

Fresno County Regional Transportation Mitigation Fee Agency

AGENDA

Date: Thursday, July 31, 2014

Time: 5:30 PM

**Place: COG Sequoia Conference Room
2035 Tulare St., Suite 201, Fresno, CA**

IMMEDIATELY FOLLOWING THE FRESNO COG POLICY BOARD MEETING - ALL POLICY BOARD MEMBERS

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I. Minutes of June 26, 2014 [APPROVE]

Link to recording of June 26, 2014 meeting

Here's the link to this file:

<https://www.hightail.com/download/ZUcxWWWzR3NvQUkxZXNUQw>

II. Clovis-Herndon LLC Appeal [Beshears] [DIRECTION]

This appeal was initially heard by the board and denied on October 25, 2012. It was heard a second time pursuant to court order on June 26, 2014 during which the Board heard appellant's presentation and staff's rebuttal. The Board closed the hearing to further argument and began its deliberations. The Board continued the hearing to this meeting to continue its deliberation.

Clovis-Herndon LLC is appealing a staff determination their project is subject to the fee. The project is the shopping center development on the northeast corner of Herndon and Clovis Blvd (Clovis Crossing). Appellant represents there is approximately 238,337 sq. ft. of commercial retail in this development owned by Clovis-Herndon Center, LLC subject to this appeal calculated at \$467,141, not including the \$25 handling fee. The appeal includes only property owned by Clovis-Herndon, LLC and not property for other owners in the shopping center subject to the fee.

At the initial October 25, 2012, the Board heard appellant's presentation and staff's rebuttal. A motion was made and seconded to the effect that the RTMF did not apply to the Clovis Crossing project. That motion failed, however a motion was never passed to affirmatively deny the appeal and no Findings of Fact were adopted describing the reason for such a denial. Clovis Herndon LLC subsequently filed suit in Fresno Superior Court and the hearing was held January 15, 2014. The judge ordered the "Fresno County Regional Transportation Mitigation Fee Agency to hold a new hearing on petitioner's appeal, make a new determination on petitioner's appeal,

and make appropriate findings in support of whatever order it may make on that hearing. Any review of subsequent findings shall be initiated by petition for writ of mandate.” The order addressed the technical absence of any formal finding of fact and did not address merits of the appeal or the Boards reasons for not granting the appeal.

At the June 26, 2014 RTMF Board meeting, after hearing appellant’s presentation and staff rebuttal, the Board closed the hearing to further argument and began its deliberations. The Board continued the hearing to this meeting to continue its deliberation.

A link is provided containing the initial 10/25/2012 appeal.

The staff rebuttal, verbatim transcripts to the 10/25/2012 hearing and a May 20, 2014 letter from Caswell Bell and Hillison LLP detailing the Clovis Herndon LLC position is enclosed in the agenda.

A separate link is provided containing a digital recording of the entire proceeding of the June 26, 2014 hearing. (SEE ITEM I MINUTES ABOVE)

County Counsel recommends in the event the Board again determines to deny the appeal, they direct County Counsel to prepare a Findings of Fact consistent with their determination, to be brought back to the board for adoption at a subsequent meeting.

Action: Staff recommends the appeal be denied and offers the following reasons.

1. The Measure “C” Ballot approved by voters in 2007 established the Regional Transportation Mitigation Fee (RTMF) would apply to all development not specifically exempted by the ballot measure.
2. Regional Transportation Mitigation Fee Agency Resolution 2009-01 as amended by Resolution 2010-01 provides;
 - a. *Section 3: L. “Development” means any work or improvement that requires a building permit or development approval.*
 - b. *Section 3: M. “New Development” means any development on vacant land or additions or expansions on existing development wherein square footage of the development, in the case of non-residential use, or the number of dwelling units, in the case of residential use, is increased, or where the use is changed.*
 - c. *Section 4: A. Fee. All new development in the Cities and the County shall be responsible for paying the RTMF unless otherwise exempted by this Resolution.*
 - d. *Section 4: E. Applicability. The RTMF shall apply to all new development within the Cities and the County effective January 1, 2010, unless otherwise exempt hereunder. None of the exemptions in Resolution 2009-01 apply to Clovis Crossing Shopping Center nor does appellant make such a claim of exemption.*
3. Language in the RTMF Administrative Manual Informational Summary regarding the applicability of the fee to all new development is consistent with language in Resolution 2009-01.
4. Clovis Crossing Shopping Center required a building permit and falls within the definition of “New Development” as defined in Resolution 2009-01 as amended by Resolution 2010-01.
5. The building permit for Clovis Crossing Shopping Center was approved February 27, 2012 therefore Clovis Crossing Shopping Center has no common law vested right because it did not

- obtain a building permit prior to the implementation of the Regional Transportation Mitigation Fee on January 1, 2010. Clovis Herndon LLC makes no claim to having vesting rights of any sort.
6. The final approval of Clovis Crossing Shopping Center, approved by the Clovis City Council on June 29, 2009, including SPR2005-17 and CUP2005-34 does not provide an exemption to the fee per adopted Regional Transportation Mitigation Fee policy or state law.
 7. Condition 94 of the Site Plan Review, SPR 2005-017, incorporated into the final approval of the Clovis Crossing development by the Clovis City Council on June 29, 2009 specifically provides *“Additional fees may be assessed and must be paid prior to issuance of subsequent development permits...Additional fees payable to the City or other agencies (FMFCD) may become due as supplemental information regarding the project is received by the City.”*
 8. The RTMF fee is levied to mitigate traffic impact to components of the State Highway System and therefore does not duplicate or overlap fees paid to mitigate local traffic impacts.
 9. The RTMF applies to the Clovis Crossing Shopping Center.

Link to Appeal files:

Here's the link to this file:

<https://www.hightail.com/download/ZUcxWWWzR3NrWTIMWE5Vag>

III. OTHER BUSINESS

- A. Items from Staff
- B. Items from Members

IV. PRESENTATIONS

A. Public Presentations

This portion of the meeting is reserved for persons wishing to address the Board on items within its jurisdiction but not on this agenda. **Note: Prior to action by the Board on any item on this agenda, the public may comment on that item. Unscheduled comments may be limited to 3 minutes.**

FOR YOUR INFORMATION:

*Items listed as information still leave the option for guidance/direction actions by the Committee.

**All enclosures are available on our website at www.fresnocog.org

Fresno County Regional Transportation Mitigation Fee Agency

EXECUTIVE MINUTES

Date: Thursday, June 26, 2014

Time: 5:30 PM

**Place: COG Sequoia Conference Room
2035 Tulare St., Suite 201, Fresno, CA**

Members Attending: Mayor Lynne Ashbeck, City of Clovis
Councilmember Ron Lander, City of Coalinga
Mayor David Cardenas, City of Fowler
Mayor Ashley Swearengin, City of Fresno
Mayor Sylvia Chavez, City of Huron
Mayor Gary Yep, City of Kerman
Mayor Chet Reilly, City of Kingsburg
Mayor Robert Silva, City of Mendota
Mayor Gabriel Jimenez, City of Orange Cove
Councilmember Raul Villanueva, City of Parlier
Mayor Robert Beck, City of Reedley
Mayor Joshua Mitchell, City of Sanger
Mayor Ken Grey, City of Selma
Supervisor Henry Perea, County of Fresno

Arthur Wille, Legal Counsel
Tony Boren, Executive Director
Les Beshears, Finance Director

Absent: Mayor Marcia Sablan, City of Firebaugh
Mayor Amarpreet Dhaliwal, City of San Joaquin

Others Attending:
Robert Hillison, CB&H
Mr. Paynter, Clovis-Herndon LLC
Melissa Garza, FCOG
Brenda Veenendaal, FCOG
Marla Day, FCOG

QUORUM: At the start of the meeting there were 14 members present representing 98.76% of the population and there was quorum to conduct business. (Clovis, Coalinga, Fowler, Fresno, Huron, Kerman, Kingsburg, Mendota, Orange Cove, Parlier, Reedley, Sanger, Selma and Fresno County)

Mayor Cardenas (Fowler) Vice Chair, called the meeting to order.

