

LEGAL DEPARTMENT
TOWN OF PAYSON
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Timothy M. Wright
Town Attorney
Extension 286

Co Horgan
Town Prosecutor
Extension 277

MEMORANDUM

February 3, 2011

TO: Mayor and Council Members

FROM: Tim Wright

SUBJECT: Followup from 1/20/11 Council Agenda Item I.1. (Limited deferral of residential development fees)

CC: Debra Galbraith, Town Manager

On January 20, 2011, the Council directed staff to do the following three things in reference to Item I.1: (1) work with residential developers to allow limited deferral of development impact fees pursuant to A.R.S. §9-463.05; (2) use the attached form development agreement, with the deletion of Alternative #2 to section 4.5, as a model for such limited deferrals; and (3) prepare amendments to the Town Code and Town Ordinances as may be necessary to implement such limited deferrals.

On February 2, 2011, Council Member Blair met with the Town Attorney and requested an update/clarification as to what was being done in reference to the Council's direction, including what role Ordinance 798 had. Below is a brief summary of what staff has done in the two weeks following the January 20, 2011 Council Meeting as a result of the Council's direction:

- 1) At the February 2, 2011 development services meeting, staff began discussions on how the Town would work with developers who were requesting deferred fees and also what systems would be necessary to verify all fees were paid prior to the issuance of a certificate of occupancy on any projects with deferred fees.
- 2) Pursuant to the Council's direction, 'alternative 2' of paragraph 4.5 of the form development agreement was removed. This new form development agreement will provide the starting point when developers and Town staff discuss the potential of deferred fees. See attached form development agreement.
- 3) Ordinance 798 is being presented to the Council on February 3 and February 17. This Ordinance makes amendments to the Town Code section addressing the timing of water impact fees (Section 50.59) and to Section 3 of Ordinance 487 which addresses the other impact fees.

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- G. Owner proposes in accordance with this Agreement to pay the development impact fee for each residential structure prior to receiving a final inspection and certificate of occupancy for each such residential structure.
- H. The Town Council has determined that this Agreement is consistent with the goals of Town's General Plan and is otherwise in the best interests of the health, safety, and welfare of the community.

NOW, THEREFORE, for and in consideration of the mutual covenants and promises contained herein, and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the Parties hereto agree as follows:

SECTION ONE. Recitals.

- 1.1 That each of the recitals set forth above are hereby incorporated into and made a part of this Agreement and the Parties acknowledge the accuracy and correctness of said recitals.

SECTION TWO. Property.

- 2.1 That this Agreement shall apply to the real property described in Exhibit A ("the Property").

SECTION THREE. Effective Date and Expiration Date.

- 3.1 This Agreement shall be effective on the later of (1) the date written above or (2) thirty (30) days following approval by the Payson Town Council.
- 3.2 This Agreement shall expire on the ____ day of _____, 20__.

SECTION FOUR. Owner Performances.

The Owner agrees to do the following:

- 4.1 Finance, design, construct, and arrange for sale of approved residential structures on lots within the Property during the term of this Agreement, except as provided hereinafter.
- 4.2 Pay when due all applicable fees and charges of the Town in accordance with applicable statutes, Town Code provisions, and Town regulations, except those development impact fees deferred and expressly set forth in Exhibit B.
- 4.3 Pay the development impact fee for each individual unit set forth in Exhibit B prior to the issuance of a certificate of occupancy for such unit or within 2 years from the date of issuance of a building permit, which ever is sooner. If Owner

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fails to pay any development impact fee owing pursuant to this section, in addition to any other remedies, the Town may utilize any security provided pursuant to Paragraph 4.5 to obtain such development impact fees.

4.4 Not now, nor in the future dispute the legality or amount of the development impact fees set forth in Exhibit B.

4.5 Provide appropriate security, including a surety bond, letter of credit, cash bond, or cash in escrow, pursuant to A.R.S. §9-463.05(B)(3) at least ten (10) days prior to the issuance of a building permit. Such security shall be in a form and amount acceptable to the Community Development Director.

