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

Date: 3/23/2017

CITY CLERK, FRESNO CA

FRESNO CITY COUNCIL



Supplemental Information Packet

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

Contents of Supplement: Letter from Timothy Taylor and Parissa Florez of Stoel Rives, LLP dated March 21, 2017

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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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.



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CITY CLERK, FRESNO CA

TIMOTHY M. TAYLOR
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March 21, 2017

VIA ELECTRONIC MAIL

Mayor Lee Brand
President Clint Olivier and Members of the City Council
City of Fresno
2600 Fresno Street
Fresno, CA 93721

Re: Proposed Modification of Water Capacity Fees

Dear Mayor Brand, President Olivier, and Members of the City Council:

The City Council is scheduled to consider Agenda Item ID17-389 on Thursday, March 23, 2017. This item pertains to the City's Proposed Water Capacity Fees, and was previously scheduled for review by the City Council on March 9, 2017, but was removed from that agenda and continued to the upcoming meeting.

As originally proposed on March 9, staff presented the Council with a series of actions that would "create a new Water Capacity Fee classification and [] adopt Water Capacity Fees as proposed by and justified in the nexus study prepared by Bartle Wells Associates." (Fee Study.)¹ As detailed in the City Council's March 9 Meeting Agenda and the accompanying Report to the City Council (March 9 Report), staff asserted that this proposed action was exempt from review under the California Environmental Quality Act (CEQA). Prior to the scheduled hearing, on March 7, 2017, this office submitted a detailed letter to Mr. Thomas Esqueda explaining why the proposed CEQA statutory exemption was unlawful and that the Water Capacity Fee proposal must undergo environmental review.² Following receipt of the March 7 letter, the City removed the fee item from the March 9 calendar.

Ongoing CEQA Deficiencies

On Friday, March 17, the City released a revised Report to the City Council (March 23 Report) for the Water Capacity Fee item, rescheduled to March 23. In the March 23 Report, the City,

¹ The Fee Study is entitled "City of Fresno Water Capacity Fee Study," dated February 27, 2017.

² A copy of the March 7, 2017 letter to Mr. Esqueda is attached for your information.

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having backed away from its original unsupportable claim of a CEQA exemption³, takes an entirely different approach, claiming that the Water Capacity Fee program is actually “not a project pursuant to [] CEQA Guidelines section 15378...[because the] program is intended to fund as-yet unknown, future projects and programs, which may include potential infrastructure related to growth [but] do not commit the City to approve any particular project, program, or capital improvement, but will be placed in a separate fund for potential unidentified future projects.”

Although the March 23 Report claims that CEQA is not required because there is only a proposal to collect money for unknown future physical projects, the City continues to rely on the Fee Study to support the proposed fee, and the study clearly bases the fee on the City’s proposed North East Surface Water Treatment Facility (NESWTF), and other improvements designed to serve future growth. (Fee Study, at p. 6. [“This fee component is based on the costs of expanding the Northeast Surface Water Treatment Plant from 30 to 60 mgd, as well as related costs of regional transmission improvements.”].) The City simply cannot claim in the March 23 Report that the fee is not linked to a project, and then support the proposed action with a study that clearly identifies the very project (the NESWTF) that lies at the center of the Water Capacity Fee program. Yet, despite this incongruity, it gets worse.

The draft Ordinance proposed for adoption by the City Council specifically acknowledges and reaffirms the Fee Study’s “recommendations for the water capital improvements”. (An Ordinance of the City of Fresno Establishing and Setting a Schedule for Water Capacity Charges Under the Mitigation Fee Act, and Amending Article 5 of Chapter 6 And Article 4.5 of Chapter 12 of the Fresno Municipal Code, at p. 9 of 16.) The clear evidence of a very substantial proposed physical development - the NESWTF, and the technical study that the City relies upon to justify the fee proposal in the first place, directly contradict staff’s recommendation that the Council approve the Water Capacity Fee because it does not constitute a project under CEQA.⁴

In sum, the Water Capacity Fee proposal is not exempt from CEQA for the reasons set forth in our March 7 letter to Mr. Esqueda, and the proposal cannot evade CEQA review based on staff’s latest novel claim that it does not constitute a project under CEQA.⁵ There is evidence throughout the record that confirms the fee was created to support, and in fact will support a

³ The City’s ability to proceed with a CEQA exemption is undermined by CEQA Guidelines (14 Cal. Code of Regulations, §15000, *et seq.*) section 15273 (b), “[r]ate increases to fund capital projects for the expansion of a system remain subject to CEQA.”

⁴ See March 7 letter, at page 5, regarding requirement that CEQA review be initiated as early as possible in the planning process to enable environmental considerations to influence project program and design...” (CEQA Guidelines § 15004(b).)

