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Reply to: *Venice*

March 13, 2015

The Honorable John W. Holic, Mayor
and Members of the City Council
401 West Venice Avenue
Venice, Florida 34285

RE: Extraordinary Mitigation Fee within Pre-Annexation Agreement

Dear Mayor Holic and Council Members:

This letter is in response to Council's direction for my analysis and opinion regarding two issues arising out of one of the provisions of the City's Pre-Annexation agreements, the Extraordinary Mitigation Fee (EMF). Specifically, I will address the legality of the EMF and, if collection is legally permissible, how the City may use the funds. Please note that I am examining the legality of the fee, not whether the fee should be modified or rescinded. Nor am I reviewing whether the funds, if legal, should be restricted by the City in some fashion for specific uses. "Should" questions are Council policy decisions. My focus is purely upon the legality of these matters.

By way of background, since at least the 1990's, when the City was asked to consider requests by property owners to have their property included within the City, the City required an agreement to establish the terms and conditions under which inclusion (annexation) would be considered. Property owners requested annexation presumably in order to be able to take advantage of the City's regulatory scheme, utility capacity or for some other advantage of being located within the City. These properties had the right to remain within the County and to

develop in accordance with County standards; however, these property owners chose to request that their property be annexed into the City.

The City's decision whether to voluntarily annex property is a highly discretionary legislative function (see City of Auburndale, et al., v. Adams Packing Association, Inc., 171 So. 2d 161, (FL 1965)). If granted, property annexed into the City obligates the City to make certain findings and provide certain services to the newly incorporated area. (See 171.043, Fl. St.)

Property owners that wished to have their property become part of the City negotiated a "Pre-Annexation Agreement." There was a Pre-Annexation Agreement for each property to be voluntarily annexed into the City. The terms and conditions of the Pre-Annexation Agreements varied from property to property. Examples of what was included are: extensions of water and sewer lines, dedications of wells, roads or streets to be built or funded, park dedication and payment of an EMF. All the agreements were conditioned upon the City annexing the property and all agreements were binding upon the property owners, their successors or assigns. In short, a Pre-Annexation Agreement was a contract between the City and the property owner that if the City annexed the property, the property owner was contractually obligated to do certain things. Once signed, the City processed an application for annexation.

Annexations and Pre-Annexation Agreements are not development orders. A "development order" is any of the myriad of development permits that grants site-specific permission to build upon the property. These include rezoning, site plans, building permits, variances, special exceptions and the like. They do not include Comprehensive Plan Amendments. (See generally, Section 163.3164, Fl. St. and Section 70.51, Fl. St.).

Stipulations to development orders that require the developer to pay money or contribute property (aka exactions) must have a rational nexus and be roughly proportional to the development's impact. (Nollan v. California Coast Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); and Koontz v. St. Johns River Water Management Dist., 133 S. Ct. 2586 (2013)) Since Pre-Annexation Agreements are not development orders, these cases do not apply.

Even if a court concluded otherwise, the statute of limitations would be applicable (either 30 days for annexation (section 171.081 Fl. St.) or five years to challenge a contract (Section 95.11(2) Fl. St.)). Additionally, the City would have the right to avail itself of the equitable defenses of latches, justifiable reliance and estoppel, since the City acted upon the promises of the property owner, annexed the property and now has obligations to the property and its occupants. (See First

Testament Baptist Church, Inc., of Miami v. State of Florida Department of Transportation, 993 So. 2d 112 (4th FL Dist. Ct. App. 2008))

The EMF is not an impact fee. Impact fees are legislatively adopted by a local government, require a factual basis for their imposition (usually provided by a professional study) and address specific impacts of development upon various capital systems and infrastructure (schools and roads, for example). They must have both a rational nexus to the impact of that development and the benefits must be fairly proportional to the impacts. Impact fees are commonly assessed for offsite capital improvements necessitated by development. (See generally St. Johns County v. Northeast Florida Builders Association, Inc., 583 So. 2nd 635, FLA 1991.) The Pre-Annexation Agreements specifically recognized that the properties being annexed would also be subject to existing and future impact fees.

Since annexations are not development orders or impact fees, it is my opinion that the validity of the City's and Property Owner's Pre-Annexation Agreement is controlled by contract law and that the EMF is a contractual obligation of the property owner with the City. Therefore, I find that its collection is legally permissible.

