MEMORANDUM OF LAW

DATE: November 3, 1986

TO: George Loveland, Director Park and Recreation Department via John P. Fowler, Assistant City Manager

FROM: City Attorney

SUBJECT: Use of Park Fees

Your memorandum of August 29, 1986 requested our comments on whether park fees can be used for the replacement of playground equipment that has exceeded its service life. You specifically asked whether you could use park fees to rehabilitate the site by installing new equipment.

In the past, this office has advised your department that park fees cannot be used for replacement of playground equipment. That advice was based upon the precise language of the Municipal Code. We now analyze that question to determine whether amendment of San Diego Municipal Code sections 96.0401 et seq., and 102.0406 et seq., pertaining to park fees, under the provisions of Government Code section 66477(b) would allow a different answer. We again reach the same conclusion based on constitutional grounds. Our analysis follows:

Under Government Code section 66477, a public agency may require land or park fees as a condition of approving a subdivision map. Government Code section 66477(c) provides as follows:

> The land, fees, or combination thereof are to be used only for the purpose of developing new or rehabilitating existing park or recreational facilities to serve the subdivision (emphasis added).

In 1982, Government Code section 66477(c) was amended (Stats. 1982, c. 1467, section 1) to substitute the above underlined words for the word "providing," thereby introducing park site rehabilitation into the Subdivision Map Act. This section is

derived from Business Professions Code section 11546 (Stats. 1965, c. 1809, p. 4183). This change was not incorporated into San Diego Municipal Code sections 102.0406, et seq. which instead cite the earlier Business Professions Code section 11546 as authority for the collection of park fees.

The word "rehabilitating" is not further defined in Government Code section 66477. The words "rehabilitate" or "rehabilitation", according to Webster's Third New International

Dictionary (1976), mean the restoration of something damaged or deteriorated to a prior good condition or its improvement to a higher level or greater value. Facially, it could appear that "rehabilitation" would include mere replacement of something older by something newer. It would also appear that sections 102.0406 et seq., which are based on the Subdivision Map Act, could be amended to refer to Government Code section 66477 as the statutory basis for imposition of the fee and include rehabilitation of existing park and recreational facilities as a permitted use of the fee.

In distinction, park fees collected under San Diego Municipal Code section 96.0401 are based on the general authority of a charter city in managing its municipal affairs to impose fees for the financing of park and recreational facilities independent of the Map Act. Cf. Bishop v City of San Jose, 1 Cal.3d 56, 81 Cal. Rptr. 465 (1969). By section 96.0402 this park fee applies only to development which creates additional dwelling units. The uses of the park fees are limited by San Diego Municipal Code section 96.0404 to the purchase of land and the construction of facilities, the purchase of already constructed facilities or the reimbursement for donated land and constructed improvements. Section 96.0401 et seq. could likewise be amended to include rehabilitation of existing recreational facilities, absent some constitutional requirement to the contrary, as a municipal affair. See Cal. Const., article XI, section 5(a); City of Redondo Beach v. Taxpayers, 54 Cal.2d 126, 137, 5 Cal. Rptr. 10,17 (1960); City Council v. South, 146 Cal.App.3d 320, 326, 194 Cal.Rptr. 110 (1983).

Amendment of either section 96.0401 or 102.0406, et seq., of the San Diego Municipal Code would still have to take into consideration the nature of the fee as an impact fee. Although replacement of equipment might be viewed as "rehabilitation" under a literal interpretation of that word, such an interpretation potentially violates the provisions of California Constitution, article XIII A, section 4 ("Proposition 13") as a disguised attempt to use impact fees for a general revenue purpose, unless, of course, there is a two-thirds voter approval.

Therefore, we would restrict its meaning to avoid an impermissible result. Our reasoning follows:

Each of the Municipal Code sections referred to involves facility acquisition or development. That is clearly stated in the purpose and intent language of the enabling legislation. Such park fees have been upheld as special assessments despite Proposition 13 because of the reasonable relationship between the need for parks and other facilities generated by the development

of land. See Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 94 Cal.Rptr. 630 (1971); Trent Meredith, Inc. v. City of Oxnard, 114 Cal.App.3d 317, 170 Cal.Rptr. 685 (1981).

Taxes are used for maintaining improvements that assessments create. A special assessment may not exceed the benefit the property actually receives from the improvement; maintenance and replacement of equipment does not constitute such a benefit. Cf. Fresno v. Malmstrom, 94 Cal.App.3d 974, 984, 156 Cal.Rptr. 777 (1979). Thus, to attempt to extend the meaning of "rehabilitation" to include a maintenance function creates the risk of the impact fee being a disguised tax and thereby invalid without voter approval.

As stated in Oxnard, "As opposed to taxes which need not be related to benefits received or burdens created ... these exactions are expressly limited by their enabling legislation to an amount of land or fees which shall bear a reasonable relationship to the need for parks or school facilities generated by the development". Oxnard, supra at 327. We also quote the following caveat concerning Proposition 13:

> We add a word of caution to taxing entities which might be tempted to use the special assessment exclusion as a means to circumvent the tax limitation of article XIII A. Our opinion excluding special assessments, including those assessed on a fixed, variable, ad valorem, or other basis, from the 1 percent limitation of section 1 applies only to true special assessments designed to directly benefit the real property assessed and make it more valuable. ... In income tax matters the courts have had little difficulty distinguishing special assessments from general taxes, and we think the same will be true in the operation of article XIII A.
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> Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal.App.3d 545, 557, 169 Cal. Rptr. 391 (1980).

We observe that in older developed areas, as younger families move in or as single family houses are replaced by multi-family residences, there is an impact on recreational facilities generated by increasing population and shifts in age groups. A playground may need expansion or a ball field or playground be built on an existing site. We perceive that rehabilitation efforts which would materially upgrade an existing park site or

allow a different or expanded use to meet changing demographic considerations associated with land development would appear related to the benefit theory associated with an impact fee as a form of special assessment.

We may therefore conclude that the Municipal Code could be amended to add rehabilitation of existing park sites as a permitted use of the park fees already authorized in sections 96.0401 and 102.0406 as a charge related to land development. We would require that the language regarding rehabilitation be drafted to require expansion, redesign or reconfiguration, which could include the addition of new equipment to supplement existing equipment, the addition of new equipment which permits an expanded use, or the placement of new playground equipment in a different location which expands or improves the utilization of the park site to handle additional persons. We do so without appreciable concern of thereby invalidating the enabling ordinance or without subjecting the expenditure to attack as a special tax in the absence of voter approval. But mere replacement of equipment in kind that does not involve expansion or extended use or some additional consideration related to the installation is nothing more than maintenance which, in the past, has not been funded through an impact fee and should not be so funded now.

Thus, we refine our earlier advice to you regarding the impermissibility of the use of park fees for equipment replacement, without more, to be not merely a matter of semantics, but to be also fundamentally related to Proposition 13 limitations. Should you wish to consider amending any of the cited sections of the Municipal Code consistent with our present advice, we shall be pleased to assist you.

JOHN W. WITT, City Attorney
By
Rudolf Hradecky
Deputy City Attorney

RH:mrh:645(x043.2)
cc Wilbur Smith
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