# Advisory Opinion #129

Parties: Gordon Miner and the Timpanogos Special Service District

Issued: July 31, 2013

**TOPIC CATEGORIES**:

A: Impact Fees Act

Impact fee analysis should follow the guidelines of the Impact Fees Act, and determine the fair allocation of capital costs that should be borne by new development. The Act does not endorse or prohibit any valuation methodology, and any acceptable method of valuing capital facilities may be used, as long as the analysis is properly followed to achieve a fair result. Impact fees may not be used to correct deficiencies, but they may be used to fund new construction to the extent needed to serve new development. A local political subdivision has discretion to select an impact fee service area, which may include its entire jurisdiction.



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**OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN**

# ADVISORY OPINION

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| Advisory Opinion Requested by: | Gordon L. Miner |
| Local Government Entity: | Timpanogos Special Service District |
| Applicant for the Land Use Approval: | Gordon L. Miner |
| Type of Property: | Residence |
| Date of this Advisory Opinion: | July 31, 2013 |
| Opinion Authored By: | Elliot R. Lawrence<br>Office of the Property Rights Ombudsman |

## Issues

Do a special service district's wastewater impact fees impose an equitable share of the capital costs of public infrastructure on new development?

## Summary of Advisory Opinion

The objective of impact fee analysis is to determine the fair share of capital costs that should be borne by new development.

A local political subdivision has discretion to select a service area, which may include the subdivision's entire jurisdiction.

Although individual usage may vary, all properties derive equal benefit from a community-wide utility, so all similarly-situated properties may be charged the same impact fee.

Multiple acceptable valuation methodologies may be used as part of the impact fee analysis. The Impact Fees Act did not dictate a valuation method.

Impact fees may not be used to cure pre-existing deficiencies in public facilities, but fees may be used help fund new or expanded facilities which are necessary due to new development.

## Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A request for an Advisory Opinion was received from Gordon L. Miner on November 8, 2012. A copy of that request was sent via certified mail to Garland J. Mayne, District Manager for the Timpanogos Special Service District, at PO Box 923, American Fork, Utah 84003. The return receipt was signed and delivered on December 4, 2012, indicating it had been received by the District.

## Evidence

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Gordon L. Miner, received by the Office of the Property Rights Ombudsman, November 8, 2012.
2. Additional materials submitted by Mr. Miner, received December 10, 2012, and March 18, 2013.

## Background

In 2012, Gordon L. Miner received a building permit to construct a new home on the eastern edge of Lehi. The Timpanogos Special Service District ("District") provides wastewater services to residents of Lehi, along with other communities in northern Utah County.[1] The District required Mr. Miner to pay wasterwater impact fees in order to obtain final approval for the new home.[2] The fees were adopted in 2009, and were based on the District's Capital Facilities Plan and an Impact Fee Analysis prepared by Lewis Young Roberston & Burningham, Inc., a private consulting firm.

[1] The District serves Alpine, American Fork, Cedar Hills, Highland, Lehi, Pleasant Grove, Saratoga Springs, and portions of Eagle Mountain, Vineyard, and the South Valley Sewer District.
[2] Lehi City also charges impact fees. Mr. Miner requested an Advisory Opinion on the City's fees, which will be prepared separately.

Mr. Miner objects to the District's impact fees, and requested this Advisory Opinion to evaluate their legality.[3] He argues that the fees were not correctly adopted, because the District did not properly follow the analysis of the Utah Impact Fees Act.[4] The District submitted nothing in response.

## Analysis

### Impact Fees Are Intended to Determine the Fair Share of Capital Costs That Should be Borne by New Development.

*A. Impact Fees Which Are Properly Adopted Are Presumed Valid.*

Impact fees are one-time charges imposed as conditions of development approval which are meant to offset or mitigate the impact the new development would have on public facilities. *See* UTAH CODE ANN. § 11-36a-102(8)(a). Special service districts that provide public utilities (such as the Timpanogos Special Service District) may charge impact fees, along with cities and counties. *See id.*, § 11-36a-102(12)(a).[5] There is no dispute that the District imposes sewer impact fees on new development within its boundaries, which include the City of Lehi. Mr Miner's new home was thus subject to the District's jurisdiction, and its wastewater impact fees.

