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Agenda Item: ID17-389 (10:15 A.M.#1)

Date: 3/23/17

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CITY CLERK, FRESNO CA

## FRESNO CITY COUNCIL



### Supplemental Information Packet

Agenda Related Item(s) – ID17-389 (10:15 A.M.#1)

Contents of Supplement: Letter from McCormick Barstow LLP, Attorneys at Law  
Item(s)

Actions pertaining to proposed water capacity fees (Citywide):

1. CONTINUED HEARING regarding the proposed Water Capacity Fees.
2. BILL - (For introduction) - Amending Article 5 of Chapter 6 of the Fresno Municipal Code and Article 4.5 of Chapter 12 to repeal various fees associated with providing water capacity for new and expanded connections to the water system and create a new Water Capacity Fee classification, and to adopt Water Capacity Fees as proposed by and justified in the nexus study prepared by Bartle Wells Associates.
3. \*\*\*RESOLUTION - 530th amendment to the Master Fee Resolution No. 80-420 adopting Water Capacity Fees under the Public Utilities Section.

#### Supplemental Information:

Any agenda related public documents received and distributed to a majority of the City Council after the Agenda Packet is printed are included in Supplemental Packets. Supplemental Packets are produced as needed. The Supplemental Packet is available for public inspection in the City Clerk's Office, 2600 Fresno Street, during normal business hours (main location pursuant to the Brown Act, G.C. 54957.5(2)). In addition, Supplemental Packets are available for public review at the City Council meeting in the City Council Chambers, 2600 Fresno Street. Supplemental Packets are also available on-line on the City Clerk's website.

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March 20, 2017

2017 MAR 21 AM 10 01

Yvonne Spence, CMC  
City Clerk  
City of Fresno  
Fresno City Hall  
2600 Fresno Street  
Fresno, CA

CITY CLERK, FRESNO CA

Re: Proposed Adoption of Citywide Water Capacity Fee  
Agenda Item 10:15 A.M. #1, March 23, 2017 (ID17-0013)

Dear Ms. Spence:

This firm represents the BIA of Fresno/Madera Counties, Inc. We submit this letter on behalf of our client and on behalf of several of its members who own property, or interests in property, in the City of Fresno or its sphere of influence. We write as a follow-up to the letter by Jeffrey M. Reid of this firm dated March 6, 2017, which is part of the public record on the above-referenced Agenda Item ("Proposed Water Capacity Fees") We request that the letter of Thomas C. Esqueda, Director, City of Fresno, Department of Public Records, responding to Mr. Reid's letter be included in record of consideration of the Proposed Water Capacity Fees. I have attached a copy of Mr. Esqueda's letter for your use.

Thank you in advance for your assistance. Please contact me at any time if you have any questions or concerns.

Very truly yours,

Todd Wynkoop  
McCormick Barstow LLP

TW:TAW  
Attachment

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**Department of Public Utilities**

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Administration Division  
2600 Fresno Street, Room 4019  
Fresno, California 93721  
559-621-8600  
www.fresno.gov

March 15, 2017

Mr. Jeffrey M. Reid, Partner  
McCormick Barstow LLP  
7647 North Fresno Street  
Fresno, CA 93720

**Subject:** Response to Letter of March 6<sup>th</sup> Regarding Water Capacity Fee

Dear Mr. Reid:

Thank you for your letter of March 6, 2017, presenting comments regarding the proposed ordinance language and resolution language for the proposed Water Capacity Fee. I sincerely apologize for the delay in responding. The purpose of this letter is to provide responses to the comments presented in your letter. Our response is structured to respond to your comments in the numerical order in which they were presented.

1. **The Proposed Municipal Code Revisions Will Illegitimately Deny Reimbursement Rights and Fee Credits Where Water Facilities Are Mandated.**
  - a. **Proposed Municipal Code Section 6-513(e)(l)(a) Adopts Unfettered Authorities to Deny Fee Credits and Reimbursements for Mandated Water Facility Installations.**
  - b. **Municipal Code Section 6-513(e)(l)(b) Denies Fee Credits And Reimbursements If Development Is Alleged To Violate Undefined Standards Of "Orderly Development".**
  - c. **Recommended Edits to Proposed Municipal Code Section 6-513(e) Will Address The Legal And Policy Issues Discussed A bove.**

We respectfully disagree with your interpretation of FMC Sections 6-513(e)(l)(a) and (b).