⁵ See also, CEQA Guidelines section 15378(a)(4), defining a project as the whole of an action that may include government funding mechanisms or other government fiscal activities that commit to any specific project “which may result in a potentially significant physical impact on the environment”. This includes the NESWTF.

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particular water project. The CEQA shape shifting efforts must end, and the Water Capacity Fee proposal must be analyzed fully in accordance with the governing laws.

The Mitigation Fee Act Prohibits the City's Imposition of Arbitrary Fees Not Directly Related to an Identified Service

Government Code section 66013, subdivision (a), provides that the fees "shall not exceed the estimated cost of providing the service for which the fee or charge is imposed", unless the amount has been approved by a two-thirds vote.

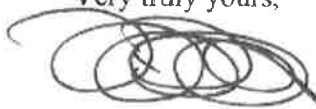
The City is attempting to impose Water Capacity Fees as permitted under section 66013, though by staff's own admission, no particular project, program, or capital improvement has been identified. In an effort to solve the City's CEQA problem involving the NESWTF, the May 17 Report now asserts only that the fees will fund "potential unidentified future projects." If this were true, however, then a reasonable cost estimate in compliance with the governing statute could not have been calculated in the first place.

Conclusion

We sincerely hope that the City Council will reconsider the wisdom of moving forward on Thursday with this extremely flawed proposal, and that it will instead instruct staff to work directly with our clients and other affected parties, address the deficiencies, and return with a proposal that works for the broader community.

Thank you very much.

Very truly yours,



Timothy M. Taylor
Parissa E. Florez

Enclosure

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cc: Yvonne Spence, City Clerk, City of Fresno
Bruce Rudd, Fresno City Manager
Douglas Sloan, City Attorney
Thomas Esqueda, Public Utilities
Josh Peterson, Wathen Castanos Homes
Mike Miller, Lennar Homes
Dave Williams, California Commercial Land Sales
Mike Prandini, Building Industry Association
Stacy Benton, Granville Homes
Darius Assemi, Granville Homes
Jeff Roberts, Granville Homes
Gary Giannetta, Civil Engineer
Amber Martinez, Granville Homes
Eric Gibbons, Granville Homes
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TIMOTHY M. TAYLOR
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March 7, 2017

VIA ELECTRONIC MAIL

Mr. Thomas Esqueda
Director of Public Utilities
City of Fresno
2600 Fresno Street, Room 4019
Fresno, CA 93721

Re: Proposed Modification of Water Capacity Fees

Dear Mr. Esqueda:

The City will be considering a number of actions regarding proposed Water Capacity Fees on Thursday, March 9, 2017. This includes: 1) findings regarding an exemption under the California Environmental Quality Act ("CEQA") (Public Resources Code section 21000 et seq.); 2) various amendments to the Fresno Municipal Code; and 3) an amendment to Master Fee Resolution No. 80-420 adopting Water Capacity Fees. As detailed below, our clients, Granville Homes and Wathen Castanos Homes, have serious concerns about the proposed fee escalation, the process by which the new Water Capacity Fee classification has been proposed for consideration, and the resulting project application of the new fees. Other interested parties, including Lennar Homes and California Commercial Land Sales, Inc., share these concerns. At a minimum, the City should refrain from any further actions to modify the fees until such time as it is clear to the City Council and the public exactly what processes staff has carried out in furtherance of the fee modifications and that the City has fully complied with CEQA.

At this time, the City has offered conflicting explanations for the amendment to Master Fee Resolution No. 80-420 adopting Water Capacity Fees. First, the report to the City Council for the March 9, 2017 hearing (the "Staff Report") recommends adopting findings that the proposed Water Capacity Fees are exempt from environmental review under CEQA based on a statutory exemption for rates, tolls, fares, and charges, as set forth in Public Resources Code section 21080(b)(8) and CEQA Guidelines section 15273(a)(4). Second, in an email response to a series of detailed inquiries submitted by Granville Homes Vice President Jeff Roberts, dated February 15, 2017, you explained that the plan for increasing the capacity of the NESWTF from 30 mgd to 60 mgd was presented in the approved 1995 Final EIR for the Metropolitan Water Resources Plan (approved by the City Council on February 1, 1996) and the February 2014 Final EIR for the Fresno Metropolitan Water Resources Management Plan Update, which summarily addressed the NESWTF expansion from 30 mgd to 60 mg. Third, your email response contends

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that on the one hand, these prior documents provided the required CEQA analysis, while also stating that “the City will [in the future] perform the required CEQA/NEPA documentation, as required by law, and as has been the City’s practice during the course of the planning, permitting, designing, constructing, and operating the NESWTF.” This is a clear indication that complete CEQA analysis and documentation remains to be performed. Not only are the City’s actions and explanations inconsistent, but even if reviewed independently, these processes cannot lawfully support the proposed Water Capacity Fee actions.

