

**CITY OF BIRMINGHAM
BOARD OF ETHICS
ADVISORY OPINION 2005-01**

DECISION

May 6,2005

I. INTRODUCTION

The Birmingham City Commission requested that the City of Birmingham Board of Ethics issue "an advisory opinion regarding the matter of complimentary golf for elected and appointed board members." That matter arose during the commission's recent review of the use of the city's golf courses, the associated fee structure, ways to encourage increased play on the courses, the need for certain capital improvements, and related issues, including consideration of various recommendations from the City of Birmingham Parks and Recreation Board. As a result of its work, the commission adopted Resolution 03-91-05, which authorizes complimentary golf during non-peak hours at the city's municipal golf courses for current city commissioners and one guest and for current members of the parks and recreation board. Resolution 03-91-05 represents a tightening of long-standing practice in the city. Cognizant, however, of the ethical implications of Resolution 03-91-05, the commission has requested an opinion from the board of ethics on the matter quoted above. We interpret this to be a request to determine whether the resolution comports with the ethics ordinance.

II. ISSUE PRESENTED

Does Resolution 03-91-05, adopted by the Birmingham City Commission on March 21,2005, comport with city's ethics ordinance where that resolution authorizes complimentary golf during non-peak hours at the city's municipal golf courses for current city commissioners and one guest and for current members of the city's parks and recreation board, but where the resolution otherwise provides no requirement, or safeguards to ensure, that the complimentary play is for the benefit of the city?

III. OPINION

No. Resolution 03-91-05 does not comport with the ethics ordinance. Resolution 03-91-05 provides for complimentary golf for current members of the city commission, plus one guest free per round, and current members of the parks and recreation board, with complimentary play limited to off-peak hours as defined by the golf course manager. Anyone playing complimentary golf who wishes to use an electric golf cart must pay for that cart. But because the resolution does not require, or establish adequate safeguards to ensure, that the complimentary golf be played for the benefit of the City of Birmingham

rather than for the personal benefit of the commissioners or board members themselves, it violates the ethics ordinance. Resolution 03-91-05 thus amounts to a special consideration, privilege, exemption, advantage or preferential treatment beyond that which is available to every other citizen. It deviates from the ethics ordinance's strict provision that city officials and employees not use city property for personal gain or benefit. It might result in or create the appearance of giving or accepting preferential treatment or might have an adverse effect on the confidence of the public or the integrity of the city government. And, to the extent that the complimentary golf is compensation to the commissioners or board members for their service to the city, it is barred by the city charter. As will be discussed below, although valid ways exist for the city to allow for complimentary or reimbursed golf for commissioners or board members who play for city purposes, Resolution 03-91-05 does not provide the necessary requirements and oversight protection to bring it within the mandate of the ethics ordinance.

IV. PROCEEDINGS IN THE BOARD OF ETHICS

On April 18, 2005, the board of ethics held a hearing to respond to the city commission's March 21, 2005, request for "an advisory opinion from the board of ethics regarding the matter of complimentary golf for elected and appointed board members." Appearing before the board of ethics were Mr. Robert J. Fox, the city's assistant director of public services, and Mr. Bill Shaw, superintendent of golf courses, both of whom gave information about the policies, procedures and history surrounding play at the golf courses. Also attending were Ms. Nancy Weiss, the city clerk, who gave information about certain city procedures, and Mr. Michael P. Salhaney, counsel from the law firm that serves as the city attorney, who opined about the relative legal force of the city charter, the ethics ordinance, and resolutions of the city commission.

V. ANALYSIS

The residents of the City of Birmingham enjoy two fine municipal golf courses, Lincoln Hills and Springdale. To play golf on these courses, residents must purchase an annual leisure activity pass from the city and pay the requisite greens fees for each round. For an extra charge, players may rent a golf cart. Businesses and certain non-residents of the city may also purchase a leisure activity pass, which may be used for golf upon payment of the greens fees. The fee structure sets different rates for leisure activity passes and for greens fees, depending on whether the golfer is a resident, a youth or senior citizen, a high school team player or coach, a business, a non-resident, or a guest playing with a leisure activity pass holder.

