

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.