

THE CITY MAY LAWFULLY EXPEND FUNDS FOR THE DESCRIBED PURPOSE

Here, the public purposes served by making the described expenditure can be seen by analyzing the impact of any ruling invalidating the Financing Agreements or the Bonds where the Bonds have been issued. In such a situation, the City would have received the proceeds from the Bonds, expended them on the Project, and pursuant to the Financing Agreements, annual payments would at some point be due to the Authority for the purpose of paying bondholders.⁰² If the Financing Agreements or the Bonds were found invalid, no contractual obligation would exist for the City to make the necessary payments. In such a situation, it can be anticipated that litigation would be filed by bondholders, not to mention bond insurance companies and others, regarding the invalidity of the Financing Agreements, the failure of the City to make annual payments under the Ballpark Facility Lease, and regarding the tax implications of the potential conversion of the Bonds from tax-exempt to taxable.⁰³ In addition, the City's credit standing could be negatively impacted, and the potential for the City to lose its interest in the Project Properties would exist.⁰⁴

Under these circumstances, the City's interests, and the interests of its citizens and

⁰² Pursuant to the Financing Agreements, the payments commence upon completion of the Project and beneficial occupancy by the City.

⁰³ Presently, the City expects to issue the Bonds on a tax-exempt basis, and expects that the Bonds will be insured. If the Financing Agreements or the Bonds are held invalid, and insurance proceeds are utilized to make payments to bondholders, there is the possibility that the interest received on the Bonds will not be treated as tax-exempt, but will be subject to income tax. The City Attorney expresses no opinion on this issue, but only notes the possibility that this impact could occur. The City Attorney also expresses no opinion on whether the voluntary payments discussed herein would have any impact on the tax treatment of the bonds in that case.

⁰⁴ Pursuant to the Financing Agreements, no right of reentry in the Project exists for failure to make an annual payment. However, in the event the Financing Agreements are found invalid, this protection would not exist, and it is foreseeable that some effort to impose a non-consensual lien and right to possession on the Project Properties could arise in an effort to collect from the City or Authority damages arising from the invalidity of the Financing Agreements or the Bonds.

taxpayers, would certainly be served by an appropriation, whether annual or mid-year, and payment for the benefit of bondholders, a bond insurance company, or others. Similar to the purposes found justified in *White*, such a payment could help maintain the City's credit standing by showing the City's willingness and ability to make good on its obligations notwithstanding the impact of any litigation. In addition, the City's liability to bondholders and others could be mitigated or minimized by the annual payments. Finally, the ability of the City to maintain beneficial use and occupancy of the Project, and avoid any non-consensual lien or effort to obtain a non-consensual right to possession, could be aided. We believe that these public purposes would support an annual expenditure of funds against a challenge that they constituted an illegal gift of funds under the Charter.

CONCLUSION

Although there is no case directly on point and the matter is not entirely free from doubt and accordingly there can be no assurance that a particular court would not hold otherwise, based on and subject to all of the foregoing, including the limitations and qualifications referred to herein, as of the date hereof, we are of the opinion that, if the matter were properly raised, briefed and presented to a court of last resort of competent jurisdiction, the court would hold that the City has the legal ability to appropriate and expend funds on an annual basis, or pursuant to a mid-year appropriation, for the purpose of making payments for the benefit of bondholders, a bond insurance company that has insured the Bonds, or other interested parties to the Financing Agreements in the event that the Bonds have been issued and sold, and the Financing Agreements or the Bonds are held invalid for any reason.

We note that the City Council has not been asked for, and has not made, any commitment to appropriate funds for the stated purpose in the event that any of the litigation successfully invalidates the Financing Agreements, or in the event that the Financing Agreements or the Bonds are otherwise found invalid. This, or any future City Council, would have to make that determination on an annual basis as part of the adoption of the annual appropriation ordinance as set forth in the Charter, or on a mid-year basis pursuant to the Charter as necessary, and the City Council would be advised that no legal duty exists to make such an appropriation or payment. There can be no assurance that such appropriation will be made.

We also note that a court's decisions regarding the matters discussed herein would be based on the court's own analysis and interpretation of the factual evidence before the court and of applicable legal principles. Furthermore, it is our and your understanding that the opinion provided above is not intended to be a guaranty as to what the court would actually hold, but an opinion as to the decision the court should reach if the issues addressed herein were properly raised, presented and argued to it and the court followed what we believe to be the applicable legal principles. The opinion set forth above is given as of the date hereof and we have undertaken no obligation to update this opinion or otherwise to advise you of any changes in law

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or any facts or circumstances that may hereafter occur or come to our attention that could affect such opinion. The analyses and conclusions above are premised upon, and limited to, the law and the facts in effect as of the date of this opinion.

This Opinion is addressed to Ambac Assurance Corporation and Merrill Lynch, Pierce Fenner & Smith, Inc., and is exclusively and entirely for their benefit in connection with the issuance of the Bonds, and is not to be used, quoted, circulated or relied on for any other purpose or by any person, including the bondholders, to whom it is not specifically addressed.

Respectfully submitted,

CASEY GWINN
City Attorney

LJG:ljj:js
LO-2002-1