

# Advisory Opinion #71

Parties: Joseph H. Florence and City of South Ogden

Issued: June 30, 2009

## TOPIC CATEGORIES:

A: Impact Fees

D: Exactions on Development

By using today's replacement cost to calculate the impact fees rather than the actual cost expended when the system was constructed, the City is going beyond recoupment of actual costs as permitted by the Impact Fees Act. The City has not considered the time-price differential inherent in fair comparisons of amounts paid at different times. This results in the developer paying more than its proportional share of costs necessary to assuage the impact of the new growth engendered by the development.

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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### ADVISORY OPINION

Advisory Opinion Requested by: Joseph H. Florence  
Local Government Entity: South Ogden City  
Applicant for the Land Use Approval: Rafter H LLC  
Project: Commercial Restaurant Development  
Date of this Advisory Opinion: July 30, 2009  
Opinion Authored By: Brent N. Bateman, Lead Attorney,  
Office of the Property Rights Ombudsman

### Issues

Has the City of South Ogden properly enacted its traffic impact fees and properly applied those impact fees to the developer?

### Summary of Advisory Opinion

The City's traffic impact fees have been calculated based upon the replacement cost, in today's dollars, of the existing roadway system. The act permits the City to recoup actual costs expended to construct capital facilities, but does not permit the City to collect replacement value of those facilities. By using today's replacement cost to calculate the impact fees rather than the actual cost expended when the system was constructed, the City is going beyond recoupment of actual costs as permitted by the Act. Thus the City's impact fees, as enacted, do not comply with the Impact Fees Act.

Likewise, by basing the impact fee on today's replacement value, the City has not considered the time-price differential inherent in fair comparisons of amounts paid at different times. This results in the developer paying more than its proportional share of costs necessary to assuage the impact of the new growth engendered by the development. Thus the City's impact fees, as applied, do not comply with the exaction law.

## 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. The 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.

The request for this Advisory Opinion was received on August 1, 2008 from Joseph H. Florence, Managing Partner of Rafter H LLC. A letter with the request attached was sent via certified mail, return receipt requested, to Dana B. Pollard, South Ogden City Recorder, 3950 S Adams Avenue, Suite 1, South Ogden, Utah 84403. Ms. Pollard's name was listed on the State's Governmental Immunity Database, as the contact person for the City. On November 19, 2008, Mr. Florence sent an additional letter outlining his primary points of concern. On December 9, 2008, J. Scott Darrington submitted a letter responding to the concerns raised by Mr. Florence. On December 24, 2008, Mr. Florence sent an additional letter, responding to Mr. Darrington's letter.

## 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 dated July 28, 2008 with the Office of the Property Rights Ombudsman by Joseph H. Florence, with attachments.
2. Letter from Joseph H. Florence dated November 17, 2008, with attachments.
3. South Ogden's response, received November 29, 2008.
4. Joseph H. Florence's reply, dated December 15, 2008.
5. *South Ogden City Corporation Traffic Capital Facilities Plan and Impact Fee Update*, Adopted 2005 (Revised 2006), prepared by Wasatch Civil Consulting Engineering.

## Background

Rafter H LLC is the owner and developer ("Developer") of the Hinckley Commons Project ("Development" or "Project") in South Ogden City ("City"). The Project is located at 5600 South Harrison Boulevard. As part of the project, the Developer proposed to build at 4559 square foot restaurant. In order to obtain a building permit for the restaurant, the City required Developer to pay roadway impact fees of \$25,712.76. The Developer paid the impact fees under protest.

When the Developer requested that the City provide the basis for the impact fees, the City provided the developer with a document titled *South Ogden City Corporation Traffic Capital Facilities Plan and Impact Fee Update*, Adopted 2005 (Revised 2006), prepared by Wasatch Civil Consulting Engineering (the "Update"). This document consists of a revision to a previous update of a previously prepared plan. The original plan was prepared by the Management Services Institute of Fullerton California, and adopted by the City of South Ogden in 1999. The first update to the plan was prepared by Jones and Associates Consulting Engineers and was adopted by South Ogden City in 2001. The Update follows the numbering system of both sections and tables from the original study. However, not all of the information from the original study is included. Neither the original study, nor the first update, has been provided.

