

Discussions with Wareham

In the summer of 2015, Wareham was getting ready to submit a building permit application for the project, and requested that the Building Division prepare an updated fee estimate. This was requested on August 19, 2015 and provided on August 20, 2015. The Building Division updated the 2010 fee estimate with the current valuation rates and fees, including the development impact fees that became effective September 15, 2014. This estimate included a Transportation Facility Impact Fee of \$938,575, a Park Facility Impact Fee of \$880,554, and an Affordable Housing Impact Fee of \$1,399,330, for a total of \$3,218,459 in impact fees. Wareham was concerned about this estimate and requested a meeting with the City Manager. The City Manager, in turn, requested that the Community Development Director double-check these fees.

Upon review, the Director realized that the impact fees had been calculated based on the square footage of the entire building, including the parking podium, rather than solely on the square footage of Research and Development space. The fee estimates were revised to include only the R&D space, resulting in a Transportation Facility Impact Fee of \$682,825 (a reduction of \$255,750), a Park Facility Impact Fee of \$640,614 (a reduction of \$239,940), and an Affordable Housing Impact Fee of \$1,018,030 (a reduction of \$381,300), for a total of \$2,341,469 in impact fees (a total reduction of \$876,990). The revised fee estimate was prepared on the morning of August 24, 2015.

The meeting between the City Manager and Wareham occurred in the City Manager's office on Monday, August 24, 2015 from 11:00 a.m. to noon. In attendance were Rich Robbins, Geoff Sears, and John Gooding, representing Wareham; and City Manager Carolyn Lehr and Community Development Director Charlie Bryant representing the City. The revised fee estimate noted above had been prepared earlier that morning, and Wareham had not seen it yet. Needless to say, they were quite pleased with the significant reduction in impact fees resulting from the revised calculations, and the urgency of the matter seemed to abate.

At the same meeting, the Community Development Director noted that, because the project included public facilities that were eligible for funding from the Transportation Facility Impact Fee, a credit of all or a portion of the impact fee may be available. However, he cautioned that, because the project had received a development bonus for providing the same public facilities, such a fee credit may be negated. The Director provided the Wareham representatives with several documents, including the development fee credit provisions in Section 9-5.1911 of the Planning Regulations with key provisions highlighted, and a copy of Resolution No.10-33 by which the City Council approved the project on February 16, 2010, and which included a finding about the public benefits of the project that warranted a development bonus, also highlighted.

The highlighted portions of the Planning Regulations included provisions specifying that a written application is required for a fee credit request; that such a request must include certain specified items; that the request must be considered by the City Council; that it must be submitted concurrently with the submittal of improvement plans; and that no credit shall be provided if the applicant received a development bonus for providing the

same public facilities for which a fee credit is requested. The highlighted portions of Resolution No. 10-33 included the finding granting a development bonus for providing public benefits, including a minimum of 125 public parking spaces and widening of the railroad platform.

These documents and the process for seeking an impact fee credit were not discussed at length during the meeting on August 24, 2015; as noted above, the main focus of that meeting was the revised fee estimate which resulted in a reduction of \$876,990 in development impact fees.

Three months later, on November 19, 2015, Wareham submitted a building permit application for the project, and paid plan check fees of \$397,741.58. No application for a Transportation Facility Impact Fee credit was submitted at that time.

Plan check for this very complicated project required five rounds of review, which took about 10 months. (For approximately 46% of this 10-month period, the plans were under review by the City, and for approximately 54% of the time, the plans were being revised by Wareham.) The plans were approved and the building permit was ready to issue on September 13, 2016, pending payment of fees.

After the building permit for the project was approved on September 13, 2016, the City and Wareham engaged in a series of discussions about the fees that were owed before the permit could be issued. A revised fee estimate was prepared on September 13, 2016 that included a Transportation Facility Impact Fee of \$1,054,376.02. (This was subsequently revised downward.) On September 19, 2016, Wareham sent an email to the Building Division commenting on the updated fee estimate, including a statement that the Community Development Director “had some time ago advised us we qualify not to pay the associated Transportation Facility Fee since we were building a public benefit transit center expansion with bus bays and parking, so that should be removed. We can remind him of that discussion if need be.” The Community Development Director was somewhat taken aback by this statement, as his recollection was that Wareham had been advised of the process for seeking a fee credit, but not that they had been told that they absolutely were not subject to this fee.

There then ensued a series of exchanges between Wareham and the Community Development Director, including a letter from Wareham dated September 26, 2016 requesting that the Director confirm to the Building Division that the project was eligible for a credit for the Transportation Facility Impact Fee (see Exhibit A). Attached to this letter were the highlighted documents that had been provided at the August 24, 2015 meeting, as summarized above. This was followed by a series of emails between September 26 and September 30, 2016, in which the Director attempted to clarify the information provided at the August 24, 2015 meeting, and Wareham insisted that they were exempt from the Transportation Facility Impact Fee because of the public benefits provided by the project.

