



CITY OF PACIFIC GROVE
300 Forest Avenue, Pacific Grove, California 93950

AGENDA REPORT

TO: Honorable Mayor and Members of City Council

FROM: Daniel Gho, Public Works Director
Ben Harvey, City Manager

MEETING DATE: March 18, 2016

SUBJECT: Authorize the City Manager to enter into an agreement to perform a ball trajectory study as it relates to the Use Permit Appeal 16-093 for Golf Course Netting at 77 Asilomar

CEQA STATUS: Categorical Exemption, Section 15303, Class 3

RECOMMENDATION

Authorize the City Manager to enter into an agreement with Tanner Consulting Group to conduct a Golf Ball Trajectory Study and prepare construction drawings as it relates to Use Permit 16-093, installation of Golf Course Netting, at 77 Asilomar

BACKGROUND

On October 16, 2015 the City of Pacific Grove (City) entered into a Stipulation for Entry of Final Judgement (Stipulated Judgement) that required removal of 6 Blue Gum Eucalyptus Trees identified as numbers 916,917,918,919,924,925 (Attachment A – Stipulated Judgment). These trees were located along the fifth hole of Pacific Grove Golf Links at 77 Asilomar Avenue (APN 006-094-099).

Based on several arborist reports prepared for the trees, it was determined that decay within the trees warranted removal. The Stipulated Judgement is an Order of the Superior Court, signed by Judge Wills. The Court Order required the City to remove the six trees; cost of the removal is to be split equally between plaintiffs and the City. The City is also required to promptly install netting on the golf course where the trees were removed. The City will bear all costs of the netting. After netting is installed, the City is required to plant replacement trees of a suitable species, likely Cypress Trees.

As a means to protect persons or property from errant golf balls, the City applied for a Use Permit (Use Permit No. 16-093) to allow installation of protective golf barrier netting, including 7 poles, and planting of 6 trees. This effort also complies with the Court Order and Stipulated Judgement. On March 3, 2016, the Planning Commission held a hearing and approved Use Permit 16-093.

On March 11, 2016, Ms. Pamela Silkwood, an attorney with Horan Lloyd Legal, submitted an appeal of the Planning Commission's approval of the permit (Attachment L – Appellant Letter

and Continuance Request). This appeal was required to be processed in accord with PGMC Chapter 23.74. Paragraph B (1) of PGMC section 23.74.030 requires any appeal to be filed within 10 days of the action being appealed.

UPDATE

At the April 6, 2016 City Council Meeting, the Council heard an appeal of Use Permit 16-093, which would install a net at a height of 35 feet and a length of 320 feet, which was approved by the Planning Commission on March 3, 2016. During the appeal, the City Council directed staff to contact PARSAC, the City's Third Party Liability Pool Administrator, in order to best determine the specifics of the proposed netting, including requisite height. The City Manager and Director of Public Works met with PARSAC in the field on April 25, 2016 and reviewed the site, the tentative height of the netting, the existing netting, the surrounding homes and the layout of the golf course. It was recommended by PARSAC that the City should retain a golf architect and/or golf netting subject matter expert to evaluate the situation and provide the City with a proposed solution.

An update was presented to the City Council at their May 4, 2016 meeting stating that Staff was seeking proposals to evaluate the specifics for the netting at the golf course. Staff has received one proposal to evaluate the proposed netting. Tanner Consulting Group (TCG) has provided the City with a proposal to evaluate and conduct a study for the 5th hole at Pacific Grove Golf Links. TCG has expertise in planning, design, consulting, and safety as relating to golf courses, driving ranges, parks/sports fields and land planning. TCG proposal will provide the City with:

- Creation of site plans in a 3-D format for the 5th hole.
- Golf Ball Trajectory Studies showing projected ball flights as they will relate to the site plans utilizing players level agreed upon for the golf course.
- Preparation of recommended netting/fencing plans that will include: Plan View, Elevations, Isometric Views, and include our Projected Ball Trajectory Chart and Construction Detail Drawings.

The City has actively tried to obtain additional proposals for the evaluation of the netting with little luck. Staff has reached out to Pebble Beach Company, Monterey Pines Golf Course, and CourseCo to try and seek additional contacts for expert analysis. No contacts have been provided by the City's outreach. Additionally to the City seeking alternative proposals, PARSAC also tried to get proposal, but unfortunately was unsuccessful.