As noted above, Resolution 03-91-05 provides, among other things, for complimentary golf for current city commissioners, plus one guest free per round, and for complimentary golf for current members of the parks and recreation board. It limits complimentary play to off-peak hours as defined by the golf course manager, and it forbids free use of electric golf carts. Resolution 03-91-05 (March 21, 2005).

Resolution 03-91-05 is a continuation, but also a tightening, of long-standing policy and practice. Since at least 1968, when the city adopted Resolution 736-68, commissioners have been permitted to obtain an identification card without payment of the customary fee for the leisure activity pass. The city issued those cards to extend to each commissioner "the privilege and responsibility for use and review of the City of Birmingham recreational facilities." Resolution 736-68 (April 29, 1968). The record is clear that the commission understood that the identification card would allow for complimentary play on the municipal courses for the commissioners and for an unlimited number of their guests. *Id.* (Resolution 03-91-05 changed this to limit a commissioner to one free guest per round. Board members may not bring a guest for free.)'

Although these resolutions theoretically permit an unlimited amount of complimentary golf, evidence presented to the board of ethics suggests that the commissioners and board members have been respectful of the complimentary golf program. They have tended to make requests for tee times in advance. When coming to the course as walk-ons, they have not cut in line and instead have tended either to leave and return at a less busy time or wait for their turn in the starter's schedule. Many have not been playing on weekends, when demand by the public is highest. Only twice since 1968 has the course manager felt that a commissioner or board member went overboard in bringing too many guests at one time; in each of those instances, the matter was reported to the city manager and was handled administratively. Of the roughly 60,000 rounds of golf played at the two courses combined in 2004, about 140 were complimentary rounds played by commissioners and their guests, and about 80 were complimentary rounds played by board members. According to the golf superintendent, many of those complimentary rounds were partial rounds. Thus, it would be hard to conclude that the commissioners or board members have been anything other than responsible in their play of complimentary golf.

Resolution 03-91-05, as did Resolution 736-68, provides a rationale for the complimentary golf program and amounts to a legislative finding that, as a matter of city policy, it is important for members of the commission to be familiar with the city's recreational facilities and programs and to encounter the public at those facilities. At least one city commissioner in 1968 believed that use of the identification card by members of the commission "entails a responsibility to visit all recreational facilities including golf courses, skating rinks, and other programs," and in fact would "impose such a responsibility." *See* Resolution 741-68 (April 29, 1968). In adopting Resolution 03-91-05, the city has reaffirmed that public policy. Indeed, recent comments to the commission by Mr. Bill Wiebrecht, a member of the parks and recreation board, indicate that the rationale for complimentary golf for commissioners and board members is "to

¹ As an aside, the board of ethics notes that, although Resolution 736-68 has authorized complimentary golf for city commissioners and their guests since April 1968, the record reveals no authorization for complimentary golf for members of the parks and recreation board, at least until the commission adopted Resolution 03-91-05 on March 21, 2005. Research by the city clerk and the city attorney has failed to produce any previous resolution or ordinance authorizing complimentary play by members of the board.

encourage them to utilize the courses and be visible." *See* Resolution 03-76-05 (March 7, 2005).

It is entirely reasonable for the city to want those persons charged with the responsibility for its golf courses – including members of the city commission and the parks and recreation board – to know and understand the courses and their use, including getting first-hand knowledge through occasional play. Indeed, the superintendent of the golf courses told the board of ethics that he receives helpful comments and criticism about the courses from commissioners and board members, some of whom also encounter members of the public while playing there. Similarly, it is sound public policy that the municipal golf courses be used by city leaders to showcase those courses and to promote the interests of the city, whether with special visitors, prospective employers, dignitaries, area politicians, through the sale of additional leisure activity passes, and the like. There is nothing wrong with complimentary, or reimbursed, golf played by commissioners or board members -- so long as that play is for the benefit of the city.