Wareham requested another meeting with the City Manager, which was scheduled for October 11, 2016. Prior to the meeting, on October 10, Wareham sent a letter to the

Director explaining why they believed that the project was eligible for a fee credit despite the fact that it had received a development bonus for providing some of the same public facilities (see Exhibit B). The Director responded with an email that again attempted to clarify the situation, which elicited a further email response from Wareham.

The requested meeting occurred on Tuesday, October 11, 2016 from 3:00 to 4:00 p.m. in the City Council conference room on the second floor of Old Town Hall. The attendees were the same as at the August 24, 2015 meeting. All three Wareham representatives recalled that they had been told at the previous meeting that the project was exempt from the Transportation Facility Impact Fee, while the recollection of the City Manager and Community Development Director was different. The Community Development Director then walked through the process for requesting a development impact fee credit. Notwithstanding the disagreement about what had transpired at the August 24, 2015 meeting, by the end of this meeting all parties understood that only the City Council can authorize a development impact fee credit. Wareham indicated that their discussions with the Building Division about the fees were ongoing, and that the Building Division was currently reviewing the fees to see if they could be reduced by reassigning areas designated as Research and Development (which has a higher fee) to Garage (which has a lower fee). Wareham indicated that they would wait for the results of this fee review before deciding whether to seek a credit of the Transportation Facility Impact Fee from the City Council.

On Thursday, October 26, 2016, the fee review was completed by the Building Division and the final permit fee calculations were provided to Wareham. The total amount due at permit issuance was \$4,338,014.30, including a Transportation Facility Impact Fee of \$728,633.13. Wareham brought a check for the full amount to the permit counter on Wednesday, November 2, 2016. On Thursday, November 3, 2016, Building Division staff sent an email to Wareham advising that an error had been discovered, and that there was an overpayment of \$143,297.40 for the Sewer Connection Fee and Art in Public Places Fee. The building permit was issued on Friday, November 4, 2016, and a refund of the \$143,297.40 overpayment was issued to Wareham on January 24, 2017.

When Wareham submitted the check for the permit fees on November 2, 2016, it was accompanied by a letter addressed to the Community Development Director that stated, in part, "This check includes a \$728,633.13 portion attributable to 'Transportation Facility' which we are paying in protest for convenience. As you and Carolyn Lehr offered, we wish you to pursue reimbursement of this amount, which you indicate requires City Council action, such reimbursement justified by the various public benefits provided by our project which were not already applied to the single height bonus we received." This letter, which was attached to the January 17, 2017 City Council staff report, formed the basis for the impact fee credit request. It was augmented by further information and justification in the staff report, which, in turn, was based partly on the previous discussions with Wareham described above.

At the January 17, 2017 City Council meeting, Geoff Sears of Wareham stated that they would be willing to accept a credit and refund of \$500,000 rather than the full amount of \$728,633.13. A motion to this effect was made, but died for lack of a second. The Council

then decided to continue the item to a future date, and requested that staff provide further information and a specific recommendation.

A third meeting with Wareham was held on Wednesday, February 22, 2017 from 2:00 to 3:30 p.m. in the City Council conference room on the second floor of Old Town Hall. The attendees were the same as at the previous two meetings, plus Public Works Director Maurice Kaufman and City Attorney Michael Guina. The purpose of the meeting was to discuss the recommendation that staff would be making to the City Council. Staff reviewed the methodology used to determine the amount of a credit and refund that could be justified. Wareham provided additional information about site remediation costs of which staff had previously not been aware. They noted that, in order to construct the Platform Extension, an underground bentonite wall, which acts as a groundwater barrier between the project site and the railroad, had had to be modified at Wareham's expense. They also noted that remediation costs had more than doubled from the original estimates, which are also Wareham's expenses. In addition, they pointed out that even if the Public Park and Bus Bays public facility were built with no associated private research and development tower, the entire site would still have to be remediated at the same cost, and thus, it would be reasonable to attribute at least some of the clean-up costs to this public facility. The meeting ended with Wareham agreeing to provide further data on the clean-up costs and to submit a formal letter requesting a credit and refund of \$500,000, and staff agreeing to recommend the \$500,000 credit and refund upon receipt of the additional information from Wareham. The additional site remediation cost data was provided on Friday, February 24, 2017 (see Attachment 3 to staff report), and the letter requesting a credit and refund of \$500,000 was provided on Wednesday, March 1, 2017 (see Attachment 2 to staff report). Based on this information, staff is recommending a credit and refund of \$500,000.