It is the recommendation of City Staff to enter into an agreement with Tanner Consulting Group for a cost of \$4,180 to evaluate the technical background needed for the Pacific Grove Golf Links 5th Hole Netting Project.

If it is the direction of the Council to enter into an agreement with TCG, then City Staff will execute all documents and work with TCG to prepare the report. Once the studies are finalized with a recommended netting plan, Staff will then bring back the final report and findings to Council for their decision on the netting.

FISCAL IMPACT:

Funding for this project will be allocated from the General Fund, Buildings and Grounds
Division: 1-503-5201, Contract Services.

ATTACHMENTS:

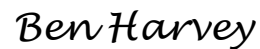
1. Tanner Consulting Group Proposal

RESPECTFULLY SUBMITTED:



Daniel Gho
Public Works Director

REVIEWED BY:



Ben Harvey
City Manager



TANNER CONSULTING GROUP

Consulting Services

603 Stanford Court—Valley Springs, CA 95252

Phone: (209) 772-2233 Fax: (209) 772-2230

April 26, 2016

To: Mr. Daniel Gho,
City of Pacific Grove public Works Director
Pacific Grove Golf Links
Pacific Grove, CA

RE: Proposals for Golfball Trajectory Study at Pacific Grove Golf links Hole #5

Dear Mr. Gho:

Thank you for the opportunity of providing you with our proposal for services. I would like to assure you that Tanner Consulting Group has the extensive experience and excellent technical background needed for the Pacific Grove Golf Links 5th Hole Netting Project. Our expertise covers all aspects of ball containment systems including planning, budgeting, and design. We pride ourselves on being able to offer innovative design and safety solutions.

With TCG, you can expect a well coordinated project from start to finish. Our designs will be done in C.A.D. to provide you with the most accurate plans available. Site information will be compiled using the most current topographic site plan, as well as, any other information you can provide for us. Additionally, all of our work will be done in strict accordance with the Uniform Plumbing Codes, National Electric Codes, Municipal Codes & Ordinances, and State & County Health Codes. Upon completion of your design, our structural engineer can create all necessary structural calculations and stamped plans needed for the permitting process of this project.

I believe this proposal addresses your requirements and provides the planning basis for a successful project. If you have any questions, please don't hesitate in calling me at (209) 772-2233. I look forward to hearing from you soon.

Best Regards,

A handwritten signature in black ink, appearing to read 'Dave Tanner', with a long horizontal line extending to the right.

Dave Tanner
Tanner Consulting Group

PROPOSAL



TANNER CONSULTING GROUP

Consulting Services

March 6, 2016

To: Mr. Daniel Gho,
City of Pacific Grove public Works Director
Pacific Grove Golf Links
Pacific Grove, CA

PACIFIC GROVE GOLF LINKS

PROPOSAL FOR BALL TRAJECTORY STUDY WITH SERVICES TO INCLUDE THE FOLLOWING:

1. TCG will create site plans in a 3-D format for the 5th hole.
2. Golf Ball Trajectory Studies showing projected ball flights as they will relate to the site plans utilizing players level agreed upon for the golf course.
3. We will prepare recommended netting/fencing plans that will include: Plan View, Elevations, Isometric Views, and include our Projected Ball Trajectory Chart and Construction Detail Drawings.

Tanner Consulting Group will utilize a current topographic map or site plan provided by you, or by utilizing satellite imagery

Our fee structure for the above mentioned items is as follows:

- | | |
|---|-------------------|
| a. Base Map Preparation | \$ 950.00 |
| b. Ball Trajectory Study, Netting Plan
and Specifications for the golf course holes. | \$ 2,450.00 |
| c. Printing & Shipping
(no charge to e-mail pdf files). | \$ 260.00 per set |

Additional Services that are requested of TCG will be provided at an hourly rate of \$140.00 per hour. Services that need to be provided by outside engineering firms will be passed through at our cost. Any necessary travel expenses will be billed at our hourly rate.

