



AGENDA REPORT
August 14, 2018

Appeal, Re: Transportation Impact Fee Exemption by Banana Riverfront, LLC (District 2)

SUBJECT:

Appeal, Re: Transportation Impact Fee Exemption by Banana Riverfront, LLC (District 2)

FISCAL IMPACT:

FY17/18 – If this appeal is resolved in favor of the applicant, up to \$33,289.06 in transportation impact fees will not be collected in the Merritt Island/North Beaches Benefit District (Fund 1209).

DEPT/OFFICE:

Planning and Development

REQUESTED ACTION:

It is requested that the Board of County Commissioners consider an appeal by Banana Riverfront, LLC of a denial of a transportation impact fee exemption for the Squid Lips Deck Addition project.

SUMMARY EXPLANATION and BACKGROUND:

On December 18, 2017 Banana Riverfront, LLC submitted a letter requesting an exemption to the transportation impact fee code for a 1,970 square foot deck addition at the Cocoa Beach Squid Lips pursuant to Section 62-815 (a) 1. and Section 62-815 (a) 2. based on a claim that no new units were being created, the use was not being changed, and no additional vehicular trips were being created. Further, the application claims the only area that should be used to determine the impact fee amount is the net area where customers have access.

After a review of the information provided, the request for exemption was Administratively denied on January 11, 2018 based on the finding that new units have been created and that absent professionally prepared evidence to the contrary, additional vehicular trips are also being created. Also, there are no impact fees assessed on commercial development that are based on net area. They are all based on gross area. This is standard methodology and is the basis of the entire transportation impact fee study, analysis and recommendations. The proposed "net" area adjustment would disrupt the entire impact fee rate schedule and at best would result in adjusting the rate schedule to have no change to the actual revenues generated.

Further, since the adoption of the smoking ban in restaurants by the State of Florida, it has become common practice to include outside restaurant seating areas in order to

accommodate patrons that smoke. Since the transportation impact fee rate schedule is based on gross square feet, it has been a standard practice to include these outside seating areas in the calculation of the transportation impact fees that are due on a particular project. Since the adoption of the smoking ban all restaurants have been required to pay for additions that provide outside seating.

On May 8, 2018, the Board tabled the item to the August 14, 2018, meeting.

ATTACHMENTS:

Description

- ▢ **Notice of Appeal**
- ▢ **Staff Report**



Tammy Rowe, Clerk to the Board, 400 South Street • P.O. Box 999, Titusville, Florida 32781-0999

Telephone: (321) 637-2001
Fax: (321) 264-6972
Tammy.Rowe@brevardclerk.us

August 15, 2018

MEMORANDUM

TO: Tad Calkins, Planning and Development Director

RE: Item I.2., Appeal for Transportation Impact Fee Exemption by Banana Riverfront, LLC – Squid Lips Deck Addition Project

The Board of County Commissioners, in regular session on August 14, 2018, tabled consideration of an appeal by Banana Riverfront, LLC of a denial for transportation impact fee exemption for the Squid Lips Deck Addition Project to the October 23, 2018, Board meeting.

Your continued cooperation is greatly appreciated.

Sincerely yours,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Rowe

Tammy Rowe, Deputy Clerk

/ds

cc: County Attorney
County Manager

Notice of Appeal

Banana Riverfront, LLC, by and through the undersigned attorney, pursuant to Section 82-819 of the Brevard County Code of Ordinances, files this Appeal of the denial of the requested exemptions to the Transportation Impact Fee Assessment of \$33,289.06 for the Squid Lips Deck Addition, Application No. 17BC10869. A copy of the Impact Fee Assessment Form B-2 is attached as **Exhibit "A"**.

On December 18, 2017, Buz Underill, Managing Member of Banana Riverfront, LLC claimed an exemption to the Transportation Impact Fee, specifically exemptions under Section 62-815 (a) (1) and (2). A copy of the letter from Mr. Underill is attached as **Exhibit "B"**.

