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OPINION	:	No. 84-306
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THE STATE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION has requested an opinion on the following question:

Does the borrowing of funds by a city, county, or school district to implement an energy conservation project pursuant to the terms of Public Resources Code sections 25410-25421 require electorate assent under the provisions of section 18 of article XVI of the Constitution?

CONCLUSION

The borrowing of funds by a city, county, or school district to implement an energy conservation project pursuant to the terms of Public Resources Code sections 25410-25421 does not require electorate assent under the provisions of section 18 of article XVI of the Constitution.

ANALYSIS

Section 18 of article XVI of the Constitution provides:

> "*No county*, *city*, *town, township*, *board of education*, *or school district, shall incur any indebtedness or liability in any manne*r *or for any purpose exceeding in any year the income and revenue provided for such year*, *without the assent of two-thirds of the qualified electors thereof*, *voting at an election to be held for that purpose,* except that with respect to any such public entity which is authorized to incur indebtedness for public school purposes, any proposition for the incurrence of indebtedness in the form of general obligation bonds for the purpose of repairing, reconstructing or replacing public school buildings determined, in the manner prescribed by law, to be structurally unsafe for school use, shall be adopted upon the approval of a majority of the qualified electors of the public entity voting on the proposition at such election; *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 two-thirds or a majority of the qualified electors, as the case may be, voting on any one of such propositions, vote in favor thereof, such proposition shall be deemed adopted." (Emphases added.)

The question presented for analysis is whether this constitutional provision is applicable to the borrowing of funds by a city, county, or school district to implement an energy conservation project as authorized by Public Resources Code sections 25410-25421.[1] We conclude that the provision is inapplicable to local governmental borrowing under this statutory program.

The legislative scheme at issue is known as the Energy Conservation Assistance Act of 1979 ("Act"). (§ 25410.) The Act authorizes local governments to borrow funds from the State Energy Resources Conservation and Development Commission ("Commission") to implement energy conservation projects. (§§ 25412-25417.) From the State Energy Conservation Assistance Account (§ 25416), the

[1] All section references hereafter are to the Public Resources Code unless otherwise specified.

Commission allocates funds to those who have filed approved applications. Section 25413 states in part:

> "Applications may be approved by the commission only in those instances where the eligible institution has furnished information satisfactory to the commission that the costs of the project, plus interest on state funds loaned, calculated in accordance with Section 25415, will be recovered through savings in the cost of energy to such institution during the repayment period of the allocation."

Section 25414 provides:

> "Annually at the conclusion of each fiscal year, but not later than October 21, each eligible institution which has received an allocation pursuant to the provisions of this chapter shall compute the cost of the energy saved as a result of implementing a project funded by such allocation. Such cost shall be calculated in a manner prescribed by the commission."

Section 25415 provides:

> "Each eligible institution to which an allocation has been made under this chapter shall repay the principal amount of such allocation, plus interest calculated on the basis of the rate of return for moneys in the Pooled Money Investment Account, in not more than 22 equal semiannual payments, as determined by the commission. The first semiannual payment shall be made on or before December 22 of the fiscal year in which the project is completed.
>
> "(b) The governing body of each eligible institution shall annually budget an amount at least sufficient to make the semiannual payments required in this section. Such amount shall not be raised by the levy of additional taxes but shall instead be obtained by a savings in energy costs."

Whether section 18 of article XVI of the Constitution is applicable to this statutory program depends upon the manner in which the constitutional provision has been interpreted by the courts. In the 100 years of judicial interpretation of this language, numerous "pressure valves" have been found to limit the application of the voter requirement. (See generally, Kosel, *Municipal Debt Limitation in California* (1977) 7 Golden Gate L.Rev. 641 (hereafter cited as *Municipal Debt*); Beebe, Hodgman & Sutherland, *Joint Power Authority Revenue Bonds* (1968) 41 So.Cal.L.Rev. 19 (hereafter cited as *Joint Power Authority*); Note, *States*: *Municipal Corporations*: *Debt Limitation*: *Circumvention* (1950) 38 Cal.L.Rev. 962; Note, *Municipal Corporations*: *Deduction of*

Assets in Computation of Indebtedness (1941) 29 Cal.L.Rev. 779; Note, *Municipal Corporations*: *Debt Limitations*: *Cal. Const. art. XI, § 18*: *Contingent Liability* (1935) 23 Cal.L.Rev. 445.)