But the problem with the practice under Resolution 736-68 and now under Resolution 03-91-05 is that neither resolution requires, or specifies procedures to ensure, that the complimentary golf by commissioners or board members be played for official city purposes. Thus, in referring the instant question to the board of ethics, the city commission has rightly questioned whether this long-standing practice is permissible. In response, the board of ethics considered the effect of the city charter and the ethics ordinance on Resolution 03-91-05. We conclude that the city charter prohibits complimentary golf insofar as that golf is compensation to commissioners or board members. We also conclude that the ethics ordinance prohibits complimentary golf because Resolution 03-91-05 does not restrict that complimentary golf to city business purposes and does not provide a mechanism to determine whether the golf was played for city benefit or for personal benefit.

The Birmingham City Charter limits the compensation that each commissioner may receive. "The members of the commission shall each receive the sum of five dollars (\$5.00) for each commission meeting attended. Members of the commission *shall receive no further compensation* from the city." Birmingham City Charter, Chpt. III, § 19 (Amendment of November 5, 1991) (emphasis added). The charter authorizes the commission to "fix the salary or compensation of its direct appointees." *Id.* By ordinance, the commission specified that "[a]ll members of the parks and recreation board, except ex-officio members, *shall sewe without compensation.*" Birmingham City Code, § 78-29 (1963). Accordingly, the board of ethics finds that, to the extent that the complimentary golf accorded to commissioners or board members amounts to, or is designed to be, compensation for their service to the city, it is barred by the city charter.

The ethics ordinance, which takes legal precedence over Resolution 03-91-05, compels the further determination that commissioners or board members may not play complimentary golf for personal benefit. The general conflict of interest portion of the ordinance provides as follows:

III. Every official or employee of the City of Birmingham shall use personnel resources, property and funds under his or her official care and control solely in accordance with prescribed constitutional, statutory and regulatory procedures and *not for personal gain or benefit*.

VIII. No official or employee of the City of Birmingham shall use, or attempt to use, his or her official position to secure, request or grant unreasonably any *special consideration, privilege, exemption, advantage, contract or preferential treatment* for himself, herself, or others, beyond that which is available to every other citizen.

Birmingham City Code, § 2-324(A)(III), (VIII) (emphasis added). Another part of the ethics ordinance expresses policy reasons underlying these provisions:

It is the intention of Section 2-324 below that City officials and employees avoid any action, whether or not specifically prohibited by Section 2-324, which might result in, or create the appearance of:

I. Using public employment or office for private gain;

II. Giving or accepting preferential treatment, including the use of City property or information, to or from any organization or person;

....

V. Affecting adversely the confidence of the public or the integrity of the City government.

Id., § 2-323. Even more fundamentally, the city has declared through the ethics ordinance "that all City officials and employees must avoid conflicts between their private interests and the public interest. Public officials and employees must . . . [n]ot use public office for personal gain." *Id.* § 2-320.²

A commissioner or board member who plays golf free for personal benefit would be using city property under his or her official control for personal gain or benefit, in violation of section 2-324(A)(III), and would be using his or her official position to secure unreasonably a special consideration, privilege, exemption, advantage, or preferential treatment for himself or herself, beyond that which is available to every other

² There is no question that the ethics ordinance applies both to the city commissioners and the board members. It defines "city official or employee" as follows: "a person elected, appointed or otherwise serving in any capacity with the City of Birmingham in any position established by the city charter or by city ordinance which involves the exercise of a public power, trust or duty. The term includes all officials and employees of the city, whether or not they receive compensation, including consultants and persons who serve on advisory boards and commissions." *Id.* § 2-322

citizen, in violation of section 2-324(A)(VIII). As importantly, because Resolution 03-91-05 authorizes complimentary golf but does not limit that golf to city purposes, it is susceptible to result in, or at least create the appearance of, the use of the golf courses for personal gain, preferential treatment for commissioners and board members, and to have an adverse effect on the confidence of the public or the integrity of the city government. Therefore, the board of ethics holds that Resolution 03-91-05 as it now stands does not validly confer complimentary golf upon the commissioners and board members.

