

Fresno County Regional Transportation Mitigation Fee Agency

AGENDA

Date: Thursday, May 28, 2015

Time: 5:30 PM

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

PRIOR TO THE FRESNO COG POLICY BOARD MEETING - ALL POLICY BOARD MEMBERS

Americans with Disabilities Act (ADA) Accommodations

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- I. Minutes of April 30, 2015 [APPROVE]**
- II. Hearing**
 - A. Clovis- Herndon LLC RTMF Appeal**

Summary: 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 resulting in \$479,468.04 paid in fees. The appeal includes only property owned by Clovis-Herndon, LLC and not property for other owners in the shopping center subject to the fee.

On October 25, 2012, the board denied the appeal and Clovis-Herndon LLC filed suit. On May 29, 2014 the court ordered the RTMF Agency to hold another hearing, make a new determination, and adopt findings to support that determination. In June and July 2014 the RTMF Board held hearings, listened to testimony and voted 12-3 to deny the appeal. That motion failed because the dual weighted voting system requires 40% of the population to agree and the vote only secured 32.91% of the population. On January 28, 2015 the court once again ordered the Fresno County Regional Transportation Mitigation Agency to hold a hearing, make a determination, and adopt findings regarding the Clovis Herndon appeal. On February 26, 2015 the board held another hearing and was again deadlocked. On March 26, 2015 the board directed staff to hold another hearing to attempt to break the deadlock.

The documentation for this issue is significant. To facilitate your review the following three links are provided.

Clovis Herndon Appeal - Caswell, Bell, & Hillison LLP (CBH) file an Appeal, including a Brief and 52 tabs, to be heard before the RTMF agency on 10/25/12. On 10/18/12 a supplement to the appeal is filed.

Here's the link to this file:

<https://www.hightail.com/download/bXBiRE9xZy9CSnBESjhUQw>

102512 Hearing –Board Meeting Package, Staff Rebuttal, a Power Point highlighting staff recommendation, Minutes, Verbatim Transcripts.

Here's the link to this file:

<https://www.hightail.com/download/bXBiRE9xZy9reEFPd3NUQw>

073114 Hearing –

05/20/14 Caswell, Bell & Hillison letter stating basis for appeal.

Caswell, Bell & Hillison Power Point presentation.

RTMF Information Summary

Resolution 2009-01

06/30/14 Executive Minutes

07/31/14 RTMF Board Agenda

Transcript of 07/31/14 hearing

Minutes of the 02/26/15 Hearing

Here's the link to this file:

<https://www.hightail.com/download/bXBZdFdaMHdWRCtVQU1UQw>

Recommendation: Staff recommends the appeal be denied.

B. Resolution 2015-02 Findings of Fact

Summary: Per the court order, County Counsel recommends in the event the Board denies the appeal, they adopt Findings of Fact consistent with the Board determination.

Recommendation: Staff recommends adoption of Resolution 2015-02.

III. Public Presentations Related To Closed Session Only And Then Retire To Closed Session

- a. Conference with legal counsel - Existing Litigation; Government Code section 54956.9(d)(1): *Clovis-Herndon, LLC v. Fresno County Regional Transportation Mitigation Fee Agency*, Fresno County Superior Court, Case No. 13 CECG 0048**

IV. Election of Chair and Vice Chair

V. OTHER BUSINESS

- A. Items from Staff
B. Items from Members

VI. 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:

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

Fresno County Regional Transportation Mitigation Fee Agency

Executive Minutes

Date: Thursday, April 30, 2015
Time: 5:30 PM
Place: COG Sequoia Conference Room
2035 Tulare St., Suite 201, Fresno, CA

Members Attending: Mayor Nathan Magsig, City of Clovis
Mayor Ron Ramsey, City of Coalinga
Mayor Craig Knight, City of Firebaugh
Mayor David Cardenas, City of Fowler
Mayor Sylvia Chavez, City of Huron
Mayor Stephen Hill, City of Kerman
Mayor Robert Silva, City of Mendota
Mayor Victor Lopez, City of Orange Cove
Mayor Pro Tem Raul Villanueva, City of Parlier
Councilmember Robert Beck, City of Reedley
Mayor Amarpreet Dhaliwal, City of San Joaquin
Mayor Scott Robertson, City of Selma
Supervisor Buddy Mendez, County of Fresno

