

RTMF Appeals Process Information Update

Section D of Resolution 2009-01 Adopting the RTMF Fee provides;

Section D. Appeals - Appeals shall be filed with FCTA in accordance with the administrative procedures established by FCTA. Appealable issues shall be the application of the fee, application of credits, application of reimbursement, and application of exemption. Appeals may also be made that the fee level for development of unique types of land uses be evaluated on an individual basis. Such unique projects and specific evaluation shall be paid for by the project applicant and performed by Fresno COG or its designee.

Section D was drafted under the assumption that since FCTA (Authority) administers the fee per the ballot measure and indemnifies the RTMF Board for imposing and collecting the fee, the final decision on appeals vest with the Authority.

Subsequently, PB Americas developed a process for evaluating Special Studies and Appeals which was introduced to the RTMF subcommittee and the RTMF Board in June. During the subcommittee discussions it was determined that it would be logical for the Authority to transfer the Appeal process to the RTMF Policy Board. It was initially reported to this board that the Authority would take action to transfer the appeal process in August and the policy would come back for the RTMF board for adoption in September. However the Authority raised an issue with the Appeal Process and it is now anticipated that the Authority will act at their October 20 meeting, therefore the earliest the board can adopt the Appeal process would be at the October 28, 2010 meeting, pursuant to Authority Board action.

The issue raised at the August Authority Board meeting regarded the requirement the fee must be paid prior to the appeal being filed. The Mayor of Fresno requested staff explore ways to allow a Charitable Non Profit to appeal without paying the fee. Section 66020 of the California Mitigation Fee Act requires payment of the fee in full or making some other arrangement, satisfactory to the entity imposing the fee, ensuring payment of the fee. Although the staff recommendation remains unchanged, there are a number of ways the Board could accomplish this if they so desired. The Board could simply write into the policy that Charitable Non Profits do not need to pay the fee prior to the decision on the appeal. There are a number of problems with this methodology as discussed in some detail below, however the most obvious one is if the appeal is lost and the entity received the certificate of occupancy while the appeal was pending, then we've lost the central motivation to compel the entity to pay the fee and it is possible we would be in the position of having to pursue legal action to collect it. Alternatively the Board could adopt a policy that required the fee placed in an escrow account, but as the cash would still be tied up, this does not accomplish much from the Appellants point of view. Another option would be to stipulate checks paid under protest in which an appeal is filed would be held uncashed until the appeal is decided, however this is not only bad from a cash management point of view, the check could be lost or stolen, but if the appeal was

lost and the check bounced we would still be forced to attempt to collect it after the certificate of occupancy had been issued.

It appears the first appeal could very possibly be from a Charitable Non Profit – Terry’s House, who is building a facility at Community Medical Center to provide temporary housing for out of town people attending sick loved ones. This sensitive issue has political support and was discussed in some depth at the June 9 subcommittee meeting. The subcommittee discussed whether a special category should be created to exempt Charitable Non Profits and considered;

The California Revenue & Tax Code list 26 different categories of Non Profits.

Terry’s House advises it is a Category 23701h corporation, which is a broad non specific category covering a large variety of organizations.

The State Attorney General maintains a Registry of Charitable Trust which could be used to limit the definition to Charities as opposed to other types of non- profit organizations. There are around 150,000 charities registered in California.

Other cities have similar humanitarian projects coming on line. It has been the practice of the City of Clovis to not waive fees for these type of projects and in some instances the city has paid development fees for worthy projects.

The ballot measure was not silent on the topic of exemptions. It specifically granted exemptions to “Essential Government Services”, and made an allowance to give Low Income Housing a reduced fee. The requested exemption for “Charitable Non Profits” was not spelled out in the ballot measure.

PB America pointed out the calculation supporting the RTMF Nexus is by necessity a generalization. The legal basis for the Nexus requires similar treatment for broad categories of similar development. Fine tuning to make the fee more specific for one group as opposed to another similar group could result in legal challenges that could ultimately destroy the Nexus.

In a recent court case a local city was successfully sued by a homeowners association for not collecting a traffic impact fee.

The subcommittee determined it would be exceedingly difficult to attempt to develop and exemption for Terry’s House that would exclude other charitable Trusts, including churches. It may be possible to develop a narrowly worded exemption that included phrases such as Childrens Health, Charitable Donations, or Humanitarian Purposes, but it is impossible to know how many other worthy cause organizations would fall under the narrowed exemption. The committee felt it could open a Pandora’s box of appeals and lawsuits from similar interest, and weaken the legal Nexus that created the fee. Ultimately the subcommittee felt the issue should be left to the Boards discretion.

The subcommittee also discussed the issue of how broad the Boards discretion on appeals may be. One view held that the Board had ultimate authority to grant appeals as they wished. Another point of view expressed the discretion of the Board to grant appeals was limited by the ballot measure. A third view held the Board most certainly could grant appeals as they saw fit, but should be apprised of the liability associated with such a decision. County Counsel has been requested to comment.