

Agenda Item: ID17-458 (11:00 A.M.#2)

Date: 4/6/17

FRESNO CITY COUNCIL



Supplemental Information Packet

Agenda Related Item(s) – ID17-458 (11:00 A.M.#2.)

Contents of Supplement: Letter from Jeffrey Reid, McCormick Barstow **LLP**
Item(s)

RECEIVED
2017 APR 3 PM 4 47
CITY CLERK, FRESNO CA

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.

Americans with Disabilities Act (ADA):

The meeting room is accessible to the physically disabled, and the services of a translator can be made available. Requests for additional accommodations for the disabled, sign language interpreters, assistive listening devices, or translators should be made one week prior to the meeting. Please call City Clerk's Office at 621-7650. Please keep the doorways, aisles and wheelchair seating areas open and accessible. If you need assistance with seating because of a disability, please see Security.



**McCORMICK
BARSTOW LLP**
ATTORNEYS AT LAW

Jeffrey M. Reid
Partner
(Admitted in California, Virginia
and District of Columbia)
(559) 433-2310
jeff.reid@mccormickbarstow.com

FRESNO, CA OFFICE
7647 North Fresno Street
Fresno, CA 93720
P.O. Box 28912
Fresno, CA 93729-8912
Telephone (559) 433-1300
Fax (559) 433-2300

Other offices of
McCORMICK, BARSTOW, SHEPPARD
WAYTE AND CARRUTH, LLP

www.mccormickbarstow.com

CINCINNATI, OH OFFICE
Scripps Center, Suite 1050
312 Walnut Street
Cincinnati, Ohio 45202
Telephone (513) 762-7520
Fax (513) 762-7521

DENVER, CO OFFICE
999 18th Street, Suite 3000
Denver, Colorado 80202
Telephone (720) 282-6126
Fax (720) 282-8127

LAS VEGAS, NV OFFICE
8337 West Sunset Road, Suite 350
Las Vegas, Nevada 89113
Telephone (702) 949-1100
Fax (702) 949-1101

MODESTO, CA OFFICE
1125 I Street, Suite 1
Modesto, California 95354
Telephone (209) 524-1100
Fax (209) 524-1188

April 3, 2017

City Council President Clinton J. Olivier
City Council Vice President Esmeralda Z. Soria
Councilmember Steve Brandau
Councilmember Oliver L. Baines, III
Councilmember Paul Caprioglio
Councilmember Louis Chavez
Councilmember Garry Bredefeld
City Clerk Yvonne Spence, CMC

Fresno City Hall
2600 Fresno Street
Fresno, California 93721

**Re: Proposed Adoption of Citywide Water Capacity Fee
Agenda Item 11:00 A.M. #2, April 6, 2017 (ID17-458)**

Dear Councilmembers:

This letter supplements the letter I submitted on March 6, 2017 concerning the above referenced Agenda Item. Please include this further correspondence in the Record of Proceedings concerning the matter.

Subsequent to my letter dated March 6, 2017, the staff responded with revisions to the proposed Municipal Code to address our concerns about reimbursement rights and fee credits. We also received written correspondence on behalf of the City confirming its intended treatment of vested rights. We appreciate that the City staff has addressed those matters.

There are still two items that remain of concern, which relate to the Nexus Study and the compliance with CEQA. We also want to provide clarification about a new policy issue that arose during the prior Council deliberations.

1. Nexus Study.

We previously asked that your Council disclaim reliance on a portion of the Nexus Study that includes analysis and approaches that violate applicable legal standards. Our concern specifically pertains to the Nexus Study analysis that attempts to justify a "Buy-In" component to the fee based on an artificially escalated "current value" of existing water infrastructure.

Our legitimate complaints about that analysis and approach led your staff to revise its recommended fee. There is therefore no need for your Council to endorse that illegitimate analysis. Unfortunately, however, the Nexus Study and adopting ordinance presented to you continues to maintain reliance on such illegitimate

analysis. We believe a simple disclaimer of that unnecessary analysis can address the matter and avoid any legal controversy concerning the issue.

To summarize the dispute, your staff has confirmed that any fee must not exceed the estimated reasonable cost of providing the service. We agree. However, that standard is not satisfied by a Nexus Study that attempts to justify a fee based on an artificially escalated "current value" of existing water infrastructure. That inflated valuation of existing water infrastructure does not relate to any actually anticipated "cost" of providing the service. These inflated values are not a cost that was previously incurred, or a cost that will, in the future, be later incurred. It therefore does not satisfy the standard that your staff advises must be met.