An impact fee adopted following the procedures and requirements of the Impact Fees Act is presumed to be valid. "[A] presumption of constitutionality attaches to the legislative decisions of municipalities when they establish impact fees." *Home Builders Association of Utah v. City of North Logan*, 1999 UT 63, ¶ 9, 983 P.2d 561, 564 (*citing Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 904 (Utah 1981). That presumption, however, may be rebutted if the impact fees "require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred." *Id.*

If a developer challenges the reasonableness of an impact fee, the local political subdivision imposing the fee "must first disclose the basis of its calculations . . .." *North Logan*, 1999 UT 63, ¶ 8, 983 P.2d at 563 (citations and alterations omitted). When that information is disclosed, "[t]he burden then falls upon the challenger to show [that the fee fails] to comply with the constitutional standard of reasonableness." *Id.* 1999 UT 63, ¶ 8, 983 P.2d at 563-64. The District provided a copy the Impact Fee Analysis that Lewis Young Robertson & Burningham, Inc. prepared in 2009. That analysis, required by the Impact Fees Act, was the basis of the wastewater impact fee charged to Mr. Miner.

Mr. Miner presented four arguments that the wastewater impact fee is not reasonable: (1) His home does not benefit from the new improvements to the District's system, because of its geographic location; (2) His home has only limited impact on the overall sewer system; (3) The

[3] It is believed that Mr. Miner paid the fees "under protest," and has completed his home.
[4] UTAH CODE ANN. §§ 11-36a-101 to -705.
[5] *See also id.*, § 11-36a-201. Special service districts and local districts are listed as "local political subdivisions" along with cities and counties. These districts have as much authority to charge impact fees covering the utility services they provide as cities and counties.

analysis impermissibly uses replacement cost of the existing facilities as the basis for the impact fee; and (4) The District is impermissibly using impact fees to "cure existing deficiencies."

*B. Designating the Entire District as the Service Area is Reasonable.*

The first of Mr. Miner's objections stems from the location of his home, which is near the eastern edge of Lehi. He argues that the District's Impact Fee Analysis improperly treated the entire District as the relevant service area, allocating the burden of new improvements throughout the District on all new development. Mr. Miner argues that most, if not all, improvements required due to new development are located in other areas of the District, and it is inequitable and unreasonable to impose a burden on his new home, located in an area that does not require as much new infrastructure.

Under the Impact Fees Act, local entities must designate at least one service area for impact fees, and may charge different impact fees in different areas. *See* UTAH CODE ANN. § 11-36a-402(1).[6] The number of service areas within each jurisdiction is left to the discretion of the local subdivisions. The number of service areas within each jurisdiction is left to the discretion of the local subdivisions. "[A local government] may have a myriad of competing choices before it, [and] the selection of one method . . . in preference to another is entirely within the discretion of the [entity,] and does not, in and of itself, constitute an abuse of discretion." *Bradley v. Payson City*, 2003 UT 16, ¶ 24, 70 P.3d 47, 54.[7] The District chose a single service area for its Wastewater Impact Fee, which covers the entire District service area. The Wastewater Impact Fee Analysis notes that there are no geographic areas within the District that demand higher levels of service or unique infrastructure needs.

Mr. Miner maintains that this decision was flawed, because the District's gravity-drained sewer system has different impacts in different areas of the District. He does not show, however, that the District's choice of a single service area was an abuse of discretion, nor has he proposed any alternative plan for service areas. Furthermore, he has not shown that his impact fee would have been substantially different if the District had chosen to designate more than one service area. Simply expressing an opinion on the choice of service area does not prove that the District should have divided its jurisdiction into different service areas subject to different impact fees.[8]

[6] The District's Wastewater Impact Fee was adopted in 2009 under the previous codification of the Impact Fees Act (UTAH CODE ANN. §§ 11-36-101 to -501). In 2011, the Utah Legislature reorganized the Impact Fees Act, by repealing Chapter 11-36, and enacting a new Chapter, 11-36a. Nevertheless, most of the provisions of the former Act were preserved in the reorganization, including a local entity's authority to designate one or more service areas. *See* UTAH CODE ANN. § 11-36-202(2)(a) (2009) (repealed 2011). Since the 2011 recodification preserved most of the relevant terms and requirements of the prior language, this Opinion will cite to the current language, except when designated.

[7] *See also Price Development Co. v. Orem City*, 2000 UT 26, ¶ 19, 995 P.2d 1237, 1245 (Local governments have broad latitude to decide how to perform their functions and address local needs).

[8] Mr. Miner also does not explain how his impact fee would be lower if the District had decided to create more than one service area.