I. Minutes of May 29, 2014 [APPROVE]

Following an expressed opportunity for public comment, a motion was made by Councilmember Lander (Coalinga) and seconded by Mayor Grey (Selma) to approve the Executive Minutes of May 29, 2014 as submitted. A vote was called for and the motion carried.

II. Clovis-Herndon LLC Appeal [Beshears] [DIRECTION]

This appeal was initially heard by the board and denied on October 25, 2012. It is being heard a second time pursuant to court order. The verbatim transcript from the 2012 hearing was enclosed.

Les Beshears, Finance Director introduced this item. (For a complete summary of this item please see the June 26, 2014 Agenda.) Mr. Beshears explained the reasons for the appeal being reheard. A copy of the letter received from Caswell Bell & Hillison LLP on May 20, 2014 was distributed to the Board members prior to the presentation by Mr. Hillison.

Mr. Hillison gave a powerpoint presentation presenting Clovis-Herndon LLC appeal. Mr. Hillison contended that staff enforcement of the fee was contrary to language in Board adopted resolutions, that the fee was not applicable to development approved prior to January 1, 2010. He also advised that Clovis-Herndon LLC had an Equal Protection argument because residential development was treated different from commercial development.

In rebuttal Mr. Beshears (FCOG) stated that the language in board adopted resolutions clearly defined New Development in terms of construction activity, the approval document for construction is a building permit, and this is consistent with state law and board adopted policy. Since Clovis-Herndon LLC had no building permit until after the imposition of the fee, the fee is applicable to the Clovis Herndon Development. In response to the Equal Protection claims raised by Mr. Hillison, Mr. Beshears demonstrated that there was no unequal treatment between residential and commercial development.

Mayor Swearingin questioned staff assessment of the legal interpretation of language in board resolutions.

Mayor Mitchell (Sanger) asked why legal counsel had not provided a legal opinion.

Mr. Wille (Legal Counsel for FCOG) recommended the public hearing continue until all testimony is complete, then close the public testimony, table the issue and county counsel would provide a legal assessment of all the facts presented by Mr. Hillison and Mr. Beshears.

Mayor Reilly (Kingsburg) questioned the circumstances surrounding approval of the project in 2003, 2007, and June 2009.

Mr. Paynter discussed the CEQA challenges and the court stay that prevented the city from issuing building permits.

Mr. Beshears advised that the building permit was issued two years and eight months after the final June 2009 approval and two years and one month after the court lifted its stay on building permits.

Mayor Mitchell (Sanger) made a motion to table the item. The motion was seconded by Mayor Swearingin (Fresno)

Mayor Cardenas (Fowler) (Vice Chair) called the question and the motion passed. The matter will be brought before the Board on July 31st.

III. OTHER BUSINESS

A. Items from Staff

None

B. Items from Members

None

IV. PRESENTATIONS

A. Public Presentations

This portion of the meeting is reserved for persons wishing to address the Board on items within its jurisdiction but not on this agenda.

There were no public presentations.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Tony Boren, Executive Director

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Staff Response to Appeal Regarding the Applicability of the RTMF to Clovis Crossing Shopping Center

Summary: The developers of this project are basing their appeal on two points, namely: a) that the project is not new development but development vested prior to the RTMF coming into effect, and b) that the traffic mitigation fees that they have already paid to the City of Clovis may overlap with the RTMF and thus constitute an illegal double-charging the project for its impacts. Staff has reviewed the material with our technical and legal advisors and has concluded that neither of these points is valid.

Issue A: Is the project vested?

The authority, and duty, to implement the RTMF comes from ballot measure "C". All development in Fresno County is subject to the fee unless exempted by the ballot measure or by state law. The RTMF Agency adopted Resolution 2009-01, implementing the RTMF, which has a set of policies designed to ensure that is the case. Resolution 2009-01 additionally includes a policy exempting projects with approved Subdivision Maps. Appellant's project has no approved Subdivision Map. Instead, the appellant is attempting to equate Clovis' approval of a different type of project document with approval of a residential subdivision or parcel map in hopes of obtaining the same vesting rights.

1) Appellant has no common law vested right because it did not obtain a building permit before January 1, 2010

The Appellant claims that its project is not new development because the city approved the project prior to January 1, 2010. This claim is contrary to provisions of California law relating to vested rights and to the definition of new development provided in RTMF Agency Resolution 2009-01, which states:

"New Development" means any development on vacant land or additions or expansions on existing development wherein square footage of the development, in the case of non-residential use, or the number of dwelling units, in the case of residential use, is increased, or where the use is changed. It shall not include remodels or reuse wherein the number of dwellings units or overall square footage is not increased if the use has not changed." (Section 3.M)

Note that this definition of new development is based entirely on physical changes (additions, expansions, etc.) not on the status of paperwork. The construction of buildings on the previously vacant Clovis Crossings site took place after the RTMF came into effect and so this is new development for the purposes of assessing the fee.

Resolution 2009-01 is consistent with the California common law of vested rights on this point. Pursuant to California decisional law, a developer's right to complete a project as proposed does not vest until 1) a valid building permit, or its functional equivalent, has been issued, and 2) the developer has performed substantial work and incurred substantial liabilities in good faith reliance on the permit. Avco Community Developers, Inc. v. South Coast Regional Commission (1976) 17 Cal 3d 785, 791. Cases decided since Avco have followed its holding that a developer has no vested right in the existing zoning, general plan designation, or build out of an approved subdivision map. (see Toigo v. Town of Ross (1998) 70 Cal.App.4th 309, 322. ["Courts have yet to extend the vested rights or estoppel theory to instances where a developer lacks a building permit or the functional equivalent, regardless of the property owner's detrimental reliance on local government actions and regardless of how many other land use and other preliminary approvals have been granted."])

In Avco, the California Supreme Court noted that the developer had already undertaken "a number of studies for the development of the tract, and proceeded to subdivide and grade the property... completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract." Furthermore, the developer "had spent \$2,082,070 and incurred liabilities of \$740,468 for the development of the tract; it is losing \$7,113.46 a day, largely due to loss of anticipated rental value, as a result of its inability to proceed with construction of buildings on the tract. Avco 17 Cal 3d 789-790. Yet, because the developer had not obtained a building permit (or its functional equivalent), and performed substantial work under the permit, the court found that the developer did not have a vested right.

Here, just like in Avco, the fact that the appellant obtained nominal project approval, and constructed limited public facility improvements, does not lead to the conclusion that the developer had a vested right to develop prior to January 1, 2010.

Furthermore, numerous cases have held that "soft costs," such as fees for engineers, consultants, and lawyers, related to the project are not the basis for a vested rights claim. (See Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach (2001) 86 Cal.App.4th 534). Therefore, any legal fees expended by Appellant for the development of the project and the related litigation cannot form the basis of a vested right for purposes of the RTMF.

2) The RTMF Resolution and existing statutory and decisional law control the determination of whether a project is vested for purposes of the RTMF

The Appellant attempts to support its claim by citing an excerpt from the RTMF Administrative Manual:

"In the Agency's Information Summary, Figure 4, page 12, of the RTMF Administrative Manual dated December, 2011, the Agency has interpreted Resolution to apply only to "...developments approved on or after January 1, 2010..." i.e. the Project is exempt"

There are several problems with this, namely:

- The Administrative Manual is not a policy document; it is a set of internal instructions to staff on how to handle the day-to-day administration of the program. It cannot and does not create the policies governing the RTMF, nor can it affect existing statutory and decisional law relating to vested rights. The staff manual, or the appellant's interpretation of staff manual, cannot counteract existing law. Policy can only be established through resolutions of the Board and, as shown above, the policy established in the resolution is that Clovis Crossing does not have a vested exemption from the fee.
- The manual speaks mainly about routine cases and advises readers to seek additional information if needed. The first lines of the page from which the appellant's citation is drawn are,

"The information given below is intended to provide general guidance related to the RTMF and is not intended to be, nor is, legal advice. Applicants for developments that might be subject to the RTMF should submit the details of their project to the RTMF Joint Powers Agency for determination of the amount due, if any."