By letter dated January 11, 2018, Stephen Swanke, Impact Fee Administrator, denied the exemption based upon his assumption that the increase in "units" – square footage – would result in an increase in the number of vehicular trips. A copy of Mr. Swanke's letter is attached as **Exhibit "C"**.

Banana Riverfront, LLC appeals this denial of the exemptions on several grounds.

1. There are few new seats actually generated by the accessory structure, that being the new deck addition. Banana Riverfront, LLC purchased the property with a total of 459 seats. A copy of the Affidavit for Vested Rights Petition, executed by the seller, is attached as **Exhibit "D"**. The impact fee should be calculated on actual potential occupancy, not gross square footage.

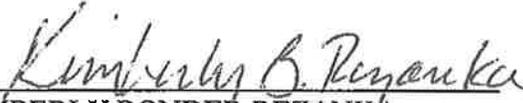
2. The "units" of additional square footage is improperly applied. While there was additional decking added, the use of 1,970 square feet, as "units" is inappropriate because some of this includes a bandstand area, a bar and bar-back area, doorway landings, coolers, stairs and corridors, none of which can be utilized for the primary occupation function of the restaurant,

which is the service of patrons. Additional "units" should be based on actual use of restaurant building – "net area" – not "gross area" or "net area". From the scaled drawings provided to the County, the actual new square footage that is for patrons is approximately 1020 square feet. . A copy of the Minor Exterior Renovations is attached as **Exhibit "E"**.

3. The fee schedule has not been reviewed by the County Commission as required by Section 62-816.

I HEREBY CERIFY that this Notice of Appeal and been sent to County Manager, Frank Abbate, at Frank.Abbate@brevardfl.gov, Impact Fee Administrator, Stephen M. Swanke, at Steve.Swanke@brevardfl.gov and to Clerk to the Board of County Commission, Sally Lewis, at Sally.Lewis@brevardfl.gov on February 12, 2018.

CANTWELL & GOLDMAN, P.A.
Attorneys for Banana Riverfront, LLC


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**BREVARD COUNTY BOARD OF COMMISSIONERS
IMPACT FEE ASSESSMENT
FORM B-2**

Project Name: Squid Lips Deck Addition

Date: 11/28/2017 | **Prep. by:** NJAH

Site Plan No.: 17SP00016

Site Address:
 Unincorporated Incorporated
Street: 2200 S Orlando Ave.
City: Cocoa Beach, FL

Applicant: Construction Eng. Group
Jake Wise, P E
Street: 2651 W Eau Gallie Blvd.
City: Melbourne, FL 32935
Phone: (321) 610-1760

Legal Description: RE#2520254
Twn: 25 **Rng:** 37 **Sec:** 26
Sub-Division: 28
Tax Parcel/Blk: **Lot:**

Owner: H J Underill, III
Banana Riverfront, LLC
Street: 490 N Harbor City Blvd
City: Melbourne, FL 32935
Phone: (321) 258-5840

Project Description:
 Quality Restaurant
Size: 1,970 sf
Units: 1

Solid Waste Billing Units: IC
Land Use Code: 2100

Impact Fee Amount:	
Transportation:	\$33,289.06
Fire/Rescue:	\$519.11
Correctional:	\$690.98
Emergency Med. Serv.:	\$370.95
Library Services:	\$0.00
Solid Waste:	\$0.00
Educational Facilities:	\$0.00
Sub-Total:	<u>\$34,870.10</u>
Credits:	
** Est. Impact Fees:	\$34,870.10

**** NOTES:**

- CHANGE OF USE ON THIS PROPERTY MANDATES A REVIEW AND MAY REQUIRE ADDITIONAL IMPACT FEE PAYMENT.**
- Payment is required before C.O. or Pre-Power, however, payment cannot be accepted before Building Permit is Issued.*
- If Permit Plan differs from Site Plan, Impact Fee assessment may change.*
- Fees calculated according to current Brevard County Commissioners approved Impact Fee Schedule.*