We do not wish to create further delay or additional consultant fees related to the need to provide corrections to the objectionable portions of the Nexus study. We simply ask that you incorporate statements into the adopting ordinance that disavows reliance on the elements of the "Buy In" charge that is based on the artificially inflated values of existing water system improvements. A further copy of the recommended edit to the adopting ordinance is attached. I wish to emphasize that your adoption of our recommendation will not affect the amount of the fee that your staff is presently recommending.

2. CEQA Compliance.

The City's shifting and somewhat contradictory approaches to CEQA compliance are troubling. On the one hand, the staff advised that they believe the North East Surface Treatment Plant expansion will be needed to support growth during the current General Plan projections. However, the current CEQA approach is to now disavow any intended development of the North East Surface Treatment Plant expansion, while at the same time collecting a fee whose nexus is dependent upon the requirement for such a plant expansion.

This circumstances has led to confusing deliberations on the CEQA issue. It has also raised additional uncertainty about the reliance that may be placed on the nexus study. We therefore join in the objections to the CEQA compliance strategies set forth in the March 31, 2017 letter submitted by Mr. Timothy Taylor on behalf of Granville Homes and Wathen Castanos Homes, and/or request that the Nexus Study be further revised to conform to the currently recommended CEQA compliance findings.

3. Bonding For Future Water Treatment Capacities.

During the prior hearing on this matter, there was discussion about the pros and cons of bonding for future infrastructure, versus pay-as-you-go methods. I wish to confirm that the BIA of Fresno/Madera Counties, Inc. has not offered any perspective about such public policy matters. Any position or recommendations would need to be based on a fuller understanding of a specific project and cost options. In addition, such funding strategies are rarely, if ever, entirely an all or nothing approach. In any



McCORMICK
BARSTOW LLP
ATTORNEYS AT LAW

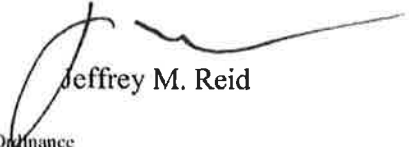
Fresno City Council
April 3, 2017
Page 3

event, we wish to clarify that our Association does not intend to endorse or oppose any specific recommendation on such matters at this time.

4. Conclusion.

We wish to again thank the Council for its sponsorship of the previously conducted stakeholder meetings, which have resulted in significant modifications to the Water Capacity Fee proposal.

Sincerely,
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP



Jeffrey M. Reid

Enc. Exhibit "A" – Redline Illustration of Edits to Proposed Adopting Ordinance

Exhibit "A"

Proposed Edits to Adopting Ordinance

worked with a consultant, Bartle Wells Associates, to develop a Water Capacity Fee Study (Study), Attachment 2 to the Report to the City Council dated March 9, 2017 and incorporated herein, which develops updated capacity fees (Water Capacity Fees) and establishes the reasonable relationship between the City's fees and the City's estimated reasonable costs of providing water capacity service to new development; and

WHEREAS, the Water Capacity Fees are designed to recover a share of costs for (a) existing and future groundwater and distribution system assets benefitting new development through buildout, and (b) the next 30 mgd expansion of the City's surface water supply and regional distribution facilities needed to address water supply and reliability needs for serving new development; and

WHEREAS, the Water Capacity Fees exclude cost recovery for the City's first phase of surface water system improvements, which were designed to benefit the City's existing customer base; and

WHEREAS, the Water Capacity Fees excludes elements of the Buy-In for Existing Infrastructure detailed in Table 7 of the Bartle Wells Associates Report to the City Council dated February 27, 2017; and

WHEREAS, the Water Capacity Fees effectuate a transition to a single, consistent system that can be applied uniformly to all future development within the City's service area, regardless of where development occurs, reducing administrative burden; and

WHEREAS, the City must amend the Fresno Municipal Code (FMC) to repeal and amend sections relating to the UGM fees to be replaced with the Citywide water capacity fee program set forth herein; and

prepared for the Fresno General Plan (State Clearing House # 2012111015), and supporting documents

F. The Water Capacity Fee Study complies with the Mitigation Fee Act, including without limitation Government Code section 66013, by determining the estimated reasonable costs of providing water capacity facilities and infrastructure that are of proportional benefit to new development.

G. The Water Capacity Fees will be used to cover the costs of existing public facilities and new public facilities to be acquired or constructed in the future that are of proportional benefit to new development, as detailed in the Bartle Wells Associates Study, except for those provisions of the Buy-In for Existing Infrastructure detailed in Table 7, item 1, of the Bartle Wells Associates Study, which the Water Capacity Fee does not incorporate and which the City Council hereby disclaims any reliance upon:

H. 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.

I. The Water Capacity Fees enacted herein are not levied as an incident of property ownership but are levied solely at the request of a property owner or its agent for the privilege of gaining access to use of the City's systems and facilities. The revenues derived from the Water Capacity Fees do not exceed the estimated reasonable costs of providing the service for which the fees are imposed.