

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: May 27, 2014

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Use of Golf Enterprise Funds for Various Aspects of the Balboa Park Golf Course Clubhouse Capital Improvement Project

INTRODUCTION

The Golf Division of the City of San Diego Park and Recreation Department manages three City-owned golf courses: Torrey Pines (North and South), Mission Bay, and Balboa Park. The revenue and expenses for these golf courses are managed by the City in an enterprise fund. The City is proposing to replace the existing Balboa Park Golf Course Clubhouse utilizing Golf Enterprise Funds, and is in the process of developing a General Development Plan (GDP), or schematic design, for its construction. Questions have arisen regarding permissible expenditures from the Golf Enterprise Fund and the effect of Proposition 26, if any, on these expenditures.¹

BACKGROUND

A proposal to replace the existing Balboa Park Golf Course Clubhouse is currently being processed (Project). The current clubhouse was built in 1934 and has been determined to be inadequate and out of date in terms of overall appearance, spatial needs, functional inefficiencies, accessibility, safety issues, and lack of amenities. Report to the Park and Recreation Board. The proposed new clubhouse includes a kitchen, restaurant and bar, two banquet rooms, a conference room, bride's room, and cart barn. *Id.* The project also includes other improvements such as a new intersection at Golf Course Drive, enhancements to the practice putting greens, expansion of

¹ This memorandum is based on the facts presented in the Report to the Park and Recreation Board, Report No. 102 (Jan. 7, 2014) and the Memorandum from Council President Gloria to City Attorney Goldsmith (Apr. 7, 2014).

the driving range tee boxes, a new restroom building, and an event lawn for outdoor events, courtyards and patios. *Id.* During the public meetings held to receive comments on the GDP, the Greater Golden Hill Planning Committee suggested that a multi-modal pathway for pedestrians and bicycles be considered to get people safely to and from the clubhouse, preferably on the south and east sides of Golf Course Drive. *Id.* While the GDP includes a pedestrian pathway along Golf Course Drive between 26th and 28th Streets and a Class III bike sharrow lane, consistent with the City's Bicycle Master Plan, funding for the pedestrian pathway has not been identified at this time.² *Id.*

The general nature of enterprise funds is one of a trust, and the City cannot allocate costs to that fund without a showing of benefit to the particular enterprise fund. 15 McQuillin Mun. Corp. § 39.56 (3rd ed. 2013); 2006 City Att'y MOL 54 (2006-6; Mar. 16, 2006). The Golf Enterprise Fund was created as part of the fiscal year 1992 budget process. San Diego Ordinance O-17667 (July 23, 1991). Enterprise funds have been described variously. The funds in the City's enterprise funds are "appropriated for the purpose of providing for the operation, maintenance and development of their respective purposes." San Diego Ordinance O-20289, Section 2.D (July 30, 2013). Enterprise funds are described in the Capital Improvement Program portion of the City's budget as follows:

Enterprise Funds account for specific services that are funded directly by fees and charges to users. These include the services provided by Public Utilities, Environmental Services, Airports, and Golf Courses. These funds are intended to be fully self-supporting and are not typically subsidized by any general revenue or taxes. Within each Enterprise Fund, budgets are developed which are sufficient to fund current year operations and maintenance expenses, as well as provide for current and future years' upgrade, replacement, and expansion-related capital construction requirements.

City of San Diego FY 2014 Adopted Budget, vol. 3, Capital Improvements Program, at 71.

The Government Finance Officers Association (GFOA) describes enterprise funds as those used to report activity for which a fee is charged to external users for goods or services. Stephen J. Gauthier, *Governmental Accounting, Auditing, and Financial Reporting*, at 21 (Gov't Finance Officers Ass'n 2001). The City follows the guidelines of the GFOA in budget creation and standards for revenue generation and expenditures. Council Policy 000-02. In addition, generally accepted accounting principles require the use of an enterprise fund in the following circumstances: (1) for any activity whose principal external review sources are debt backed solely by fees and charges; (2) when there is a legal requirement to recover costs through fees and charges; or (3) when there has been a policy decision to recover costs. Gauthier, *supra* at 21 (citing to generally accepted accounting principles for state and local governments as stated in

² No information has been provided to this Office regarding either a funding deficit or source for the Class III bike sharrow lane improvements.