Date: _____

Signature of Acceptance: _____ Title: _____

Please send a signed copy of this proposal, our new account information sheet, and any site information to: **Tanner Consulting Group—603 Stanford Ct, Valley Springs, CA 95252.**



TANNER CONSULTING GROUP

Consulting Services

PACIFIC GROVE GOLF LINKS

NEW ACCOUNT INFORMATION

Name of Company: _____

Billing Address: _____

Shipping Address: _____

Phone: _____ Fax: _____

Email: _____

Mail Signed Copy of Proposal, New Account Information and any Site Information to:

TANNER CONSULTING GROUP
603 Stanford Court
Valley Springs, CA 95252

E-mail: tannerconsulting@aol.com
Website: www.tannerconsulting.com

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File No. 6910.02

May 12, 2016

By Electronic Mail

(Attention: Wendy Lao)
City Council
City of Pacific Grove
300 Forest Ave.
Pacific Grove, CA 93950

Re: Appeal of Use Permit 16-093

Honorable Mayor and Council:

This letter is specifically to address the City Manager's decision to retain a consultant regarding the height of the netting for the Pacific Grove Golf Links as part of the above referenced project/appeal. To put the City Manager's decision in context, the City Council had directed the City Manager to contact PARSAC to determine if the City's installation of a 14-foot netting in an area comprising 320 linear feet of approximately 20,000 linear feet for the entire Golf Links (or less than 2% of the linear feet) is acceptable to PARSAC. Not discussed during the City Council's deliberation is the Golf Course Lease ("Lease") between the City and Pacific Grove Golf, LLC ("Tenant") and the improvement, indemnification, and insurance obligations of the Tenant. The City has haphazardly acted to increase its liability by taking control of the leased premises. It is not the City's obligation to install netting on the premises that the Tenant has sole possession and control of under the Lease. Rather than assume liability, the City should notify the Tenant of the tree removals, provide the Tenant the Arborist Report and have the Tenant make a determination on whether the netting is required and if required, the Tenant should submit an application for the netting. Simply put, the City should allow the Tenant full control of the leased premises consistent with the Lease. An alternative is to install a 14-foot netting on the Monarch Pines property consistent with the City Council's decision and the settlement agreement, and notify the Tenant that the netting is installed as a precautionary measure and that the Tenant is responsible and liable for the entire 20,000 linear feet of the Golf Links for any injury or damage caused by errant golf balls consistent with the Lease.

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Background

The City entered into a Settlement Agreement with Nancy Dolton, Marion Trentman Morelli and Robert Morelli (collectively, "Plaintiffs"), three residents of Monarch Pines. The Plaintiffs filed suit against the City for nuisance and negligence associated with six Blue Gum Eucalyptus trees, not with errant golf balls from the Golf Links. Subsequently, the City removed six public trees (for a total of 10 trees removed) without following the City's permit procedure for the tree removals. Now, the City is taking the position that the netting is needed to replace the protection the trees had previously provided from errant golf balls. Interestingly, the Plaintiffs did not include in their complaint any nuisance and negligence claims associated with golf balls, nor is there any such complaint in the entire City Planning files for Monarch Pines. Moreover, the Plaintiffs in their pleadings disagreed that the trees provided any protection from errant golf balls by referencing an arborist report prepared by Certified Arborist Joseph Bileci ("Bileci"). Specifically, the Plaintiffs' Complaint states in relevant part as follows:

Bileci further found that the ten (10) Eucalyptus trees served no special value because they were non-native, structurally weak due to topping and root decay caused by over-watering, and *ineffective as a windbreak or barrier to errant golf balls* due to the generally high foliage levels of such trees, and heavily thinned lower foliage. (Emphasis added.)

Yet, the City continues to take the position that netting is required to replace the protection the trees had previously provided. By doing so, the City is no longer shielded from liability under the Lease because the City would be assuming control of the leased premises.