Nowhere in Sections 6-513(e)(l)(a) and (b) does the proposed FMC language indicate that the City will deny reimbursements to developers for constructing water supply facilities as a condition precedent to approval of development. Rather, FMC Sections 6-513(e)(l)(a) and (b) are specifically related to defining the parties responsible for constructing water supply facilities. Specifically, FMC Section 6-513 states:



*A Nationally Accredited Public Utility Agency*

*"The City shall be responsible for constructing water supply facilities in a manner which will supply water to all properties developed in an orderly sequence as defined in the City's then-current General Plan."*

Further

*(1) The Council may require, as a condition precedent to approval of development, a developer to construct water supply facilities in accordance with City standards, if the City Manager or his or her designee determines one or more of the following conditions exist:*

*a. The water demands for the development can be served with a dedicated water supply facility that only serves that development;*

*b. The proposed development is not consistent with the orderly sequence of development as defined in the City's then-current General Plan;*

Again, nowhere in FMC Section 6-513 (e)(1)(a) and (b) is it stated or suggested that the City will deny reimbursements to developers that construct water supply facilities as a condition precedent to approval of development. In fact, the Ordinance is clear that the City will continue to reimburse all developers that are required to construct water supply facilities as a condition precedent to approval of development. The Ordinance also provides that the City will allocate 50 percent of the Water Capacity Fee revenues to reimburse developers who were required to construct water facilities as a condition precedent to development, and that the City will continue to honor valid reimbursement agreements issued under the current Urban Growth Management ("UGM") Regulations.

However, to provide better clarity on reimbursement eligibility for the building community, the City will move 6-513(e)(2)(c) out to 6-513(e)(3).

## **2. The Proposed Revisions To The Fresno Municipal Code Include Unnecessary And Punitive Limitations On The Reimbursement Rights That It Does Acknowledge.**

The City is not prohibited from placing reasonable limitations on the right to receive reimbursement for construction of water supply facilities. Moreover, as a practical matter, developers will be reimbursed much faster under the proposed city-wide Water Capacity Fee than they typically were under the UGM Regulations because the City will use revenues from fees paid across the City, rather than only in the corresponding UGM area, to satisfy developer reimbursement agreements. However, in an effort to address your concerns, City staff is removing the reference to the 10 year expiration period for reimbursement agreements from the proposed FMC provisions.

**3. The Agenda Materials Do Not Confirm The City's Intended Treatment of Existing Vested Maps.**

It is a fact of California law that the City cannot apply the proposed Water Capacity Fees to existing, unexpired approved tentative and vesting tentative maps. Therefore, it was not deemed necessary to add language to the FMC stipulating what is already required by law, particularly because Section 2(H) of the Ordinance states that the "Water Capacity Fees will be applied to projects approved under the Subdivision Map Act (Government Code sections 66410 et seq.) in accordance with the provisions of that Act.

City staff estimates that there are approximately 100 approved tentative maps currently on file with the City, representing approximately 10,000 lots (~25,000 persons). As long as these approved tentative maps remain unexpired and development is pursued in substantial compliance with the terms and conditions of the approved map, they will not be subject to the proposed Water Capacity Fee.

**4. The Bartle Wells Associates Nexus Study Presented To Support The Water Capacity Fee Program Includes Unnecessary Advocacy For Fee Levels That The Council Should Expressly Disclaim.**

We respectfully disagree with your characterization of the Bartle Wells Water Capacity Fee Study. The objective of the City's Water Capacity Fee Study is to establish a proposed fee schedule based on a nexus between the water demands associated with new or expanded connections to the water system and the costs to provide water system infrastructure to serve the water demands associated with new and expanded connections to the water system. The Government Code specifically prohibits local agencies from imposing fees for water capacity services that exceed the estimated reasonable cost of public facilities in existence at the time a charge is imposed, and requires that water capacity fee charges for new public facilities to be acquired or constructed in the future be of proportional benefit to new or expanded water connections (Gov. Code § 66013.). However, the Code does not detail any specific method for calculating capacity fees and provides agencies with sufficient flexibility to tailor such fees to best reflect the interests and needs of the local community.

