From: Chad Jacobs
Sent: Tuesday, June 09, 2020 3:15 PM
To: Vickie Nogle
Subject: Reimbursement District Questions

Vickie,

As requested, I have reviewed the letter from the attorney for James Halbirt regarding the proposed reimbursement district on tonight's council agenda. Please find below short responses to each of the issues raised in the letter. As you know, I will also attend the meeting to further answer any questions staff or the Council may have about this matter. In the meantime, please do not hesitate to call or email if you need additional assistance. Apologies to all involved that I was not able to get this out sooner in the day today.

Background

The reimbursement district process is governed by Chapter 3.07 of the City's municipal code. As an initial matter, it is important to understand two points. First, a reimbursement district is used to permit developers to recover some of the initial costs they paid for public infrastructure. It is a cost-sharing mechanism for areas that lack critical infrastructure wherein the first developer pays upfront costs of initial improvements and future developers, who benefit from those improvements, pay their share upon development of their properties. Second, whether to approve a reimbursement district is purely a policy decision for the Council to make. The Council is not legally bound to approve the formation of a reimbursement district as presented. Rather, the Council is free to approve, reject or modify the proposed district in accordance with what the Council determines to be the best policy decision for the City.

Issues Raised

The letter in question raised several issues related to the proposed reimbursement district. Below is a brief reply to each issue. As noted above, it is a policy decision for the Council as to whether to approve the proposed district, and to that end, this information is provided solely for the purposes of providing the Council with information to make the best policy decision possible.

A. The Halbirt property should be excluded from the propose district.

The letter argues that any property not supported and served by the public improvement should be excluded from the proposed district. This argument is contrary to the purpose of a reimbursement district. A property owner is not required to pay the reimbursement fee until they take steps to develop the affected property, thereby receiving support from and eventually being served by the public improvement. If the property does not develop during the time period the district is in place, (10 years from the date of the resolution forming the reimbursement district), then the fee will never have to be paid. Conversely, if the property begins the development process during this time period, they must pay the fee because their development application is supported by the public infrastructure previously installed without any cost to them. The fee is meant to be the representative costs of what the property owner would have had to pay to build their portion of the infrastructure if it had not already been built by a previous developer. There is no immediate liability or lien placed on the property. Rather the fee only becomes due upon the property owner's decision to develop their property.

B. The Reimbursement District should only apply when a permit is sought to connect to the sewer line in question.

A property owner in a reimbursement district must pay a fee when they begin the development process. This can include various actions as defined by the Code, including land use applications and building permits. The reason the code is drafted in this manner is to prevent future developers from gaming the system. As mentioned above, the reimbursement district is in place for 10 years, which may be extended by the Council for an additional five years. If the fee was not due until actual connection occurred, then a developer could go through various stages of

development and then wait until the district expired before actually connecting so as to avoid having to pay the fee. Certainly a developer can still do so by taking no development action during the life of the reimbursement district, but as drafted the current ordinance seeks to limit this type of gamesmanship by having a broader definition of development activities.

C. The Code is ambiguous as to when it would apply.

The letter also argues that the City's municipal code is ambiguous as to when a fee must be paid. Under section 3.07.100, the fee must be paid upon any of the following: (1) a building permit for a new building; (2) building permit(s) for any addition(s) of a building, which cumulatively exceed 25 percent of the existing square footage in any 36-month period; (3) a development permit as defined in this chapter; or (4) a permit issued for connection to a public improvement. Each of these terms is specifically defined by state or city law and when the city code defines a term, it uses commonly known and defined terms such as a final land use decision, a limited land use decision, expedited land division decision, partition, subdivision, planned unit development, applicable public or private infrastructure permit, or driveway permit. This language has been used by other jurisdictions without problem or confusion.

D. It is unclear how and over what amount of time a fee must be paid.

The letter argues that the Code is also unclear as to when a fee is due and over what amount of time the fee must be paid. Under 3.07.100(1) of the Code, the fee is due in full upon the approval of any permit described above. If the fee is not paid, the permit in question will not be issued.

E. The Code does not permit a challenge to a determination as to when a fee is due.

The letter suggests that there is no process available to challenge a fee. Initially, it is important to note that the amount of the fee is established upon the creation of the district, and the code provides that any challenges to that determination must be done by a writ of review within 60 days. HMC 3.07.090. Once the fee is established, the only question is when the fee becomes due, which as explained above is determined by HMC 3.07.100. If there is a debate about this issue, any affected party may seek a judicial determination under state law through a declaratory action. The reason the language about the City's decision being final is included in the Code is to permit that judicial process to begin, if necessary.

F. The report by the City Engineer should be used to determine allocations.

Under the Code, the City is required to prepare a report that will be used as the basis for the Council's consideration of the reimbursement district application. The report prepared by the City Engineer contains the allocation requested by the letter. The applicant's proposed allocation is not recommended by the City Engineer.

All the very best,

Chad

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