Lease

Under basic landlord-tenant law, the tenant has sole possession and control of the leased premises under a lease. In the absence of an express covenant in the lease, the landlord is not obligated to prepare the nonresidential premises for the tenant's use or keep them in repair except to the extent that they retain control over an area. (See, e.g., *Glenn R. Sewell Sheet Metal, Inc. v. Loverde* (1969) 70 Cal. 2d 666, 669.) Paragraph 9.1 of the Lease places the maintenance, repair and improvement obligation on the Tenant as follows:

Tenant's Responsibility for Maintenance and Repair. City shall not be obligated to perform any repairs, changes or alterations to the Premises or Improvements¹,

¹ Under the Lease, "Improvements" means any and all buildings, structures, fixtures and other improvements constructed, installed or placed on the Premises by or on behalf of Tenant pursuant to this Lease, including, without limitation, any signs, roads, trails, driveways, parking areas, curbs, walks, fences, walls, stairs, poles, plantings and landscaping. Notwithstanding the foregoing or anything to the contrary in this Lease, the term "Improvements" as used in this Lease shall specifically exclude, for all purposes, the restaurant, the restaurant building (except for the

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nor shall City be liable for the cost thereof. Tenant assumes full and sole responsibility for the condition, operation, repair and maintenance and management of the Premises and any permitted Improvements or Alterations, from and after the Commencement Date; provided, however, this obligation shall not include the assumption of any liability or responsibility by Tenant for the presence of any Hazardous Materials or underground tanks or the failure of the Premises to comply with any Environmental Laws, in each case as of the Commencement Date.

Even where there is active negligence or intentional acts of the landlord causing damages, an exculpation clause in a lease may validly disclaim liability. In this Lease, the City is not liable to the Tenant, even for negligent or willful misconduct of the City as follows:

Waiver of Claims. Tenant covenants and agrees that City shall not be responsible for or liable to Tenant for, and, to the fullest extent allowed by law, Tenant hereby waives all rights against City and releases City from, any and all losses, including, but not limited to incidental and consequential damages, relating to any injury, accident or death of any person or loss or damage to any property, in or about the Premises from any cause whatsoever except for (i) a breach of this Lease by City, (ii) the negligence or willful misconduct of City or its employees, Agents or contractors, or (iii) the presence of any Hazardous Materials or underground tanks or the failure of the Premises to comply with any Environmental Laws, in each case in respect of this clause (iii) as of the Commencement Date.

Although every property owner owes a duty to exercise ordinary care in the management of their property to prevent injury to other persons, that duty shifts to the tenant if the owner is not in possession and has no control over the premises. It is the tenant in possession of land who must act reasonably to prevent injury to others and is liable to all persons who may be injured as a result of the failure to act as a reasonable person under the circumstances, whether the injury occurred on or off the premises. The issue here is that the City has intentionally exercised control over a portion of the leased premises to implement the Settlement Agreement and thus, the City is not shielded from liability under the Lease. To shift the liability back to the Tenant, the City should relinquish control of the leased premises, notify the Tenant of the public tree removals, provide the Tenant a copy of the Arborist Report, and have the Tenant make a determination on whether or not to install netting. If the Tenant determines that netting is necessary, then the Tenant should be the applicant of the Use Permit application. Another simple alternative is to install a 14-foot netting on the Monarch Pines property consistent with the City Council's decision and the settlement agreement, and notify the Tenant that the netting is installed as a precautionary measure and that the Tenant is responsible and liable for the entire

restrooms and for the portion of such restaurant building constituting the cart barn which is located beneath the restaurant and which portions shall be deemed Improvements as that term is used herein1), food and beverage facilities, and related equipment, improvements and appurtenances.

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20,000 linear feet of the Golf Links for any injury or damage caused by errant golf balls consistent with the Lease. By acting as proscribed, the City is likely to be shielded from liability under the Lease.

If the City relinquishes control of this portion of the leased premises, the City would be have two levels of protection: (1) the golfer who hits the golf ball that causes damage or injury is first liable; and (2) the Tenant is liable and is sufficiently insured for such liability as required under the Lease. The insurance provision of the Lease requires, in part, the following:

(c) Comprehensive or commercial general liability insurance with limits not less than Five Million Dollars (\$5,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including Contractual Liability, Broad form Property Damage, Independent Contractors, Liquor Liability, Personal Injury, Products and Completed Operations. Effective April 1, 2024, insurance coverage under this provision shall increase to an amount not less than Ten Million Dollars (\$10,000,000) each occurrence.