Gail Miller, Caltrans
Arthur Wille, Legal Counsel
Tony Boren, Executive Director

Absent: Mayor Ashley Swearengin, City of Fresno
Mayor Chet Reilly, City of Kingsburg
Mayor Joshua Mitchell, City of Sanger

Others Attending:
Bob Hillison, Caldwell Bell & Hillison LLP

QUORUM: At the start of the meeting there were 13 members present representing 42.72% of the population and there was a quorum to conduct business. (Clovis, Coalinga, Firebaugh, Fowler, Huron, Kerman, Mendota, Orange Cove, Parlier, Reedley, San Joaquin, Selma, Fresno County)

Mayor Dhaliwal (San Joaquin) Chair, called the meeting to order at 6:54 pm.

I. Executive Minutes for March 26, 2015 [APPROVE]

A motion was made by Mayor Chavez (Huron) and seconded by Mayor Cardenas (Fowler) to approve the Executive Minutes of March 26, 2015 as presented. A vote was called for and the motion carried.

II. Hearing

A. Clovis- Herndon LLC RTMF Appeal

Tony Boren, Executive Director (FCOG) explained that the City of Fresno was unable to send a delegate to the RTMF meeting because of a full agenda on the City's own Council meeting. Mr. Boren stated that after deliberations with Chair Dhaliwal and with other FCOG staff, there was consensus that the hearing be postponed until next month because it would be futile to try and proceed with the hearing as the City of Fresno's absence ensures that a decisive decision could not be made tonight.

Bob Hillison, Caldwell Bell & Hillison LLP, representative of the appellate applicant, stated that he was in support of a postponement so that the City of Fresno could be in attendance. The return of writ is due May 29, 2015, but if the County Counsel needed additional time, the applicant would not object and an agreement to that effect could be reached with the County Counsel. He stated that he was confident that Judge Cabrera would agree that the extra time to prepare the return of writ should be granted.

After an informed discussion, Board members agreed that it would be prudent for the hearing to be postponed due to the absence of the City of Fresno and the inability to reach a decisive decision because of the absence.

Mayor Hill (Kerman) expressed his dismay that delegates from two of the larger cities were not in attendance during the meeting and felt that their absence was disrespectful to the entire Board.

A motion was made by Mayor Cardenas (Fowler) and seconded by Mayor Chavez (Huron) to: **A)** postpone the RTMF Hearing to the next scheduled meeting in May, 2015, with a statement noting that there are other delegates that the various Cities could send in the primary appointee's place, and that membership to this Board is an obligation that should not so easily be overlooked; and **B)** secure the appellate applicant's confirmation that the deadline for the return of writ will be extended. A vote was called for and the motion carried.

B. Resolution 2015-01 Findings of Fact

Due to the postponement of Item A, Resolutions 2015-01 was not considered.

III. Public Presentations Related To Closed Session Only And Then Retire To Closed Session

A. Conference with legal counsel - Existing Litigation; Government Code section 54956.9(d)(1): *Clovis-Herndon, LLC v. Fresno County Regional Transportation Mitigation Fee Agency, Fresno County Superior Court, Case No. 13 CECG 0048*

The Board retired to Closed Session at 7:08 pm.

The board returned from Closed Session at 7:14 pm with nothing to report.

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,

A handwritten signature in blue ink that reads "Tony Boren". The signature is written in a cursive, flowing style.