Proposed Water Capacity Fees and Recommended Findings

The Staff Report outlines details for the proposed Water Capacity Fees, as well as the staff recommendation for the City Council to adopt findings. The City contends that the existing fees are insufficient to meet anticipated needs, and as a result of increasing needs and additional challenges, the City must develop new water supply and management systems, including new surface water supplies.

The City’s actual intentions for the new water supply and management systems described in the Staff Report are more fully explained in the City of Fresno’s 2015 Urban Water Management Plan (“2015 UWMP”), dated June 2016. The 2015 UWMP states that “[t]he [Northeast Surface Water Treatment Facility] NESWTF is presently sized at a 30 mgd capacity. As growth within the City increases demands, this facility will be expanded by another 30 mgd for a total capacity of 60 mgd.” (2015 UWMP, p. 6-28).¹ The 2015 UWMP clearly provides that plans for the NESWTF constitute an *expansion* of an existing system.

The CEQA exemptions relied upon in the Staff Report cannot properly be applied under these circumstances.

¹ In addition to the analysis that follows regarding the legally appropriate manner by which CEQA must be applied to the proposed City Council action, it is important to note that the NESWTF and preliminary actions that set that project in motion, including the proposed Water Capacity Fees, trigger CEQA Guidelines section 15126.2(d). Section 15126.2(d) requires a discussion of how the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. “Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas).” (*Ibid.*)

The CEQA Guidelines also state that growth in any area should not be assumed as necessarily beneficial, detrimental, or of little significance to the environment. Growth-inducing impacts are caused by those characteristics of a project that tend to foster or encourage population, either directly or indirectly. (*Ibid.*)

The City has Wrongly Interpreted CEQA and CEQA Guidelines

Public Resources Code section 21080(b)(8), as well as CEQA Guidelines section 15273(a)(4), state that CEQA does not apply to “rates, tolls, fares, and other charges” applied to capital projects necessary to “maintain a service.” While the statute does not provide additional language, the CEQA Guidelines carve out a very clear exception to the exemption which states that “[r]ate increases to fund capital projects for the expansion of a system remain subject to CEQA.” (CEQA Guidelines, § 15273(b).)

This exception to the exemption broadly outlined in Public Resources Code section 21080(b)(8) and Guidelines section 15273(a)(4), is reiterated in both secondary sources and in case law.

- “Rate increases to fund capital projects for the expansion of a system or of services remain subject to CEQA.” (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (2d ed. CEB 2015) § 5.18.) “This exemption applies if the funds are being obtained for capital projects necessary to maintain service within existing service areas and does not apply to rate increases to fund capital projects for expanding a system.” (*Id.* at § 20.122, citing CEQA Guidelines, § 15273(b) (internal citations omitted).)
- In *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (“*Great Oaks*”) (2009) 170 Cal.App.4th 956, after the Santa Clara Valley Water District adopted a resolution raising groundwater-charge rates, the Great Oaks Water Company filed a petition for a writ of mandate challenging the District's use of a statutory rate setting exemption from CEQA as part of the resolution. Great Oaks argued that the record showed that increases would actually be used to fund capital projects for *expansion* of the system, which falls *outside* the exemption under CEQA Guidelines section 15273(b). The court found that the Water District resolution raising rates for extraction of groundwater fell under the parallel exemption provisions in Public Resources Code section 21080(b)(8)(D) and CEQA Guidelines section 15273(a)(4) because the Water District sufficiently stated its basis for the statutory exemption from CEQA.

Should the City continue to contend that the CEQA rate exemptions apply, the Environmental Findings provided in the Staff Report are conclusory and fail to come anywhere close to meeting the test for adequacy set forth in *Great Oaks*. (*Great Oaks, supra*, 170 Cal.App.4th at pp. 971-972.) The cursory environmental findings in the Staff Report are as follows:

The proposed Ordinance and related Master Fee Resolution amendment are exempt from environmental review under a Statutory Exemption to the California Environmental

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Quality Act (CEQA) for rates, tolls, fares, and charges pursuant to Public Resources Code section 21080(b)(8) and CEQA Guidelines section 15273(a)(4). (Staff Report, p. 12.)

The findings are inadequate because they summarily state only that an exemption applies. The findings do not begin to meet the statute's additional requirement that "[t]he public agency shall incorporate written findings in the record of any proceeding in which an exemption under this paragraph is claimed setting forth *with specificity the basis for the claim of exemption.*" (Pub. Resources Code, § 21080(b)(8) (emphasis added).)