Comments:

Permit No.:

Application No. 17BC10869

Brevard County Impact Fees assessed by:
 Brevard County Land Development Code
 Phone: (321) 633-2065, Fax: (321) 633-2052

December 18, 2017

Mr. Steve Swanke
Land Development Impact Fees
2725 Judge Fran Jamieson Way, Bldg A
Viera, FL 32940

**RE: Banana Riverfront, LLC (a/k/a Cocoa Beach Squid Lips) Construction Permit
and Transportation Impact Fees, 2200 S. Orlando Avenue, Cocoa Beach**

Dear Mr. Swanke:

Pursuant to Sec. 62-815 (a), Banana Riverfront is claiming an exemption to the transportation impact fee assessed against its Property due to the expansion of the accessory structure, the outdoor deck. The usable areas of the Property have been restructured such that there is no increase in "units" or usable square footage, the use has not changed and there will be no additional trips produced from this deck expansion.

Sec. 62-815. - Exemptions, credits, reimbursements, and deferrals.

(a) *Exemptions.* The following shall be exempted from payment of the transportation impact fee:

- (1) Alteration or expansion of an existing building where no additional units are created, where the use is not changed and where no additional vehicular trips will be produced over and above those produced by the existing use.
- (2) The construction of accessory buildings or structures which will not produce additional vehicular trips over and above those produced by the principal building or use of the land.

Please evaluate this exemption request and provide written acceptance or denial of this claim. If denied, Banana Riverfront, LLC intends to appeal to the County Commission.

Thank you for your attention to this matter.

Sincerely,



Buz Underill
Managing Member

cc: Tad Calkins, Director of Planning & Development (tad.calkins@brevardfl.gov)



6609
Planning & Development Department
2725 Judge Fran Jamieson Way
Building A, Room 114
Viera, Florida 32940

BOARD OF COUNTY COMMISSIONERS

January 11, 2018

Buz Underhill, Managing Member
Banana Riverfront, LLC.
490 N. Harbor City Boulevard
Melbourne, Florida 32935

Dear Mr. Underhill:

I have received your letter of December 18, 2017 requesting an exemption to the transportation impact fees assessed on your property pursuant to the terms of Section 62-815(a) of the Brevard County Code of Ordinances. To be considered exempt under that section, your development activity must not increase the number of units, change the use or produce additional vehicular trips above that of the existing use. Therefore, this exemption requires all three of these conditions to be true.

Per Section 62-818, at your request, the deck addition has been assessed as a low turnover, quality restaurant which is the lowest rate that can be assessed on a restaurant. Although you have not expanded the existing building and the deck addition may be considered an accessory structure, you are able to provide food and beverage service to restaurant patrons on the deck and the deck addition must be considered to be a part of the restaurant. The computation of the transportation impact fee is based on the gross square footage of the restaurant including the deck and the deck addition thus represents an increase in the number of units.

You also state that no additional vehicular trips would be produced by this addition. Without professionally prepared, supporting documentation indicating that no additional vehicular trips will be created, I must assume that the increase in the number of units will result in an increase in the number of vehicular trips. At your option, you may retain a qualified traffic consultant to prepare an independent fee calculation study pursuant to the terms of Section 62-809 (b) to calculate a transportation impact fee rate different than that listed in Section 62-818.

I concur that the deck addition does not represent a change of use of this property. However, for the reasons identified above, I have found that the number of units has been increased and additional vehicular trips will be created. Therefore, your request for an exemption pursuant to Section 62-815 (1) & (2) is denied. You may appeal this decision to the Board of County Commissioners per the terms of Section 62-819.