Preliminarily, we note that the Constitution also places a voter approval requirement upon the creation of debt at the state level (Cal. Const., art. XVI, § 1) and that these two constitutional provisions have been construed together due to their common language and purpose. "[G]enerally speaking, the same case law applies to both the local and state debt limitation provision." (*Joint Powers Authority*, *supra*, p. 22; see *Dean* v. *Kuchel* (1950) 35 Cal.2d 444, 446; *In re California Toll Bridge Authority* (1931) 212 Cal. 298, 307-308.)

The design and purpose of section 18 of article XVI of the Constitution was stated by the Supreme Court in *San Francisco Gas Co*. v. *Brickwedel* (1882) 62 Cal. 641, 642:

> "The system previously prevailing in some of the municipalities of the State by which liabilities and indebtedness were incurred by them far in excess of their income and revenue for the year in which the same were contracted, thus creating a floating indebtedness which had to be paid out of the income and revenue of future years, and which, in turn, necessitated the carrying forward of other indebtedness, was a fruitful source of municipal extravagance. The evil consequences of that system had been felt by the people at home and witnessed elsewhere. It was to put a stop to all of that, that the constitutional provision in question was adopted."

While espousing such a broad purpose (see, e.g., *City of Redondo Beach* v. *Taxpayers, Property Owners, etc., City of Redondo Beach* (1960) 54 Cal.2d 126, 131; *City of Palm Springs* v. *Ringwald* (1959) 52 Cal.2d 620, 627; *City of Long Beach* v. *Lisenby* (1919) 180 Cal. 52, 56; *Bradford* v. *City of San Francisco* (1896) 112 Cal. 537, 545; *County of Shasta* v. *County of Trinity* (1980) 106 Cal.App.3d 30, 35-36; *Starr* v. *City and County of San Francisco* (1977) 72 Cal.App.3d 164, 173-176; *Board of Supervisors* v. *Dolan* (1975) 45 Cal.App.3d 237, 249; *Lagiss* v. *County of Contra Costa* (1963) 223 Cal.App.2d 77, 85), the courts have concluded that various types of debts and liabilities are outside the scope of the constitutional provision.

One major basis upon which to find the voter requirement inapplicable is where the debt is contingent upon the happening of some event. "A sum payable upon a contingency is not a debt, nor does it become a debt until the contingency happens." (*Doland* v. *Clark* (1904) 143 Cal. 176, 181; accord, *American Co.* v. *City of Lakeport* (1934) 220 Cal. 548, 557; see *Bickerdike* v. *State* (1904) 145 Cal. 682, 695-697; *McBean*

v. *City of Fresno* (1896) 112 Cal. 159, 168; 58 Ops.Cal.Atty.Gen. 691, 695 (1975).) The rationale for the contingent debt exception was stated in *Municipal Debt*, *supra*, pp. 649-650:

> "Until the occurrence of the condition precedent to an obligation, it is not certain that a local entity will in fact have to pay it. There is no sense in treating an obligation as a debt until the occurrence of the condition. Real needs may go unmet in order to preserve sufficient revenues for the repayment of a debt that may never become due. Voter approval of a contingent obligation is misleading and may well prove to be a useless act if the contingency fails to occur. Therefore, the obligation should be treated as a debt only when the need for payment is certain."

Another significant exception to the voter approval requirement is where the liability is found to be divisible into annual parts with each payment due only for the consideration received during the particular year. (See *Starr* v. *City and County of San Francisco*, *supra*, 72 Cal.App.3d 164, 172-174; *County of Sacramento* v. *Assessment Appeals Bd. No. 2* (1973) 32 Cal.App.3d 654, 668; *Joint Powers Authority*, *supra*, p. 22.)

The usual application of this rule has been in the area of lease obligations and is known as the "lease exception" to the voter requirement. (See, e.g., *Dean* v. *Kuchel*, *supra*, 35 Cal.2d 444, 446-447; *City of Los Angeles* v. *Offner* (1942) 19 Cal. 483, 485-486; *County of Los Angeles* v. *Nesvig* (1965) 231 Cal.App.2d 603, 609-610; *County of Los Angeles* v. *Byram* (1951) 36 Cal.2d 694, 696; *Lagiss* v. *County of Contra Costa*, *supra*, 223 Cal.App.2d 77, 85.)

