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**MEMORANDUM OF LAW**

**DATE:** October 9, 2020

**TO:** Andy Field, Parks and Recreation Director

**FROM:** City Attorney

**SUBJECT:** Debt Limitation Issues Associated with the United States Department of Interior National Park Service Grant Obtained by the Balboa Park Conservancy

**INTRODUCTION**

The Parks and Recreation Department (Parks) has asked for legal guidance regarding a grant obtained by the Balboa Park Conservancy (Conservancy) from the United States Department of Interior National Park Service (NPS). The Conservancy is a non-profit corporation that advocates for resources to improve, maintain, enhance, and sustain Balboa Park for all visitors. It obtained a \$257,668 grant from NPS (contingent on \$257,668 in matching funds from the Conservancy) (Grant) and wishes to donate \$156,285 toward the restoration of the Welcome Gallery in the Botanical Building in Balboa Park, as well as other ancillary work.

The City of San Diego's (City) Engineering and Capitol Projects Department (E&CP) is currently working on a Capital Improvement Project (CIP) for the design and construction of improvements to the Botanical Building (Project). In July 2019, the City obtained an \$8,000,000 grant from the State Department of Parks and Recreation for this Project. City Council approved the application, acceptance, and expenditure of the State grant money on February 11, 2020. *See* San Diego Resolution R-312839 (Feb. 11, 2020).<sup>1</sup> This memo addresses legal issues associated with acceptance of the federal Grant, which has not been considered by the City Council.

**QUESTION PRESENTED**

May the City accept \$156,285 in NPS Grant funds from the Conservancy to use toward the restoration of the Welcome Gallery in the Botanical Building in Balboa Park, as well as other

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<sup>1</sup> In June 2020, four months after Council approved the State grant, staff informed our Office that the Conservancy obtained the federal Grant and had proposed donating the Grant funds to the City. This memorandum summarizes the legal concerns that our Office has since identified.

ancillary work, when the Grant is conditioned on a specific use of City property for a 50-year term in a manner satisfactory to the Secretary of the Interior?

### **SHORT ANSWER**

Yes, so long as NPS removes or modifies the requirements of 54 U.S.C. § 302902 of the National Historic Preservation Act that require grantees to maintain the grant-assisted property for 50 years in a manner satisfactory to the Secretary of the Interior, so that it does not violate the debt limitation provision of article XVI, section 18 of the California Constitution and San Diego Charter (Charter) section 99. However, staff should consider policy considerations, some of which are identified here, and the cost versus benefit of accepting the funds.

### **ANALYSIS**

#### **A. Conservancy Grant Requirements for the Project**

##### **1. California Constitution Debt Limitation Provision**

Pursuant to 54 U.S.C. § 302902 of the National Historic Preservation Act, the Grant requires grantees (here, the City) to assume, after the completion of the project, the total cost of continued maintenance, repair, and administration of the grant-assisted property in a manner satisfactory to the Secretary of the Interior, for 50 years from the end date of the Grant agreement, and to sign and register with the deed of property a Preservation Covenant/Easement with the State Historic Preservation Officer codifying that obligation. *See* Paragraph 15, Attachment A of the Grant. The City has not been provided with, and therefore is unaware of, what standards would satisfy “in a manner satisfactory to the Secretary of the Interior.” In addition, the City has no information or estimate of the annual cost to the City for such maintenance and repair.

Further, this requirement is most likely in violation of the debt limitation provision of article XVI, section 18 of the California Constitution and Charter section 99 because it requires the City to agree to incur future indebtedness without a vote of the electorate.<sup>2</sup>

Article XVI, section 18 of the California Constitution provides, in part:

(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 two-thirds of the voters of the public entity voting at an election to be held for that purpose...

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<sup>2</sup> This Office has written several legal memoranda analyzing the debt limitation of the California Constitution and Charter section 99. *See* City Att’y MOL No. 89-75 (July 28, 1989); City Att’y MOL No. 98-14 (June 4, 1998); City Att’y MOL 2004-12 (July 15, 2004); City Att’y MOL 2012-8 (July 16, 2012).

The debt limitation provision of the California Constitution is intended to hold cities accountable for the debt that they incur by preventing current city leaders from burdening future city leaders and taxpayers with agreements containing long-term obligations. *McBean v. City of Fresno*, 112 Cal. 159, 164 (1896). All the money required to meet a present liability must be provided 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. Charter Section 99**

The 50-year Grant requirement, as currently worded, would also violate the San Diego City Charter. The voters amended Charter section 99 in 1968 to bring it into uniformity with the debt limitation provision of the Constitution of the State of California. The debt limitation provision of Charter section 99 is interpreted no more restrictively than article XVI, section 18 of the California Constitution. *Rider v. City of San Diego*, 18 Cal. 4th 1035, 1050 (1998). Charter section 99 states, in part:

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 ....

Charter section 99 is modeled on the debt limitation provision of article XVI, section 18 of the California Constitution. *See* Prop. A, Special Municipal Elec. (June 4, 1968). 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.

**b. Contingent Obligation Exception**

Since the 1890s, the Courts have recognized certain exceptions to the debt limitation provision to allow cities to function. One exception, known as the "contingent obligation" exception, does not apply under the existing terms of the Grant but potentially might apply if the Grant provisions were revised. 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, 352-53 (1984). "A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens." *Id.* at 352 (citations omitted). 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. *Id.* at 352-53; *see also Rider*, 18 Cal. 4th at 1047.