The passage shows that the general guidance is merely that, general guidance, and that the ultimate determination will be made by the Agency.

3) Prior to January 1, 2010, the Appellant was on notice that additional development fees may be required

The most compelling evidence that the project has no vesting and is not exempt from the fee can be found in Condition 94 of the appellant's approval Site Plan Review, SPR 2005-017 approved 4/22/09 (Tab 34).

*"The applicant shall pay all applicable development fees prior to the issuing of a building permit. A partial preliminary estimate of fees is \$7,325,390(OLD FEES). A breakdown of this estimate is attached to these conditions for your information. **Additional fees may be assessed and must be paid prior to issuance of subsequent development permits. NOTE: The fees given at this time are an estimate calculated using rates currently in effect. These rates are subject to change without notice and the actual amount due shall be calculated using fee rates in effect at the time of payment. Additional fees payable to the City or other agencies (FMFCD) may become due as supplemental information regarding the project is received by the City.**" (emphasis added)*

This document clearly shows that the City's approval did not convey vesting rights to the project since it leaves the door open for fees to be assessed later.

Issue B: Is the Project being Double-Charged for Impacts?

Appellant was required, as a condition of approval by the City of Clovis, to construct street improvements to mitigate traffic impacts associated with the Project. Appellant paid \$206,000 in fees to the City, related to the improvements of intersections on Herndon, Villa and Clovis avenues. Appellant accepts that the traffic mitigations required by the city were for impacts on local roads and that the adopted RTMF program is to mitigate impacts on the state highway system.

However appellant points out that the Nexus Study (quoting the wording of ballot measure) states, *"The RTMF shall apply to Regional Transportation Program-Measure "C" projects identified in Tier 1, Tier 2 and other such regional projects as may be identified in the RTMF study."* The appeal correctly identifies Herndon Widening – Clovis to Fowler as being Project K2 on the Measure C Tier I project list. However, it then incorrectly describes the project as being severely underfunded and requiring \$265 million in future local development fees and goes on to speculate, *"it is reasonable to conclude there is a probability the Board will commit RTMF funds toward the Project in the future"*. They then go on to imply this would amount to an illegal double charging of impact fees, and *"as the project is within the boundaries of the Measure "C" project scope for Herndon Widening and in all probability, will be part of the nexus of the RTMF, the requested exemption should be granted or, in the alternate, the amounts paid for Herndon Avenue street improvements and fees related to the Herndon/Villa and Herndon/Clovis intersections deemed to be Exaction Credits"*.

That idea that the plan is severely under-funded stems from a typo on the Transportation Authority's website that changed \$.265 million (two hundred and sixty five thousand) into \$265 million. In fact Project K2 is not underfunded. To the contrary, the Board and Transportation Authority recently adopted an updated Tier I plan fully funding the total Herndon – Clovis to Fowler project with Measure C and State and Local Partnership funds. Furthermore, the conditions of the State and Local Partnership funds require the project to be listed by June 2013 and the City of Clovis has committed to delivering this project. So this project will be finished before any future revisions of the RTMF program take place (the next is scheduled for 2014). So there are no current or future RTMF funds associated with this project.

Moreover, in the event that there was a shortfall in funds for the Project K2 or any other local street, the shortfall could not be made up through RTMF funds. That is because the danger of an overlap between the RTMF and local impact fee programs was identified in the nexus study and the Board structured the RTMF program to preclude such an overlap. The appellant is well

aware of this, and in fact includes evidence of this in two different parts of their submission. The Supplemental Brief includes the following paragraph,

"The RTMF Administrative Manual, "Development Fee Structure" (page 2) states that the [Board] approved the plan that "... **limits the use of RTMF funds to project for state facilities identified on the Regional Transportation Funding Tier 1 list**" A copy of this Measure "C" list is marked Exhibit 51 attached hereto." (emphasis added)

Herndon Avenue is not a state facility and so is excluded from RTMF funding. The appellant's Exhibit 51 makes the same point a different way. Column D of the table shows that Herndon Avenue is not a state facility and so Column F shows that the portion of project costs that is eligible for RTMF funding is zero dollars. So there is no overlap between the RTMF program and the fees already paid by the appellant. The City fees mitigate project impacts to local streets while the RTMF mitigates project impacts to the state highway system that are not mitigated through any other mechanism¹.

¹ The fact that the Clovis Crossing Project has freeway impacts can be seen from Table 6 of their traffic study which shows that 27.6% of project traffic, more than 5,000 trips per day, uses the state highway system.

Fresno County Regional Transportation Mitigation Fee Agency
October 25, 2012 Meeting Verbatim Transcripts

Mayor Dhaliwal – Item #1 is the Minutes of September 27, 2012 meeting. Need a motion to approve those unless there are questions/comments.

Mayor Flores – So moved.

Mayor Yep – Second.

Mayor Dhaliwal – Those in favor say “Aye.”
“Aye”

Mayor Dhaliwal – Item #2 is the Measure C RTMF Appeal. And we have our staff

Les Beshears – Yes. Clovis-Herndon LLC owns property in the shopping center that’s being built over there at the northeast corner of Herndon and Clovis Boulevards. They have approximately 238,000 square feet of commercial/retail. The RTMF fee calculates at \$467,000. They’ve paid \$98,000 of that so far. The bill includes only property owned by the Clovis-Herndon LLC and does not include property by any other owners in that shopping center. Briefly, the project was approved by the City of Clovis in 2003. They finalized it in 2009 and then they got tied up in a lawsuit by challenging CEQA violations. A judge issued a stay preventing them from drawing any building permits. They didn’t get that resolved until the final judgment was in August 2011. Okay, they’re basically saying that if not for the lawsuit they would have got their permits and had this project done prior to the RTMF being implemented January 1, 2010. That may or may not be the case. I can’t go back in time and prove or disprove that theory. But there’s no statute in State law or in the ballot measure or in your adopted RTMF policy that allows me to grant the exemption for time delays to projects. Their problem with that is that the MAP act and our adopted policy predicates vesting on having an active subdivision or parcel map. There are no active subdivision or parcel maps in this project. They are a commercial development. Therefore, the vesting rules of the RTMF do not apply. The agency paid some mitigation fees to the City of Clovis. I believe it was around \$206,000. They also did some improvements to the street out there requesting consideration for that. However, the RTMF fee is a regional program. It mitigates traffic on the state highway system. All the fees they paid to the City of Clovis and the traffic mitigation improvements they put on out there were for local mitigation and do not overlap. With that I think I’m going to turn the formal appeal request over to David Paynter and Bob Hillison.