The Capital Facilities Plan ("CFP") portion of the Update establishes a level-of-service C as the target level of City service at traffic intersections. The CFP then sets forth five road and traffic projects:

- Project No. 1 – Extension of Edgewood Drive, connecting two stub roads, establishing a collector street to improve traffic circulation.
- Project No. 2 – Installation of a median at Wasatch Drive and 5600 South, to improve traffic flow at a non-standard intersection.
- Project No. 3 – Construction of Park Vista Drive through a new city park area.
- Project No. 4 – Installation of vehicle preemption signal controllers at various locations throughout the City.
- Project No. 5 – Upgrading the traffic signal at Adams Avenue and 40<sup>th</sup> Street.

The CFP sets forth a total estimated cost of the five projects at \$1,526,253. The CFP calculates a replacement value of the current roadway system of \$8,555,811.68.

The Impact Fee Study ("IFS") portion of the Update recommends that the City adopt an impact fee for commercial use of \$81.00 per trip, based upon the replacement value of the current roadway system. The South Ogden City Impact Fee Table, not included in the Impact Fee Study but provided by South Ogden City, sets forth impact fees for various types of commercial development. The impact fee for a Restaurant with Drive Thru window is set at \$7.52 per square foot. According to the City, this calculation is based upon the number of trips that each type of commercial use is expected to generate.

The Developer requested that this Office provide an Advisory Opinion regarding the roadway impact fee. The Developer did not articulate any basis on which to challenge the fee.

## **Analysis**

### **I. The Developer Has The Burden To Show That The Impact Fee Is Unreasonable Or Illegal.**

The Developer has requested that this Advisory Opinion examine whether "What South Ogden is doing [with their impact fee] is in total compliance with the State Law in all aspects."

Essentially, the Developer believes that the impact fee is excessive, and challenges it on that basis alone, without articulating how the impact fee in its enactment or its application violates the law. The Developer simply leaves it to this office to review the South Ogden impact fee, and to seek out any way in which the South Ogden impact fees may violate the law, thus providing a basis to relieve the Developer from the obligation to pay the excessive charges.

This is simply not the correct approach for challenging impact fees. A challenge to impact fees cannot be based upon the premise that the impact fees are illegal just because they seem high. Such a *res ipsa loquitur* challenge to the impact fee has been expressly rejected by the Utah Supreme Court. In *Home Builders Ass'n v. City of N. Logan*, 1999 UT 63, the Court rejected a challenge to a road impact fee because the plaintiff “fail[ed] to articulate why [the City’s] fees are unreasonable or how proper application of *Banberry* would have resulted in a different fee.” *Id.* at ¶ 13. According to the Court, once a party imposing the impact fee discloses the basis of its impact fee calculations, the burden to show that why the fees are illegal lies upon the challenger.

The Developer has not done that here. None of the concerns expressed by the Developer articulate how the impact fees are illegal in either enactment or application. Rather the Developer has requested that this Office review the entire impact fee scheme to determine compliance with state law “in all aspects.” The burden rather rests upon the Developer to make its own case.

Nevertheless, in an effort to assist the parties to this dispute, as well as future parties seeking Advisory Opinions, this Office has reviewed the South Ogden traffic impact fee, and with this Advisory Opinion will attempt to establish one possible model or rubric for examination of impact fees. This is done in the hope that it will assist the parties to understand impact fees, articulate and discuss issues regarding impact fees, and resolve impact fee disputes before they escalate.

## **II. Was the South Ogden City Roadway Impact Fee Legally Adopted?**

An impact fee is “payment of money imposed upon new development activity as a condition of development approval to mitigate the impact of the new development on public facilities.” UTAH CODE § 11-36-102(8)(a). In other words, it is a one-time charge, imposed by the owner of a public facility (such as a road, sewer, or park) upon new development. The purpose of an impact fee is to collect from the new development the costs of establishing or expanding those public system facilities necessitated by that new development. Impact fees differ from taxes, connection or hookup fees, special assessments, application fees, and other kinds of fees. Impact fees are governed by the Impact Fees Act, UTAH CODE § 11-36-101 *et seq.* (the “Act”). They must comply with the provisions of that Act.