In short, Mr. Miner has not shown that the District's choice of service area was an abuse of discretion, and so he cannot claim that the impact fee was unreasonable on that basis.[9]

*C. It is Permissible to Treat all Similar Development as Having the Same Impact.*

The second point to be evaluated is Mr. Miner's assertion that he is entitled to a reduced impact fee because he claims his home has less impact than new homes in other areas served by the District. Essentially, he claims a minimal impact, because his wastewater travels through only one or two pipes, and does not create a need for new infrastructure. In addition, he apparently argues that there is no new infrastructure needed in his immediate neighborhood, and so his impact fee should be reduced accordingly.

Mr. Miner fails to consider, however, that he benefits from the entire system along with everyone else served by the District. He may only "use" a small portion of the pipe system, but he also benefits from the water treatment facilities operated by the District. In addition, he benefits because the entire community's wastewater is handled and treated in a safe and efficient manner. This promotes the public health and improves the quality of life for residential and commercial areas. He has not shown that the District's impact fee imposes an unfair burden upon him.

The Utah Supreme Court reached the same conclusion in the *North Logan* decision. "[T]he central facilities that support water *and sewer services* would generally confer the same benefits in every part of the [local subdivision] . . .." *North Logan*, 1999 UT 63, ¶ 18, 983 P.2d at 566 (emphasis added, citation omitted).[10] In other words, every home receives a similar benefit from the District's wastewater system, even though the individual usage of each home may vary. As long as it is reasonable to conclude that each residence is similarly situated, it is reasonable and permissible to impose the same impact fee on all such residences. As was addressed in the preceding section, there is no reason to conclude that Mr. Miner's use of the wastewater system is significantly different than any other residence served by the District. It is appropriate for the District to conclude that each residential use has similar impacts, and so each may be charged the same impact fee.[11]

[9] Mr. Miner's "service area" argument appears to be a variation on the second point, that the fees imposed on his new home are disproportionately higher than the home's impact on the wastewater system.

[10] In *North Logan*, the builder's association argued that the city's park impact fees were unfair to new development, because the new parks acquired using impact fees would primarily benefit existing residences. The Court accepted the premise that the benefits of parks or flood control may be "measurably different" depending upon the type or location of the facilities. However, the Court concluded that the builders failed to show that the parks fee imposed a disproportionate burden on new development.

[11] This does not necessarily mean that the same fee may be charged to all new development. It may be reasonable to distinguish between different uses, such as commercial and residential, and formulate an impact fee for each. As long as the different classes of uses are rationally based and reasonably defined, and the impact fees justified by proper analysis, the fees should be considered reasonable and constitutionally valid.

*D. Mr. Miner Has Not Shown that the District's Use of The System's Depreciated Replacement Value Was Unacceptable.*

Because the ultimate goal of impact fee analysis is fairness and equitable sharing of the costs to build and maintain public infrastructure, any acceptable valuation method could have been used determine the value of existing facilities.[12] Mr. Miner cites to § 11-36a-202(1)(a)(iii) of the Impact Fees Act, which states that an impact fee may not "recoup more than the . . . costs actually incurred for excess capacity in an existing system improvement." This language, however, was added in 2011, when the Act was reorganized and recodified. That language was not in effect in 2009, when the District adopted its wastewater impact fee, and so it cannot be applied to the District's fee.[13]

In 2009, the Impact Fees Act required a written analysis of each impact fee, including an estimate of the proportionate share of the costs of existing capacity that would be recouped. *See* UTAH CODE ANN. § 11-36-201(5)(a)(iv)(A) (repealed 2011). The Impact Fees Act did not dictate any particular valuation method.[14] The term "cost" was not defined. Using depreciated replacement value to measure the cost of excess capacity to system improvements may be as appropriate as any other accepted valuation method.[15]

The object of impact fee analysis is to fairly allocate the relative burdens for funding capital improvements imposed on both new and existing development. A valid impact fee imposes a fair share of the costs to build public infrastructure on new development and considers contributions made by existing development:

> [T]o comply with the standard of reasonableness, a . . . fee related to services like water or sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.
>
> To determine the equitable share of the capital costs to be borne by newly developed properties, a [local political subdivision] should determine the relative burdens previously borne and yet to be borne by those properties in comparison with other properties in the [locality] as a whole; the fee in question should not

[12] This does not mean that the valuation method used is not important. The methodology used is a critical component of impact fee analysis.

[13] "A provision of the Utah Code is not retroactive, unless the provision is expressly declared to be retroactive." UTAH CODE ANN. § 68-3-3.