David Paynter – Mr. Chairman, Board Members, Dave Paynter. I’m the managing member of the Clovis-Herndon Center LLC which is the owner of the property. The project that our LLC owns is on the east side of where the Wal-Mart will be. So our request doesn’t have anything to do with the Wal-Mart so we don’t own that property. I would like to just in fairness I’d like to I’m not an attorney so I don’t have legal state law things I can cite for you but in fairness I’d like to talk just briefly about the history of the project, the approvals that we’ve obtained and how they relate to the timeline of the RTMF implementation. This project has taken 10 long years to get to the point where we’re finally building out there. We started assembling 17 different properties to make up the project in 2002. The property was General Planned correctly. It was zoned correctly. And on April 7, 2003, we obtained our first approval from the Clovis City Council for the project. Subsequent to that there was litigation in an attempt to delay Wal-Mart which we could do nothing about. As a result of that litigation a full Environmental Impact Report was completed for the project. After that we obtained a second approval of the project which occurred in October 15, 2007. Another challenge was again filed in the court claiming flaws to the Environmental Impact Report. The Superior Court denied the challenge and found in our favor and in the City of Clovis’ favor. Then there was an appellate a legal challenge with the Appellate Court. So we were again delayed. All this time we had a stay from the court preventing us from going forward and building on the property. Just to back up we did the modifications to the EIR and we obtained our third and final approval from the City of Clovis on June 29, 2009. And the RTMF implementation is January 1, 2010. So our so even though we’ve got three approvals our last

approval and the one that stands now that we're building under was prior to Jan 1, 2010 was June 29, 2009. So the project had project approval. We're not a home builder so we don't do parcel maps like talked about vesting parcel maps in State law and so forth as Les was talking about. You know we have 17 different parcels. To adjust parcel lines we do lot line adjustments. The staff function you know commercial projects seldom use parcel maps as described earlier. The Appellate Court final ruling was effective August 1, 2011 and by December 2011 we were grading at the site. So Les said he didn't know if our if we weren't delayed by the legal challenges if we would have gone forward timely or not but I can tell you we started grading there four months after we got past the Appellate Court so we would have gone forward. We believe in fairness. Correctly our project should not be required to pay these fees. Our project was approved prior multiple times but the last time the one that stands today prior to the implementation of the RTMF fees. So we ask that you find in our favor with regard to that this evening. And I would just point out one thing that caught my attention. The County Counsel's office, I assume County Counsel prepared the response here. It says Issue A is the project vested? Then it quotes from the resolution new development means and it says the definition of new development. I think that's missing the point because right above in the definition section under above new development is Item L which is development. It says development means any work or improvement that requires a building permit or development approval and then it goes on. Clearly we had a development approval. So under the definition of the resolution we had an approval and we had it before the date of the commencement of these fees. I'd be happy to answer any questions about the project. I know Mayor Flores was there for multiple meetings that we had that lasted until 1:30 in the morning as there was conversation and so forth and challenges to the project to try and stop Wal-Mart. He's familiar with the timelines that we've been through a long hard process to get to this point. Certainly everyone knew there was a project coming here and it was in the works and it wouldn't be new to anybody with regard to the enactment of RTMF. We don't have this kind of money budgeted for this project. We've had to hold this property all these years, pay the taxes, cut the weeds down. We did pull a building permit to put in a storm drain line across the middle of the property so I guess if you want to say was there a permit pulled that could be made as well. It wasn't a building permit but we ask that you support our request. Thank you.

Mayor Dhaliwal – Thank you.

Mayor Flores – I have a question.

Mayor Dhaliwal – Mayor Flores, we're open for the question. Go ahead.

Mayor Flores – The first time you came before the Clovis City Council for which you had approval in '03, would you have built in '03?

David Paynter – Absolutely.

Mayor Flores – And then you had the second approval in '07, would you have built in '07?

David Paynter – Yes we were precluded because of the court.

Mayor Flores – And in '09 would you have built in '09?

David Paynter – Absolutely.

Mayor Flores – So the only thing that kept you from building was the lawsuits from this third party suing Clovis for permitting or approving this project.

David Paynter – Absolutely. And that's further evidence for the fact that when we finally got passed the Appellate Court we started grading out there within four months.

Mayor Flores – And this permit for the sewage

David Paynter – for the storm drain line

Mayor Flores – When was that?

David Paynter – Um I have that here

Mayor Flores – But it was before January 1?

David Paynter – Absolutely yeah it was on March 26, 2008. It was for the storm drain line. The storm drain line went from Clovis Avenue it went about a third of the way to the east and stopped. And then we finished it the rest of the way to Sunnyside.

Mayor Dhaliwal – Any other questions? Mayor Silva.

Mayor Silva – Yes, just for clarification on the so-called double illegal fees charge of the impact fees could somebody give us an explanation on that?

Tony Boren – Well, I think Les you want to speak to it? Basically I think it's the Clovis mitigation fee and the regional fees?

Les Beshears – Yeah, at this time we have our consultant PB Americas here that has a power point slide show he wanted to show you that explains all the issues in this case and that will be covered in it if you want we could get started on that we could. Don Hubbard from PB Americas. He has basically prepared our staff's defense and the reason why we collect the fee.

Mayor Dhaliwal – Les, can you sort of briefly freshen the memory for all the board members on what the RTMF fee is and how it was put in place.

Les Beshears – Yes, the RTMF fee was established by the it was a requirement of the Measure C when the voters passed Measure C in 2007. It stipulated that the regional transportation mitigation fee would be collected. Those of y'all that were around then recollect that we convened we retained PB Americas here to do the Nexus and we convened a committee of your public works directors and City managers and such and went through a long process of determining how that fee would be structured and worked. It's a county-wide fee on all the traffic networks in the county and it's levied equally throughout the county. It's for state highway mitigation and PB Americas did the nexus. Originally the ballot envisioned that each individual City would be levying and collecting that fee themselves. During the process everyone decided that it would probably be a function that should be done collectively so they formed the Joint Powers Agency and gave it to the COG here to administrate. And here we are.

Mayor Dhaliwal – And it was passed with Measure C when was it passed?

Les Beshears – The Measure C was passed in 2007. The actual fee was implemented January 1, 2010.

Mayor Dhaliwal – Because of the logistics of how to

Les Beshears – It took us a couple of years to get together. It's was a complicated formation.

Mayor Dhaliwal – Even with the rationale of the fee that was passed by the will of the voters in 2007?

Les Beshears – 2007, yes.

Mayor Dhaliwal – Any other questions?

Les Beshears – Okay, would you like Don would you like to come up?

Don Hubbard – And just to add to what Les was saying part of the reason for the delay was that state law requires a nexus study. So the nexus study took time and that accounts for the interval between when it was passed and when it was actually became implemented – the time for the nexus study. What I planned to do this evening is briefly to give a background of the project and the appeal and I'll talk over the two main issues

Mayor Flores - Actually the two only issues

Don Hubbard – which is whether or not the project is vested and whether or not it's being double charged for the same impacts. Then I'll tell you what our conclusions were and answer any questions you may have. So the background for the project and the appeal – project was first approved as has been said by the City of Clovis in 2003. The EIR was challenged in court which delayed the start of the construction. The first building permit was issued in 2012. It was issued for pipe that wasn't a building permit for Mr. Paynter's buildings. The project is 491,000 square feet of retail. Mr. Paynter has part of that. Total project will generate 19,000 vehicle trips a day, more than 5,000 of which are gonna use the state highway system. The developer approached RTMF staff in January to ask whether or not the project was exempt. After meeting with the developer, we reviewed the materials. Staff informed him that yes the RTMF applied to the project. In August they submitted payment for the RTMF for the first building along with a notice of protest. That follows the protest procedures that you have to pay before you are allowed to protest otherwise you don't have anything to protest. In September the 8th they submitted an appeal and supporting documents and that brought us to where we are this evening.

- A. The appeal is based on two points – number one – the developer claims this project has vested exemption based on their interpretation of the text of certain RTMF documents and they have also in their brief further claimed that paying the RTMF in addition to the traffic impact fees already paid to the City of Clovis would be double charging for the same impacts. So I'll go over those one at a time starting with is the project vested? Vesting rights concerning the RTMF are governed by two things – state law and the agency policy. The agency's policy is basically built on the text of the ballot measure. Both of these provide vesting rights based on the date of approval of certain types of subdivision maps or based on building permit. So we call this the subdivision map act because it applies to subdivisions which means residential developments. So the law does not apply to commercial developments and whether we think that that's a good thing or not that's the way the law is. This project does not have an approved subdivision map because it's not a residential development and it did not receive a building permit until after the RTMF came into effect. So in accordance with rules which has come up in court before that nominal approval of projects, that is the other approvals one in 2003, 2007, 2009, they do not convey vesting rights unless you've got a building permit and they did not have a building permit until after the fee came into effect. So the developer has based their appeal, I'm taking this from the brief they submitted, based on this particular excerpt from the agency resolution, the first resolution the one that established the fee says in their brief the developer says the RTMF agency resolution defines applicability of the RTMF to all new development within City and county effective January 1, 2010. So the claim is that this is a new development because they received certain types of approval prior to January 2010. However, their claim is contrary to the definition of new development found in that same resolution. What it says is, I'm going to read this because I don't want to try your patience – new development means any development on vacant land or additions or expansions on existing development wherein square footage of the development, in the case of non-residential use, or the number of dwelling units, in the case of residential use, is increased, or where the use is changed. It shall not include remodels or reuse where the number of dwelling units or overall square footage is not changed. The key thing