The first question in reviewing an impact fee examines whether an impact fee has been legally and properly adopted under the Impact Fee Act. This inquiry can involve a line-by-line review of the lengthy Impact Fee Act. However, issues regarding proper enactment of an impact fee can generally be distilled down into five questions:

- (1) Did the Impact fee enactment comply with the formalities required by the Act?
- (2) Does the Capital Facilities Plan and the Impact Fee Analysis include the required information and analysis?
- (3) Are the planned improvements system improvements permitted under the Impact Fees Act?
- (4) Do the planned improvements raise the level of service above the presently existing level of service, and/or are the impact fees simply to be used for operation and maintenance of existing facilities?
- (5) Does the analysis properly calculate the impact fee, including permitted costs while offsetting costs with other alternate sources of payment and means of meeting demand?

(1) Did the Impact fee enactment comply with the formalities required by the Act?

The parties have raised no question regarding whether the South Ogden City Impact Fee has been properly enacted – *i.e.* whether proper notices were delivered under UTAH CODE § 11-36-201(2)(b) or whether the enactment ordinance was in the proper form under UTAH CODE § 11-36-202. Nothing provided to this office indicates that the impact fee enactment failed to comply with those formalities.

(2) Does the Capital Facilities Plan and the Impact Fee Analysis include the required information and analysis?

The Impact Fee Act requires that the CFP identify the proposed means by which the municipality shall meet the demands placed upon existing public facilities by new development activity. UTAH CODE § 11-36-201(2)(c)(i). In doing so, the CFP must calculate the cost of needed improvements to meet that demand, considering all revenue sources, including impact fees and developer exactions. UTAH CODE § 11-36-201(2)(c)(ii).

The Update CFP identifies five road projects necessitated by development growth. Approximately two-thirds of the total projected cost for the five projects arises in the first project, the creation of a new collector road (Edgewood Drive) by connecting two existing stub roads. The CFP contemplates that approximately 80% of the cost of the third project, construction of a new road through a future city park, will be paid by developers rather than by impact fees. The Update CFP calculates the total cost of these system improvements, and includes detail regarding how those costs are calculated. Nothing in those calculations was found to violate the provisions of the Impact Fees Act.

The Act also requires an Impact Fee Analysis that identifies how the impact fee is calculated, after considering excess capacity, available revenue and financing, offsets and credits, etc. The Act requires, primarily in UTAH CODE § 11-36-201(5), that the analysis consider and analyze numerous items in its calculation of the actual impact fee being imposed. The Update provided to this Office only partially provides the statutorily required information. The Update is an update to a previously prepared and adopted impact fee analysis. The Update refers to the previous

analysis in several locations, and refers to tables and calculations that apparently appear in the original Impact Fee Analysis, but do not appear in the update. Accordingly, it is unknown whether the Impact Fee Analysis includes all of the statutorily required information. As the original Impact Fee Analysis was not provided, no attempt was made to determine whether the analysis contained the information required by UTAH CODE § 11-36-201(5). The Update, along with the original impact fee analysis, may be complete and comply with the statute. Nevertheless, by providing only the Update to the Developer, the City has provided Developer with incomplete information under UTAH CODE § 11-36-401(2).

(3) Are the planned improvements system improvements permitted under the Impact Fees Act?

Impact fees may only be imposed on those improvements enumerated under the Impact Fees Act. See UTAH CODE § 11-36-102. Subsection (13) of that statute defines “public facilities” on which impact fees may be used as those which have a life expectancy of not less than ten years, are owned or operated by or on behalf of a local political subdivision, and are one of the enumerated types of facilities. The statute specifically names *roadway facilities* as a permitted improvement. Roadway facilities are defined in subsection (15) of the statute as roads and any necessary appurtenances to roadways. New roads therefore may be constructed using impact fees. Traffic signals, traffic control medians, etc., are necessary appurtenances to roadways, and may also be constructed using impact fees. There appears to be no question regarding whether the planned facilities will be owned by the City or will have a life expectancy of more than ten years.