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.

*Offner*, 19 Cal. 2d at 485-86.

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.

The NPS Grant provision, as written, does not fall within the contingent obligation exception because the requirement does not provide for the maintenance costs to be exchanged for contemporaneously received consideration, nor does it confine liability to each installment as it falls due. Rather, the Grant requires the City to assume, upon completion of the Project, the total cost of continued maintenance, repair, and administration of the Grant-assisted property "in a manner satisfactory to the Secretary of the Interior" for 50 years. This is most likely in violation of the debt limitation provision of article XVI, section 18 of the California Constitution and Charter section 99. However, if the federal government were to revise the grant conditions so that they fell within the contingent obligation exception, the City could potentially accept the Grant funds; however, this would require further review and analysis.<sup>3</sup>

## **2. Policy Concerns Regarding Additional Grant Provisions**

Assuming the federal granting agency is willing to remove or appropriately modify the provisions triggering the debt limitation problem, there are other issues that may affect the City's acceptance of the Grant funds.

Staff from Parks, E&CP, and Department of Finance have determined the \$156,285 in proposed Grant funds is not enough money to completely refurbish the Welcome Gallery. If the City accepts the Grant into the existing CIP Project, the entire CIP Project would be subject to the NPS Grant requirements. Several of the Grant requirements could significantly delay the Project and put the \$8,000,000 State grant funds the City received in jeopardy. Further,

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<sup>3</sup> There may be other potentially relevant exceptions to the debt limitation provision, such as those obligations implied by law. As written, the Grant does not appear to fall within any of those other exceptions, but we are available to review modified Grant provisions to determine if any other exceptions apply.

administration costs to comply with the Grant requirements could drive up soft costs significantly beyond the \$156,285 received from the Grant. Even if the Conservancy does a separate project outside the CIP Project, the City would still be required to comply with the Grant requirements.<sup>4</sup>

E&CP staff identified multiple provisions in the Grant that could potentially delay the project, drive up its costs, or impose additional obligations on the City. These provisions include:

- The City must submit the 50% and 100% planning and design documents to NPS for review and approval to ensure conformance with Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. NPS has advised staff this process will take between 3-6 months to complete. This will likely delay the Project, which is currently on schedule to advertise the bid in October 2020, and could put the \$8,000,000 the City received in State grant funds in jeopardy.
- The Grant would subject the Project to the requirements of the National Environmental Policy Act, which could potentially delay the Project and put the \$8,000,000 in State grant funds in jeopardy.
- Parks and EC&P will need to enter into a reimbursement agreement as a sub-contractor to the Conservancy. Under such an agreement, NPS must approve and consent to key personnel changes.
- NPS must approve the selected winning contractor before the contract is awarded (all qualifications and scoring justification must be sent to NPS for their review or approval).
- NPS must be indemnified and named as an insured in the City's insurance policies.
- NPS must approve all media inquiries, public information, and press releases.
- The City must comply with the Minimum Wage for Contractors under Executive Order 13658, 79 Fed. Reg. 9851 (Feb. 12, 2014).
- The Project would be subject to the Buy American laws, 41 U.S.C. §§ 8301-8305; Executive Order 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017); Executive Order 13858, 84 Fed. Reg. 2039 (Jan. 31, 2019), which means that steel and iron must be maximized to the fullest extent possible and must be manufactured and purchased in the United States. This could significantly drive up the cost of the Project.

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<sup>4</sup> The Conservancy may wish to confer with its own legal counsel regarding other permissible uses of the Grant funds if the City is unable to accept them due to the aforementioned legal constraints.

- The Project would be subject to the Minority Business Enterprise Development pursuant to Executive Order 12432, 48 Fed. Reg. 32551 (July 14, 1983).
- All work on the Project must be performed in compliance with the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.
- All project consultants and contractors must be competitively selected, and qualifications forwarded to the NPS Agreements Technical Representative for review of compliance with the Secretary of the Interior's Professional Qualifications Standards.
- The Project would be subject to compliance with 54 U.S.C. § 306108 (regarding historic property).
- The Project would be subject to the compliance with 54 U.S.C. § 306107 (regarding historic property).
- The Grant provides that if the Project property is damaged or destroyed, NPS will not replace or repair the building. Further, if NPS determines that damage to the Project property renders it unsuitable for continued use by the City, NPS shall assume sole control over such buildings or portions thereof. *See* Article XIII (C) (Insurance and Liability – Indemnification) of Grant.

The aforementioned Grant provisions are not legal impediments to the City accepting the Grant, but may drive up costs beyond the amount the Conservancy wants to donate to the City.

### CONCLUSION

The City may accept the Grant funds if the Grant terms are amended to avoid a violation of the debt limitation provision of article XVI, section 18 of the California Constitution and Charter Section 99. Alternatively, the decision to accept the Grant as currently written would require a vote of qualified electors of the City. Further, as discussed herein, there are other important policy issues associated with accepting the Grant that City staff should consider, including the cost versus benefit of accepting the Grant funds.

MARA W. ELLIOTT, CITY ATTORNEY

By           /s/ Jane M. Boardman            
Jane M. Boardman  
Deputy City Attorney

Andy Field, Parks and  
Recreation Director

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October 9, 2020

cc: Aimee Fawcett, Interim Chief Operating Officer  
Jeff Sturak, Assistant Chief Operating Officer  
Kristina Peralta, Interim Deputy Chief Operating Officer