CITY OF MILWAUKEE

Form CA-43

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
Deputy City Attorney

THOMAS E. HAYES
PATRICK B. McDONNELL
CHARLES R. THEIS
Special Deputy City Attorneys

OFFICE OF CITY ATTORNEY
200 EAST WELLS STREET, SUITE 800
MILWAUKEE, WISCONSIN 53202-3551
TELEPHONE (414) 286-2601
TDD 286-2025
FAX (414) 286-8550

BEVERLY A. TEMPLE
THOMAS O. GARTNER
LINDA ULISS BURKE
BRUCE D. SCHRIMPF
ROXANE L. CRAWFORD
SUSAN D. BICKERT
HAZEL MOSLEY
HARRY A. STEIN
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
MICHAEL G. TOBIN
DAVID J. STANOSZ
SUSAN E. LAPPEN
DAVID R. HALBROOKS
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
JAY A. UNORA
DONALD L. SCHRIEFER
EDWARD M. EHRLICH
CHRISTOPHER J. CHERELLA
LEONARD A. TOKUS
MIRIAM R. HORWITZ
MARYNELL REGAN
G. O'SULLIVAN-CROWLEY

Assistant City Attorneys

May 3, 2001

Mr. Willie Jude, Deputy Superintendent
Milwaukee Public Schools
P.O. Box 2181
Milwaukee, WI 53201-2181

Re: Land Contracts as Debt; proposed acquisition of 6914 West Appleton Avenue, the Milwaukee School of Entrepenership

Dear Mr. Jude:

This is in response to your April 16, 2001 letter requesting a formal opinion on the feasibility of acquiring the property at 6914 West Appleton Avenue, Milwaukee, WI via a land contract. In particular, your concern is that by entering into a land contract, the Milwaukee Board of School Directors ("MBSD") might inadvertently incur indebtedness in violation of Article XI, sec. 3(2) of the Wisconsin Constitution. In addition, since the City of Milwaukee ("City") holds title to school sites pursuant to sec. 119.16(3)(b), Stats., this issue is also of concern to the City. Based on the discussion below, our opinion is that a land contract to acquire such property, which on its face makes clear that the obligation to pay is not considered City debt and further is made subject to an annual appropriation, would not be in violation of the Constitutional provision.

In arriving at this opinion, we are persuaded by the case of Burnham v. City of Milwaukee, 98 Wis. 128 (1897). In the Burnham case the Supreme Court distinguished between a situation in which existing city property was pledged as security for a debt and a land contract situation in which the City did not gain legal title until all installment payments had been made. Specifically, the court stated and we quote at length:

> We are cited to cases holding, in effect, that a borrowing of money upon a pledge of existing public property, or a charge upon the public revenue, constitutes a

debt, within the meaning of such an inhibition as the one here involved, although no promise of payment is in terms made. Baltimore v. Gill, 31 Md. 375; Newell v. People ex rel. Phelps, 7 N.Y. 9-87. The reasoning on which these decisions rest is that it is a manifest evasion of the law, and that the lender has power to demand and collect the entire amount loaned out of the corporate property; that, while there may be no promise to pay by the corporation, there is a power to enforce out of the corporate property by reason of the pledge or hypothecation thereof. Thus it is construed to be a debt because the payment of the amount due may be enforced out of the city funds or property. Such is not the case here. Under these contracts the city acquires no title to the lands covered by the contracts until it pays all the installments. It may stop such payment at any time, and none of its property can be sold to pay the remaining installments. The case is somewhat similar to the case of Stedman v. Berlin, 97 Wis. 505, where the city, by ordinance granting franchise to a waterworks company, reserved an option to purchase at a specified price, within a specified time; in that case it was held that the stipulation for an option did not constitute an indebtedness within the meaning of the constitution, because it might decline to purchase and thus end the whole matter. So, here, all the future payments are optional with the city. It is not like the case of Earles v. Wells, 94 Wis. 285, where there was an agreement to purchase by installments under the guise of water rental, and which was held to be manifestly an obligation in excess of the constitutional limit. There is a class of recent cases much like that of Earles v. Wells, and which are cited in the opinion in that case, which reach the same general conclusions, but they manifestly do not in any way affect this case. Brown v. Corry, 175 Pa. St. 528. The case which approaches nearest to supporting plaintiff's contention is that of Ironwood Water Works Co. v. Trebilcock, 99 Mich. 454, where it was held that a city could not buy an equity of redemption in a waterworks plant subject to a mortgage thereon, which mortgage, if added to the already existing corporate debt, would exceed the constitutional limit. The conclusion is partly based upon the Maryland case of Baltimore v. Gill, supra, and on the same line of reasoning. We have before indicated wherein that line of reasoning seems to us inapplicable to the present case, and we must decline to follow it, especially in view of the fact that we have already twice construed these very contracts adversely to the views of the Michigan court. See Kelly v. Minneapolis, 63 Minn. 125.

The contracts in question are not all worded alike. Some of them contain express provisions that there shall be no corporate liability on the part of the city; others do not contain these provisions, nor do they contain any promise to pay by the city; while still others contain a formal promise to pay by the city. All the contracts, however, were made under the provisions of the laws of 1889 and 1891, authorizing purchases of park lands on credit, before mentioned, and we do not understand that the city had power to make such purchases, except as given by

> these laws. Upon familiar principles, the provisions of the laws granting the power entered into the various contracts, and must control them, and these laws provide, in substance, that no corporate liabilities shall be created. Hence all the contracts are governed by the same rule. Our conclusion is that the unpaid installments upon the park land contracts do not constitute corporate indebtedness within the meaning of the constitution, because the payment thereof is entirely optional on the part of the city.

The result in the Burnham case was also discussed in the definitive Wisconsin Law Review article by William J. Kiernan, Jr., Wisconsin Municipal Indebtedness, 1964 Wisconsin Law Review 173 at 208 wherein the author stated:

> The obligation at issue was a land contract which included a provision that it was not a general obligation of the municipality. The court held there was no debt. It cited both Stedman and Earles and indicated that the case before it was like Stedman. But in Stedman no municipal property was subject to the debt, while in Burnham the property being purchased was subject to it. What the court meant was that only property owned prior to incurring the debt was municipal property for this purpose, and this is the rationale which has been articulated in later cases. Thus, in Conner v. City of Marshfield the court, citing Burnham, held that there was no debt because the city had not obligated itself to pay and 'was free at its election to abandon the plan of acquiring or holding that which, prior to the contract, it did not own.'"

Therefore, a properly drafted land contract observing the factors relied on in the above-referenced cases will not violate the constitutional provisions regarding debt. In this regard, as referenced in your letter, Assistant City Attorney Harry A. Stein is engaged with your staff in assuring that a land contract for the above-referenced property meets the conditions outlined in this opinion.

Very truly yours,

GRANT F. LANGLEY
City Attorney

HARRY A. STEIN
Assistant City Attorney

HAS/bl
1034-2001-1301
40604