The City indicates in the CFP that each of the five improvements, less that portion of the third project expected to be borne by developers, are system improvements as defined by UTAH CODE § 11-36-102(18). The City indicates its belief that all of these projects are necessitated by projected new development activity in the City. It does appear that each of these projects are calculated to handle increased traffic flow, and designed to provide services to the community at large. Nothing in the materials provided, including the capital improvement projects map included in the CPF, compels a contrary conclusion. Accordingly, each project appears to be a system improvement permitted under the Impact Fees Act.

(4) Do the planned improvements raise the level of service above the presently existing level of service, and/or are the impact fees simply to be used for operation and maintenance of existing facilities?

Impact fees are not permitted to be used to raise the level of service above the level of service that is supported by existing residents. UTAH CODE § 11-36-202(5)(b). With some impact fees, determining the level of service before and after the expenditure of impact fees is a simple calculation. For example, in order to measure the level of service for parks, one may just calculate the acres of available park space against the number of residents. If the planned capital improvements increase that level of service, i.e. increase the amount of park space per resident, the Act has been violated.

Calculating the level of service for traffic is not as simple. The *Highway Capacity Manual* defines traffic level-of-service for signalized and unsignalized intersections as a function of the average vehicle control delay. The traffic level of service system uses the letters A through F, with A being best and F being worst. Under level of service A, all motorists have complete mobility between lanes at or above the posted speed limit. Level of service F is basically a constant traffic jam. According to the CFP, South Ogden City recognizes level C as the target level of service, where posted speeds are generally maintained with occasional delays, while the road operates at nearly maximum capacity. Most urban communities would consider themselves wildly fortunate to maintain a traffic level of service C throughout their service areas.

The point at which the level of service moves between level of service B or D is difficult to tell without a professionally prepared traffic study. Nevertheless, there is no question that additional development, particularly commercial development, generates and increases road traffic. Increased road traffic increases the volume on a road. Increased volume on a road can cause a drop in the level of service. Additional roads can increase capacity, which can improve volume to capacity ratio. Improved traffic control devices such as signals and medians can improve traffic flow and reduce congestion. The improvements planned in the CFP appear designed to these ends, and do not appear to be excessive or designed to greatly improve the traffic level of service in South Ogden City. Although detecting an increase in the traffic level of service can be nebulous, nothing has been provided to indicate that the planned improvements will raise the level of service above that presently supported.

Likewise, the planned improvements have been earmarked for new roads and new traffic control devices. Nothing has been provided to indicate that the City plans to use the impact fee proceeds for operation or upkeep, or to improve deficiencies in existing facilities.

(5) Does the analysis properly calculate the impact fee, including permitted costs while offsetting costs with other alternate sources of payment and means of meeting demand?

When enacting an impact fee, the City is obligated to generally consider all revenue sources to finance the system improvements. In the documentation provided, the City considers that developer dedication will finance approximately 80% of project #3, Park Vista Drive. The City calculates that the remaining balance of the five projects will be fully paid by impact fees. The Update offsets the current balance in the City's impact fee account. The Update also credits 0.13% against the facilities costs for past use of general taxes for roadway construction. No other offsets or contributions are considered.

Again, the information provided is incomplete, leaving it impossible to make a full analysis of whether the impact fee has been properly calculated. Only an Update to the original Impact Fee Analysis has been provided, and although it refers to the original analysis, the Update does not itself contain the full and complete analysis.

However, one major flaw is apparent. As stated in the Impact Fee Study, the City was presented with two options in calculating its impact fees; the Equity Fee (Full Recoupment) option, and the Marginal Fee (Development) option. They are described in the Impact Fee Analysis as follows:



Equity Fee (Full Recoupment) – This fee option takes into account the value of the existing transportation system and divides this value by the number of existing trip ends. This option provides a recoupment of costs that were invested by previous residents for the construction of existing facilities.

Marginal Fee (Development) – This fee is calculated using the estimated costs of future capital improvements and divides that value by the estimated number of future trips generated by new development. Under this option, the individuals or activities who develop properties within the Study Area would pay for the growth related capital improvements.