The doctrine has been applied, however, in a number of other areas. (See, e.g., *California Pac. Title & Trust Co.* v. *Boyle* (1930) 209 Cal. 398, 407 [acquisition of contiguous parcels for a public park]; *Smilie* v. *Fresno County* (1896) 112 Cal. 311, 313 [construction contract for additions to a county courthouse]; *McBean* v. *City of Fresno*, *supra*, 112 Cal. 159, 167 [city sewage disposal services]; *Koppikus* v. *State Capitol Com.* (1860) 16 Cal. 248, 253 [construction of the capitol building]; *State of California* v. *McCauley* (1860) 15 Cal. 429, 454-455 [prison maintenance services].)

Under the "appropriation doctrine" the courts have held "that an obligation for which an appropriation is made at the time of its creation from existing funds, or reasonably anticipated funds subject to appropriation, is not within the constitutional limitation on indebtedness." (*Pooled Money Investment Bd.* v. *Unruh* (1984) 153 Cal.App.3d 155, 160-161; see *Flournoy* v. *Priest* (1971) 5 Cal.3d 350, 352-353; *Riley* v. *Johnson* (1933) 219 Cal. 513, 520-521.)

Under the "special fund" doctrine, the voter requirement will be found inapplicable where the debt is not a legally enforceable obligation against the local government's general funds or taxing power. (See *California Housing Agency* v. *Elliott* (1976) 17 Cal.3d 575, 587-588; *California Educational Facilities Authority* v. *Priest* (1974) 12 Cal.3d 593, 607; *City of Palm Springs* v. *Ringwald, supra,* 52 Cal.2d 620, 624-626; *City of Oxnard* v. *Dale* (1955) 45 Cal.2d 729, 737; *The Housing Authority* v. *Dockweiler* (1939) 14 Cal.2d 437, 460; *Department of Water, etc.* v. *Vroman* (1933) 218 Cal. 206, 216; *San Francisco Sulphur Co.* v. *County of Contra Costa* (1929) 207 Cal. 1, 5; *Shelton* v. *City of Los Angeles* (1929) 206 Cal. 544, 551; *Board of Supervisors* v. *Dolan, supra,* 45 Cal.App.3d 237, 248-249; *City of Glendale* v. *Chapman* (1951) 108 Cal.App.2d 74, 76.) The rationale for the doctrine is that where the local government's "credit [is] not involved in the incurring of the indebtedness" (*Mesmer* v. *Board etc.* (1913) 23 Cal.App. 578, 583) and the debt will not effect an increase in property taxes or threaten foreclosure upon government property, the debt is outside the scope of the constitutional provision (see *City of Redondo Beach* v. *Taxpayers, Property Owners, etc., City of Redondo Beach*, *supra*, 54 Cal.2d 126, 131; *County of Shasta* v. *County of Trinity*, *supra*, 106 Cal.App.3d 30, 36; *Starr* v. *City and County of San Francisco*, *supra*, 72 Cal.App.3d 164, 176; *Board of Supervisors* v. *Dolan*, *supra*, 45 Cal.App.3d 237, 249; *Municipal Debt*, *supra*, p. 655; *Joint Powers Authority*, *supra*, pp. 25-26, 33).

If the debt is not "voluntarily" incurred, the constitutional requirement will be found inapplicable. (*American Co.* v. *City of Lakeport*, *supra*, 220 Cal. 548, 557-558; *City of Pasadena* v. *McAllaster* (1928) 204 Cal. 267, 273; *City of Long Beach* v. *Lisenby*, *supra*, 180 Cal. 52, 57-58; *Lotts* v. *Board of Park Commrs.* (1936) 13 Cal.App.2d 625, 635.) The primary application of this theory has been where the Legislature has "imposed" an obligation upon local governments by statute. (See, e.g., *Lewis* v. *Widber* (1893) 99 Cal. 412, 413; *Wright* v. *Compton Unified School District* (1975) 46 Cal.App.3d 177, 181-183; *City of La Habra* v. *Pellerin* (1963) 216 Cal.App.2d 99, 102; *People* ex rel. *City of Downey* v. *Downey County Water Dist*. (1962) 202 Cal.App.2d 786, 805; *Sacramento Municipal Util. Dist.* v. *Spink* (1956) 145 Cal.App.2d 568, 579-580.) As one commentator has stated:

> "The unarticulated rationale for this exception undoubtedly is that it is pointless to submit obligations imposed by law to the electorate for approval, since the local entity cannot refuse to pay the debt, regardless of election outcome." (*Municipal Debt*, *supra*, p. 647.)

