



**Environmental
Planning
Commission**

*Agenda Number: 4
Project Number: 2019-002263
Case Number: RZ-2019-00107
Hearing Date: August 8, 2019*

Staff Report

Agent	Hunt & Davis PC
Applicant	Paul Allen Homes
Request	Appeal of a denial requesting reimbursement of excess open space impact fee credits (citywide service area).
Legal Description	n/a
Location	See request above.
Size	n/a
Existing Zoning	n/a
Proposed Zoning	n/a

Staff Recommendation

*No Recommendation for
Project Number 2019-002263
Case Number RZ-2019-00107*

Staff Planner
*Tony Loyd,
Impact Fees Administrator*

Summary of Analysis

At the EPC Hearing on May 9, 2019, the Director of Planning requested a 30 day deferral to negotiate a resolution on the appeal. After discussions, the EPC granted a 60 day deferral to the July 11, 2019 EPC Hearing. At the EPC Hearing on July 11, 2019 the Appellant requested a 30 day deferral to continue negotiations. After discussion, the EPC granted a 30 day deferral to the August 8, 2019 EPC Hearing. During the 30 day deferral period, negotiations were successful. The Appellant will withdraw his appeal upon receipt of payment.

On November 9, 2018, the Appellant requested cash reimbursement of his excess open space impact fee credits in the citywide service area (“Credits”). On March 19, 2019, the Impact Fees Administrator denied the request. Per Section 14-14-19(J)(7)(c) of the City’s Impact Fee Ordinance (“IFO”), the city shall not be obligated to provide reimbursements for excess credits in the event there is no unencumbered account balance in the city’s impact fee account for the appropriate service category and service area. With that said, during the period from November 9, 2018 to March 19, 2019, there were meetings held and conversations between the Impact Fees Administrator and the Appellant intended to work towards the approval of the Appellant’s request for reimbursement as there were sufficient unencumbered funds available. However and during this same time period, there were internal requests made to the Impact Fees Administrator to deny the Appellant’s request to allow time for the City’s Parks Department to provide material that would demonstrate that all impact fee funds for open space were encumbered.

See May 9, 2019 full Staff Report as there are no revisions, except discussions related to negotiations cited above.

Appeal Report

INTRODUCTION

Request

Appeal of a denial, by the Impact Fees Administrator, of the Appellant's request for reimbursement from the City in the amount of \$268,345.00 for excess open space impact fee credits in the citywide service area ("Credits").

EPC Role

- The EPC's role is to hear this case based on Section 14-19-20 ADMINISTRATIVE APPEALS of the Impact Fee Ordinance ("IFO"). For full text, see Exhibit A, Impact Fee Ordinance, Section 14-19-20 ADMINISTRATIVE APPEALS.

History

- The Appellant's Credits were originally issued on July 15, 2014 (Exhibit K) in exchange for the conveyance of real property, known as Tract N, located within the Saltillo Unit I Subdivision in the amount of \$311,000.00. The property was conveyed as open space according to the City's applicable Component Capital Improvement Plan ("CCIP") as listed in the City of Albuquerque 2013-2022 Decade Plan for Capital Improvements and 2013 General Obligation Bond Program (Exhibit C). By definition, the holder of Credits can request reimbursement from the City for all or part of the amount of excess impact fee credits from revenue generated by impact fees paid by new development for system improvements. However, the city is not obligated to provide reimbursements in the event there is no unencumbered account balance in the city's impact fee account for the appropriate service category and service area.
- The following will be needed to assist the Commission in its decision making:
 1. December 2012, by definition IFO (Exhibit A), Encumbered - Impact fee funds committed for a specified capital improvement on a specified time schedule which does not exceed seven years from the date of payment of the impact fees.
 2. February 1, 2016, a New Mexico District Court entered a Memorandum Opinion and Order regarding the City's encumbrance of impact fee funds (Exhibit E Memorandum Opinion and Order Keeran, et. al. v. City of Albuquerque, D-202-CV-2014-07331). The Court concluded that the city's definition of encumbered means that to qualify as encumbered, the funds must be committed, or in other words, ear marked, to a specified capital improvement, and must be scheduled to be spent on that specific capital improvement within seven years from the date the

fees were paid. In addition, merely listing a project on the CCIP is not sufficient to encumber an unspent balance. This is important when reviewing the City's Capital Implementation Program Financial Status Reports for Open Space (Exhibit D). Finally, the Court remanded back to the City to determine if impact fee funds were encumbered according to the corrected definition described in the opinion (Exhibit E). For reference, the City Council Case # is AC-14-4.