Turning now to how the monies received may be spent, since these are contractual obligations, the use will be governed by the terms of each agreement (there are approximately forty (40) Pre-Annexation Agreements in which the EMF is a requirement).

In the Pre-Annexation Agreement with WCI (and others) dated February 8, 2000, the paragraph regarding the EMF reads as follows:

A. EXTRAORDINARY WATER UTILITY IMPACT FEE EXACTION

> In order to mitigate the impacts of the proposed development upon the City water utility system, WCI, G&P and GRANT shall pay at the time of issuance of a Certificate of Occupancy an extraordinary impact fee, in addition to the standard water utility rates, fees and charges, including any capital charges for water plant capacity charges (as set forth in Paragraph 6, herein), in an amount of $1,585.00 per equivalent dwelling unit ("EDU"). The extraordinary impact fee shall be adjusted every five (5) years by an amount based on the fluctuations of the Consumer Price Index, subject to certain limitations and requirements set forth in Exhibit "D" to this agreement. The party responsible for paying the extraordinary impact fee is the party upon whose Parcel the structure receiving the Certificate of Occupancy is located. For purposes of this agreement, the definition of equivalent dwelling unit is the same

> as the definition contained in the City Comprehensive Plan. The parties agree that by payment of such an extraordinary impact fee, WCI, G&P and GRANT's obligations set forth in Paragraph 4, herein, shall be satisfied.

Thus the use of the EMF funds is directed towards the water utility system. This provision was in the first three Pre-Annexation Agreements beginning with the WCI agreement referenced above.

Beginning with the Pre-Annexation Agreement with Calvary Bible Church, Inc., dated March 12, 2002, the EMF language reads as follows:

> 7. EXTRAORDINARY MITIGATION FEE EXTRACTION. In order to mitigate the impacts of the proposed development upon the City, the Owner shall pay at the time of issuance of a Certificate of Occupancy an extraordinary mitigation fee, in an amount of $1598.00 per equivalent dwelling unit ("EDU"). The extraordinary mitigation fee shall be adjusted every five (5) years by an amount based on the fluctuations of the Consumer Price Index, subject to certain limitations and requirements as set forth in Exhibit "B" to this agreement. For purposes of this agreement, the definition of equivalent dwelling unit is the same as the definition contained in the City Comprehensive Plan.

Thus the use of the EMF is unrestricted except to "mitigate the impacts of the development." This language changes again beginning with a Pre-Annexation Agreement dated May 13, 2003, (Waterford Land Group, Inc.) which now adjusted the fee every year rather than every 5 years. (The amount of the fee also changes with the passage of time, perhaps as a result of a CPI calculation, but I have not investigated this.) The EMF continues to be one of the requirements of Pre-Annexation Agreements up through and including the last one which was executed in 2012.

Regarding the EMF funds received that were not restricted to the water utility system, I am told that the City has historically placed those funds in the general fund and used them for City purposes which include services and infrastructure to the newly-annexed lands. Since part of City services are to provide both operation and maintenance to various City services in the annexed areas, I cannot say that the City's use of the funds has been unreasonable or in violation of the language of the agreements. Thus, while the City has the right to restrict the use of the funds, it appears that it does not have that obligation under the terms of the contract with the annexed properties other than to mitigate the impacts of the development.

Finally, all Pre-Annexation Agreements have a provision regarding the binding nature of the agreement.

14. BINDING ON SUCCESSORS. The covenants contained herein shall run with the Subject Property and shall inure to the benefit of and be binding upon the respective successors, heirs, legal representatives and assigns of the parties to this agreement.

Therefore, it is my opinion that the EMF is a lawful, binding obligation which can only be modified by subsequent mutual agreement. Further, the funds collected pursuant to the agreements, other than those obligated to the water utility service, may be spent by the City as necessary to address the general costs of providing infrastructure and services to the annexed areas within the City and mitigate the impacts of the development. The City has the ability, but not the obligation, to further restrict those funds if it sees fit.

If I can address any questions that you might have, please contact me.

Respectfully,

David P. Persson

DPP/dgb

cc: Edward Lavallee, City Manager
Jeffery Snyder, Finance Director
Jeff Shrum, Community Development Director
Lori Stelzer, City Clerk