



CITY OF
PORTLAND, OREGON
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INTEROFFICE MEMORANDUM

TO: David Judd
Deputy Director, Bureau of Parks

FROM: Harry Auerbach *HA*
Deputy City Attorney

Jeffrey L. Rogers *JL*
City Attorney

SUBJECT: Options relating to the Parks Levy

You have asked for an opinion regarding the legality of various strategies proposed for the Parks Levy, in light of the passage of Ballot Measure 5, which enacted Article XI, section 11b of the Oregon Constitution, limiting the rate of property taxes.

QUESTION ONE: May money from the Parks Levy be used for Park Bureau operating needs, rather than for capital improvements?

ANSWER: Not exclusively; the money must be spent roughly in the same proportion of capital to operating expense as proposed to the voters in the ballot title.

QUESTION TWO: May the money from the Parks Levy be used city-wide for operating needs?

ANSWER: No. The money may only be used for the purpose of constructing, reconstructing, maintaining and operating improvements to the parks.

QUESTION THREE: Can the remaining year of the levy simply not be collected?

ANSWER: The City may discontinue this special tax levy if at least two-thirds of the members of the City Council adopt a resolution finding conditions which dispense with the necessity of further accumulation in or expenditures from the Parks System Improvements Fund. See Interoffice Memorandum from Jeffrey L. Rogers to Steve Bauer and Tim Grewe, dated December 6, 1990.

QUESTION FOUR: May the City redefine the levy projects, concentrating on those which address safety, efficiency, or high community needs criteria, and using the remaining money for operational purposes?

ANSWER: The City Council has some discretion over which projects are funded from the levy. It probably must choose from among the capital projects set out in the Park Futures Study and must focus on projects that serve youth. Improvements to make parks more safe are clearly contemplated within the levy. Money may be used to operate these improvements.

DISCUSSION: The Parks Levy was submitted to and approved by the voters under the provisions of ORS 280.040 to 280.140. ORS 280.110(2) provides that funds received from the levy may be "[r]etained or expended only for the purpose for which the funds were created."

In Stringham et al., v. Union Co. P.U.D. et al., 182 Or 565 (1948), taxpayers sought to enjoin the use of part of the proceeds of a proposed sale of revenue bonds, which sale had been approved by the voters. Id. at 568-69. The plaintiffs there claimed that the proposed use was "a substantial departure from the purpose authorized by the voters at the bond election." Id. at 569. The Oregon Supreme Court identified the sources which would identify the purpose authorized by the voters:

In determining to what extent and for what purpose the voters authorized the Board of Directors of the "District" to issue revenue bonds, we turn to the Resolution calling the election, the Notice of Election, and the Official Ballot. The Resolution is not so important as it is seen by only a few voters. Its principal purpose is to set the election machinery in motion, although it is required to state the purpose for which the election is called. It is the "Notice" and the "Official Ballot" that bring to the attention of the voters the specific question for their decision.

Id. at 573. The court further held, "If the question . . . is submitted in clear and unambiguous language, courts are not warranted in going outside of election procedure to determine what the voters may or may not have contemplated." Id. at 574.

The Parks Levy was approved by the voters as Ballot Measure 26-2, on June 27, 1989. To determine for what purpose the voters authorized the Parks Levy, then, we look primarily to the Ballot Title prepared and submitted in accordance with ORS 250.035 and

ORS 250.285. The caption¹ identified the measure as a "three-year serial levy for youth-oriented park improvement and operation." The question² was, "Shall Portland levy \$2,433,334 outside tax base each year for three years beginning 1989-90 for constructing and operating park improvements?" (Emphasis added). The purpose statement³ explained:

This levy is for park improvements. The focus will be on projects to serve youth. The proceeds would be used to construct and operate capital projects set out in the Park Futures Study. One such project is to build or rebuild sixteen athletic fields for youth sports. Another is to build or fix five community centers and eight playgrounds. Included is the pool at Matt Dishman. The levy will fund improvements to make parks more safe. The money also will be used to develop or rebuild thirteen park sites. \$6,400,000 is the planned cost of the improvements. The rest of the money is to operate these improvements after they are made.