Otherwise stated as understood, the Equity Fee option requires the developer to repay a share of the cost of the already existing transportation system. This appears to be basically a buy-in option, where the City is reimbursed by new growth a share of the cost of constructing the existing capital facilities. Under the Marginal Fee option, new development pays for the new planned system facilities only. South Ogden City’s Impact Fee Study calculates that the Equity Fee will be \$81.00 per trip, while the Marginal Fee option will be \$25.00 per trip. In its Impact Fee Analysis, the City’s consultants recommend to the City and the City has adopted the “Equity Fee Option” for its impact fees.

Both of these approaches are generally permissible under the Impact Fee Act. The Act expressly permits a local government to use impact fees to recoup costs previously incurred in installing a public facility or improvement. UTAH CODE § 11-36-201(5)(c).

The problem, however, lies in how the Equity Fee option is calculated. The Equity Fee option has been calculated using the total value of the city road system upon a *replacement cost* basis rather than a recoupment basis. In other words, the impact fee has been derived from a calculation of the cost of replacing the entire existing roadway system in today’s dollars, rather than the value actually expended by the City at the time the roadway system was constructed. Basically, under the Equity Fee Option, the City is requiring new development to pay to build a road that has already been built, rather than reimburse the City for costs expended to build the road. The City is benefiting from the “equity” in the road, because it is collecting today’s value rather than the value actually expended. This is not permitted under the Impact Fee Act, which only permits recoupment for the cost of existing facilities.

The City must either select the Marginal Fee option, which requires the Developer to pay its proportional share of the costs to establish the new facilities necessitated by growth, or the City must recalculate the recoupment option to consider the actual costs of installing the existing facilities and obtain reimbursement for those amounts.

### **III. Was the South Ogden City Roadway Impact Fee Properly and Legally Applied?**

The next inquiry into the propriety of impact fees concerns whether the Impact Fee was properly applied to the Developer. This inquiry examines the following questions:

- (1) Is the Developer creating an impact that the planned facilities will address?
- (2) Is the total burden imposed upon the developer by the impact fee roughly equivalent to the impact of the development on the City?
- (3) Is the developer contributing benefits to the City that offset the burdens of the development?

(1) Is the Developer creating an impact that the planned facilities will address?

Impact fees may only be collected from development activity that creates a burden that the impact fee is intended to address. For example, constructing a new office building on a previously empty lot would create a traffic impact on the community by adding to the number of people on the road who must access the building. However, constructing a new office building to replace an existing building of the same general size and shape will have little or no impact -- because traffic would not increase. The same number of vehicles accessed the old office building that would access the new. Building a larger office building than the building being replaced would only impact traffic to the extent that the new building had increased capacity and this increased traffic. Thus, not all development activity is subject to impact fees. Only that activity that creates an impact is subject to the fee.

It appears that the Developer plans to construct a restaurant where no development previously existed. That restaurant will certainly engender a significant amount of traffic on South Ogden City streets where that traffic did not exist before. The planned facilities, the five road projects described in the CFP, all appear designed to increase traffic capacity, and improve safety and traffic flow. Therefore, they can be said to address the impact that the Project creates.

The Developer expresses a concern that his restaurant Project is at the extreme southeast side of the City. The Developer argues that none of the approved projects are close to his project, and therefore the questions whether the projects will address the direct traffic impacts created by his restaurant.

The purpose of impact fees is to pay for system improvements necessitated by growth. *System improvements* are distinguished from *project improvements*. Project improvements are those improvements intended to primarily serve a particular development project, such as a local neighborhood road. Project improvements are generally constructed as part of the project that necessitates them, through dedications and exactions on the project developer. Impact fees are generally not used for project improvements. System improvements, on the other hand, are those public facilities “designed to provide services to service areas within the community at large.” UTAH CODE § 11-36-102(18)(a)(1)(b). They include collector and arterial roads into which pours the traffic from numerous developments. System improvements are therefore financed by the users: the community at large.

The Impact Fee Act requires that the local political subdivision establish one or more service areas within which the local political subdivision calculates and imposes impact fees. UTAH CODE § 11-36-202(2)(a)(i). There is no requirement that such a service area be a certain

maximum or minimum size, or that the proposed system improvements be within a certain distance from the development activity. It is presumed that the size of such service areas must be reasonably calculated to impose the impact fee on those who will be benefited by the improvement.