Tony Boren, Executive Director

\smm

Resolution No. 2015-02
A Resolution of the Fresno County Regional Transportation Mitigation
Fee Agency
Findings of Fact

In the Matter of the Appeal of Clovis Herndon LLC, concerning the applicability of the RTMF to the Clovis Crossing Project:

The application of Clovis Herndon, LLC (Clovis-Herndon”) from staff’s imposition of the Regional Transportation Mitigation fee (“RTMF”) upon the Clovis Crossing Shopping Center project (“Clovis Crossing”), came on regularly scheduled hearing before the Fresno County Regional Transportation Mitigation Fee Agency (“FCRTMFA”) on May 28, 2015. After receiving oral and documentary evidence and argument submitted by the Appellant and FCRTMFA staff, the Board renders its decision to deny the appeal and to uphold staff’s determination that the RTMF applies to the Clovis Crossing project.

I. FINDINGS

1. Clovis-Herndon owns a portion of Clovis Crossing located at the northeast corner of Clovis and Herndon Avenues in the City of Clovis. Clovis-Herndon has paid \$479,468.01 under protest relating to imposition of the RTMF upon Clovis Crossing.
2. Clovis-Herndon received certain City of Clovis land use approvals for Clovis Crossing prior to January 1, 2010, and did not obtain a building permit until after that date. The land use approvals did not involve a subdivision map.
3. The Measure “C” Ballot approved by voters in 2007 established the Regional Transportation Mitigation Fee (RTMF) shall apply to all development not specifically exempted by the ballot measure.
4. 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. This provision contemplates physical building of structures, which occurs only after the building permit issues.
 - c. Section 4.A: All new development in the Cities and the County shall be responsible for paying the RTMF unless otherwise exempted by this Resolution. None of the exemptions in Resolution 2009-01 apply to Clovis Crossing Shopping Center nor does appellant make such a claim of exemption.
 - d. Section 4.B. addresses how the fee is calculated. For “non-residential projects, the fee rate utilized shall be based on a per-square-foot of the building or structure identified on the building permit.” The fee can be calculated only by reference to information contained on the face of the building permit issued, which supports the proposition that New Development is a development for which a building permit has not timely issued.
 - e. 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.
5. The FCRTMA Administrative Manual does not support Clovis-Herndon’s position that the project “approval” before 2010 take Clovis Crossing out of the definition of “New Development.” Clovis-Herndon focuses on the term, “approval”, where it appears in a truncated one-page Information Summary in the Administrative Manual, and argues that the pre-2010 project “approval” by the City of Clovis take the project outside the definition of new development. However, placing in context the term, “approval”, where it appears in the Information Summary, it is clear that “approval” is intended to mean approval of a subdivision map, which Clovis-Herndon does not claim to have obtained. In the Administrative Manual, at page 5, it is

stated, “For the purposed of the RTMF program, all properties subject to a Final Subdivision Map or Final Parcel Map that has been approved and recorded prior to January 1, 2010 will be considered to have vesting rights as to the RTMF and will therefore be exempt from paying the RTMF...” Accordingly, the term “approval”, where it appears in the Informational Summary, means approval of a subdivision map, when context is supplied. The on-page Information Summary also contains a disclaimer that it is intended to “provide general guidance “ only and that it is not legal advice.

6. Clovis City Council’s last approval of Clovis Crossing in 2009 contemplates that additional fees or exactions can be assessed against Clovis Crossing. Condition 94 of the Site Plan Review, SPR 2005-017, which Clovis City Council incorporated into the approval of Clovis Crossing, provides: “Additional fees may be assessed and must be paid prior to issuance of subsequent development permits...Additional fees payable to the City of other agencies (FMFCD) may become due as supplemental information regarding the project is received by the City.”
7. 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.
8. Clovis-Herndon possesses 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. Alternatively, because Clovis-Herndon, LLC had not obtained a building permit for Clovis Crossing prior to January 1, 2010, the development fits the definition of “New Development” as defined in Resolution 2009-01 as amended by Resolution 2010-01, and the RTMF applies to the development.

II. ADOPTION OF FINDINGS

The foregoing Findings of Fact and decision are adopted by the FCRTMFA Board on May 28, 2015.

By: _____

AMPAREET DHALIWAL, CHAIR

FRESNO COUNTY REGIONAL MITIGATION FEE AGENCY

ATTEST:

TONY BOREN, EXECUTIVE DIRECTOR