about this definition is it's based on physical changes. Something in the field has changed. This is not a definition that's based on paperwork, what the status of this that or the other piece of paper is. New development means you did something in the field, you built something. So since they did not start building until after the fee came into effect, a couple of years afterwards, this is not new development according to this definition. The developer again in their brief they use a similar excerpt from the RTMF Administrative Manual to make the same argument. The Agency's Information Summary, pages 4, page 12 of the Administrative Manual says the Agency has interpreted the resolution to apply to developments approved on or after January 1. There's two problems with the way this is being presented. Number one – the Administrative Manual is not a policy guide. It doesn't make policy, it doesn't interpret policy, it's not a policy manual. It's just instructions for the staff for the day-to-day procedures. Policy has to either come from Agency resolution or from state law and these contradict the claim that this is a vested development. So you can't claim some other thing with no legal weight from state law or the ballot measure. Plus the appeal also ignores other parts of the same page. This is the page that they're quoting from. See that box up there? The very first words on the page says "The information given below is intended to provide general guidance related to the RTMF and is not intended to be, nor is, legal advice. Applicants for developments that might be subject to the RTMF should submit details of their project to the RTMF Joint Powers Agency for determination of the amount due, if any."

So what this shows is that this is general guidance and that's all it is. It's just general guidance – you go to the Agency, the Agency gives you the final answer based on the details. So again it does not trump state law, it doesn't trump the Agency's resolution. And the strangest thing of all is the developer was told in advance by the City that this was not a vested that these documents that the City approved did not vest their project. And you can tell this just looking at the site plan review – this is from 2009 – this is one of the conditions where it says the applicant shall pay all applicable development fees prior to the issuance of a building permit. Partial preliminary estimate of the fees is \$7,325,000. A breakdown of this estimate is attached to these conditions for your information. In green, additional fees may be assessed and must be paid prior to the issuance of subsequent development permits. Note, fees given at this time are an estimate calculated on the rates currently in effect. Rates are subject to change without notice and the actual amount due shall be calculated using the fee in effect at the time of payment. Additional payments payable to the City or other agencies may become due as supplemental information regarding the project is received by the City. So clearly this is the City's document the one that they're basing their thing on and I'm telling you this is not a vesting document because it's says three different ways that the fees can change. If it was a vesting document fees cannot change. So just to summarize on the first thing, the only way you have vesting rights is either through state law or through the ballot measure and neither of those convey vesting. The document that he's claiming says that it has vesting rights is shown clearly within the body of the document it does not convey vesting. So then the other issue they've got is are they being double charged which is a different violation of state law. Okay the City required the development to mitigate impacts on Herndon Avenue and Sunnyside Avenue and what you see here in this figure you can see some yellow dots there – those are intersection improvements. The red lines are street widenings and street improvements – curbs, gutters, etc. The developer claims that these improvements to this portion of Herndon Avenue were part of the RTMF and they are therefore being double charged for these improvements. The City made them pay and then the RTMF is also needing to be paid. This claim was based on a typo, some unsupported surmise and selected regional documents. In their brief the supplemental brief the developer references this document, the FCTC website and this is an excerpt from their supplemental brief. Sorry it's small and has the markings that they've put on it but I've expanded the ones that are important. The Herndon Avenue widening is shown as a 150 million dollar project with 94 million in funding to be determined. Then they break it down into different subsections. Project K is the whole thing; K-1 is one subpart, K-2 is another, K-3 is the third. The one we're interested in is K-2 which is pointed out here. The

funding from local fees for this one part is listed as 265 million dollars. That's the typo. This thing is based on a typo. It's supposed to read point two six five. So it's not 265 million, it's 265 thousand. The decimal point got left off on the website. And you could have figured that out anyways since one subcomponent can't cost more than the entire project which has like nine different components. So anyways it was a typo but you could call that an honest mistake. The incorrect amount was then used to launch an unsupported conclusion. So this is an excerpt from them. The funding sources for subsection two called for in Measure C Extension amounts to 1.06 million and local development fees in the amount of 265 million. That's the typo. Although no RTMF funds are shown as the source of funding for the Herndon Avenue widening project on the Measure C list, when considering the large amount of funds to be determine, it is reasonable to conclude that there is a probability that the Board will commit RTMF funds towards the project in the future. In other words in order to claim that there's going to be a double accounting you have to say that there's this big unfunded amount which again was based on a typo. So if you're saying that's reasonable, actually it's not. Not just because the number isn't right but because the Herndon Avenue Widening Project is specifically excluded from the RTMF program as other documents in the appeal show. So there was never any possibility that this was going to be a double charge. And we dealt with that issue early on in the two years between when the ballot measure passed and when the fee came into effect. I raised this issue myself that there might be some overlap between local fees and regional fees and policy measure came in. We're going to prevent that by only allowing state facilities to be funded by the RTMF. So we eliminated in the way the fee is set-up any possibility of an overcharge. The appeal then selectively reads this passage from the administrative manual. This is an excerpt from their brief. Based on this input and the guidance in the Measure C Ballot measure language, the JPA ultimately approved a plan that limits the use of RTMF funds to projects for State facilities identified in the regional transportation funding Tier 1 list or on the freeway interchange deficiency study. So their argument rests on the part that limits the use of RTMF funds to projects on the regional transportation funding Tier 1 list and then you look at that list and Herndon Avenue is on it but you can't look at this other section or then that kills that argument because it says it limits the use of RTMF funds to projects for state facilities. Herndon Avenue is not a state facility so it's not eligible. There absolutely is no overlap. And again this is another excerpt from their own thing. If you look down at this green thing this is the Tier 1 project list. Herndon Avenue widening is shown there and then in the blue it says is it a state facility and it says yes or no and this for Herndon Avenue it says no in the little box right there. So it says the amount of RTMF funds that it is eligible for and the answer is zero. And besides all that is the fact that the project is already fully funded so it's not like we have to guess where the funding is going to come from. The project Herndon widening is a combination of several standalone projects. It's very long – it goes from the 99/Herndon intersection all the way out through the City of Clovis. The Authority website showed 94 million in funding to be determined. The debts for two components K-8 and K-9 which are on the west side of the City of Fresno project site, we know we reviewed the project site, the project did not get charged for it. The widening of Herndon in front of Clovis Crossing is project K-2 which this Board recently fully funded through Measure C and state funding. Clovis has already committed to having this project under construction by December 2013 using funds already available. So again there is no RTMF funds going to this so charging an RTMF fee for this is not double charging. All of the stuff that they paid for local fees goes to local improvements. RTMF only goes to state improvements which they haven't been charged for yet. So our conclusions – the project does not have a vesting map or a building permit issued prior to the RTMF coming into effect. Their interpretation of RTMF internal documents is faulty and it ignores other parts of the same document that contradicts the claim. The City's own approving documents contradict the claim that they convey vesting. That's not what the documents say. So this project is not exempt from the RTMF. Any questions?

Mayor Dhaliwal – Any questions for Don? Mayor Flores.

Mayor Flores – You cite two cases in your report – Avco Community Development is one and Toigo is the other. Now are these pertaining to commercial developments or residential developments? Are they on point?

Don Hubbard - I'm sorry, yes they are relational to the testimony.

Mayor Flores – So they are exactly counsels point as far as the argument that he's making? The argument of the appellant court?

Don Hubbard – The argument that he's making that the fact that he got delayed in court says that if it hadn't been for this, I'm not a lawyer, I'm a city planner and traffic engineer. The county counsel has I understand has looked at this. He's the one as saying this is an example where the fact that somebody got delayed does not so much as convey a right.