According to South Ogden, the City's small size has led it to establish the entire city as one traffic service area. This is permitted under the Act. UTAH CODE § 11-36-102(16)(b). Accordingly, development activity in the City is considered to have an impact on all traffic system improvements within the City. Indeed, South Ogden City is relatively small, and one traffic service area for the City does not appear patently unreasonable. The Developer's activity will create an impact upon traffic within the City. The proposed improvements are meant to address impacts to traffic in the City system. Therefore, the planned facilities will address the impacts the project will create.

(2) Is the total burden imposed upon the developer by the impact fee roughly equivalent to the impact of the development on the City?

Impact fees are a form of development exaction, and must comply with the exaction law. *Salt Lake County v. Bd. of Educ.*, 808 P.2d 1056, 1058 (Utah 1991). UTAH CODE § 10-9a-508 authorizes cities to impose exactions on new development, within established limits:

- (1) A municipality may impose an exaction or exactions on development proposed in a land use application if:
  - (a) an essential link exists between a legitimate governmental interest and each exaction; and
  - (b) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

The language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). The analysis has come to be known as the *Nollan/Dolan* "rough proportionality" test. The Utah Supreme Court further honed the "rough proportionality" rule in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"). The court explained that rough proportionality analysis "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *B.A.M. II*, 2008 UT 74, ¶ 9, 196 P.3d at 603. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court stated that the approach should be expressed "in terms of a solution and a problem . . . . [T]he impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied." *Id.*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04. The "extent" aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost:

The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the

development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

*Id.*, 2008 UT 74, ¶ 11, 196 P.3d at 604. Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to address (or “assuage”) the impact attributable to a new development.

*A. Is There an Essential Link Between the Impact Fee and Legitimate Government Interests?*

Requiring the Developer to pay an impact fee for construction of the five planned traffic control facilities satisfies the first aspect of the exaction analysis. Building and maintaining adequate roadways, and control of safe traffic flow is a legitimate government interest. UTAH CODE § 10-8-8; *see also Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117. Constructing additional roads and adding traffic controls are reasonable means to promote that interest. *Id.* Requiring developers to pay for these facilities promotes the City’s legitimate objectives, so the first prong of § 10-9a-508(1) is satisfied.

*B. Is There Rough Equivalency Between the Impact Fee and the Impacts of the Development?*

The second aspect of the exaction analysis requires an “individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 392. As noted above, the Utah Supreme Court has given the “rough proportionality” test a two-part analysis. First, each exaction must be related in nature to an impact attributable to the development. *B.A.M. II*, 2008 UT 74, ¶ 9-10, 196 P.3d at 603-04. Second, there must be “rough equivalence” of the costs to “assuage” the impacts caused by a new development, and the expense borne by the property owner to satisfy the development condition. *See B.A.M. II*, 2008 UT 74, ¶ 11, 196 P.3d at 604. The court noted that “exact equality between the factors is unnecessary.” *Id.*, 2008 UT 74, ¶ 12, n.4, 196 P.3d at 604, n.4 (*quoting Dolan*, 512 U.S. at 391). A complete analysis, therefore, requires that both the impacts and the costs be measured and compared.

*(i) Measuring the Impacts of Development*

The most recent *B.A.M.* decision stated that the property owner’s cost is the value of the property that is dedicated. In the Impact Fee context, this value is easily calculated. It is simply the amount of money that the City requires the Developer to pay. In the present case, the City has required that the Developer pay \$25,712.76 in roadway impact fees. In order for this Impact Fee to pass the exaction test, this fee must be roughly equivalent to the cost to the City to assuage the impact of the Developer’s project.

The cost to a local government to assuage the impact of development is more difficult to measure. The impact may be read more broadly than just that which directly arises from the development itself, such as the number of vehicle trips to and from a development. Fortunately, the Utah Supreme Court has provided some guidance on how to gauge the impact of a

development. In *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899 (Utah 1981), the Utah Supreme Court established an illustrative list of seven factors for determining the reasonableness of fees. An examination should be made of

- (i) the cost of existing public facilities;
- (ii) the financing of existing public facilities: user charges, special assessments, etc.
- (iii) the relative contribution of newly developed and other properties to the cost of existing public facilities: user charges, special assessments, or general taxes;
- (iv) the relative future contribution of newly developed and other properties to the cost of existing public facilities;
- (v) any credit to which newly developed properties are entitled for providing common facilities provided by the local government (or a private entity) elsewhere in the service area;
- (vi) any extraordinary costs in servicing newly developed properties; and
- (vii) the time-price differential inherent in fair comparisons of amounts paid at different times.