[14] There are several accepted methodologies to estimating the value of a facility's excess capacity, including original cost, original cost plus interest, replacement value, and depreciated replacement value. *See e.g.*, "Wastewater Impact Fees: A Recent Ruling With National Implications," C.W. Corssmit, *et al.*, 2002 (available at http://www.grimshawharring.com/wp-content/uploads/Wastewater_Impact_Fees.pdf ).

[15] A distinction exists between "depreciated replacement value" and "replacement value" based on present costs. As discussed below, a previous Advisory Opinion by this Office held that the impact fee act prohibited impact fees to recoup the *present* replacement value of existing facilities. Whether using impact fees to recoup *depreciated* replacement value was not determined by that decision. It is likewise not determined here, and remains an open question.

> exceed the amount sufficient to *equalize the relative burdens of newly developed and other properties.*

*Banberry*, 631 P.2d at 903 (emphasis added). In other words, an "equitable share" includes equalizing the past contributions from existing properties and the expected contributions from new development. To achieve this fairness between existing property owners and new development, it is necessary to consider the costs of capital facilities, so that the contributions made at different times may be compared and the costs allocated proportionately. The so-called "*Banberry* Factors," which form the heart of impact fee analysis, is intended to accomplish this goal. "The 'equitable share' standard is the ultimate legal standard that municipalities are obligated to meet. Consideration of the *Banberry* factors is a means to that end, but is not the end itself." *Home Builders Association of Utah v. American Fork*, 1999 UT 7, ¶ 20, 973 P.2d 425, 430.

The *Banberry* decision listed seven important considerations to help ensure that impact fees are reasonable and proportionate. The seven factors were eventually codified into the Impact Fees Act.[16] The first of the seven factors is "the cost of existing capital facilities." *Id.*, 631 P.2d at 904. The seventh is "the time-price differential inherent in fair comparisons of amounts paid at different times." *Id.*[17] Thus, impact fee analysis should include a thorough financial analysis of the costs of capital improvements over time, as well as the contributions made by existing development. One method to compare the contributions made by different property owners at different times and equitably share the cost of facilities may use the improvements' depreciated replacement value.[18] The objective is an impact fee that fairly and equitably allocates facility costs. Multiple methods that do so may be permissible by the Act.

Mr. Miner has not indicated that the values used by the District in its Impact Fee Analysis were inaccurate. His objection stems from using the depreciated replacement value of the system as part of the basis for the wastewater impact fee. He has not shown that this methodology is not acceptable or appropriate, nor has he shown that the impact fee would have been substantially different using a different valuation approach. As has been discussed, using depreciated replacement value as part of a valid analysis may be appropriate. Mr. Miner has not met his burden to invalidate the use of that method.[19]

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[16] UTAH CODE ANN. § 11-36a-304(2).

[17] The other five factors are: The manner of financing existing capital facilities; the relative extent to which the newly developed properties and other properties have already contributed to the costs; the relative extent to which the newly developed properties and other properties will contribute to the cost of facilities in the future; the extent to which the newly developed properties are entitled to a credit for contributions; and extraordinary costs to service newly developed properties. *See Banberry*, 631 P.2d at 904.

[18] In an Advisory Opinion issued on June 30, 2009, the Office of the Property Rights Ombudsman determined that using replacement costs of capital facilities was not appropriate, and would result in new properties paying a disproportionate share for capital facilities. However, the fees considered in that Opinion were based on the replacement value of facilities, evidently without adjustments for depreciation and the time-price differential, as required by the Impact Fees Act. Depreciated replacement value therefore was not considered in that Opinion, and may be valid in an analysis which equalizes the relative burdens of newly developed and existing properties.

[19] This Opinion does not determine whether the depreciated replacement value method is appropriate in this matter, nor does it interpret the new language of § 11-36a-202(1)(a)(iii), which would apply to impact fees adopted after 2011.

*E. An Impact Fee May Include Estimated Costs for New Facilities Due to Growth.*

Mr. Miner's final objection to the District's wastewater impact fee misapplies the prohibition on using impact fee to cure deficiencies. He has not shown that the new facilities proposed in the District's Impact Fee Analysis are intended to correct pre-existing facility problems or to expand the District's level of service. Mr. Miner cites § 11-36a-202(1)(a)(i) of the current Impact Fees Act, which prohibits impact fees that "cure deficiencies in a public facility serving existing development." As has been discussed, the current language of the Act was adopted in 2011, after the District had adopted its impact fee. The same language was in effect in 2009, and so the District was subject to the prohibition on curing deficiencies.[20] However, the new facilities identified by the District do not "cure deficiencies," but are necessary to maintain the same level of service for all properties in the District.