To summarize so far, the Birmingham City Charter bars complimentary golf to the extent that it is compensation to the commissioners or board members for official services rendered. The ethics ordinance bars complimentary golf to the extent that it is for their personal benefit. Therefore, Resolution 03-91-05 is ineffective insofar as it allows for complimentary golf for commissioners and board members because it lacks the requirement, and adequate protection, that the complimentary golf be played for city purposes.

Although these holdings answer the specific question referred by the city commission, the board of ethics suggests that the city could consistent with the ethics ordinance provide for complimentary golf, or reimbursed golf, through a resolution tailored to require, and ensure, that the complimentary golf is being played for city purposes.³ Commissioners and volunteer members of the city's many boards perform important duties that benefit the city. Often they incur no out-of-pocket expense in performing their duties, but sometimes they incur expenses that are reimbursable. For instance, commissioners who are approved to participate in a conference are reimbursed, according to regular city procedures, for the expenses incurred in attending the conference. Reimbursement is allowed because the expense must be incurred in order to participate in the activity, and the activity has been determined to be in the interests of the city – the commissioner is attending on city business. Similarly, to play golf at the municipal courses requires the payment of fees, and the city commission has determined that play by commissioners and board members is in the interests of the city – they would be playing golf on city business. There is no ethical reason why the city could not reimburse commissioners or board members for those fees if the golf is played for purposes of city business, whether it be overseeing or evaluating the golf courses, meeting the public, showcasing the courses to others, trying to increase the number of leisure activity pass holders, trying to bring new business opportunities to the city, or any other city business.


Another problem with the current system is that, although we have found no abuse in the complimentary play of golf, there is a potential for abuse, whether actual or perceived, because the system leaves the commissioners and board members unaccountable. They are left to themselves to determine if the golf they play benefits the city. The golf courses have not in the past kept detailed records about complimentary

³ The board of ethics offers this discussion in the interest of fulfilling the mandate of the ethics ordinance that “[t]o enhance the public trust, the City of Birmingham must provide its officials and employees with adequate guidelines for separating their roles as private citizens from their roles as public servants.” *Id.* § 2-320.

play. Indeed, the board of ethics finds that many city residents are unaware that complimentary golf is available to commissioners and board members. Furthermore, the expense to the city associated with complimentary play, although perhaps not substantial, nevertheless amounts to an expense that is not taken into account as part of the city's regular budgetary process. It is a hidden and uncontrolled cost of government that, in these times when transparency in government is needed, should be planned for and incurred in plain view.

To fulfill the policy of encouraging members of the city commission and the parks and recreation board to use the golf courses in a way that ensures that the golf is played for city purposes but fairly reimburses them for the associated cost, the city might consider appropriating a budget for a specified amount of dollars, or simply authorize a specified number of complimentary rounds. It might authorize commissioners and board members to seek reimbursement of their greens fees upon their certification that the golf was played on city business rather than for private purpose. Surely the city's capable administrative professionals can devise ways beyond these to ensure that the complimentary golf program meets the requirements of the charter and the ethics ordinance. The process need not be burdensome or cumbersome. But it should be reasonably calculated to ensure that whatever complimentary golf is allowed to commissioners and board members is played for city benefit and not for personal benefit.


The board of ethics hopes that this opinion provides useful guidance to the commission in its further consideration of the issue of complimentary golf at the municipal golf courses.



John J. Schrot, Jr., Chairperson



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