The allocation of the funds among the projects authorized by the voters is a matter "committed to the judgment and discretion of the [City Council]." Gurdane et al. v. No. Wasco Co. P.U.D., 183 Or 565, 581 (1948). "[W]hether they act wisely or unwisely in so doing, it is not the province of a court of equity to interfere, so long as they exercise such judgment or discretion in good faith." Id. at 580, quoting Avery v. Job, 25 Or 512, 525 (1894). Accord 25 Atty Gen 279, 280 (1951):

[T]he county court may expend the money, as far as it goes, on any or all of the roads which they have designated. . . . [T]he county court may use its own discretion as to which of the designated roads should be completed first . . . By completing the roads of their choice first it is foreseeable that due to the increase in costs some of the less important roads will

¹ The caption "reasonably identifies the subject of the measure." ORS 250.035(1)(a).

² The question "plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure." ORS 250.035(1)(b).

³ This portion of the ballot title is "a concise and impartial statement . . . summarizing the measure and its major effect." ORS 250.035(1)(c).

not be improved. The only duty the county court has is to see that the funds are expended as far as they will go and within their best discretion to the designated roads that need the repairs and improvements.

The City Council has the discretion to choose which improvements to make with the money from the Parks Levy. One of the effects of Ballot Measure 5, by which the people enacted Article XI, section 11b of the Oregon Constitution, is that the Parks Levy will have to be reduced proportionally in order to bring the combined tax levies of all non-school governmental units who tax property in the City of Portland down to a maximum combined rate of \$10 per \$1,000 of real market value. Or Const Art XI, sec 11b(4). This means that it is almost certain that the City will receive less money from the Parks Levy than was originally approved by the voters. Even if the costs of the planned improvements had been perfectly forecasted, the Council would still need to exercise its discretion and judgment to choose among the projects to be funded.

The outer reaches of Council's legitimate exercise of judgment and discretion in this matter have not been explored in Oregon cases. However, as we mentioned at the outset, the Legislature has provided that the money in funds, such as the Parks System Improvements Fund, created by special levies, may be "expended only for the purpose for which the funds were created." ORS 280.110(2). It should be noted as well that ORS 280.140 provides:

No member of the governing body of a subdivision through the vote of the member shall cause to be made an unauthorized expenditure or a deficit in a fund originating pursuant to the provisions of ORS 280.040 to 280.130.

This statute reinforces Council's obligation to exercise its discretion to choose among the levy projects once it finds either that the levy will produce less money or that the projects will cost more money than was contemplated by the voters who approved the levy. It limits that discretion to the extent that it prevents any Council member from voting to spend levy funds for purposes other than those for which the levy was enacted.

The Oregon Supreme Court has indicated that the Council would exceed its discretion either through a "radical departure" from the purpose stated in the ballot title, see Stringham et al. v. Union Co. P.U.D. et al., 182 Or at 575, or if "fraud is shown, or the power or discretion is being manifestly abused to the

oppression of the citizen." Gurdane et al. v. No. Wasco Co. P.U.D., 183 Or at 580, quoting Avery v. Job, 25 Or at 525.

The levy has the following elements:

- (1) It is to construct and operate park improvements;
- (2) The focus is to be on projects to serve youth;
- (3) The improvements to be funded are among those identified in the Park Futures study;
- (4) Specific projects contemplated include sixteen athletic fields, five community centers, eight playgrounds, the pool at Matt Dishman and thirteen park sites;
- (5) Improvements for park safety are contemplated; and
- (6) Approximately 88% of the money was planned to be spent on capital improvements and 12% on operations.

