

From: [Sheri Hartz](#)
To: [*DL City Council](#)
Cc: [Tom F. McGurk](#); [Charles S. Bryant](#)
Subject: Late Correspondence on Item 9.2 for 1/17/17 Council Meeting
Date: Friday, January 13, 2017 6:39:45 PM

Good Evening, Council,

The following questions were posed by Vice Mayor Bauters in regard to Item 9.2 on your regular meeting agenda of Tuesday, January 17, 2017, regarding the request of Wareham Development for a Transportation Facility Impact Fee Credit for the EmeryStation West/Transit Center Project. We are providing staff's responses to these questions (in red below) to the entire City Council so that you will all have the same information prior to the meeting. This information will be added as an attachment to the item on our online agenda as late correspondence, and printouts will be available on the dais and in the public binder at next Tuesday's meeting.

(1) Under EMC 9-5.1911 the applicant for a credit is required to submit a written application. The application must specify a number of items detailed in the subparagraphs of the same section. Please bring a copy of the written application for me. In it, please highlight where the applicant has provided each piece of information required for a written application, as enumerated by the statute. **The only application was the letter from Wareham dated November 2, 2016 that is attached to the staff report (Attachment 1). While all of the information required by Section 9-5.1911 is not contained in this letter, that information was discussed verbally in previous meetings with Wareham and is summarized in the staff report.**

(2) Please review the council video for this item from February 16, 2010. In that meeting the Council voted to grant the appeal of the applicant and approve this project. They added as conditions of approval to the project three conditions that the applicant agreed to subsequent to the Planning Commission meeting and a fourth related to the plaza being left open, allowing for gates and allowing for the closure of the plaza only if approved by the Commission. I would like you to highlight and mark where each of those four conditions are listed in the conditions of approval for me. **Staff has not had a chance to review the full video yet, and compare it to the conditions of approval. That will be done prior to next Tuesday's Council meeting. If it turns out that there were conditions adopted by the Council that are not reflected in the Conditions of Approval document, we will administratively amend the Conditions of Approval. This would be considered correction of a clerical error, and does not require any further action by the City Council.**

(3) I would like to know how many projects we approved during the interim zoning guidelines that paid the city a transportation impact fee and the total sum of those fees. **The Interim Zoning Regulations were in effect from November 2009 to March 2013. During that period, a number of major development projects were approved in addition to the EmeryStation West project, including the EMME Apartments at 64th and Christie, the 3900 Adeline residential project, Escuela Bilingüe, City Storage, Allegro Ballroom Expansion, Fire Station #2, PRC Medical Offices, Panera Bread, Bullseye Glass, 5701 Hollis Street, Pixar Warehouse, and the Emeryville Center of the Arts. All of these projects have either been completed, or their entitlements have expired; none besides the**

EmeryStation West project is still a currently active development project. It would take additional research to determine the total amount of Traffic Impact Fees paid by these individual projects, but it should be noted that none of these projects requested a fee credit. The total amount of Traffic Impact Fees collected between November 2009 and March 2013 was approximately \$294,440. This would have been for projects that were approved previously, since at the time the Traffic Impact Fee was collected at Certificate of Occupancy.

(4) I would like confirmation as to how many times we have previously considered an application made pursuant to 9-5.1911. **None. This is the first.**

(5) I would like you to review the portion of the Feb 2010 Council Resolution approving this project, and in particular the section allowing for a bonus height over 100 feet. I am going to ask you to reconcile the plain language of 9-5.1911(f)'s prohibition on allowing a credit if the project for which a credit was requested was used to obtain a development bonus with this proposal. **Section 9-5.1911(f) provides that “no credit shall be provided against impact fees” if the applicant has received a development bonus in accordance with Section 9-4.204. The project did not receive a development bonus under Section 9-4.204. Instead, the project received a development bonus under the Interim Zoning Regulations (IZR), Section 9-6.407. The development bonus system under the current regulations is substantially different than the development bonus system under the IZR. Since the developer did not receive a bonus under Section 9-4.204, Section 9-5.1911(f) does not apply to the developer’s request. Therefore, Section 9-5.1911 does not prohibit the Council from considering the developer’s request for a fee credit.**

(6) I am going to ask for someone on staff to tell me who proposed the argument that because more than 3 qualitative bases for bonus were in the authorizing resolution that the developer has the ability to pick which ones apply to the bonus and seek credit for the others. I will further ask Michael to explain whether he thinks there is precedent in the law for this type of conduct and whether this is a legal application. **The notion that this project is eligible for a fee credit because the development bonus was based on additional public benefits besides those that are eligible for funding under the Transportation Impact Fee was discussed in meetings with Wareham and is mentioned in Wareham’s November 2, 2016 letter requesting the fee credit. It is further discussed and analyzed in the staff report, which was prepared by the Community Development Director and reviewed and approved by the City Attorney and City Manager.**

(7) I will ask the City Manager to explain why you recommend this application come forward for the agenda and whether you think this refund will have an impact on the fiscal health of the city. **Staff is obligated to process any request that is presented to us. As noted in the staff report, this fee credit request impacts only the Transportation Impact Fee Fund. According to the Capital Improvement Program, an excerpt of which is attached to the staff report (Attachment 8), there will be sufficient funds for all 12 projects listed in the CIP to be funded by the Transportation Impact Fee Fund if this credit/refund request is granted; it will simply reduce the balance remaining in the fund from approximately \$1 million to approximately \$250,000. It will not impact the General Fund nor any other fund.**

(8) I will ask the City Attorney to advise whether approving this application under the argument

being made that any three can count will eliminate or restrict our ability to exercise discretion in the future if others ask for this credit. This request is unique in that it is the only application involving an impact fee credit for a project that was approved under the previous qualitative development bonus system. Any future impact fee credit request will be for a project that was approved under the current quantitative (i.e. point-based) development impact fee system. Therefore, this project will not set any type of precedent for future credit requests because it is a unique situation that will not be applicable to any future requests.

Best,



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