3. May 16, 2016, Remand of AC-14-4 per order of the Second Judicial District Court (Exhibit F).
4. December 6, 2016, Notice of Decision, City Council, City of Albuquerque (Exhibit G) which was based on the recommendations of the Land Use Hearing Officer ("LUHO"). Some key statements from the Notice applicable to this appeal:
 - a. Listing a project on the CCIP is not sufficient to encumber an unspent balance;
 - b. Under the City's/Department of Municipal Development's ("DMD") incremental process of encumbering impact fees, impact fees are considered unencumbered;
 - c. Ms. Christine Ching, DMD Fiscal Manager stated/clarified that impact fees were encumbered only when a specific capital improvement project is contracted out;
 - d. If impact fees were not earmarked for a specific contract, they were unencumbered.
5. September 30, 2018 thru April 9, 2019, The Impact Fees Administrator used DMD's Capital Implementation Program Financial Status Reports for Open Space (Exhibit D) to determine what impact fee funds were encumbered and/or unencumbered as of the date of the applicant's reimbursement request (i.e. November 9, 2018).
 - a. After reviewing the reports, the impact fee funds for open space were unencumbered at the time of the request.
6. November and December, 2018, Received Real Estate Purchase Agreements (Krueger and Chant) from the City's Parks Department (Exhibit H). Used to determine unencumbered balances.
 - a. The date of the request for reimbursement precedes the reserved date in the Capital Implementation Program Financial Status Reports for Open Space (Exhibit D). However, reserved does not meet the

- definition of encumbered. As such, bullet point a. is for illustration purposes only and to determine the open space account balance.
- b. The date of the request for reimbursement precedes the dates of the Real Estate Purchase Agreements.
 - c. After reviewing the agreements, the impact fee funds for open space were unencumbered at the time of the request.
7. March 8, 2019, Received Real Estate Purchase Agreement with Option to Purchase, Notice of Exercise of Option, and Map from the City's Parks Department (Exhibit I). This information/material was submitted to the Impact Fees Administrator by the Parks Department for consideration in determining encumbered balances.
- a. The Real Estate Purchase Agreement with Option to Purchase does not meet the definition of encumbered. The definition of encumbered means that to qualify as encumbered, the funds must be committed, or in other words, ear marked, to a specified capital improvement, and must be scheduled to be spent on that specific capital improvement within seven years from the date the fees were paid (see bullet points i thru iii below). As such, the Real Estate Purchase Agreement with Option to Purchase was not considered in determining the open space account balance in fund 345 Impact Fees.
 - i. There are no funds committed under Fund 345 Impact Fees in the open space account for properties listed in the Real Estate Purchase Agreement with Option to Purchase.
 - ii. There are no specific capital improvements listed under Fund 345 Impact Fees in the open space account for properties listed in the Real Estate Purchase Agreement with Option to Purchase.
 - iii. The timeframes to execute purchases listed in the Real Estate Purchase Agreement with Option to Purchase are dependent on exercising an option to purchase and only become effective upon the purchase and closing of the properties. Not necessarily within seven years from the date that open space impact fees are paid.
 - iv. Listing a project on the CCIP is not sufficient to encumber an unspent balance.
8. March 19, 2019, Transmitted letter of denial to Appellant (Exhibit J).

Applicable Ordinances, Plans, Policies and Additional Materials

- Exhibit A – Impact Fee Ordinance, Chapter 14, Article 19 of the Revised Ordinances of Albuquerque 1994, Sections 14-19-1 through 14-19-99 ROA 1994 and can be referred to interchangeably as “Ordinance or IFO”.
- Exhibit B – Development Process Manual, Chapter 18, Impact Fees Regulations and can be referred to interchangeably as “DPM”.
- Exhibit C – City’s applicable Component Capital Improvement Plan (“CCIP”) as listed in the City of Albuquerque 2013-2022 Decade Plan for Capital Improvements and 2013 General Obligation Bond Program.
- Exhibit D – Capital Implementation Program Financial Status Reports for Open Space, June 31, 2018 thru April 9, 2019.
- Exhibit E – New Mexico District Court Memorandum Opinion and Order.
- Exhibit F – Remand of AC-14-4 per order of the Second Judicial District Court.
- Exhibit G – Notice of Decision, City Council, City of Albuquerque.
- Exhibit H – Krueger and Chant Real Estate Purchase Agreements.
- Exhibit I – Real Estate Purchase Agreement with Option to Purchase, Notice of Exercise of Option, and Map.
- Exhibit J – Letter of denial to Appellant.
- Exhibit K – Open Space Impact Fee Credits.
- Appellant information as provided by Hunt & Davis.