Clearly, the construction and operation of park improvements set the outside limits of Council's authority to expend funds from this levy. Using the funds for general city operations would be a "radical departure" from the stated purpose of the levy, and would be enjoined by the courts. The limitations, if any, imposed by the remaining five elements identified in the purpose statement are far less certain. Because it was specifically stated that the improvements would be among those identified in the Park Futures Study, it is possible that an abuse of discretion could be found if Council chose to redirect the funds to improvements that were not included in that document. See Gurdane et al. v. No. Wasco P.U.D., 183 Or at 572-77 (discussing Medford Irrigation District v. Hill, 96 Or 649 (1920)).

Similarly, although the ballot title did not specify that all of the improvements would be youth-oriented, the caption clearly stated that purpose, and the purpose statement reflected the intent to "focus . . . on projects to serve youth." A wholesale abandonment of such projects in favor of other uses of the funds with no benefit to youth would probably be seen as either a radical departure from the stated purpose or as a fraud on the voters.

It is well established by the authorities cited in this memorandum that Council is not obligated to fund all of the projects described in the purpose statement. In the first place, it is possible to read the purpose statement as simply listing

these items as examples of the types of improvements which would be funded by the levy, and not as the specific projects which would be undertaken. More importantly, for the reasons described above, Council has the obligation to exercise its judgment and discretion to choose among the available projects if the funds are inadequate to do them all.

There are two issues raised by the provision in the levy for both capital improvements and operating expenses. First, according to the purpose statement, money is authorized only "to operate these improvements after they are made." (Emphasis added). Money from the levy cannot be used to fund general parks operations, except to the extent that those services can be allocated to improvements undertaken pursuant to the levy.

The second operating expense issue is the proportion of capital to operating expense authorized by the measure. The purpose statement explained, "\$6,400,000 is the planned cost of the improvements. The rest of the money is to operate these improvements after they are made." The total levy was \$7,300,002. This represents a ratio of approximately 88% capital improvements and 12% operating expenses. While the result of the Council's exercise of its discretion over which projects to fund, or of unanticipated reductions in the costs of the improvements, may be some change in the proportion of capital to operating expense, a grossly disproportionate increase in the percentage of funds devoted to operating expenses could be viewed as a "radical departure" from the authorized purpose of the fund.

This is not to say that all of the money must be spent on capital improvements if there will be no money left for operating the improvements. Rather, Council must carefully allocate money within the limits of the purposes authorized by the voters, and should do so generally within the proportion of capital to operating expenses identified in the measure.

The issue of Council's authority to abandon collection of the levy altogether has been fully addressed in Jeff Rogers' memorandum of December 6, 1990, to Steve Bauer and Tim Grewe, and need not be repeated here. For your reference, a copy of that memorandum accompanies this one. Our conclusion was that, under the proper circumstances, the Council could discontinue or reduce its special levies, including the Parks levy.

To summarize, Council may spend money derived from the Parks levy only for purposes authorized by the voters. In this case, that means that the funds may be spent only for the construction, reconstruction, maintenance and operation of park improvements. The money cannot be spent for general City operations. Within

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the confines of the authorized purposes, Council has wide discretion as to how to expend the funds. The safest course is for Council to use the funds for the construction and operation of improvements identified in the Park Futures Study, primarily on those which will serve youth. Improvements for park safety are clearly within those permitted by the levy, but it would be difficult to justify redirecting all of the money to park safety improvements if none of those projects were youth-oriented. There may be some deviation from the proportion of capital to operating expense identified in the purpose statement, but the money can be used for operations only for improvements made under the levy, and too great a redirection in favor of operations may be viewed as an unlawful diversion of funds.

CONCLUSION

Council cannot use funds from the Parks levy for general City operating needs or for general Park Bureau operations, except to the extent that those operating expenses can be allocated to improvements funded by the levy. The City may discontinue the Parks levy if at least two-thirds of the members of the City Council adopt a resolution finding conditions which dispense with the necessity of further accumulation in or expenditures from the Parks System Improvements Fund. The City Council has discretion to allocate the money from the levy for the authorized purposes, but cannot expend the funds in a manner which would be a radical departure from authorized purposes or which would constitute a fraud on the voters.