Governmental Accounting Standards Board Statement No. 34, paragraph 67 (June 1999)). As an enterprise fund, the Golf Enterprise Fund is funded through the fees charged to the users of the golf courses, and the expenses for the maintenance, operations, and capital improvements of the golf courses are paid from the Golf Enterprise Fund.

An enterprise is a “revenue-producing improvement, building, system, plant, works, facilities, or undertaking used for or useful for any of the following purposes: . . . [T]he providing of public golf courses, and facilities and improvements in connection therewith.” Cal. Gov’t Code § 54309(i). “A local agency may prescribe, revise, and collect charges for the services . . . furnished by the enterprise.” Cal. Gov’t Code § 54344. However, a charge cannot exceed the estimated cost of providing the service or regulatory activity, or the fee may be considered a special tax. Cal. Gov’t Code § 50076; *Weisblat v. City of San Diego*, 176 Cal. App.4th 1022 (2009).

Proposition 26, passed by the California electorate in November, 2010, amended articles XIII A and XIII C of the California Constitution to impose limits on the ability of government to impose fees and charges.³ Pursuant to Proposition 26, “any levy, charge, or exaction of any kind” imposed by local government for a specific purpose which is placed in the general fund is a special tax which requires two-thirds voter approval, unless an exception applies. Cal. Const. art. XIII C, §§ 1(d)-(e), 2(d). Charges by local governments in the following circumstances are exempt from Proposition 26:

- a charge imposed for a specific benefit or privilege accorded directly to the payor that is not provided to those not charged, and which does not exceed the reasonable cost to the local government of conferring the benefit or granting the privilege
- a charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable cost to the local government of conferring the benefit or granting the privilege
- a charge imposed for reasonable permitting and inspection fees
- a charge imposed for entrance to or use of government property, or the purchase, rental, or lease of government property
- a fine and penalty, or other charge imposed by the judicial branch of government or a local government, as a result of a violation of law
- a charge imposed as a condition of property development
- an assessment and property related fee imposed in accordance with Proposition 218

Cal. Const. art. XIII C, § 1(e).

³ For a general overview of Proposition 26, see City Att’y MOL 2011-3 (Mar. 4, 2011).

QUESTIONS PRESENTED

1. Can Golf Enterprise Funds be used to construct special event facilities as part of the proposed Project?
2. Can Golf Enterprise Funds be used to pay for pedestrian and bicycle improvements, such as those requested by the community, which will allow the public to better access the proposed clubhouse?
3. Does Proposition 26 restrict the use of Golf Enterprise Funds for either of these purposes?

SHORT ANSWERS

1. Yes, Golf Enterprise Funds may be used to construct special event facilities as part of the proposed Project if that expenditure provides for the operation, maintenance and development of the golf course. Special events facilities for golf tournament awards ceremonies and dinners appear to be related to this purpose, while others such as a bride's room, do not. To be legally defensible, a record should be created supporting the decision to use the funds.

2. Yes, Golf Enterprise Funds may be used to construct pedestrian and bicycle improvements if that expenditure provides for the operation, maintenance and development of the golf course. To be legally defensible, a record should be created supporting the decision to use the funds. The background material provided to this Office does not include facts necessary to make this determination, such as the likelihood and frequency of golf course users walking or bicycling to the golf course.

3. The revenue in the Golf Enterprise Fund, which is based on fees charged to golf course users, is likely exempt from Proposition 26 under the "benefits or privileges" or the "use of property" exemption, or both. The "benefits or privileges" exemption requires that the fee not exceed the reasonable cost to the government of providing the specific benefit or privilege to the payor, however, an incidental benefit to the public will not result in a determination that the fee is a tax.

ANALYSIS

I. GOLF ENTERPRISE FUNDS MAY BE USED TO CONSTRUCT SPECIAL EVENT FACILITIES IF THAT EXPENDITURE PROVIDES FOR THE OPERATION, MAINTENANCE AND DEVELOPMENT OF THE GOLF COURSE

While no description of the proposed special events to be held at the clubhouse has been provided, to the extent that the special events facilities are for the operation, maintenance and development of the golf course, such as tournament awards ceremonies and dinners, then the

expenditures are permissible. It is noted that the floor plan for the proposed clubhouse includes a “bride’s room”; it does not appear that this use is for the operation, maintenance and development of the golf course and therefore could be found to be impermissible. Report to Park and Recreation Board, Attachment A.