Sincerely,

Stephen M. Swanke
Impact Fee Administration & Cashier Program Manager

AFFIDAVIT FOR VESTED RIGHTS PETITION
Banana Riverfront, LLC

STATE OF New Jersey
COUNTY OF Ocean

BEFORE ME, the undersigned authority, personally appeared, Robert R. Cooper, President of Chefs International, Inc., who, after fully being duly sworn, deposes and says:

1. Chefs International, Inc. owned the Property at 2200 S. Orlando Avenue, Cocoa Beach, Brevard County, Florida, as more particularly described in Exhibit "A" attached hereto, from September 30, 1981 to October 16, 2015.
2. Chefs International, Inc., is the holder of that certain Mortgage and Security Agreement, dated October 20, 2015, and recorded on October 26, 2015, in O.R. Book 7480, Page 315, Public Records of Brevard County, Florida, and encumbering lands described in said Mortgage.
3. The attached survey, Exhibit "B", dated September 10, 2015 is an accurate depiction of the buildings and structures that existed at the time of the sale of the Property to Banana Riverfront, LLC.
4. At the time of the sale, the restaurant provided for 358 seats inside and 101 on the deck, walkway and gazebo areas on the west side of the restaurant building, for a total of 459 seats.
5. To my knowledge, all structures were properly permitted through Brevard County, or were repairs that Chefs International, Inc. did not believe required permits.
6. The structures and pier sustained substantial damage from the three (3) hurricanes in 2004 and there were many repairs needed.
7. Unfortunately, all records of the permits and structures in the possession of Chefs International, Inc. were destroyed while in storage in New Jersey due to Super Storm Sandy in 2012.

Exhibit "D"



Planning & Development Department
2725 Judge Fran Jamieson Way
Building A, Room 114
Viera, Florida 32940

BOARD OF COUNTY COMMISSIONERS

STAFF REPORT: NOTICE OF APPEAL by Banana Riverfront, LLC of a denial of transportation impact fee exemptions.

On December 18, 2017, Banana Riverfront, LLC claimed an exemption to the imposition of Transportation Impact Fees pursuant to Section 62-815 (a) 1. and Section 62-815 (a) 2. These sections allow exemption to transportation impact fees for expansions that do not increase the number of units, change the use, and do not create additional vehicular trips.

Following submittal of their claim of exemption, the claim was reviewed and a letter of denial was issued on January 11, 2018 based on the finding that additional units are being created and an increase in additional vehicular trips could result. Their request did not include professionally prepared evidence to the contrary.

Banana Riverfront, LLC has now filed a Notice of Appeal to the Board of County Commissioners seeking to overturn the denial of their exemption. Their appeal is based on the following grounds:

1. The impact fee should be based on "actual potential occupancy" not gross square footage.
2. The calculation of additional units is incorrect since it was based on gross square footage which includes the bandstand and bar area.
3. The Board of County Commissioners has not reviewed the transportation impact fee rate schedule contained in Section 62-818 in this fiscal biennium as required by Section 62-816.

Staff's responses to the grounds of this appeal are as follows:

1. On April 24, 2001 the Board of County Commissioners adopted Ordinance 01-21 which amended the transportation impact fee rate schedule contained in Section 62-818 to reflect the rates calculated by the Brevard County Impact Fee Update Study, dated March 2000 and prepared by Tindale Oliver and Associates, Inc. The calculation of the rates for the three restaurant land uses was based on the gross square footage of the facilities and not on the "actual potential occupancy" of the facility. Basing impact fee rates on gross square footage is a common practice in the State of Florida. Utilizing "net area" or "actual potential occupancy" would require a recalculation of the transportation impact fee rate schedule for restaurants and would increase the rate charged for "net area" or "actual potential occupancy" in order to compensate for the reduction in square feet since the actual traffic impact would remain



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BOARD OF COUNTY COMMISSIONERS

unchanged. This would result in higher transportation impact fee payments for all new restaurants in order to reduce the transportation impact fee payment for the Squid Lips Deck Addition. Banana Riverfront, LLC was advised that they could perform an independent fee calculation study pursuant to Section 62-809 (b) rather than using the rate contained in Section 62-818. These sections of the code are attached for your information.