Another significant means by which the constitutional voter requirement is avoided is to have the debt incurred by a separately formed and "independent" entity. (See *California Educational Facilities Authority* v. *Priest*, *supra*, 12 Cal.3d 593, 607; *The Housing Authority* v. *Dockweiler*, *supra*, 14 Cal.2d 437, 459; *In re California Toll Bridge*

Authority, *supra*, 212 Cal. 298, 302; *Shelton* v. *City of Los Angeles*, *supra*, 206 Cal. 544, 548-549; *Vanoni* v. *County of Sonoma* (1974) 40 Cal.App.3d 743, 748-751; *Eastern Water Dist*. v. *Scott* (1969) 1 Cal.App.3d 129, 132-133; *Municipal Debt*, *supra*, pp. 666-668; *Joint Powers Agreement*, *supra*, pp. 53-54.)

Finally, we note the Supreme Court's cautionary language in *City of Palm Springs* v. *Ringwald*, *supra*, 52 Cal.2d 620, 627:

> "The purpose of section 18, article XI, of the Constitution is not to interfere with the city's exercise of its discretion in determining for what objects of public convenience and welfare its power shall be exercised or for which money may be appropriated. It is designed to afford the people who are required to pay the cost of providing such objects of public convenience and welfare an opportunity to express their approval or disapproval of a long-term indebtedness. The constitutional provision does not prohibit the legislative body of the city from spending any or all of its current income for whatever it deems proper or necessary objects of public convenience or welfare. It simply provides that the legislative body may not encumber the general funds of the city beyond the year's income without first obtaining the consent of two thirds of the electorate."[2]

Returning to the language of section 18 of article XVI of the Constitution, we find that the borrowing of funds under the Act's provisions does not come within the scope of the constitutional requirement.

While section 25415 says that each institution "shall repay" the loan, it also provides that a governing body is not empowered to budget payments "raised by the levy of additional taxes but shall instead be obtained by a savings in energy costs." In the view of the Commission, the apparent tension between these provisions—on the one hand appearing to make the obligation to pay unconditional, on the other prohibiting use of the district' ultimate means to raise revenue to pay the debt—is properly resolved by interpreting the statute to make the obligation to repay the loan contingent on non-tax revenues being adequate to meet the repayment obligation. In other words, the Commission interprets the law to place on the state the risk that the savings are less than the principal and interest on the loan.

The plain language of the statute neither precludes nor compels this interpretation. However, we, like the courts, owe deference to the interpretation of a statute by the administrators charged with its implementation. (*Judson Steel Corp.* v. *Workers'*

[2] Section 18 of article XVI was previously section 18 of article XI of the Constitution.

Comp. Appeals Bd. (1978) 22 Cal.3d 658; *Nipper* v. *California Auto. Assigned Risk Plan* (1977) 19 Cal.3d 35, 45.) And the Commission's interpretation meets the objective of harmonizing otherwise conflicting parts of the statute in a manner that preserves its constitutionality. (*In re Kay* (1970) 1 Cal.3d 930, 942; *Franklin* v. *Municipal Court* (1972) 26 Cal.App.3d 884, 896.) We therefore conclude that the obligation to repay the loans is contingent on the ability to repay the loan without levying additional taxes. That limits repayment to the savings in energy costs that the loan has provided.[3]

Given the fact that the statute cannot lead to an obligation against tax revenues, the loans fall within the exception to article XVI, section 18, for debts payable upon a contingency. (*Doland* v. *Clark*, *supra*, 143 Cal. 176.) The limitation to energy savings likens the loans to those approved under the "special fund" doctrine (*California Housing Agency* v. *Elliott*, *supra*, 17 Cal.3d 575), since the energy savings function like such a fund for repayment. We therefore find that the statute does not violate article XVI, section 18, of the California Constitution.

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[3] Some loan recipients may have other sources of funds that can be drawn upon without levying new taxes in violation of article XVI, section 18. We are not called upon here to decide, and offer no opinion on, whether there is an obligation to repay the loan in excess of energy savings where the raising of funds for repayment is not precluded by the Constitution.

Energy savings from a conservation measure are, of course, not susceptible to precise calculation. Actual savings will vary according to weather and utility rates, among other things; the savings are customarily calculated by comparing hypothetical estimates of energy usage for the facilities in question with and without the conservation measure. These being technical matters falling within the unique expertise of the Commission, the methods it adopts for such calculations would ordinarily be controlling on any question of whether the savings materialized. (Cf. *Woods* v. *Superior Court* (1981) 28