4.6 The parties hereto expressly acknowledge that these covenants touch and concern the Property, and that there is privity of estate between the Town and Owner. However, notwithstanding anything to the contrary herein, Owner is not obligated to actually develop any lots with new residential housing types under this Agreement.

SECTION FIVE. Town Performances.

That the Town hereby agrees to do the following:

5.1 Upon receipt of appropriate security, defer payment of the development impact fees set forth in Exhibit B, until each unit is ready for final inspection and the issuance of a certificate of occupancy.

5.2 Issue necessary building permits upon the payment of all applicable fees and charges of the Town in accordance with applicable statutes, Town Code provisions and Town regulations, except those development impact fees expressly set forth in Exhibit B.

SECTION SIX. Certificate of Occupancy/Water Service

6.1 The Town will not issue a certificate of occupancy for any structure until Owner has paid all applicable fees and charges of the Town, in accordance with applicable statutes, Town Code provisions and Town regulations, including those development impact fees set forth in Exhibit B.

6.2 Owner will not allow any person to live within any permanent structure on the Property until a certificate of occupancy has been issued for such structure.

6.3 Prior to the payment of all applicable fees and charges of the Town, including those development impact fees set forth in Exhibit B, any water service established on a

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parcel shall be considered temporary and such temporary water service may not be used for occupancy.

- 6.4 In addition to any other remedies, the Town may discontinue water service for any violation of paragraphs 6.2 or 6.3.

SECTION SEVEN. Recording.

7.1 This Agreement shall be recorded in the Office of the County Recorder of Gila County, pursuant to ARS §9-500.05(D).

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7.2 Owner shall reimburse the Town for any costs associated with recording this Agreement.

SECTION EIGHT. Continuing Effect.

- 8.1 If a building permit for a lot or lots is issued and this Agreement is terminated for any reason and both the payment of the development impact fees set forth in Exhibit B for such lot or lots are not paid and a certificate of occupancy is not obtained for such lot or lots, Paragraphs 4.3, 4.4, 6.1, and 6.2 shall survive such termination as to any such lot or lots and shall have continued effect until the Exhibit B fees are paid for such lot or lots and a certificate of occupancy is issued for such lot or lots.

SECTION NINE. Miscellaneous Provisions.

- 9.1 **Modification.** No provision of this Agreement shall be amended or otherwise modified, in whole or in part, except by an instrument in writing duly executed by the Town and the Owner.
- 9.2 **Termination.** Without limiting or waiving any other remedies, the Town, in case of a breach of any provision in this Agreement by Owner, and without election, may terminate this Agreement, in whole or in part, by written notice to Owner.
- 9.3 **Dispute Resolution.**
- 9.3.1 This Agreement shall be governed and construed in accordance with the internal laws of the State of Arizona.
- 9.3.2 If a dispute arises out of or relates to this Agreement, or the breach thereof, and if the dispute cannot be settled through negotiation, the Parties agree first to try to settle the dispute through mediation before resorting to arbitration, litigation, or some other dispute resolution procedure. In the event that the Parties cannot agree upon the selection of a mediator within seven (7) days, either party may request the presiding judge of the Superior Court of Gila County to assign a mediator from a list of mediators maintained by the Arizona Municipal Risk Retention Pool.

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9.3.3 The venue for any such dispute under this Agreement shall be Gila County, Arizona, and both Parties consent in advance to such venue and jurisdiction and waive any right to object that Gila County is an inconvenient or improper forum based upon lack of venue.

9.3.4 Neither Party shall be entitled to recover from the other party any of its attorneys' fees, costs, or expert witness fees incurred in any such dispute, controversy, claim, or cause of action, but each party shall bear its own attorneys' fees without contribution from the other party, whether the same is resolved through arbitration, mediation, litigation in a court, or otherwise.

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9.4. **Cancellation (A.R.S. §38-511).** This Agreement is subject to the provisions of A.R.S. § 38-511 which provides for cancellation of contracts by the municipality for certain conflicts of interest.

9.5. **Assignment.** Owner shall not assign this Agreement without the written consent of Town, and any attempted assignment or subcontracting in violation of this Paragraph shall render this Agreement void and of no effect.