Mayor Flores – What I've heard today and what I've read in the report is that a lot of this vesting issues pertain to residential development and not necessarily commercial development.

Don Hubbard – Because what the law says is commercial developments don't get vesting rights until they pull a building permit.

Mayor Flores – And so that's my question.

Don Hubbard – So he didn't get one until 2012.

Mayor Flores – And these two cases pertain to

Don Hubbard – What they pertain to is that they have nominal approval – approval of something – project's been approved, EIR, but they didn't get a building permit. So that's the issue. If you don't get, with nominal approval by itself doesn't get you anything other than the right to move to the next step. That's what the City's approved.

Mayor Dhaliwal – Any other questions? Supervisor?

Supervisor Case – What is the first stage the project would have been eligible for a building permit? Would it have been June 29, 2009? Would they have had the right to get a building permit and then stopped in court because of the challenge? When would they have gotten all the City pieces together?

Mayor Flores – In '03.

Supervisor Case – So in '03 they had the right to pull a building permit?

Mayor Dhaliwal – Let's have whoever wants to

Supervisor Case – I'm just trying to understand at what point was there a miscommunication? At what point could they have I mean if they would have known that it would make a difference I'm making a presumption that once you have a building permit you have like two years to build the building. At what point were they eligible to do that in terms of the construction timeline and implementation for the current building that they want to build?

Mayor Dhaliwal – I think the project owners can answer that question.

Bob Hillison – Good Evening. Mr. Chairman, members of the board, I'm Bob Hillison. I'm a lawyer here in Fresno. I can either answer Supervisor Case's question or I can make a hopefully short presentation.

Mayor Dhaliwal – Let's have him answer the question. We have the facts.

Bob Hillison – Let me begin by saying that first of all we understand that the staff's recommendation is based on the Board's adopted policies. But for the reasons that I'm going to explain we think that the staff's recommendation in this case should not be accepted. And as the staff report points out the ultimate determination is going to be made by the Agency. You have the authority to make the decisions one of two alternatives I'm going to propose. What this appeal really is about is fundamental fairness. Fairness under the circumstances here we think justifies granting an exemption of our appeal. Certainly we agree that it's the resolutions of the board that establish and articulate the board's policy. And there's no question that the resolutions both in 2009 and 2010 talk about vested rights and the kind of situations where there will be limited vesting rights granted. Particularly it refers to residential subdivision maps. Final subdivision maps, tentative maps and vested tentative maps. So we agree that it's the resolutions that set forth the policies. But here we have the administrative manual which the staff argues that does not establish the policy. Well it doesn't establish the policy but it was prepared by PB Americas Inc., Mr. Hubbard's firm. And if it doesn't actually establish the policies it's certainly the kind of document that when distributed to the public that I think this board would want to reflect the policies of the board. And instead despite the fact that it says it's for general guidance only and not legal advice what it really talks about is the general idea behind the establishment of the fee and when it's going to be effective. And it says the RTMF is effective for all developments approved on or after January 1, 2010. So Mr. Hubbard argues that the three site plan review approvals that this project received from the City of Clovis are only nominal approvals. Well I disagree. Those were in fact final approvals. And but for the fact that this lawsuit was pending building permits could have been issued immediately upon the City of Clovis granting the final site plan review approval. The first one was in 2003, the second one in 2007 and the final one on June 29, 2009. But in March 2008 at the request of the plaintiffs in this lawsuit in this CEQA lawsuit, the court issued a stay not against the developer, our client, but against the City of Clovis, ordering the City not to issue building permits. As we explained in our brief, even though there's a CEQA lawsuit pending a developer is permitted to go forward and begin construction at his own risk. Now that is a risk. But were it not for this stay that the court issued, that Judge Ellison issued here in Fresno County Superior Court, Clovis-Herndon LLC and Mr. Paynter could have gotten a building permit and could have begun the development and begun the construction. So we disagree that the site plan approval by the City of Clovis is only a nominal approval. It is in fact a final decision by the City.

Mayor Dhaliwal – Let me interrupt. Let's just have questions and answers and then the board can deliberate and can move on. We do have an agenda.

Bob Hillison – I have a few more moments if you don't mind. I'll move it along. This is not an issue about vested rights. There is no dispute here about vested rights. California law is clear. The Avco case and the vested right document apply to all projects, residential and commercial. But the Avco case was a residential case. It involved 18,925 residential units in southern California. The problem is the policy adopted by the board which exempts only residential projects if no building permit is issued. For example, a tentative subdivision map is not a final approval compared with a site plan review. The limited vesting rights that are granted only to residential projects is unfair and it's arbitrary. And the distinction between residential and commercial is also arbitrary and unfair. And there's no rational policy, there's no rationale for the policy distinction in either of the resolutions. Generally, the other for example the difference between a tentative map and a site plan review is the site plan review is a final approval; a tentative map is not. It could take another two years for example for final approval of a tentative map. Not only that for example traffic is generated from residential developments at a much higher ratio and at a much higher rate than from commercial projects. So what we think and we request is that you rectify the disparity and the unfairness at least with respect to our project and you can do that by one of two ways. You can do that by granting an exemption which is what we request or of course you can change your policy and apply it equally to residential and commercial projects. I would like to quote from one case that was on a slightly different issue but I think encapsulates what we're trying to say here. This is the kind of thing this exemption should be granted because this is an extraordinary case where the injustice is great. The precedent set would be granting the exemption would be narrow and if you look at where this project was beginning in 2003 and take that timeline all

the way til the court final judgment in 2011, there was at least a functional equivalent of a building permit. Now that concludes my presentation and if the board has any questions I would be happy to do my best to answer.
Mayor Dhaliwal – Thank you Bob.

Mayor Grey – The question I have, is this project complete now?

Bob Hillison – No. There are more buildings that are being constructed. There's a total of about 230,000 plus buildings square footage of buildings that are going to be constructed. And the building permits are being requested on the rest of them.

Mayor Grey – When is your first lease of occupancy?

Bob Hillison – Well, Dick's Sporting Goods has already occupied the premises and there are other buildings. So we've got

Mayor Grey – When did that take place?

Bob Hillison – Dick's opened what last month? September? Dick's opened in September.

Mayor Grey – I guess my concern is we're talking about our fees which are typically passed on. In other words you don't lease a project for less than what you've got invested in the project. And so from 2010 when you knew these fees were coming, you were stayed, that's true. But you were in a position to finalize the lease negotiations with your clients until sometime following that. So certainly you had the opportunity to incorporate those fees into the lease documents.

Bob Hillison – Well, frankly, I disagree. I don't think that, in this case anyway, that statement is supported by the facts. What happens in these large commercial developments is these lease were negotiated a long time ago and as we've heard this project was originally approved by the City of Clovis in 2003. At that time, Wal-Mart was already in place. Many of the other tenants were already in place. You're right, those leases were not finalized until sometime later, but my understanding is, Mr. Paynter is here, he can tell you probably on a lease by lease basis when these leases were finalized and they were finalized prior to the effective date of January 1, 2010. It was our hope I mean it was an unreasonable hope that this matter was going to be resolved before that. Unfortunately, it was not. But those leases were negotiated and the rents were fixed before the effective date of the RTMF.

Mayor Grey – Well I guess the only comeback I can make to that comment is you took that risk. You took the risk upon yourself by finalizing the lease before you knew you had a project with a building permit.

Bob Hillison – I think your comment and I mean this without any disrespect at all, reflects a misunderstanding or a lack of understanding of how these commercial projects are put together, how lease negotiations are structured, how developers and tenants interact with one another, and the risks that developers assume and how they go about this. You're right. There are a lot of business risks in this business. And I think you try to do your best to mitigate. But I can tell you that nobody believed that this RTMF, over 400 thousand dollars in fees, would be applied to this project because the approvals were granted.

Mayor Yep – Mr. Chairman?

Mayor Dhaliwal – Go ahead.