(d) Comprehensive Builder's Risk insurance, on an all-risk form, excluding earthquake and flood, for 100% of the completed value of any Improvements, Alterations or other new construction, including materials in transit and storage off-site, in the event that such construction is beyond the scope of coverage in the property policy for remodeling or renovation. Such policy shall include as named insureds Tenant, City, any contractor in connection with such construction and subcontractors of all tiers, with any deductible not to exceed \$10,000 each occurrence.

Additionally, the Lease includes indemnify and waiver of subrogation provisions, further protecting the City.

17.2 Tenant's Indemnity. Tenant shall indemnify, defend with counsel approved by City, and hold harmless City, its officers, officials, employees and volunteers from and against all liability, loss, damage, expense, cost (including without limitation reasonable attorneys fees, expert fees and all other costs and fees of litigation) of every nature arising out of or in connection with Tenant's performance of work hereunder or its failure to comply with any of its obligations contained herein, and including, without limitation, any and all claims for injuries or damages to persons and/or property incurred in connection with or arising directly or indirectly, whole or in part, out of (a) the use of the Premises; (b) a condition of the Premises arising after the Commencement Date; (c) any construction or other work undertaken by Tenant; (d) any acts, omissions or negligence of Tenant, its Agents or Invitees; (e) any accident, injury to or death of a person, including Agents and Invitees of Tenant, except for the Exceptions described in Article 17.1 above. Should conflict of interest principles preclude a single lawyer from representing both City and Tenant, or should City otherwise

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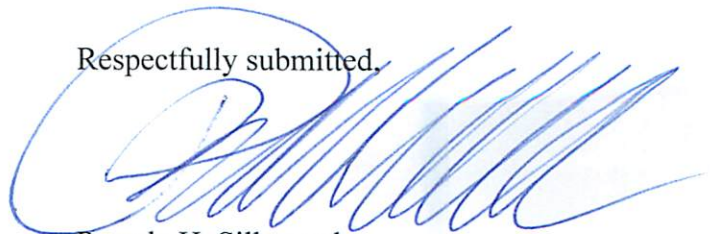
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find Tenant's legal counsel unacceptable, then Tenant shall reimburse the City its costs of defense, including without limitation reasonable attorneys fees, expert fees and all other costs and fees of litigation. The Tenant shall promptly pay any final judgment rendered against the City (and its officers, officials, employees and volunteers) covered by this indemnity obligation. It is expressly understood and agreed that the foregoing provisions are intended to be as broad and inclusive as is permitted by the law of the State of California and will survive termination of this Lease.

18.9 Waiver of Subrogation. Notwithstanding anything to the contrary contained herein, to the extent permitted by their respective policies of insurance, City and Tenant each hereby waive any right of recovery against the other party and against any other party maintaining a policy of insurance covering the Premises or other City property and their contents, or any portion thereof, for any loss or damage maintained by such other party with respect to the Premises, other City property or any portion thereof or the contents of the same or any operation therein, whether or not such loss is caused by the fault or negligence of such other party. If any policy of insurance relating to the Premises or other City property carried by Tenant does not permit the foregoing waiver or if the coverage under any such policy would be invalidated due to such waiver, Tenant shall obtain, if possible, from the insurer under such policy a waiver of all rights of subrogation the insurer might have against City or any other party maintaining a policy of insurance covering the same loss, in connection with any claim, loss or damage covered by such policy.

Based on the foregoing, the City is assuming liability it had shielded itself from under the Lease by taking control of an area of the leased premises that was under sole possession and control of the Tenant. Rather than assume that liability, the City should relinquish control, notify the Tenant of the tree removals, provide the Tenant the Arborist Report and have the Tenant make a determination on whether or not netting is required in that area comprising 320 linear feet of approximately 20,000 linear feet for the entire Golf Links (or less than 2% of the linear feet). Again, a simpler alternative is to install a 14-foot netting on the Monarch Pines property consistent with the City Council's decision and the settlement agreement, and notify the Tenant that the netting is installed as a precautionary measure and that the Tenant is responsible and liable for the entire 20,000 linear feet of the Golf Links for any injury or damage caused by errant golf balls consistent with the Lease.

Respectfully submitted,



Pamela H. Silkwood

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Cc: David Laredo
City Manager
Wendy Lao
Mark Brodeur