The analysis provided above outlines why the exemptions pursuant to Public Resources Code section 21080(b)(8) and CEQA Guidelines section 15273(a)(4) cannot properly be applied under these circumstances because the funds at issue are not merely for "capital projects necessary to maintain services within existing service areas", but actually are for the provision of expanded services. (See Pub. Resources Code, § 21080(b)(8)(D).) Because the City contends that the NESWTF will provide expanded services, the exception provision in CEQA Guidelines section 15273(b) necessarily applies.

For each of these reasons, the proposed actions cannot proceed in the absence of full CEQA compliance. To effectively achieve the City's objective of approving valid Water Capacity Fees that fully meet the needs of local business and community interests, this item should be continued for further review and consideration of the important issues outlined above, including CEQA review.

The City has Compounded the Problem of Inadequate Environmental Review Rather than Addressing It

Both the original staff report for the continued December 2016 hearing and the current March 2017 version, provide that the proposed Water Capacity Fees and Municipal Code amendments are exempt from environmental review. It was not until Jeff Roberts specifically inquired via email to the City, that you alluded to the 1995 Final EIR for the Metropolitan Water Resources Plan (approved by the City Council on February 1, 1996) ("1995 Final EIR") and the May 2014 Final EIR for the Fresno Metropolitan Water Resources Management Plan Update ("May 2014 Final EIR") as support for the proposed Water Capacity Fees.² While we were

² The 2014 Draft EIR intends to provide a project level EIR for a collection of projects under a category referred to as "Near-Term Project Elements" (2014 Draft EIR, p. 3-4) and provide program level EIR for "Future-Term Projects." Under general CEQA principles, a "program EIR" evaluates the broad policy direction of a planning document, such as a general plan, but does not examine the potential site-specific impacts of the many individual projects that may be proposed in the future consistent with the overarching plan. (CEQA Guidelines, § 15168.) In

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unable to acquire a copy of either Final EIR³, we did review the February 2014 Draft EIR for the Metropolitan Water Resources Management Plan Update.

The City cannot simultaneously indicate that: 1) the 1995 Final EIR and the 2014 February Final EIR have addressed the expansion of the NESWTF from 30 mgd to 60 mgd; 2) an exemption from further CEQA review is appropriate; and 3) further claim in your response that “the City will perform the required CEQA/NEPA documentation, as required by law, and as has been the City’s practice during the course of the planning, permitting, designing, constructing, and operating the NESWTF.”

Under CEQA, the public must be able to provide input at the earliest possible stage, when genuine flexibility in the planning process still exists. (*Bozung v. Local Agency Formation Commission of Ventura County* (1975) 13 Cal.3d 263, 282.) Here, the public was never provided any detailed analysis under either the 1995 or 2014 Draft EIRs as part of the current Water Capacity Fees proposal, but received only a vague promise that at some undefined time in the future a detailed analysis will be forthcoming. This is occurring at the same time the window for meaningful flexibility in the planning process is passing, and unfortunately may close depending on the Council’s March 9 actions.

The City is attempting to stand on shifting sands. Inconsistent and confusing references to past and future EIRs do not align with the present attempt to avoid CEQA review via an exemption that the Guidelines actually prohibit. None of these explanations are consistent with the others, nor do they individually provide the proper analysis and support required to approve the proposed Water Capacity Fees.

Conclusion

Although the City has provided a variety of reasons this project should be approved, the only way to properly address these conflicts and discrepancies is to remove this item from the March 9 agenda, solicit further public input to avoid similar pitfalls going forward, and then bring the proposal back for a hearing with the proper support and a clearly reasoned analysis.

contrast, a “project EIR” is prepared for a construction-level project, and should focus primarily on the changes in the environment resulting from the development project and examine all phases of the project including planning, construction, and operation. (CEQA Guidelines, § 15161.) The level of analysis specific to the expansion of the NESWTF provided under this larger umbrella of Near-Term Project Elements is minimal and does not address project level detail regarding the expansion itself, especially under the more specific requirements of a project level EIR.

³ Neither of these documents referred to in your responses to Mr. Roberts are available on the City’s website.

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We look forward to continued discussions regarding the issues presented above. Thank you for your time and thoughtful consideration.

Respectfully,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left.

Timothy M. Taylor
Parissa E. Florez

cc: Josh Peterson, Wathen Castanos Homes
Mike Miller, Lennar Homes
Dave Williams, California Commercial Land Sales
Mike Prandini, Building Industry Association
Stacy Benton, Granville Homes
Darius Assemi, Granville Homes
Jeff Roberts, Granville Homes