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May 6, 2019

Delivered by email to: PLNDRS@cabq.gov and TLloyd@cabq.gov

Tony Loyd
Impact Fee Administrator
City of Albuquerque
PO Box 1293
Albuquerque, NM 87103

**RE: FORTY-EIGHT HOUR EPC SUPPLEMENTAL SUBMITTAL FOR
2019-002263/VA 2019-00107 & 2019-002264/VA2019-00108**

Dear Administrator Loyd:

Please consider this correspondence as an additional part of the above referenced Notices of Appeal (“Notices”) that are scheduled to be heard by the Environmental Planning Commission (“EPC”) on May 9th, 2019, pursuant to § 14-19-20 of the City of Albuquerque’s (the “City”) Impact Fee Ordinance (herein the “Ordinance”)—which Notices were submitted by this firm on behalf of SLG Holdings, LLC (“SLG”); Paul Allen Homes, Inc. (“Paul Allen”); and, Rex Wilson (“Wilson”) (collectively from time-to-time the “Appellants”). In their April 30, 2019, letter, Appellants stated that they intended to submit supplemental arguments regarding the internal emails disclosed by the City in response to Inspection of Public Records Act requests, which arguments were to be submitted under the EPC’s “48 Hour-rule”. This correspondence both lists those additional arguments and responds to the May 9, 2019, Staff Report (the “Staff Report”) you submitted to the EPC. While the Appellants appreciate the acknowledgment in your Staff Report that “[t]he facts support an unencumbered balance of open space impact fees sufficient to cover the request for reimbursement,” Appellants are troubled that such recognition was not accompanied by the City’s actual reimbursement of the referenced funds to Appellants. Which raises the question: if the City’s Impact Fee Administrator has determined that the City possesses unencumbered funds that should be reimbursed to Appellants, then why is the City continuing to withhold those funds and forcing Appellants to incur additional costs and fees in the upcoming hearing? Regardless, please see the below additional arguments.

The “History” section of the Staff Report provided an accurate timeline of the larger events that led to this appeal. Furthermore, that section concedes that “impact fee funds for open space were unencumbered at the time of the [Appellants’] request.” *See* Staff Report p. 2. However, while the timeline broadly discusses requests and submissions made by the City’s Parks and Recreation Department (the “Park’s Department”), it does not discuss the nature of those requests. As above mentioned, Appellants received certain emails from the City as part of a records request. Appellants do not believe the emails submitted by the City in reply to this request included all responsive emails and Appellants reserve the right to demand additional emails to supplement the record if this appeal continues. Still, the records provided depict the Parks Department’s questionable efforts to impede Appellants’ request.

- Through November 10, 2018, the City’s Capital Implementation Program documents show \$837,080 in unencumbered Open Space impact fee funds available for reimbursement (Doc. No. 18).
- On December 12, 2018, Brandon Gibson, Associate Director of the Parks Department worries that Appellants, together with another developer, are requesting certain reimbursements but notes that “Chant can be reimbursed from Impact Fees to 2%[.] Accounting needs to be figured out” (Doc. No. 211). This email is sent months after Appellants’ initial request for reimbursement and appears to discuss an attempt to use the above unencumbered funds on an otherwise unidentified “Chant” purchase.
- Also on December 12, 2018, David Simon Director of the Parks Department, sends an email to David Campbell, Director of the Planning Department, demanding that the Planning Department “take no action to refund any Open Space impact fees until we have a chance to meet” to discuss the Parks Department’s desire to use the reimbursement funds for another project. Director Campbell tells Planning staff—including the Impact Fee Administrator—to withhold processing the reimbursements pending this meeting (Doc. Nos. 211-15)
- On December 13, 2018, the Impact Fee Administrator emails Director Campbell and Planning Department staff, informing them that the Director and Associate Director of the Parks Department are omitting critical information in their requests and that it is untrue that the impact fee funds are not available for reimbursement (Doc. No. 216).
- Also on December 13, 2018, the Impact Fee Administrator notes in a memorandum that SLG submitted a reimbursement request on September 28, 2018, that the Administrator “will be processing” (Doc. Nos. 218-19).
- On December 18, 2018, Associate Director Gibson states it is his intention to use “any Open Space Impact Fees available to pay for the Chant property” (Doc. No. 226).
- Also on December 18, 2018, Associate Director Gibson instructs Deb Jordan, Accountant for the Parks Department, to pay for three projects using—at least partially—\$367,108.90 in impact fee funds that were previously noted as reimbursable to Appellants (Doc. No. 224).

