

## **Legal Analysis of Application**

It has been noted that the EmeryStation West/Transit Center project was approved under the Interim Zoning Regulations, which were in effect from November 2009 to March 2013, and that the fee credit request is being processed under the current Planning Regulations. Specifically, Section 9-5.1911(f) of the current regulations references development bonuses granted pursuant to Section 9-4.204, which did not exist when the project was approved. The City Council has asked for additional legal analysis regarding the fee credit provisions in Section 9-5.1911 regarding this specific project.

Section 9-1.104 of the Planning Regulations provides that “The Director of Planning and Building [i.e. the Community Development Director] shall have the authority to interpret the content and applicability of these Regulations.” In exercising his responsibility to interpret the regulations, the Director has determined that the provisions for Development Impact Fees, including the potential for a fee credit, do apply to the EmeryStation West/Transit Center project, even though it was approved under prior regulations, for reasons discussed below.

First, there are two provisions in the Planning Regulations that specifically reference projects approved under prior regulations. Section 9-1.103(g) under “General Provisions” states that “Any project which has been approved prior to the adoption of these Regulations may be completed in accordance with the plans for which the planning approval was granted, provided the planning approval has not expired.” Section 9-5.1003(f) under “Nonconforming Uses” states that “Any use allowed under a planning entitlement, including but not limited to a conditional use permit, design review permit, or variance, that was approved prior to the adoption of these Planning Regulations and that has not expired, is deemed to be a conforming use and is subject to any conditions included in its approval.”

Second, the conditions of approval of the EmeryStation West/Transit Center project specifically calls for the payment of fees, including development impact fees. Condition of Approval II.C.2 of the project, as approved by the City Council on February 16, 2010, states:

“Fees, Dedications and Exactions. Conditions of Approval set forth herein include certain fees, dedication requirements, reservation requirements and other exactions, attached as Exhibit A. Pursuant to Government Code Section 66020(d)(1), this set of Conditions of Approval constitutes written notice of a statement of the amount of such fees and a description of the dedications, reservations and other exactions. Applicant is hereby further notified that the 90-day approval period in which these fees, dedications, reservations and other exactions may be protested, pursuant to Government Code Section 66020(a) will begin upon approval of the aforementioned project approvals by the City of Emeryville City Council. If Applicant fails to file a protest within this 90-day period complying with all of the requirements of Section 66020, Applicant will be legally barred from challenging such exactions. Prior to the issuance of a building permit, the Building Official shall confirm that all applicable fees due at the issuance of a building permit have been paid.”

The referenced attachment to the conditions of approval is entitled “Preliminary Fee Calculations”, which is dated February 5, 2010, and which includes a Traffic Impact Fee (as the Transportation Facility Impact Fee was then known) of \$194,667.20. At the bottom of this chart is the following disclaimer: “Note: This is a PRELIMINARY fee calculation for estimating purposes only. Fees will be recalculated at the time of submittal, prior to permit issuance and at any time when the scope of work is revised (including: type of construction, # of stories, floor area, declared valuation, and use).” [Emphasis in original.]

Third, the current Planning Regulations require the payment of applicable impact fees at the time a building permit is issued, unless a fee adjustment, exemption, or credit is granted. Section 9-5.1905(a), entitled “Obligation to Pay Fees” states in pertinent part: “Each applicant for City approval of a project (including applications for a change of use and remodels) shall pay impact fees to the City, in accordance with the amounts set forth in implementing resolutions, unless the applicant establishes, to the satisfaction of the Director, entitlement to a fee adjustment pursuant to Section 9-5.1908 of this Article, a fee exemption pursuant to Section 9-5.1909 of this Article, or approval of a fee credit pursuant to Section 9-5.1913 of this Article.” Section 9-5.1906(a), entitled “Timing of Payment”, states: “Except as otherwise provided in this section, the fees for each project shall be paid in full prior to the issuance of the [building] permit required for that project.”

Taken together, these provisions clearly indicate that, although the Transit Center project received its planning entitlements under prior regulations, it is subject to the provisions for impact fees that are in place today, including the ability to request a fee credit, because the building permit was issued after the current Planning Regulations and Development Impact Fees took effect.

Concerning development bonuses, 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 Section 9-6.407 of the Interim Zoning Regulations. A strict interpretation of Section 9-5.1911(f) would be that, if a project did receive a development bonus under Section 9-4.204, it is not eligible for a fee credit, and, as a corollary, if a project did not receive a development bonus under Section 9-4.204, it is eligible for a fee credit. Under this interpretation, the EmeryStation West/Transit Center Project is eligible for a fee credit because it did not receive a development bonus under Section 9-4.204.

Thus, the Community Development, in exercising his authority and responsibility to interpret the Planning Regulations, has determined that the EmeryStation West/Transit Center project is eligible for consideration of a development impact fee credit pursuant to Sections 9-5.1911 through 9-5.1913.