2. Brevard County's transportation impact fee code does not provide for assessment of impact fees based on "net area" or "actual potential occupancy". Presumably, liquor sales and live music attract patrons to this restaurant and could result in additional vehicular traffic or the owner would not provide these services. Coolers, stairs and corridors are necessary appurtenances to this facility. The transportation impact fee rates were calculated with such appurtenances included in the gross square footage. Therefore, their exclusion is not sufficient justification for the applicant's claim of an exemption.
3. This expansion project has been assessed at the lowest transportation impact fee rate in effect for any restaurant land use category. This rate was calculated in March 2000. The Board of County Commissioners authorized a new impact fee update study in 2014. This study was completed in March 2015. The Board of County Commissioners reviewed the updated Transportation Impact Fee Rate Schedule from this study but declined to increase transportation impact fee rates at that time. No new information has been submitted since March 2015 that would necessitate further review by the Board.

By way of comparison, the current rate for a low turnover restaurant based on the March 2000 study is \$16.90 per square foot. The rate for a low turnover restaurant recommended by the 2015 study was \$30.55, an increase of 81%.

Sec. 62-809. Computation.

- (a) At the option of the feepayer, the amount of the fee required by this division may be determined by the fee schedule set out in section 62-818. If a building permit is requested for mixed uses, then the fee shall be determined through using the fee schedule in section 62-818 by apportioning the space committed to uses specified on the schedule. If the applicant for a building permit neglects or fails to describe such uses, or fails to do so with sufficient specificity in the opinion of the county manager, or if the basis for calculating the transportation impact fee is unclear, then the county manager shall assume maximum impact by imposing the fee from section 62-818 assuming the highest uses for the proposed improvement for which the building permit is sought. If the type of development activity for which a building permit is applied for is not specified on the fee schedule in section 62-818, the county manager shall use the fee applicable to the most nearly comparable type of land use on the fee schedule. The county manager shall be guided in the selection of a comparable type by the report entitled "Trip Generation" (sixth edition) prepared by the Institute of Transportation Engineers. If the county manager determines that there is no comparable type of land use on the fee schedule in section 62-818, then the county manager shall determine the fee by:
- (1) Using traffic generation statistics contained in the report entitled "Trip Generation" (sixth edition), prepared by the Institute of Transportation Engineers; and
 - (2) Applying the formula set forth in subsection (b) of this section.

In the case of the conversion of a residential use to a nonresidential use, the impact fee shall be based upon the net increase in the impact fee for the new use as compared to the previous use. The county manager shall be guided in this determination by the report entitled "Trip Generation" (sixth edition) prepared by the Institute of Transportation Engineers.

- (b) If a feepayer opts not to have the impact fees determined according to subsection (a) of this section, then the feepayer shall prepare and submit to the county manager an independent fee calculation study for the land development activity for which a building permit is sought. The independent fee calculation study shall follow the prescribed methodologies and formats for such a study established by the county manager. The traffic engineering study and economic documentation submitted shall show the basis upon which the independent fee calculation was made, including but not limited to the following:
- (1) *Traffic engineering studies.*
 - a. Documentation of trip generation rates appropriate for the proposed land development activity.
 - b. Documentation of trip length appropriate for the proposed land development activity.
 - c. Documentation of trip data appropriate for the proposed land development activity.
 - (2) *Economic documentation studies.*

- a. Documentation of the cost per lane per mile for roadway construction appropriate for the proposed land development activity.
- b. Documentation of credits attributable to the proposed land development activity which can be expected to be available to replace the portion of the service volume used by the traffic generated by the proposed land development activity. This documentation shall be prepared and presented by qualified professionals in their respective fields.
- (c) The following formula shall be used by the county manager to determine the impact fee per unit of development:
 - (1) New travel = Trips per day per unit × trip length × percent new travel.
 - (2) New road capacity = New travel / 2 / lane capacity.
 - (3) Total cost = New road capacity × cost per lane mile.
 - (4) Credits = (Dollars per gallon × (annual travel) / (miles per gallon)) × present value factor.
 - (5) Net cost = Total cost - credits.
 - (6) Impact fee = Net cost.