Applicable Definitions

- Definitions can be found in the Impact Fee Ordinance, Chapter 14, Article 19 of the Revised Ordinances of Albuquerque 1994, Section 14-19-3 ROA 1994, see Exhibit A.

BASIS FOR APPEAL/RESPONSE TO APPEAL

The Appellant’s grounds for appeal are summarized below, followed by the City’s response in bold and applicable sections within the Ordinance and DPM as provided to the EPC for reference. However, the entire Impact Fee Ordinance and Chapter 18, Impact Fees Regulations, from the Development Process Manual were used to prepare the response to the appeal.

1. On March 29, 2019, the Appellant requested documents related to this appeal and an explanation for the City’s decision to deny Appellant’s reimbursement request. To date, the City has provided no explanation or documents pursuant to the request and accordingly, failed to provide Appellants with a true opportunity to appeal the City’s decision. Thus, the City’s decision is both arbitrary and capricious and unsupported by substantial evidence and raises serious due process issues.

There is no recollection of a specific request for information, dated March 29, 2019, that was received by the Impact Fees Administrator. However, an Inspection of Public Records Request (“IPRR”) was made through the City Clerk’s Office around the time of the letter of denial. The requested materials were received by Hunt & Davis (Agent). The request includes applicable materials necessary to respond to the denial. In addition, most of the Exhibits included in this Staff Report are readily available online through the City’s Website/Planning Department Webpage. Also, a specific reference (spelled out verbatim) to the Impact Fee Ordinance denying the request was provided by letter dated March 19, 2019. As such, the decision to deny was neither arbitrary or capricious. In terms of due process, the Appellant is seeking relief through the Environmental Planning Commission which is the first step in the appeal process as defined by the Impact Fee Ordinance Ordinance (Exhibit A).

2. Appellant has received hundreds of pages of emails related to the appeal from the IPRR request.

Hunt & Davis will respond by supplement to the emails received.

3. The Appellant is challenging the encumbrance of open space impact fees and the use of those fees on projects listed in the CCIP.

Encumbrance and expenditure of fees are addressed in detail in this Staff Report and through the Capital Implementation Program Financial Status Reports for Open Space, dated June 31, 2018 thru April 9, 2019 (Exhibit D). This material is part of the IPRR.

4. The City has processed other requests, excluding open space, for reimbursement of excess impact fee credits, except for the request before the Commission.

Agree.

5. The City required additional W-9’s.

The requirement was necessary, as the City has an Amended W-9. The Impact Fees Administrator provided the Appellant with the Amended W-9 when made aware of the change.

CONCLUSION

The facts support an unencumbered balance of open space impact fees sufficient to cover the request for reimbursement.

FINDINGS - RZ-2019-00107, May 9, 2019, Appeal

1. The case is an appeal of a denial, by the Impact Fee Administrator, of the Appellant's request for reimbursement from the City in the amount of \$268,345.00 for excess open space impact fee credits in the citywide service area.
2. Section 14-19-20 ADMINISTRATIVE APPEALS of the Impact Fee Ordinance, authorizes the Environmental Planning Commission (EPC) to hear appeals of any determinations regarding impact fees. This case is such an appeal and has been duly filed in accordance with the referenced Ordinance.
3. The Impact Fee Ordinance Section 14-19-19 CREDITS, allow for the granting of impact fee credits for system improvements, provided a project is listed on the Component Capital Improvements Plan (CCIP) as listed in the Ordinance. Additionally, should credit be granted for system improvements which exceed the value of the impact fees otherwise due from development, then that portion may become excess credits as issued by the Impact Fees Administrator.
4. The holder of excess impact fee credits can request reimbursement from the City for all or part of the amount of excess impact fee credits from revenue generated by impact fees paid by new development for system improvements. However, the city is not obligated to provide reimbursements in the event there is no unencumbered account balance in the city's impact fee account for the appropriate service category and service area.
5. Based on Section 14-19-3 DEFINITIONS – “Encumbered” with additional language in Section 14-19-19(J)(7)(c) of the Impact Fee Ordinance, the facts support an unencumbered balance of open space impact fees sufficient to cover the request for reimbursement.

RECOMMENDATION - RZ-2019-00107, May 9, 2018

No recommendation.

***Tony Loyd
Impact Fees Administrator***

Notice of Decision cc list:

Hunt & Davis, PC, Attorneys at Law
Blake Whitcomb
2632 Mesilla, NE
Albuquerque, NM 87110
COA, P.O. Box 1293, Albuquerque, NM 87103
COA, Planning Department, 600 2nd St. NW, Albuquerque, NM 87102