In addition to the cost of existing capacity, impact fees may also be based on the costs needed for new infrastructure to serve new development. New facilities are sometimes needed to maintain the same level of service as new development is built in a community, and existing facilities may need to be upgraded or expanded. Impact fees may provide some of the funding for these new facilities. The same analysis from the Impact Fees Act applies, to ensure that the fees are fair and equitable.

Impact fees may not be used, however, to raise the level of service or "cure deficiencies" in existing infrastructure. For example, if a city's water tank does not have enough capacity to provide adequate water service, that would be a deficiency in the facility, and impact fees could not be imposed to increase the tank's capacity. On the other hand, if additional capacity were needed because of new growth, impact fees could be used to enlarge (or replace) the tank.[21] In a similar manner, impact fees cannot be used to fund facilities to raise a level of service, but they may be used towards facilities needed to maintain the existing level of service.[22]

In its Capital Facilities Plan, the District identified eight projects necessary to accommodate future growth.[23] These projects included upgrades to existing facilities, and improvements required by new government regulation. The capital facilities plan determined how much of these upgrades were due to new growth, which was expressed as a percentage. The Impact Fee Analysis used that data to calculate the impact fee. Mr. Miner's objection misapplies the prohibition against curing deficiencies. He argues that any upgrade, expansion, or replacement of existing facilities is a "deficiency" that cannot be "cured" through impact fees. This overlooks the District's statements that the new projects have been deemed necessary, at least in part,

[20] *See* UTAH CODE ANN. § 11-36-202(5)(a) (repealed 2011). The language was retained in the 2011 recodification.
[21] This does not mean that impact fees may be the *sole* source of funding, but that it is permissible to use the cost of the necessary expansion when calculating the appropriate impact fee.
[22] In 2013, the Utah Legislature added a provision to the Impact Fees Act that allows an impact fee to be based on a proposed level of service, if the local political subdivision shows that it has other funding in place to acquire the needed facilities. *See* UTAH CODE ANN. § 11-36a-302(1)(c).
[23] A capital facilities plan identifies existing and needed infrastructure, and is a required part of impact fees analysis.

because of new growth. Mr. Miner has not shown that the District's Capital Facilities Plan is inaccurate, and so it must be considered valid. Since impact fees may be used towards new facilities necessary to accommodate new growth, and because there is no reason to question the District's Capital Facilities Plan; this Opinion concludes that the wastewater impact fee does not violate the prohibition against curing deficiencies in the District's facilities.

## Conclusion

Impact fees are intended to offset the impacts on public facilities caused by new development. An impact fee may be adopted by following the analysis required by the Impact Fees Act. Compliance with that Act grants a presumption of validity on the fees, which may be overcome by showing that the fee requires new development to bear an inequitable share of capital costs. The overall objective of impact fee analysis is to determine the equitable share of capital costs that should be imposed on new development, to equalize the relative burdens of existing property owners and new development.

A local political subdivision must designate a service area as part of an impact fee analysis, but each subdivision has discretion to choose the size of the area, which may encompass the subdivision's entire jurisdiction. The service area chosen is presumed valid, unless it is shown to be an abuse of discretion.

All similarly-situated properties derive equal benefit from community-wide systems such as water or sewer facilities. Even though each individual property's use may vary, it is permissible to treat all similarly-situated properties equally, and impose the same impact fee. A local political subdivision may be justified in distinguishing between different types or different intensities of property uses, as long as the distinctions are rationally based and reasonable.

The analysis which calculates an impact fee is more critical than the valuation methodology used to measure the cost or value of public infrastructure. The Act does not dictate any valuation method, and so any acceptable methodology may be used. The objective is to determine the equitable share of the capital costs, which may be achieved through a valid analysis using the "*Banberry* Factors" of the Impact Fees Act.

Impact fees may not be used to cure deficiencies in public facilities, but they may be used to help fund new facilities needed because of new growth. A capital facilities plan that identifies which new or expanded facilities are needed due to growth is presumed valid, and that information may be used to calculate an appropriate impact fee.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

**NOTE:**

**This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.**

**While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.**

**An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.**

**Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.**

**MAILING CERTIFICATE**

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Garland J. Mayne, District Manager
Timpanogos Special Service District
PO Box 923
American Fork, Utah 84003

On this _____ Day of July, 2013, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman