



WASHOE COUNTY

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STAFF REPORT

BOARD MEETING DATE: June 26, 2018

DATE: May 17, 2018

TO: Board of County Commissioners

FROM: Nathan Edwards, Deputy Washoe County District Attorney,
337-5700, nedwards@da.washoecounty.us

THROUGH: Mojra Hauenstein, Architect, AICP Planner, LEED AP,
Director of Planning and Building, 328-3619,
mahuenstein@washoecounty.us; and,

Paul Lipparelli, Assistant Washoe County District Attorney,
Civil Division, 337-5700, plipparelli@da.washoecounty.us

SUBJECT: Consideration of possible courses of action and direction to legal counsel and county staff to pursue one or more of those courses of action regarding the Warm Springs Specific Plan refunds lawsuit, Newell (plaintiff) et. al. vs. Washoe County CV15-01104. The lawsuit was filed in 2015 seeking, among other things, refunds of money paid by a number of property owners in the Warm Springs Specific Plan in Washoe County at the time they recorded their final maps for development in that area. The money was intended to build infrastructure in the area, including community water and sewer facilities, certain roads, drainage, and other improvements. At this point, the Court has dismissed all of the plaintiffs and all of the claims in the case, except for the claims based on a single 5 acre parcel still owned by the Newells. Additionally, one developer (Brian Murphy) has sought “reimbursement” of approximately \$319,252 for work done on roads in or near the plan area. Possible direction at this point could include any of the following individual courses or a combination of them:

1) *Refunds.*

- a) Pay partial or full refunds to all current property owners in the Warm Springs Specific Plan area in the total amount of approximately \$800,000 (\$781,882.37 approximate fund balance as of 4/6/18)) based on the Court’s ruling that the amounts are NRS 278B “impact fees” refundable if improvements are not built within 10 years; or,
- b) Pay no refunds and maintain the county’s position in the lawsuit that the fees are not “impact fees” and

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that the plaintiffs waived any refunds;

- 2) *Reimbursement*. Allow, partially allow, or disallow Capurro Investments, LLC's/Brian Murphy's claim for "reimbursement" of approximately \$319,252 - for work done on certain roads, some of which were identified in the Warm Springs Specific Plan area agreement, see Exhibit A;
- 3) *Master Plan Amendment*. Direct planning staff to initiate master plan amendments to the Warm Springs Specific Plan removing the financing provisions of the plan that require current or future developers to continue paying development fees at the time of recording their final maps; this option could include direction to staff to cease taking payments under the financing plan on development maps within the area plan while the amendment process is underway;
- 4) *Interpleader*. File a lawsuit against all persons or entities with competing claims for the money in the fund, "interplead" the money into the Court, and allow the claimants to make their case for a share of the money with the Court ultimately deciding.

(Commission District 5.)

SUMMARY

Legal counsel and county staff are seeking direction on Washoe County's position with respect to claims for refunds and reimbursements of money paid in connection with various final map approvals and/or roadway improvements in the Warm Springs Specific Plan (WSSP) area. The fees are the subject of the lawsuit filed by 11 different plaintiffs against the County in June of 2015 (CV15-01104, Newell et. al. vs. Washoe County). Plaintiffs contend the fees are NRS chapter 278B "impact fees" and that refunds are due once 10 years has lapsed without the improvements being built. Washoe County disputes that the fees are "impact fees" and, alternatively, contends the plaintiffs waived any right to refunds in any event.

The fund balance is approximately \$800,000 (\$781,882.37 as of 4/6/18). The plaintiffs seek approximately \$500,000 in refunds. Meanwhile, however, the Court has granted the County's motions to dismiss all of the plaintiffs and all of the claims in the case, with the exception of Newells and a single 5 acre parcel they still own within the WSSP area. According to the Newells, the amount of refund potentially associated with that parcel is \$10,377.13. The Court has also ruled that the fees in dispute are in fact "impact fees," and that if refunds are due, they must be paid to the owners of property within the WSSP area at the time the refunds are paid.

In addition to the claims of the plaintiffs and after the lawsuit was filed, one development group (Capurro Investments, LLC, associated with Mr. Brian Murphy) has claimed entitlement to reimbursements for work done to certain roadways and drainages, some portions of which were included in the WSSP and some that were not identified as eligible under the WSSP agreement - see Exhibit A. The reimbursement claim is for

\$319,252 and included roadway and associated drainage work done to certain roadways and drainages, within the roadway prism as well as area specific drainage work. Understanding that all work associated with improvement projects where reimbursement is requested must follow Washoe County Development Code Standards as required by the WSSP, staff reviewed the post-construction activities to determine conformance to the required standards. As a result of the review which included a site visit of the work, discussions with Mr. Murphy and his engineer and also a review of correspondence provided by Mr. Murphy, it is staff's opinion that the work does not fully comply with Washoe County design standards. For example, Washoe County Development Code requires that roadways, either private or public, are designed and constructed with approved subgrade, gravel base, and hot-mix asphalt asphaltic concrete structural sections. In contrast, the work performed by Mr. Murphy appears to include a gravel base layer, but does not include a hot-mix asphaltic concrete layer and the condition of the subgrade is not known. Further, the reimbursement request includes roadways that were not identified in the WSSP, including Amy Rd. and Sharrack Road. Should Capurro Investments complete the roadway work to Washoe County Design Code minimum standards as required under the WSSP, consideration for reimbursement of WSSP identified roadways may be eligible for reimbursement consideration if sufficient funds exist. No lawsuit has been filed in connection with the reimbursement claim to date. If any reimbursement is considered, the fund available for refund (Option 1 above) will be reduced by the reimbursement amount.

Due to the Court's rulings, counsel for the parties stipulated to vacate the June 2018 trial date in order to allow the Washoe County Board of Commissioners (Board) to provide direction on the refund and reimbursement requests, as well as the possibility of amending the Washoe County Master Plan, specifically the WSSP, to remove the financing component. Any Master Plan amendment will need to be in conformance with the Regional Plan and be subject to the approval of the Truckee Meadows Regional Planning Agency;

Washoe County Strategic Objective supported by this item: Stewardship of our Community.

PREVIOUS ACTION

- In early 2015, a group of present or former property owners in the WSSP area seek refunds of money paid in connection with development approvals that was intended to fund infrastructure within the WSSP area on the ground that the infrastructure has not been built.
- On May 12, 2015, the Board directs staff to initiate amendments to the Washoe County Master plan to remove the financing plan from the WSSP and to process the refunds requested.
- On June 8, 2015, before the Master Plan amendment could occur and refunds could be paid, the County is sued by 11 named plaintiffs seeking refunds.
- On July 27, 2015, Washoe County moves to dismiss the lawsuit.
- On September 20, 2015, Capurro Investments, LLC seeks "reimbursement" for roadway improvements in or near the area in the amount of \$319,252.

- On April 16, 2016, Court grants the County's motion to dismiss all claims that are not yet "ripe" due to the 10 year impact fee refund timeline not having expired since payment by certain plaintiffs.
- On August 10, 2016, Court grants the County's motion to dismiss all claims filed too late after the expiration of the 10 year impact fee refund timeline applicable to specific claims due to the statute of limitations.
- On April 6, 2017, Court grants the County's motion to dismiss all remaining claims and plaintiffs, with the exception of the single 5 acre parcel still owned by the Newells, on the ground that none of the other remaining plaintiffs still own property in the plan area.
- On March 14, 2018, the June 2018 trial date vacated on stipulation of counsel to allow the Board to provide direction to legal counsel and County staff.

BACKGROUND

WARM SPRINGS SPECIFIC PLAN – HISTORY

In 1995, Washoe County adopted the Warm Springs Specific Plan (WSSP), a part of the Warm Springs Area Plan. The WSSP includes 3,983 acres of privately owned land and establishes a mix of land uses including agricultural, residential, parks and recreation, public facilities, light industrial and small scale commercial. The WSSP is intended to function as both the center of residential development, and as the community service center, for the Warm Springs community.

During the public review process leading to adoption of the WSSP, the Board provided direction that the development area was not part of, nor contemplated to be within, planned public services and facilities areas by the County. Therefore, the specific plan should provide for "self-funding" of any public services and facilities by those property owners within the specific plan area (and not by Warm Springs residents outside of the specific plan area nor by the County at large).

Consequently, the WSSP was adopted with a financing component that would provide for the construction of roads, community water or sewer services and limited recreation (parks) and fire and police protection. The financing plan requires that any property owner who subdivides properties and develops within the WSSP area must pay into a fund that would help support the construction of the public facilities. The plan envisioned at the time of adoption that a large land owner would fairly quickly develop a large portion of the WSSP and would construct the necessary backbone infrastructure including water and wastewater treatment facilities, roads, drainage facilities, parks, etc.

Every subdivision or parcel map submitted within the WSSP area is required to submit a development agreement for adoption by Washoe County. Each development agreement includes a provision based on the adopted financing plan for the purpose of paying a proportionate share to fund the major infrastructure costs which benefit the residents and property owners within the WSSP area. The financing plan establishes a fee per parcel to be paid by the individual developers and is based on the development potential that would occur with buildout of the WSSP area (utilizing the water resource limit of 3,000 acre-feet of perennial yield available for groundwater recharge limits, the total amount of

residential and commercial development within the WSSP). This financing plan also incorporated a mechanism for reimbursement and credit for infrastructure improvements within the WSSP area provided by private property owners that support the WSSP. Since the adoption of the WSSP in 1995, a total of 110 new parcels have been created within the WSSP area and a total of nearly \$800,000 has been collected by Washoe County in the WSSP area fund.

LITIGATION BACKGROUND

In early 2015, a group of present or former property owners in the WSSP began an effort to obtain refunds of money they or their predecessors had paid to Washoe County over a period of years beginning in 1996 in connection with individual development projects. Members of the group claimed entitlement to refunds because the infrastructure contemplated by the WSSP had never been built despite the passage of, in some cases, a decade or more since the money was paid into the fund. At the time of their initial push for refunds, around \$619,000 had been paid. By summer 2015, that amount with interest had grown to around \$773,000.

On May 12, 2015, the Board directed staff to begin the process of amending the Washoe County Master Plan by removing the financing component of the WSSP and ultimately paying the refunds sought in the matter. Before that could happen, however, the group seeking refunds sued the County in the Second Judicial District Court of the State of Nevada on June 8, 2015 (CV15-01104). It included 11 named plaintiffs, who sought approximately \$500,000 in refunds. The Master Plan amendment and refund process stalled out at that point as litigation got underway and the County faced the risk of inconsistent or duplicate liabilities.

Plaintiffs are not the only ones seeking money from the fund. On September 30, 2015, Capurro Investments, LLC, requested (by letter) reimbursement in the amount of \$319,252 for work associated with certain roadways in the Warm Springs Valley area that they assert qualify for reimbursement under the WSSP. These area roadways are not the responsibility of Washoe County and are operated and maintained by the Palomino Valley General Improvement District. According to the letter seeking reimbursement, the work was done to Broken Spur Road, Sharrock Road, and Amy Road. The WSSP itself designates an unnamed "Spine Road," Whiskey Springs Road, Broken Spur Road, and Grass Valley Road for improvement and reimbursement (Plan p. G-x, G-xi). While all identified roadways are operated and maintained by the GID, the WSSP required the subject roadways to be designed and constructed to Washoe County Development Code standards which includes a paved roadway structural section and associated roadway drainage improvements. Both the County's review and through information provided by Mr. Murphy, the roadways were generally constructed as gravel roadways and in some areas an oil emulsion was applied to the surface. The work done on the subject roadways was not done to Washoe County standards and therefore it is staff's determination that the requirements of the WSSP and subsequently the WCDC requirements were not met and therefore the basis for reimbursement has not been met and reimbursement is not recommended.