This Office has issued several previous opinions in similar “enterprise fund” situations, which conclude that a fact-specific analysis is required in each instance. For example, this Office has previously opined that the use of water enterprise funds to construct roads, public restrooms, fences and other public access control devices at City reservoirs was permissible. 1991 City Att’y Report 1580 (91-53; Nov. 13, 1991). This conclusion was predicated on the Water Department need for the roads around the reservoirs for Water Department purposes, in which case the use of these roads by the public for recreational activities would not preclude the use of the enterprise funds. *Id.* If the public were allowed access, the construction of the restroom facilities was then an appropriate expenditure to protect the water supply from pollution. *Id.* However, the use of waterworks funds to pay for the construction of a police court, even though it was in a waterworks building, was determined to be improper because it was not for waterworks purposes. *People ex rel. Alexander v. Swift*, 28 Cal. 397 (1865).

Similarly, this Office has opined that expenditures from the wastewater enterprise fund for a permanent sound wall at Camino del Norte, the site of escalating noise and traffic problems, was improper because the construction of the sound wall to address these issues had no factual connection to maintaining, operating, or extending the wastewater system. 2001 City Att’y MOL 161 (2001-12; July 12, 2001). However, the use of wastewater enterprise funds that would otherwise be spent on a temporary sound wall for mitigation of construction noise for this wastewater project could be allocated to contribute to the cost of a permanent sound wall. *Id.* As discussed further in Section II, this Office has also cautioned that the use of wastewater enterprise funds to grant a community request to provide curb to curb repaving of the streets impacted by a wastewater project, where only a portion of the streets had been disturbed by that project, could be deemed an abuse of discretion if the additional work was beyond that necessary for restoration and unrelated to the wastewater project. 1995 City Att’y MOL 100 (95-7; Jan. 24, 1995).

Regarding the Project, if the construction of special event facilities is a proper expenditure of Golf Enterprise Funds because the facilities will be used for golf purposes, then the additional use of these facilities for non-enterprise fund purposes is not impermissible. However, if the facilities are not for the operation, maintenance or development of golf, then the expenditure is impermissible.

II. GOLF ENTERPRISE FUNDS MAY BE USED TO CONSTRUCT PEDESTRIAN AND BICYCLE IMPROVEMENTS IF THAT EXPENDITURE PROVIDES FOR THE OPERATION, MAINTENANCE AND DEVELOPMENT OF THE GOLF COURSE

The Golf Enterprise Fund may be used to fund pedestrian and bicycle improvements if that expenditure provides for the operation, maintenance and development of the golf course. As discussed above, to be legally defensible, a record should be created supporting the decision to use the funds. The background material provided to this Office does not include facts indicating how the use of Golf Enterprise Funds for the construction of the pedestrian and bicycle improvements is related to the purpose for which the fund was established, such as the likelihood and frequency of golf course users walking or bicycling to the golf course.

In 1995, this Office addressed a request by the community to use wastewater enterprise funds to pave streets from curb to curb, when the wastewater project had only disturbed a portion of the street. 1995 City Att’y MOL 100. While the question of whether the expanded resurfacing was in fact “restoration” that was warranted by the wastewater project was a factual determination for the City Council, City Manager, and the department to make, this Office noted that a policy of such expanded resurfacing when wastewater pipes were concerned could be considered an abuse of discretion. *Id.* We urged that any such determination be supported by an articulation of the factual basis for the decision. *Id.*

Our advice now is the essentially the same. Enterprise funds are created for a particular purpose; use of the funds beyond that purpose is improper, and where the use is questionable, we recommend that there be a record created to support the decision to proceed.⁴

III. TWO EXEMPTIONS TO PROPOSITION 26 LIKELY APPLY TO THE REVENUE IN USE OF THE GOLF ENTERPRISE FUND

Proposition 26 requires that a “levy, charge, or exaction of any kind” be approved by the electorate as a tax, unless an exemption applies. Cal. Const. art. XIII C, §§ 1(e), 2(d). As discussed above, the City’s enterprise funds contain the revenue from specific services that are funded directly by fees and charges to users. In the case of the City’s Golf Courses, the service is golfing, and the revenue is based on fees and charges such as the golf tee times.