- On December 20, 2018, the Impact Fee Administrator notes in a memorandum that the Parks Department is now claiming as encumbered all but \$58,000 of the impact fee funds that were previously encumbered (Doc. No. 228).
- On January 15, 2019, Linda Whitson, CIP Financial Program Manager, confirms that the Parks Department's targeted projects are not actually eligible to encumber the targeted Open Space impact fee funds and that there is at least \$415,245 in funds available for reimbursement (Doc. Nos. 235-37). This at least partially confirms the Impact Fee Administrator's December 13th email that noted the Parks Department was misrepresenting the nature of their encumbrances. During this time, Appellants are being asked to submit modified W-9s so that reimbursement payments can be processed (*see e.g.* Doc. No. 344).
- On February 8, 2019, the Development Review Services Weekly Status Report notes that counsel for Appellants is making legal demands for reimbursement of excess impact fee credits while "DMD is working on encumbering impact fees by contractual obligation" (Doc. No. 333).
- On February 14, 2019, the Impact Fee Administrator notes in a memorandum that there is a "meeting with the Director . . . scheduled for Thursday the 21st to discuss reimbursement of excess open space impact fee credits" (Doc. No. 356). Appellants' requests are listed in this memorandum as "on hold" (Doc. No. 357). This meeting is to take place approximately five months after Appellants' initial request was submitted.
- On February 28, 2019, Director Campbell wrote to Director Simons and Associate Director Gibson of the Parks Department: "As we discussed earlier this week, we are getting some private sector legal pressure to refund Open Space Impact Fee credits that are unencumbered. Want to let you know this, in the event you have pre-existing encumbrances or commitments that would withstand legal review" (Doc. No. 404).
- Also on February 28, 2019, Director Simon exclaims in an email to Associate Director Gibson "La Q!" in reference to Director Campbell's earlier correspondence, which is an apparent reference to a "La Cuentista" Open Space purchase that the Parks Department was contemplating. (Doc. Nos. 405-07). Based on the Staff Report, Appellants further understand that this is a reference to the "Real Estate Purchase Agreement with Option to Purchase" (herein the "Option Agreement") that the Parks Department now claims encumbered the impact fees subject to Appellants' reimbursement request. Again, this revelation and conversation took place five months after Appellants' initial submittal. Furthermore, as noted in the Staff Report, the Option Agreement is legally insufficient to encumber impact fee funds.
- Again on February 28, 2019, Director Campbell separately responds to the Impact Fee Administrator that he is ready to move forward with reimbursing Appellants (Doc. Nos. 408-09).
- Between March 5 and 8, 2019, Associate Director Gibson begins emailing different City staff regarding interests in the unencumbered balances in the City's Open Space impact fee accounts over the past twelve months (Doc. Nos. 410-26). Deb Jordan, Accountant for the Parks Department, appears to indicate that there are over \$416,000 in unencumbered Open Space impact fee funds as of March 8, 2019 (Doc. No. 426). Based on the Staff Report, it was at

approximately this time that the Parks Department submitted the Option Agreement to the Impact Fee Administrator while claiming that Agreement encumbered funds.

- On March 19, 2019, the Impact Fee Administrator issued a letter denying Appellants' Request for Reimbursement.

As above stated, Appellants believe there are additional emails on the above topics that the City has not produced at this time. However, the City has closed the applicable inspection request, indicating it has produced all of the documents it intends to produce. Still, the above documents show that the City stalled Appellants' request for five months prior to the Parks Department's allegation that the Option Agreement encumbered the fees sought through this appeal in early March of 2019. In the Staff Report, the Impact Fee Administrator has affirmed that there were unencumbered fees available for reimbursement at the time of Appellants' requests, and Appellants adopt herein all of the reasoning contained in pages one through three of the Staff Report. The City has produced no valid documentation or legal explanation for its denial of Appellants' request prior to the impending hearing before the EPC. In fact, were the City to attempt to assert new arguments at the upcoming EPC hearing without providing Appellants any prior notice of those arguments, such arguments would be essentially trial by ambush and likely a violation of Appellants' rights to procedural due process. Furthermore, an even more troubling procedural due process violation has been revealed through the Parks Department's behind-the-scenes instructions to the Impact Fee Administrator—as the Parks Department has no authority under the Impact Fee Ordinance to dictate either the procedure of a reimbursement request or when a reimbursement should or should not occur. Regardless, the one matter that is absolutely clear at this point is there were sufficient unencumbered impact fee funds available to fulfill Appellants' original request at the time that request was made. Accordingly, Appellants respectfully request that the EPC find and conclude that: 1) Appellants' appeal should be granted; 2) there were sufficient unencumbered funds in the Open Space impact fee accounts to reimburse Appellants at the time Appellants made their reimbursement requests; and, 3) Appellants are entitled to a reimbursement of their excess impact fee credits as requested from any currently unencumbered funds or, otherwise, from funds held by the Parks Department for other projects if the unencumbered funds have been since expended.

Very truly yours,

HUNT & DAVIS, P.C.



Blake Whitcomb
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