9.6. **Notices.** All notices, filings, consents, approvals, and other communications provided for herein or given in connection herewith shall be validly given, filed, made, delivered, or served if in writing and delivered personally or sent by certified United States mail, postage prepaid, return receipt requested, to:

If to the Town:

Town Manager
Town of Payson
303 North Beeline Highway
Payson, Arizona 85541

With Copies to:

Community Development Director
Town of Payson
303 North Beeline Highway
Payson, AZ 85541

Town Attorney
Town of Payson
303 North Beeline Highway
Payson, AZ 85541

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If to the Owner:

Attention: _____

or to such other addresses as either Party hereto may from time to time designate in writing and deliver in a like manner. Notices, filings, consents, approvals, and communication given by certified mail shall be deemed delivered forty-eight (48) hours following deposit in the U.S. mail, postage prepaid and addressed as set forth above. Notices delivered personally shall be deemed delivered upon delivery.

- 9.7 No Partnership.** It is not intended by this Agreement to, and nothing contained herein shall, create any employment relationship, partnership, joint venture, or other arrangement between Town and Owner.
- 9.8 No Third Party Beneficiaries.** No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization, or corporation not a party hereto, and no such other person, firm, organization, or corporation shall have any right or cause of action hereunder.
- 9.9 Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all parties may be physically attached to a single document.
- 9.10 No Waiver.** No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by the Town of a breach of any of the covenants of this Agreement shall be construed as a waiver of any proceeding or succeeding breach of the same or any other covenant or condition of this Agreement.
- 9.11 Construction of Agreement.** This Agreement shall be construed and interpreted according to its plain meaning, and no presumption shall be deemed to apply in favor of or against the party drafting this Agreement. The parties acknowledge and agree that each has had the opportunity to seek and utilize legal counsel in the drafting of, review of, and entry into this Agreement.
- 9.12 Further Documentation.** Each Party agrees in good faith to execute such further or additional documents as may be necessary or appropriate to fully carry out the intent

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and purpose of this Agreement.

9.13 **Time of Essence.** Time is of the essence in this Agreement and all of its parts.

9.14 **Authority.** The Owner acknowledge and warrant that it is fully authorized and empowered to execute this Agreement by and through the individual(s) executing hereinafter. The Town Council approved Resolution _____ authorizing the Mayor to execute the Agreement.

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9.15 **Entire Agreement.** This Agreement contains and sets forth the entire and exclusive agreement and understanding between the Parties hereto pertaining to the subject matter and all prior or contemporaneous oral or written agreements shall have no effect.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement by and through their authorized representatives the day and year first-above written.

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Owner
an Arizona corp, part, llc, etc

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by _____, its _____
TOWN OF PAYSON
an Arizona municipal corporation

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_____, Mayor

ATTEST:

APPROVED AS TO FORM:

_____, Town Clerk

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_____, Town Attorney

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STATE OF ARIZONA)
) ss:
County of Gila)

The foregoing instrument was acknowledged before me this ___ day of _____, 20 __, by _____, Mayor of the Town of Payson, an Arizona municipal corporation, on behalf of said municipal corporation.

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My Commission Expires:

Notary Public

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STATE OF ARIZONA)
) ss:
County of _____)

The foregoing instrument was acknowledged before me this ___ day of _____, 20 __, by _____ name _____, title _____ of _____ Owner _____, an Arizona _____, on behalf of said _____.

My Commission Expires:

Notary Public

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EXHIBIT A

[TO DEVELOPMENT AGREEMENT BETWEEN
TOWN OF PAYSON AND _____]

DESCRIPTION OF THE PROPERTY

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EXHIBIT B

[TO DEVELOPMENT AGREEMENT BETWEEN
TOWN OF PAYSON AND _____]

Deferred Development Impact Fees:

Parks Impact Fee	\$1000.00 per residential unit
Streets Impact Fee	\$1235.00 per residential unit
Public Safety Impact Fee	\$500.00 per residential unit
Water Impact Fee	\$7570.00 per Equivalent Residential Unit

[If the development contains anything other than single family homes that are one ERU each, that should be noted here; for example, if there is an apartment complex, the number of ERU's and the total impact fee for each building should be noted.]

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