The Bartle Wells Study initially implemented a widely-used methodology to calculate the maximum allowable water capacity fees, which included a proportionate share of costs for a) existing and future groundwater and distribution system assets benefiting new or expanded connections, and b) the next 30 mgd expansion of the City's surface water treatment and regional transmission main facilities needed for new or expanded connections. After consultation with the local building industry, including seven (7), two to three hour meetings, City staff directed Bartle Wells to develop a reduced water capacity fee that would address

Mr. Jeff Reid, Partner, McCormick and Barstow, LLP  
Response to March 6<sup>th</sup> Letter Regarding Water Capacity Fee

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developers' objections to the buy-in component for existing groundwater facilities. The reduced fee approach limits the buy-in component to the proportionate share of outstanding, future debt service for existing groundwater facilities that provide benefit to new or expanded connections. While both fee approaches are legally defensible, per direction from City staff, the Bartle Wells Fee Study only provides the per Meter fee calculation for the reduced water capacity fees.

City staff recommends Council adopt the reduced water capacity fee, as this level of fee will ensure water supply availability, reliability and drought resiliency for new and expanded connections to the City water system. Additionally, after conducting seven (7) meetings with building industry representatives, City staff believes that the reduced fee best reflects the values, interests, and needs of the community for future water supply development.

### **Closing Comments**

Once again, thank you for your letter of March 6, 2017, and we greatly appreciate your participation and input provided during January and February 2017 to allow for a more complete and comprehensive discussion regarding the purpose, need, and methodology for Proposed Water Capacity Fee. Again, I do apologize for the delay in responding. For reference purposes, I have attached a document that identifies the changes made to the proposed Municipal Code.

If you have any additional questions, or require additional information, please do not hesitate to contact me at your earliest convenience. We look forward to receiving your support for the Water Capacity Fee on March 23, 2017 at the scheduled Public Hearing.

Sincerely,

  
Thomas C. Esqueda, Director  
City of Fresno, Department of Public Utilities

cc: Honorable Mayor Lee Brand  
Bruce Rudd, City Manager  
Douglas Sloan, City Attorney

Changes to EXHIBIT A from the version published March 3, 2017:

All changes refer to proposed revised language to be added to the Code.

**1. Section 6-513(e)(2)(c) shall instead be added as Section 6-513(e)(3).**

**2. Section 6-513(f)(3)(b) shall be added as follows:**

b. A valid reimbursement agreement.

Instead of the following published on March 3, 2017:

b. A valid and non-expired reimbursement agreement.

**3. Section 6-513(f)(5) shall be added as follows:**

(5) If the project accounting is not timely filed as required above, the City will not enter into a reimbursement agreement or make any reimbursement payments to the person that constructed the water facilities.

Instead of the following published on March 3, 2017:

(5) Reimbursement agreements shall expire and reimbursement payments shall not be made after 10 years from the date the water supply facility was accepted by the City. Additionally, if the project accounting is not timely filed as required above, the City will not enter into a reimbursement agreement or make any reimbursement payments to the person that constructed the water facilities.

**4. Section 6-513(g)(2) shall be added as follows:**

(2) When there are no valid reimbursement agreements relating to a UGM water-related fee account and no pending projects in a UGM area that could potentially qualify for reimbursement under the UGM Regulations, any funds remaining in the existing UGM water-related fee accounts shall be

deposited into the Water Capacity Fund, and the City may use those funds in accordance with the priorities described in 6-513(d).

Instead of the following published on March 3, 2017:

(2) When there are no valid, non-expired reimbursement agreements relating to a UGM water-related fee account and no pending projects in a UGM area that could potentially qualify for reimbursement under the UGM Regulations, any funds remaining in the existing UGM water-related fee accounts shall be deposited into the Water Capacity Fund, and the City may use those funds in accordance with the priorities described in 6-513(d).

**5. The first sentence of Section 6-513(g)(3) shall be added as follows:**

3) Notwithstanding any other provision of this section, in order to honor valid reimbursement agreements issued under the UGM Regulations, the City shall make available revenue from the Water Capacity Fee Fund to the UGM water-related fee accounts for reimbursements pursuant to the UGM Regulations.

Instead of the following published on March 3, 2017:

3) Notwithstanding any other provision of this section, in order to honor valid, non-expired reimbursement agreements issued under the UGM Regulations, the City shall make available revenue from the Water Capacity Fee Fund to the UGM water-related fee accounts for reimbursements pursuant to the UGM Regulations.