Mayor Yep – Is this still open to the public or are we discussing?

Mayor Dhaliwal – Let's have discussion

Mayor Yep – Because I don't want to litigate an issue that's gone through the whole court system and I have a lot of agreement on that stuff and I don't want to sit here and bill the City 300 hundred dollars an hour. It comes to a matter of fundamental fairness. It comes down to a lot of different issues. If my town was 3,000 population fundamental fairness says we can kinda wink wink. We're a City of laws, we're a county of laws. And if we sit here and we overturn a lot of those things the fundamental fairness stance is going to overtake us in the long run. So my thing is while I can sympathize and I hate dolphins being caught in the nets of tuna but as soon as we start cutting the nets up we let some of the dolphins out we are letting all the tuna out at the same time. So is this an issue that we need to discuss as an attorney, as a legal system or are we just here to understand the appeal and address the situation amongst ourselves? If we're here to litigate a case then I want to charge the City 300 hundred dollars an hour. But if we're here basically to make a decision on behalf of understanding an appeal then I think we need to discuss this amongst ourselves. If not we'll be here until nine o'clock or one o'clock in the morning.

Mayor Dhaliwal – Absolutely I agree with you. Let's try to wrap it up. Let's have the final questions on it and then we'll have one chance from the public and then we'll go ahead and take a vote. Mayor Fast?

Mayor Fast – I just had a question of clarification. I'm understanding that this is not a residential project

Bob Hillison – Right.

Mayor Fast – and I tend to agree with the gentlemen at the podium on the fact that the June 29, 2009 approval by Clovis City council had there not been a stay had there not been something stopping the City from allowing this to go forward it would have gone forward at that time. And that's before January 2010. Why are we saying because this is a commercial property that that's not the case? I'm not quite understanding that.

Mayor Dhaliwal – Let's have Don

Don Hubbard – Can we put that slideshow back up? The particular issue of the distinction between commercial development and residential development was debated for three months when we were developing this because it's complicated and because the commercial development industry and their group came and lobbied on behalf of this at the same time that the building industry association came lobbying for the residential side. We're in an unusual situation. The RTMF is different from almost all the other fees. Different from the City of Clovis fees, different from the City of Fresno fees. Usually an agency creates a fee. An agency decides we need the money or for whatever reason or for public policy reasons. They develop a fee and as long as they stick with the mitigation fee act they're fine. In this particular case though, for the RTMF, the fee created the agency. In a very real sense, because the framework for the fee was established in the ballot measure outside the JPAs control the agency has a lot less flexibility than is usually the case. Usually you've got all sorts of discretion to say well we did this fee because we wanted to fund this and we think this project is worthwhile for something so we're going to put aside that one goal in hopes of performing differently. That's fine for a normal fee. But for this fee you really don't have the discretion to do that. Because the ballot measure says this is going to apply to all development unless, and then it lists certain cases where you can give an exemption, and if it's not on that list you really can't just make up exemptions that weren't on the list whether you agree with it or disagree with it. That's what the ballot measure says. Now if there was something in the state law that came to us you could do it. But again state law for whatever reason, their lobbyists are better or whatever, they protect the residential development a lot more than they protect the commercial development partly because they were concerned about a big residential development got partway through construction then stops and then they're left with a site with a problem that isn't just for the developer anymore. Now it's for the people that live there. So we had very good reasons for protecting residential development. But in this case I'm just not sure where you come up with the authority to do

what he wants which is say don't look, forget the law, the law doesn't help me, forget the City's own documents which said that it wasn't vested forget that too and just reach in and decide

Mayor Flores – Doesn't the measure say something about approval prior, have the dates certain on approval?

Don Hubbard – Yeah we can check and show you what the measure is

Mayor Flores – What is the date that the measure says determines a project's approval?

Don Hubbard – Okay it says

Mayor Flores – You're saying it's nominal. They're arguing that

Don Hubbard – No no no read what the law says. Nominal means it covers certain things. When you go with a redevelopment project it gets approved a lot. I went through one where it had 23 different approvals. The only approval that counts though is the last one. And for the case of a commercial development the approval that counts is the building permit.

Mayor Fast – Okay okay let me

Mayor Dhaliwal – Let's have some order here

Mayor Fast – Let me have some clarification on that issue then okay we're at June 29, 2009. This has been approved by the Clovis City council. What is the next step if there was no legal issue with this development? What would be the next step? I want somebody to tell me that.

Mayor Flores – They'd get a building permit.

Mayor Fast – They would have been issued a building permit?

Don Hubbard – So six months went by and

Mayor Fast – Okay okay okay hold on hold on. Okay. Now. Okay. The stay at the City level had I as a builder come and said I want to get a building permit on this would they have been issued a building permit at the City of Clovis in 2009?

Don Hubbard – I'm gonna say no because of the stay.

Mayor Fast – Because of the stay. So whose fault is that? Is that this builder's fault?

Don Hubbard – I wasn't involved in that case so I don't really know. All I know is that the fact that he was delayed for whatever reason, ran out of money, bad market, whatever, or a court case. And in the case of Avco it was for court cases. The fact that he was delayed, for whatever reason, unless it's a reason that gives him a legal basis for an exemption isn't a legal reason for an exemption. It's just not. I sympathize with the guy. This is exactly what I would do, come looking for exemption. But you can't just make up authority if it isn't there. If he can say something in state law that says here is where you get the authority to exempt or in the ballot measure here is where you get your authority to exempt then you can exempt him. But if not all you can say is gosh we're real sorry that this happened to you but it happened to you. You've gotta have the authority from somewhere.

Les Beshears – Let me see if I can extract this

Supervisor Case – Isn't our discussion whether they were a project before the date of implementation or no?

Mayor Yep – I think the issue is whether or not we want to grant an exemption and then we're arguing whether or not we have the right to do that or not.

Supervisor Case – I mean to me it's whether they had a project before this fee was applied or not.

Les Beshears – Let me see if I can

Supervisor Case – and that to me is not an exemption that's just you either had a project or you didn't have a project.

Les Beshears – Let me see if I can focus us on this a bit. The ballot said all development will pay the fee and set forth specific exemptions. This project was not on that exemption list. It's all development. Now then wait a minute. We've got the state map act that says you can't charge fees on projects that have vesting. Per the map act. This project does not have vesting per the map act. So when you're charged by the ballot to collect fees on all development unless we legally can't do it and that's where we're at. The approval by the City of Clovis was a non-vesting approval. It didn't convey the rights to exempt them from future fees. It says so right in the approval. He showed you that slide that said condition 94 I believe it was it said future fees can be assessed against this project. So it was a project approval but it wasn't an approval that would give you vesting rights per state law or your adopted RTMF policy.

Mayor Dhaliwal – And it sounds like we're litigating a case here. We're not a court of law. We just oversee a political body. I think as a body a comment earlier out of fairness what is the fairness? That's what we have to decide in our heart and mind. We had the Measure C passed by the will of the voters in 2007 and 2010 actually Nexus Study which was prior to get it done. Now Nexus Study, some people may agree or disagree with it. That is something that we base our policy on. So that is the basis that we have to make our decision on and as the Mayor suggested we are not legally required to look at the technicalities. Mayor would you like to make that last comment.

Mayor Blayney – I need to get clarification from Counsel. Do we have the legal authority to declare this an exemption or not?

Zachary Redmond – The term exemption is probably an incorrect term because the measure does talk about exempt projects.

Mayor Blayney – Do we have the right to waive this?

Zachary Redmond – And the exempt projects are related like to schools and public facilities. But yeah I think the RTMF Agency has the authority to make determinations as to I think the cities and the county all have the authority to make determinations as to when a project is developed for the purposes of the RTMF and the cities and county have passed that duty and authority on to the RTMF agency.

Mayor Blayney – So we have that right to do this? So we have the right to make a decision?

Zachary Redmond – And you're interpreting the resolution of the board and Measure C creating the fee.

Mayor Blayney – Okay.