Sec. 62-810. Payment.

- (a) The person applying for the issuance of a building permit shall pay the fee assessed pursuant to this division to the county manager prior to the issuance of a certificate of occupancy. No certificate of occupancy shall be issued until all assessed impact fees are paid. The obligation to pay the fee shall run with the land.
- (b) All funds collected shall be properly identified by transportation impact fee district and promptly transferred for deposit in the appropriate transportation impact fee trust fund, to be held in separate accounts as determined in section 62-812 and used solely for the purposes specified in this division.
- (c) In lieu of all or part of the transportation impact fees, the board of county commissioners may accept the offer by a feepayer, developer, or community development district to construct all or part of a road improvement project, including right-of-way, shown in the county comprehensive plan or appropriate to the implementation thereof. This offer shall not include the construction of site-related improvements. Such construction must be in accordance with county, municipal or state design standards, whichever are applicable. The feepayer, developer, or community development district shall submit a project description in sufficient detail, including competitive bids if so requested, to allow the county manager to establish an engineering and construction cost estimate. The county manager shall credit this estimated cost or the actual cost of the construction, whichever is the lower, against the transportation impact fee otherwise due as further described in section 62-815. The portion of the fee represented by the road construction shall be deemed paid when the construction is completed and accepted by the county or state for maintenance or when the feepayer posts security as provided in this subsection for the costs of such construction. Security in the form of a performance bond, irrevocable letter of credit or escrow agreement shall be posted with the board of county commissioners in an amount approved by the board equal to 110 percent of the full cost of such

Manufacturing	1,000 square feet	\$1,712.00
Warehouse	1,000 square feet	\$2,223.00
Miniwarehouse	1,000 square feet	\$543.00
Commercial:		
Hotel	Room	\$2,735.00
Motel	Room	\$1,480.00
Resort hotel	Room	\$6,522.00
Office under 10,000 GSF	1,000 square feet	\$8,630.00
Office 10,000 GSF and over	1,000 square feet	\$5,058.00
Office park	1,000 square feet	\$6,228.00
Medical office	1,000 square feet	\$13,024.00
Bank	1,000 square feet	\$13,766.00
Bank with drive-through	1,000 square feet	\$23,331.00
Retail:		
under 50,000 GSF	1,000 square feet	\$5,804.00
50,000 to 99,999 GSF	1,000 square feet	\$6,396.00
100,000 to 299,999 GSF	1,000 square feet	\$5,270.00
300,000 to 499,999 GSF	1,000 square feet	\$5,833.00
500,000 GSF & over	1,000 square feet	\$5,834.00
Service Station	Fuel Position	\$4,269.00
New & Used Auto Sales	1,000 square feet	\$10,933.00
Low Turnover Quality Restaurant	1,000 square feet	\$16,898.00
High Turnover Restaurant	1,000 square feet	\$23,213.00
Restaurant w/Drive-through	1,000 square feet	\$35,791.00
Supermarket	1,000 square feet	\$11,258.00
Car Wash	Wash Stall	\$11,530.00
Auto Repair	1,000 square feet	\$7,703.00
Convenience Market	1,000 square feet	\$34,542.00
Convenience Market with Gas & Fast Food	1,000 square feet	\$22,563.00
Furniture Store	1,000 square feet	\$1,332.00
Recreation		
Marina	acre	\$6,430.00
Golf Course	Hole	\$11,501.00
Tennis Court	Court	\$9,535.00
Racquet Club/Health Spa	1,000 square feet	\$5,761.00
Movie Theater with matinee	Seat	\$44.00
Institutional		
Church	1,000 square feet	\$2,532.00
ACLF or retirement home	Dwelling	\$378.00
Nursing Home	Bed	\$472.00
Day Care Center	1,000 square feet	\$11,769.00
Elementary School	Student	\$273.00
Middle School	Student	\$307.00
High School	Student	\$430.00