At least two exemptions from Proposition 26 likely apply to the fees and charges which comprise the Golf Enterprise Fund revenue: (1) fees imposed for specific benefits or privileges conferred on the payor which are not provided to those not charged and which do not exceed the reasonable cost of providing the benefit or privilege; and (2) a charge for entrance to or use of

⁴ There are no provisions of the law exempting a project constructed with enterprise funds from compliance with all legal requirements. Therefore, it is possible that the construction of the Project could trigger an obligation to construct pedestrian and bicycle improvements based on requirements such as compliance with the California Environmental Quality Act (CEQA) or the City’s street design manual, however, no relevant information to make a determination of this nature has been provided to this Office.

government property, or the purchase, rental, or lease of government property. Cal. Const. art. XIII C, § 1(e)(1), (4).⁵

A. Exemption for Fees Imposed for Specific Benefits or Privileges

The exemption for fees imposed for specific benefits or privileges conferred on the payor which are not conferred on those not charged, and which do not exceed the reasonable cost to the local government of providing the service, is commonly understood to apply to those fees charged only to those specific users or purchasers of a government service or product, when the fees do not exceed the reasonable cost to the government of providing the benefit of privilege. City Att’y MOL 2011-3; CalTax, Understanding Proposition 26 (Aug. 15, 2011); League of California Cities, Proposition 26 Implementation Guide (Apr. 2011). While some discussion has occurred to the effect that fees charged by the government when operating like a private party are not “imposed” within the meaning of Proposition 26, there are no cases interpreting this theory, and for the purposes of discussion, this Memorandum assumes that the golf fees are “imposed” within the meaning of Proposition 26. City Att’y MOL 2011-3; Proposition 26 Implementation Guide.

The City’s enterprise funds impose fees based on the cost of providing the services, including costs relating to capital improvements. City of San Diego FY 2014 Adopted Budget, vol. 3, Capital Improvements Program, at 71. Fees charged to users of the golf course provide benefits or privileges only to those charged, and so long as these fees do not exceed the reasonable cost of providing this benefit or privilege, this Proposition 26 exemption should apply. Additionally, an incidental benefit to the public as a result of the expenditure of the user fee will not transform a fee into a tax; “the public should not be required to finance through taxation an expenditure that benefits only a small segment of the population.” *Weisblat*, 176 Cal. App.4th at 1038.

The use of the fees to construct special event facilities or pedestrian and bicycle improvements as part of the Project will not defeat this Proposition 26 exemption, so long as the fees are used to specifically benefit those users who pay the fee and the fee does not exceed the reasonable cost to the government of providing the benefit or privilege, even if there is an incidental benefit to the public, as noted above.

B. Exemption for Property Use Fees

The Proposition 26 exemption for entrance to or use of government property has been commonly understood to include park and recreation entrance charges and equipment rental charges, as well as charges for the purchase, rental or lease of government property, although there are no cases interpreting this exemption. City Att’y MOL 2011-3; Understanding Proposition 26; Proposition

⁵ In March, 2011, the County of Los Angeles approved an increase in golf fees and noted that they were exempt from Proposition 26 based on the “benefits or privileges” and “property” exemption, Letter from County of Los Angeles Department of Parks and Recreation to Board of Supervisors of the County of Los Angeles, at 4 (Mar. 22, 2011).

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26 Implementation Guide. This exemption does not include a requirement that the fee be based on the reasonable cost to the government of providing the access or use of property and while there are some opinions that this fee may be whatever the market will bear, there are no cases addressing this issue. City Att’y MOL 2011-3; Proposition 26 Implementation Guide. The use of the fees to construct special event facilities or pedestrian and bicycle improvements as part of the Project will not defeat this Proposition 26 exemption.

CONCLUSION

The use of Golf Enterprise Funds to construct special event facilities at the proposed Balboa Park Golf Course Clubhouse is a permissible use of those funds if the special event facilities are for the operation, maintenance and development of the golf course. Similarly, the use of Golf Enterprise Funds for pedestrian and bicycle improvements to Golf Course Drive as part of the proposed Balboa Park Golf Course Clubhouse Project is a permissible use of these funds if these pedestrian and bicycle improvements are for the operation, maintenance and development of the golf course. A decision to use the Golf Enterprise Funds for either or both of the uses should be contained in the record. The use of the Golf Enterprise Funds for these purposes is likely exempt from Proposition 26 under the “specific benefits or privileges” exemption or the “use of property” exemption, or both, although the “specific benefits or privileges” exemption requires that a determination be made that these improvements provide a specific benefit to the payors, and that the fees charged do not exceed the reasonable cost to the government of providing that benefit or privilege. Each of the determinations is a policy determination for the City Council, City Manager, and the department to make. To be legally defensible, each of the determinations must be supported by evidence in the record.

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