Dave Paynter – I just want to make one brief comment. Les was talking about development and he was talking about pulling building permits and I'm going to misquote him but. The definition under development again just to read the first line without going over the rest of it so we can spend our time on business development means any work or improvement that requires a building permit or development approval. Clearly we had development approval.

Mayor Fast – Thank you.

Mayor Dhaliwal – Mayor you can make the last comment and then after that let's wrap it up.

Mayor Grey – I just have one question. It was up for approval in 2003?

Les Beshears – Yes. In 2007 and finalized in 2009.

Mayor Grey – Why didn't they pull a building permit in 2003 or 2007? On Clovis, 2003 and 2007. Or just in 2009?

Les Beshears – I wasn't there then so

Mayor Gray – Yeah but they talked about 2003 we got approval, 2007 we got approval. Why wasn't the building permit pulled then? It was just a curious question.

Les Beshears – I don't think I can answer that. Can y'all answer that?

Supervisor Case – And maybe somebody can clarify the appellant's brief on the appeal on page six it talks of the appellant did submit plans that were required for processing and plan check. If that was the case it sounds like something was pulled to move it forward and the court case officially stopped that process.

Dave Paynter – Each and every time that we we obtained three separate approvals and with each and every with the first approval the Association for Sensible and Informed Planning, was a newly formed entity that filed the lawsuit and challenged the project and sued the City as a real party interest. We were blocked each and every time because of this. And we did submit building plans at one point and the City wouldn't allow us to continue to process them.

Mayor Yep – In the legalese, fundamental fairness is when you want to overturn something that you don't feel is right but you have no legal leg to stand on. So I caution this body on overturning something on fundamental fairness for the simple reason that you're going to have Wal-Mart come in in six more months, you're gonna have a bigger developer come in and say fundamental fairness I went to pull this out but CEQA laws and this and this and so. By opening up this dam you're opening yourself up to fundamental fairness as an excuse.

Mayor Flores – I disagree. It's not about fundamental fairness.

Mayor Yep – That was the argument

Mayor Flores – They're going to throw all kinds of arguments in their appeal. Their second argument that the RTMF is a double fee that doesn't hold water for me. If you're going to try anything try it in an appeal you've gotta try. But I think what's before us as a body is does it apply or doesn't it apply. You don't even need authority from either one. Measure C was very or what happened because of Measure C is very clear. January 1, 2010. If something's being built then it applies. This was being built in '03 and but because of a court order not allowing Clovis to proceed this developer was not allowed to proceed. And that happened for 10 years. So it's not about fairness. Did the fee apply to this development – yes or no? And I would submit it and I would hope this board it did not apply because it was prior to Measure C approval and January 1, 2010.

Les Beshears – Do not collect the money.

Mayor Flores – If the fee does not apply you don't collect the money. Will you call my name?

Clerk – Clovis?

Mayor Flores – I'm a yes.

Clerk – Coalinga?

Mayor Ramsey – Yes.

Clerk – Firebaugh?

Mayor DeFrancesco – No.

Clerk – Fowler?

Mayor Cardenas – No.

Clerk – City of Fresno?

Councilmember Brand – No.

Clerk – Huron?

Mayor Chavez – No.

Clerk – Kerman?

Mayor Yep – No.

Clerk – Kingsburg?

Mayor Blayney – Yes.

Clerk – Mendota?

Mayor Silva – Yes.

Clerk – Orange Cove?

Mayor Jimenez – No.

Clerk – Parlier?

Mayor Lopez – Yes.

Clerk – Reedley?

Mayor Fast – Yes.

Clerk – Sanger?

Mayor Fast – Sanger's not here.

Clerk – San Joaquin?

Mayor Dhaliwal – No.

Clerk – Selma?

Mayor Grey – No.

Clerk – Fresno County?

Supervisor Case – Yes.

Les Beshears – The motion fails.

Tony Boren – Again it's a dual weighted test. You need nine the majority of the board which is nine and a majority of the population which is 40.

Mayor Dhaliwal – Thank you very much everybody. Let's move on.

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May 20, 2014

HAND DELIVERED

Fresno COG Policy Board/RTMF Agency Members
Regional Transportation Mitigation Fee Joint Powers Agency
2035 Tulare Street, Suite 201
Fresno, CA 93721

Re: **Appeal of Clovis-Herndon, LLC**

Ladies and Gentlemen:

We are attorneys for Clovis-Herndon, LLC. This letter is in response to the Staff e-mail preview of the May 29, 2014, RTMF Agenda and Staff Report dated May 15, 2014.

Initially, we wish to caution all interested persons that unless Judge Cabrera issues a peremptory writ of mandate prior to the hearing of May 29, 2014, we believe, as we have previously informed the County Counsel, that the Board of Directors of the Regional Transportation Mitigation Fee Agency will not have jurisdiction to hear this matter and/or to make any decisions or rulings that will be binding or effective.

1. The Staff Report accurately states that Appellant's ". . . project was approved by the City of Clovis in 2003, again in 2007, and finalized in 2009"
2. However, the Staff argues that the appeal should be denied on grounds that are **not** issues in dispute:
 - a. **Vested Rights.** Appellant does not now contend and never has contended that it should not be required to pay the RTMF because it has vested rights. There is no dispute that a vesting tentative map was not approved for the project and no claim that a building permit was issued before January 1, 2010.

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FRESNO COG

- b. **Double Charge.** Although Appellant initially raised the possibility of a double charge in its Notice of Appeal of September 18, 2012, Appellant elected not to pursue this contention in its Petition for Writ of Administrative Mandate filed with the Fresno County Superior Court on February 15, 2013, and does not make this argument now.
3. The issues before the Board to be determined are:
- a. **Application of the RTMF.** Whether the RTMF applies to Appellant's project because it received final approval on June 29, 2009, before the effective date of the RTMF on January 1, 2010.

There is no dispute, and the Staff agrees, that the City of Clovis gave Appellant's project final approval on June 29, 2009.

Section 4.E. of Resolution 2009-01 provides:

"Applicability. The RTMF shall apply to all new development within the Cities and the County effective January 1, 2010, unless otherwise exempt hereunder."

Moreover, there is no dispute that the Agency's Administrative Manual provides:

"The RTMF is effective for all developments approved on or after January 1, 2010, unless the development is exempt for one of the reasons described below."

- b. **Equal Protection.** If the Board chooses to ignore the undisputed evidence of final approval and the provisions of the Agency's Administrative Manual interpreting this Board's Resolutions, which was designed and prepared to ". . . provide a step by step guidance for administering the program . . .", then and only then the question before the Board to be determined is whether there is a rational basis for distinguishing between approval of vesting maps for residential projects and final approval, e.g., site plan review, for commercial projects. Because there is no rational basis for such a distinction, the

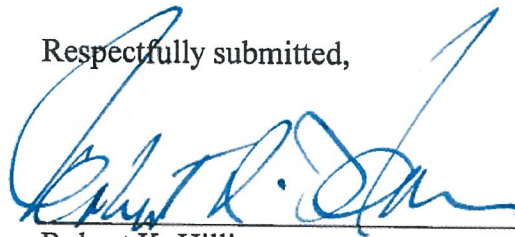
Fresno COG Policy Board/
RTMF Agency Members
May 20, 2014
Page 3

Agency's policy of exempting residential projects with approved vesting maps and not exempting commercial projects with final approval violates the constitutional guarantee of equal protection and, accordingly, the appeal should be upheld on that ground.

4. **Conclusion.** Because there is no dispute that Appellant's project received final approval before the effective date of the RTMF on January 1, 2010, and because the Agency's Administrative Manual states that the RTMF applies only to projects approved after January 1, 2010, the Staff's arguments for denying the appeal should be rejected, its recommendation should not be followed, and the appeal should be granted.

Appellant requests thirty (30) minutes to present its arguments to the Board at the hearing. Thank you for your consideration.

Respectfully submitted,



Robert K. Hillison

Attorneys for Appellant Clovis-Herndon LLC

RKH/ch
c: David H. Paynter