*Id.*, 631 P.2d at 903-04. These factors were codified into the Impact Fees Act, and are critical to the analysis of how “the proportionate share of the costs of public facilities are reasonably related to . . . new development activity.” UTAH CODE § 11-36-201(5)(c).

The factors expressed in *Banberry* are not exclusive, and “should not be read as limiting the ability of [local governments] to deal with differing circumstances.” *Home Builders Association of Utah v. American Fork*, 1999 UT 7, ¶ 6, 973 P.2d 425, 427. The factors are the means to accomplish the goal of determining if a particular exaction is roughly proportional, both in nature and extent, to the impact of the development. Other information may be equally relevant to the analysis, including studies which project the anticipated use of public facilities, etc.

(ii) *The Impact Fees Required of the Developer*

It cannot be said that the Developer’s new restaurant construction has zero impact on the City’s services. Any development will impact public services and infrastructure. The Developer’s Project is not only a commercial development, but a restaurant. There can be no question that a restaurant will generate traffic, and more traffic than some other types of commercial development. Accordingly, some traffic impact fees would be appropriate.

In preparing its Capital Facilities Plan and Impact Fee Study, the City has attempted to calculate the cost of the existing public facilities, set forth how those public facilities will be financed, and the relative contribution of new development to these facilities --- covering the first four *Banberry* factors. It is beyond the scope of this Opinion to determine whether the City has calculated those costs accurately. Nevertheless, the City has attempted to make such a showing, as required by *Banberry*. Regarding the fifth *Banberry* factor, nothing in the documents received indicate that the Developer claims entitlement for any credit for providing common facilities

elsewhere in the service area. Likewise with the sixth *Banberry* factor. The City has not claimed any extraordinary costs in servicing the Development, apart from those costs necessary to serve the City as a whole.

It is the last of the *Banberry* factors that presents a problem. The City is obligated by *Banberry* and the statute to consider “the time-price differential inherent in fair comparisons of amounts paid at different times.” As discussed above, the City was presented with two options in determining its impact fees; the Equity Fee (Full Recoupment) option, and the Marginal Fee (Development) option. The City has adopted the “Equity Fee Option” for its impact fees.

However, as discussed above, the City has calculated this option using the total value of the city road system upon a replacement cost basis, at today’s dollars, rather recouping amounts actually expended when the roads were built. This approach falls afoul of the exaction law. The *Banberry* factors require the City to consider the time-price differential of values expended at different times. The City does not appear to have done this.

Accordingly, the impact fee imposed is not roughly equivalent to the impact of the development. The Development will have some impact, and therefore some impact fee is appropriate, but the South Ogden City impact fee as calculated requires the Developer to pay today’s prices for replacement rather than the cost of assuaging the impact (the cost of building the road). The traffic impact fee is impermissible in its current form.

As stated above, the City must either select the Marginal Fee option, which requires the Developer to pay its proportional share of the costs to establish the new facilities necessitated by growth, or the City must recalculate the recoupment option to consider the time-price differential of values expended at different times.

(3) Is the Developer contributing benefits to the City that offset the burdens of the Development?

The final question concerns whether the Developer has conferred benefits to the City that offset the burdens created by the Development, thus entitling the Developer to an offset of impact fees. Nothing provided in the materials indicates that the Developer has provided to the City any benefits calculated to offset the increased traffic burden created by the Project. Therefore, the Developer is not entitled to this type of offset to its impact fees.

## **Conclusion**

South Ogden City must revise its impact fees. The current system does not comply with the Impact Fees Act, nor does it comply with the exaction law.

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 § 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:

Dana B. Pollard  
South Ogden City Recorder  
3950 S Adams Avenue, Suite 1  
Ogden, Utah 84403

On this 30<sup>th</sup> day of July, 2009, 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.

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Office of the Property Rights Ombudsman