In the lawsuit, the plaintiffs claim the fees paid were NRS chapter 278B “impact fees” due to be refunded when 10 years has elapsed without the designated improvements being built. The County disputes that characterization. The Court, however, has entered an order finding that the fees were, in fact, “impact fees.” Thus, unless the plaintiffs waived or are otherwise barred from seeking refunds, and unless the County were to ultimately appeal the Court’s characterization of these fees as “impact fees,” refunds would be due at the latest when 10 years has elapsed since payment and the corresponding infrastructure has not been built.

As a result of various motions to dismiss filed by the county, the Court has dismissed all of the plaintiffs and all of the claims in the case, except for the claims based on a single 5 acre parcel still owned by the Newells. According to the Newells, the amount of the refund sought on that parcel is approximately \$10,377.13. Some of the claims were dismissed on statute of limitations grounds---i.e., some of the plaintiffs waited too long after the expiration of the 10 year refund period to file their lawsuit. Others were dismissed because they were not yet ripe, meaning the 10 year period for construction of infrastructure had not yet lapsed since they paid their fees. Some or all of the plaintiffs dismissed on ripeness grounds can or will be able to re-file a lawsuit for refunds (assuming they otherwise qualify for refunds) as the 10 year period applicable to their individual payments expires.

Lastly, except for the 5 acre parcel still owned by the Newells, the rest of the plaintiffs were dismissed because they no longer own the properties for which they paid fees in the first place. NRS chapter 278B specifically requires that any refunds of impact fees due be paid to the owners of the property at the time the refund is paid. Anyone who paid fees originally but then sold the property would generally not be eligible for a refund if the sale occurred before refunds were paid.

Trial was set for June 2018. However, at a pretrial conference on March 14, 2018, counsel for the parties stipulated to vacate the trial date and set the case for a status conference instead. Meanwhile, counsel and staff for the County are seeking direction from the Board on how to proceed concerning these claims at this point. There are several options. Generally speaking, direction is needed in the following areas:

- (1) Should the County pay refunds or continue fighting the lawsuit?;
- (2) Should the County grant some or all of the Capurro request for reimbursement for roadway work in or near the area?; If refunds are granted, should the County amend its Master Plan to remove the financing component of the Warm Springs Specific Plan in order to avoid conflicting payments from new developers as the fund balance diminishes due to current refunds?; and/or
- (3) Should the County attempt to avoid taking any further position on the fee fund and “interplead” it into the Court for resolution amongst the various claimants?

FISCAL IMPACT

The potential fiscal impact could cover the entire amount of the fees plus interest in the fund, depending on whether refunds are directed or reimbursement ordered. Funds are located in the Capital Improvements Fund (402) in cost center C925000.

RECOMMENDATION

It is recommended that the Board of County Commissioners provide direction to legal counsel and County staff on which course of action to take regarding the Warm Springs Specific Plan area refunds lawsuit, Newell et. al. vs. Washoe County CV15-01104.

POSSIBLE MOTION

The following motion is offered for consideration:

“Move to direct legal counsel and County staff to take one or more of the following courses of action regarding the Warm Springs Specific Plan Area refunds lawsuit, Newell et. al. vs. Washoe County CV15-01104:

- 1) *Refunds*. Pay partial or full refunds to all current property owners in the Warm Springs Specific Plan area based on the Court’s ruling that the amounts are NRS 278B “impact fees” and are refundable if improvements are not built within 10 years, or pay no refunds and maintain the county’s position in the lawsuit that the fees are not “impact fees” and that the plaintiffs waived any refunds;
- 2) *Reimbursement*. Allow, partially allow, or disallow Capurro Investments, LLC’s/Brian Murphy’s claim for “reimbursement” of approximately \$319,252 - for work done on certain roads, some of which were identified in the Warm Springs Specific Plan area agreement;
- 3) *Master Plan Amendment*. Direct planning staff to initiate master plan amendments to the Warm Springs Specific Plan removing the financing provisions of the plan that require current or future developers to continue paying development fees at the time of recording their final maps; or,
- 4) *Interpleader*. Deny refunds or reimbursement and file a lawsuit against all persons or entities with competing claims for the money in the fund, “interplead” the money into the Court, and allow the claimants to make their case for a share of the money with the Court ultimately deciding.

Exhibit A. Warm Springs Specific Plan Improvements